CIVIL PRACTICE

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INTRODUCTION

During this *Survey* year,[1] New York's Court of Appeals and appellate divisions published hundreds of decisions that impact virtually all practitioners. These cases have been "surveyed" in this article, meaning that the author has made an effort to alert practitioners and academicians about interesting commentary about and/or noteworthy changes in New York State law and provide basic detail about the changes in the context of the Civil Practice Law and Rules ("CPLR"). Whether by accident or design, the author did not endeavor to discuss every Court of Appeals or appellate division decision.

1. July 1, 2012, through June 30, 2013.

I. LEGISLATIVE ENACTMENTS

A. CPLR 217-a

Chapter 24 of the Laws of 2013, effective June 15, 2013, amended CPLR 217-a to provide for "a uniform process and requirement for the filing of notices of claim prior to the commencement of a cause of action against any state or municipal entity, public authority or public benefit corporation."[2] CPLR 217-a, as amended, provides:

> Notwithstanding any other provision of law to the contrary, and irrespective of whether the relevant statute is expressly amended by the uniform notice of claim act, every action for damages or injuries to real or personal property, or for the destruction thereof, or for personal injuries or wrongful death, against any political subdivision of the state, or any instrumentality or agency of the state or a political subdivision, any public authority or any public benefit corporation that is entitled to receive a notice of claim as a condition precedent to commencement of an action, shall not be commenced unless a notice of claim shall have been served on such governmental entity within the time limit established by SECTION FIFTY-E OF THE GENERAL MUNICIPAL LAW, and SUCH ACTION MUST BE COMMENCED in compliance with all the requirements of section fifty-e AND SUBDIVISION ONE OF SECTION FIFTY-I of the general municipal law. Except in an action for wrongful death against such an entity, an action for damages or for injuries to real or personal property, or for the destruction thereof, or for personal injuries, alleged to have been sustained, shall not be commenced more than one year and ninety days after the cause of action therefor shall have accrued or within the time period otherwise prescribed by any special provision of law, whichever is longer. Nothing herein is intended to amend the court of claims act or any provision thereof.[3]

B. CPLR 3015

Chapter 21 of the Laws of 2013, effective May 2, 2013, amended CPLR 3015 to remove a provision that permitted the plaintiff to amend

2. *See* Act of May 2, 2013, ch. 24, 2013 McKinney's Sess. Laws of N.Y. 1051 (codified at N.Y. C.P.L.R. 217-a (McKinney Supp. 2013)). In addition to the amendment of the Civil Practice Law and Rules, S. 02155, 2013-14 Gen. Assemb., Reg. Sess. (N.Y. 2013) also amended sections of the General Municipal Law, the Environmental Conservation Law, the Public Authorities Law, the Education Law, the Mental Hygiene Law, the Private Housing Finance Law, the Facilities Development Corporation Act, the Administrative Code of the City of New York, and chapter 154 of the Laws of 1921 relating to the Port Authority of New York and New Jersey.

3. N.Y. C.P.L.R. 217-a (McKinney 2013) (emphasis added).

a complaint to include a license after the action was commenced.[4] CPLR 3015 as amended provides:

> [w]here the plaintiff's cause of action against a consumer arises from the plaintiff's conduct of a business which is required by state or local law to be licensed by the department of consumer affairs of the city of New York, the Suffolk county department of consumer affairs, the Westchester county department of consumer affairs/weight-measures, the county of Rockland, the county of Putnam or the Nassau county department of consumer affairs, the complaint shall allege, as part of the cause of action, that plaintiff was duly licensed at the time of services rendered and shall contain the name and number, if any, of such license and the governmental agency which issued such license; provided, however, that where the plaintiff does not have a license at the commencement of the action the plaintiff may, subject to the provisions of rule thirty hundred twenty-five of this article, amend the complaint with the name and number of an after-acquired license or the previously held license, as the case may be, and the name of the governmental agency which issued such license or move for leave to amend the complaint in accordance with such provisions. The failure of the plaintiff to comply with this subdivision will permit the defendant to move for dismissal pursuant to paragraph seven of subdivision (a) of rule thirty-two hundred eleven of this chapter.[5]

C. CPLR 3101

Chapter 23 of the Laws of 2013, effective February 17, 2014, amended CPLR 3101 to include a provision that allows a physician to testify as an expert witness at trial for podiatric malpractice.[6] CPLR 3101 as amended provides "[i]n an action for podiatric medical malpractice, a physician may be called as an expert witness at trial."[7]

D. CPLR 3103

Chapter 205 of the Laws of 2013, effective July 31, 2013, amended CPLR 3103 to allow a non-party to seek a protective order for records sought by a party or another non-party.[8] CPLR 3103 as amended provides:

4. Act of May 2, 2013, ch. 21, 2013 McKinney's Sess. Laws of N.Y. 195 (codified at N.Y. C.P.L.R. 3015 (McKinney 2013)).

5. N.Y. C.P.L.R. 3015.

6. Act of May 2, 2013, ch. 23, 2013 McKinney's Sess. Laws of N.Y. 814 (codified at N.Y. C.P.L.R. 3101 (McKinney 2013)).

7. N.Y. C.P.L.R. 3101.

8. Act of July 31, 2013, ch. 205, 2013 McKinney's Sess. Laws of N.Y. 6554 (codified at N.Y. C.P.L.R. 3103 (McKinney 2013)).

> [t]he court may at any time on its own initiative, or on motion of any party or of any person from whom or about whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.[9]

E. CPLR 3408

Chapter 306 of the Laws of 2013, effective August 30, 2013, amended CPLR 3408 to require the plaintiff in a residential foreclosure action to file timely proof of service and the Court to hold a mandatory settlement conference.[10] CPLR 3408 as amended provides:

> [i]n any residential foreclosure action involving a home loan as such term is defined in section thirteen hundred four of the real property actions and proceedings law, in which the defendant is a resident of the property subject to foreclosure, plaintiff shall file proof of service within twenty days of such service, however service is made, and the court shall hold a mandatory conference within sixty days after the date when proof of service upon such defendant is filed with the county clerk, or on such adjourned date as has been agreed to by the parties, for the purpose of holding settlement discussions pertaining to the relative rights and obligations of the parties under the mortgage loan documents, including, but not limited to determining whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing his or her home, and evaluating the potential for a resolution in which payment schedules or amounts may be modified or other workout options may be agreed to, and for whatever other purposes the court deems appropriate.[11]

II. CASE LAW DEVELOPMENTS

A. Article 2: Limitations of Time

1. Methods for Computing

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

9. N.Y. C.P.L.R. 3103(a).

10. Act of July 31, 2013, ch. 306, 2013 McKinney's Sess. Laws of N.Y. 5582-A (codified at N.Y. C.P.L.R. 3408 (McKinney 2013)).

11. N.Y. C.P.L.R. 3408(a).

claims contained in amended pleadings are considered asserted.[12]

The date essential facts are discovered may also be relevant to the analysis as CPLR 203 provides that a statute of limitations can run from "the time when facts were discovered or from the time when facts could within reasonable diligence have been discovered . . . . The action must be commenced within two years after such actual or imputed discovery . . . ."[13]

The availability of facts giving rise to a claim for damages was at issue in *Boardman v. Kennedy*.[14] The plaintiff in *Boardman* filed suit against the decedent's widow, who was executrix of the decedent's estate, for her one-half share of an individual retirement account ("IRA") that was due under a judgment of divorce entered on March 1, 1991.[15] The plaintiff's causes of action included breach of contract, fraud, and unjust enrichment.[16] She argued that her claims were governed by the twenty-year statute of limitations set forth in CPLR 211(b), applicable to money judgments.[17] The defendant countered that the plaintiff's claims were governed by the six year statute of limitations set forth in CPLR 213(1) and (2), as well as the two year statute of limitations set forth in CPLR 203(g).[18] The trial court agreed with the defendant and the Fourth Department affirmed, stating that the plaintiff's claims were untimely.[19] With respect to discovery of facts, the appellate division noted that:

> plaintiff did not have to wait until decedent retired in order to obtain her share of his IRA; instead, she was immediately entitled to her half of that account. Thus, it should not have taken her approximately 20 years to realize that she did not receive her share of that asset.[20]

To the extent the plaintiff directed an unjust enrichment claim toward the decedent's spouse, individually, the appellate division added that the relationship between the plaintiff and the decedent's spouse was "too attenuated to support that cause of action inasmuch as plaintiff and defendant simply had no dealings with each other."[21]

12. *See* N.Y. C.P.L.R. 203 (McKinney 2013).
13. N.Y. C.P.L.R. 203(g).
14. 105 A.D.3d 1375, 964 N.Y.S.2d 337 (4th Dep't 2013).
15. *Id.* at 1376, 964 N.Y.S.2d at 338.
16. *Id*.
17. *Id*.
18. *Id*.
19. *Boardman*, 105 A.D.3d at 1376, 964 N.Y.S.2d at 338.
20. *Id.*
21. *Id*. at 1377, 964 N.Y.S.2d at 338 (citations omitted) (internal quotation marks omitted).

Parties frequently litigate the relation back doctrine now codified in CPLR 203(b), which was first set forth in *Brock v. Bua*,[22] adopted by the Court of Appeals in *Mondello v. N.Y. Blood Center*,[23] and refined in *Buran v. Coupal*.[24] More specifically, parties litigate whether the three-part test articulated in case law has been satisfied so that a claim against defendant added in an amended pleading is considered interposed when the original pleading was filed.[25]

Satisfaction of the three-part test was at issue recently in *Kirk v. University OB-GYN Associates, Inc.*[26] The plaintiffs in *Kirk* filed a medical malpractice action for injuries allegedly sustained during childbirth.[27] Named defendants included the hospital where the delivery occurred, the medical group, a physician, a John Doe, M.D., and a Jane Roe, M.D.[28] The complaint alleged that John Doe and Jane Roe were employed by the medical group.[29] Approximately one year after the statute of limitations expired, the plaintiffs sought leave to amend their complaint to substitute a non-party for the John Doe.[30] The trial court granted the motion. On appeal, the Fourth Department noted that the relation back doctrine:

> allows the addition of a party after the expiration of the statute of limitations if (1) both claims arose out of the same conduct, transaction, or occurrence, (2) the additional party is united in interest with the original party, and by reason of that relationship can be charged with notice of the institution of the action such that he or she will not be prejudiced in maintaining a defense on the merits, and (3) the additional 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 the additional party as well.[31]

As prongs one and two were satisfied, the appellate division focused upon the third prong—mistake by the plaintiff.[32] The defendants argued that "there was no mistake and only neglect on the part of the

22. 83 A.D.2d 61, 66, 443 N.Y.S.2d 407, 410 (2d Dep't 1981).

23. 80 N.Y.2d 219, 223, 604 N.E.2d 81, 83, 590 N.Y.S.2d 19, 21 (1992).

24. 87 N.Y.2d 173, 177, 661 N.E.2d 978, 981, 638 N.Y.S.2d 405, 408 (1995).

25. *Id.* at 178, 661 N.E.2d at 981, 638 N.Y.S.2d at 408 (citing *Mondello*, 80 N.Y.2d at 226, 590 N.Y.S.2d at 85, 638 N.Y.S.2d at 23; *Brock*, 83 A.D.2d at 68-69, 443 N.Y.S.2d at 412).

26. 104 A.D.3d 1192, 1193, 960 N.Y.S.2d 793, 795 (4th Dep't 2013).

27. *Id.* at 1193, 960 N.Y.S.2d at 794.

28. *Id*.

29. *Id*.

30. *Id*.

31. *Kirk*, 104 A.D.3d at 1193-94, 960 N.Y.S.2d at 795.

32. *Id*. at 1194, 960 N.Y.S.2d at 795.

plaintiffs."[33] Affirming the trial court, the appellate division stated, "'New York law requires merely mistake—not excusable mistake—on the part of the litigant seeking the benefit of the doctrine,'"[34] and "[w]e agree with plaintiffs, however, that even if they were negligent, there was still a mistake by plaintiffs in failing to identify [the non-party physician] as a defendant."[35]

When attempting to add a claim for damage after expiration of the statute of limitations, a party may benefit from a search of the record to determine if the defendant is on notice. In *Giambrone v. Kings Harbor Multicare Center*, the plaintiff filed suit in August of 2009 for injuries sustained while he was at a rehabilitation facility following a hospital stay.[36] The summons and complaint did not list the plaintiff's spouse.[37] In December of 2010, the plaintiff and his wife filed an action against the hospital which was consolidated with the first.[38] Then, approximately seven weeks after expiration of the statute of limitations for the derivative claim against the rehabilitation facility, the plaintiff moved to amend the complaint to include an action for his wife.[39] The trial court concluded that the derivative claim related back to the complaint filed in August of 2009 and granted the motion.[40] The First Department analyzed recent case law applying CPLR 203(f) and affirmed because:

> Mrs. Giambrone's claim is based on the same alleged malpractice that is the basis for her husband's claim. The plaintiffs are so closely related that Mr. Giambrone's claim would have given [the rehabilitation facility] notice of the proposed specific claim. And, notably, [the rehabilitation facility] was aware that Mr. Giambrone had a spouse, as she had brought a derivative claim in the related lawsuit against [the hospital], had participated in the mediations with [the rehabilitation facility], and Mr. Giambrone had testified at his deposition that he was married.[41]

The appellate division also noted that "exposure to greater liability" did not require denial of the motion to amend as "defendant, from the outset

33. *Id*.

34. *Id.* (quoting Buran v. Coupal, 87 N.Y.2d 173, 176, 661 N.E.2d 978, 980, 638 N.Y.S.2d 405, 407(1995)).

35. *Id*.

36. 104 A.D.3d 546, 546, 961 N.Y.S.2d 157, 158 (1st Dep't 2013).

37. *Id*.

38. *Id*.

39. *Id*. at 546-47, 961 N.Y.S.2d at 158.

40. *Id*. at 547, 961 N.Y.S.2d at 158.

41. *Giambrone*, 104 A.D.3d at 547, 961 N.Y.S.2d at 158-59.

of its involvement in the litigation, had sufficient knowledge to motivate the type of litigation preparation and planning needed to defend against the entirety of the particular plaintiff's situation."[42]

2. Termination of Action

Pursuant to CPLR 205, where a timely commenced action is terminated for any reason other than (1) voluntary discontinuance, (2) failure to obtain personal jurisdiction over the defendant, (3) a dismissal for neglect to prosecute, or (4) final judgment on the merits, the plaintiff may file a new action on the same facts within six months if the new action would have been timely if commenced at the time the original action was commenced, and the defendant is served within six months.[43]

As a reminder, the six month savings provision contained in CPLR 205 is unavailable to a party with unclean hands.[44] The plaintiff in *Zulic* filed an action for medical malpractice that was dismissed for failure to prosecute.[45] As the statute of limitations had expired, the plaintiff then filed a second action attempting to invoke the six month savings provision set forth in CPLR 205(a).[46] The trial court granted the defendants motion to dismiss.[47] After reviewing the order dismissing the first action to determine if it "adequately set forth the plaintiffs' conduct constituting the neglect and demonstrating a general pattern of delay in proceeding," the Second Department affirmed.[48]

It behooves a party seeking to amend a complaint pursuant to CPLR 205(a) and (b) to follow procedural rules to a "T," as many courts require strict compliance. Following the rules was at issue in *Kelley v. Schneck*.[49] The plaintiff in *Kelley* filed suit against her landlord in October of 2008 following an incident that occurred on October 22, 2006, in which the plaintiff's son was killed when an oven tipped over.[50] Before the incident, the plaintiff had requested a new stove from her landlord.[51] When the new stove was delivered, an anti-

42. *Id*. at 548, 961 N.Y.S.2d at 159 (citations omitted) (internal quotation marks omitted).

43. *See* N.Y. C.P.L.R. 205(a) (McKinney 2013).

44. *See* Zulic v. Persich, 106 A.D.3d 904, 905, 965 N.Y.S.2d 551, 552 (2d Dep't 2013).

45. *Zulic*, 106 A.D.3d at 904-05, 965 N.Y.S.2d at 552.

46. *Id*. at 905, 965 N.Y.S.2d 552.

47. *Id*.

48. *Id*.

49. 106 A.D.3d 1175, 964 N.Y.S.2d 301 (3d Dep't 2013).

50. *Id.* at 1175, 964 N.Y.S.2d at 303.

51. *Id*.

tip bracket was not installed.[52] An amended summons and complaint was served in November of 2008.[53] In January of 2009, the plaintiff served a second amended summons and complaint without leave.[54] The second amended summons and complaint was the first pleading that named the stove installation company.[55] The defendant was successful in moving to dismiss the action against it.[56] In December of 2009, the plaintiff commenced another action against the defendant.[57] In October of 2010, the plaintiff's parental rights were terminated and, in September of 2011, plaintiff's counsel served an amended summons and complaint adding the child's adoptive parents to the action in their representative capacity.[58]

On appeal, the Third Department noted:

> [w]hen a plaintiff is approaching the expiration of the statute of limitations and needs judicial leave to properly add a party, the filing of a motion for leave to amend, together with the proposed supplemental summons and amended complaint, tolls the statute of limitations until the date of entry of the motion court's order.[59]

The plaintiff's decision to disregard "statutory procedures" and proceed by serving the complaint without leave of the court was an error which "rendered the pleadings jurisdictionally defective."[60] In addition, the plaintiff's attempt to remedy her mistake by moving for leave to add the defendant before expiration of the statute of limitations failed because "she sought leave only regarding the summons.[61] Her notice of motion did not request relief regarding the jurisdictionally defective second amended complaint." Ultimately, the appellate division affirmed the trial court's rulings as to the stove installer.[62]

3. Defendant's Absence from State

Pursuant to CPLR 207, more time may be available for service where the plaintiff can establish that the defendant is outside of the state

52. *Id*. at 1176, 964 N.Y.S.2d at 303.
53. *Id*.
54. *Kelley*, 106 A.D.3d at 1176, 964 N.Y.S.2d at 303-04.
55. *Id.* at 1176, 964 N.Y.S.2d at 304.
56. *Id*.
57. *Id*.
58. *Id*. at 1777, 964 N.Y.S.2d at 304.
59. *Kelley*, 106 A.D.3d at at 1178, 964 N.Y.S.2d at 305.
60. *Id.*
61. *Id*.
62. *Id*. at 1178-79, 964 N.Y.S.2d at 305-06.

for a period of time or is living in the state under a false name.[63] While additional time may be available, the plaintiff cannot benefit from equitable tolling unless the issue is brought to the attention of the court.

In *Ari v. Cohen*, the plaintiff brought a petition to confirm an arbitration award.[64] The petition was unopposed and granted; however, it was later vacated because the one year statute of limitations for confirmation of the arbitration award had expired.[65] On appeal, the plaintiff argued that the time to confirm the 2006 award should have been tolled by CPLR 207.[66] Unfortunately, the plaintiff failed to present this argument to the trial court.[67] The First Department affirmed because "[t]hese arguments are not preserved for appellate review."[68] The appellate division also noted that, had the plaintiff raised this issue, the defendant could have countered that "he was still subject to New York jurisdiction [under CPLR 207(c)], even though he had moved to Israel."[69]

4. Statutes of Limitations

Article 2 of the CPLR sets forth statutes of limitations for claims. The time periods range in duration from less than one year to twenty years.[70] Some of the most commonly used time periods are six years under CPLR 213,[71] three years under CPLR 214,[72] and two and one-half years under 214-a.[73] These sections are discussed, *infra*.

Accrual of a claim was at issue in *Bielecki v. Bielecki*.[74] The plaintiff in *Bielecki* filed a motion in 2010 to collect pension benefits due pursuant to a 1985 judgment of divorce.[75] The plaintiff's motion sought benefits from March of 1991 through October of 2005, at which time the plaintiff began receiving her share.[76] The trial court granted the plaintiff's motion in its entirety.[77] The Fourth Department reviewed

63. *See* N.Y. C.P.L.R. 207 (McKinney 2013).
64. 107 A.D.3d 516, 516, 968 N.Y.S.2d 31, 32 (1st Dep't 2013).
65. *Ari*, 107 A.D.3d at 516, 968 N.Y.S.2d at 32.
66. *Id*. at 517, 968 N.Y.S.2d at 32.
67. *Id*.
68. *Id*.
69. *Id.*
70. *See* N.Y. C.P.L.R. 211-218 (McKinney 2013).
71. N.Y. C.P.L.R. 213.
72. N.Y. C.P.L.R. 214.
73. N.Y. C.P.L.R. 214-a.
74. 106 A.D.3d 1454, 964 N.Y.S.2d 832 (4th Dep't 2013).
75. *Id.* at 1454-55, 964 N.Y.S.2d at 832.
76. *Id*. at 1455, 964 N.Y.S.2d at 832.
77. *Id*.

the statute of limitations on appeal, noting that the plaintiff's claims were subject to the six-year statute of limitations contained in CPLR 213, which "began to run when [the] defendant began receiving his pension in March 1991."[78] Moreover, because "defendant's obligation to pay plaintiff her share of the pension was ongoing, the statute began to run anew with each missed payment."[79] In turn, the plaintiff's claim was timely "to the extent that it seeks payments missed within six years prior to her motion filed on October 21, 2010. To the extent that plaintiff sought her share of pension payments made more than six years prior to October 21, 2010, however, plaintiff's claim is untimely."[80] The appellate division also noted that the defendant's "silence or failure to disclose the date on which he began receiving his pension benefits is insufficient to invoke the doctrine of equitable estoppel."[81]

Misrepresentations made by a party may extend the statute of limitations. This situation was at issue in *In re Hiletzaris*.[82] The petitioner in *Hiletzaris* commenced a probate proceeding to require the estate administrator to account for the estate's assets.[83] The defendant administrator moved to dismiss the action because the action was not commenced within six years of the decedent's death.[84] The surrogate's court denied the defendant's motion.[85] On appeal, the Second Department reviewed the record and affirmed, noting that "[a] proceeding to compel a fiduciary to account is governed by the six-year statute of limitations set forth in CPLR 213(1)," and that the "fiduciary relationship ended upon the decedent's death on April 17, 2004."[86] However, evidence in the record "raised triable issues of fact" as to whether the statute of limitations should be tolled because the estate representative made "misrepresentations in his 2009 accounting of the estate."[87]

Courts recognize a difference between affirmative misrepresentation and the omission of information when it comes to tolling the statute of limitations. The latter was recently reviewed by

78. *Id*. at 1455, 964 N.Y.S.2d at 833.
79. *Bielecki*, 106 A.D.3d at 1455, 964 N.Y.S.2d at 833.
80. *Id*.
81. *Id*.
82. 105 A.D.3d 740, 962 N.Y.S.2d 623 (2d Dep't 2013).
83. *Id.* at 740, 962 N.Y.S.2d at 624.
84. *Id*. at 741, 962 N.Y.S.2d at 624.
85. *Id*.
86. *Id*.
87. *In re Hiletzaris*, 105 A.D.3d at 741, 962 N.Y.S.2d at 624.

the First Department in *Access Point Medical, LLC v. Mandell*.[88] The plaintiff in *Access Point* filed suit in 2010 against his former attorney and law firm for breach of fiduciary duty, legal malpractice, and breach of contract.[89] In sum, the plaintiff claimed that the attorney failed to disclose a conflict of interest.[90] The defendants moved to dismiss the malpractice and breach of fiduciary claims as time-barred under CPLR 214.[91] In its opposition, the plaintiff conceded that the legal malpractice claim was time-barred, but argued that the breach of fiduciary duty claim was timely because of continuous representation and the fiduciary tolling rule.[92] The trial court dismissed the breach of fiduciary duty claim.[93] The First Department affirmed, stating that:

> where one party's fiduciary obligations to another arose out of their attorney-client relationship, and would not have existed without that relationship, there is no need for an open repudiation of the fiduciary's role, because the attorney's fiduciary duty to the client necessarily ends when the representation ends. Plaintiffs' causes of action alleging breach of fiduciary duty specifically assert that defendants' fiduciary duty to them arose out of their attorney-client relationship with them, thus, their fiduciary relationship ended when their attorney-client relationship ended, without any need for a declaration to that effect.[94]

The appellate division also held that "we reject the application of the fiduciary tolling rule to claims by a client against an attorney for breach of the fiduciary duty arising out of the attorney-client relationship, at least in the absence of a true entitlement to equitable relief."[95]

The impact of continuous representation on the statute of limitations was also discussed in *Aseel v. Jonathan E. Kroll & Associates, PLLC*.[96] The plaintiff in *Aseel* filed suit against his former lawyer and law firm for legal malpractice in connection with a divorce action.[97] The action was commenced on November 8, 2010.[98] The trial court granted the defendants' motion to dismiss the action as time-barred.[99] The Second Department affirmed, stating:

88. 106 A.D.3d 40, 963 N.Y.S.2d 44 (1st Dep't 2013).
89. *Id.* at 42, 963 N.Y.S.2d at 45.
90. *Id*.
91. *Id*. at 42-43, 963 N.Y.S.2d at 46.
92. *Id*. at 43, 963 N.Y.S.2d at 46.
93. *Access Point Med., LLC*, 106 A.D.3d at 42, 963 N.Y.S.2d at 46.
94. *Id.* at 45, 963 N.Y.S.2d at 47-48.
95. *Id*. at 46, 963 N.Y.S.2d at 48.
96. 106 A.D.3d 1037, 966 N.Y.S.2d 202 (2d Dep't 2013).
97. *Id.* at 1037-38, 966 N.Y.S.2d at 203.
98. *Id*. at 1037, 966 N.Y.S.2d at 203.
99. *Id*. at 1038, 966 N.Y.S.2d at 204.

> contrary to the plaintiff's sole contention on the issue of timeliness, the Supreme Court did not err in concluding that the relationship necessary to invoke the continuous representation rule ceased to exist by November 5, 2007, when the plaintiff surreptitiously removed his file from the defendants' office. By so removing the file, the plaintiff evinced his lack of trust and confidence in the parties' relationship, and his intention to discharge the defendants as his attorneys. Accordingly, because, contrary to the plaintiff's contention, the relationship necessary to invoke the continuous representation doctrine terminated more than three years prior to the commencement of this action, the Supreme Court properly granted that branch of the defendants' motion which was pursuant to CPLR 3211(a) to dismiss so much of the complaint as alleged legal malpractice against the defendants.[100]

It is well-known that a fraud cause of action must be filed within the greater of six years from the date the cause of action accrued or two years from the time the fraud was discovered (or with reasonable diligence should have been discovered).[101]

If and when a plaintiff learned of a fraud was discussed in *House of Spices (India), Inc. v. SMJ Services, Inc.*[102] The plaintiff in *House of Spices* employed an accountant who, together with another individual, embezzled money from the company by cashing checks at the defendant's business.[103] The plaintiff argued that the defendant had knowledge of the scheme dating back to 2004 and, in furtherance of the conspiracy, failed to record the names and addresses of the people cashing the checks.[104] Apparently, the scheme was discovered by the plaintiff in August of 2009, when approximately $868,480.75 had been taken.[105] The defendant moved for summary judgment and argued that the fraud claim was time-barred.[106] The trial court denied the motion because the defendant failed to satisfy its burden of establishing that the action was untimely.[107]

On appeal, the Second Department analyzed the information available to the plaintiff and when.[108] It concluded, as did the trial court, that the fraud claim accrued "at the earliest, on April 19, 2004,

100. *Id*. (internal citations omitted).
101. *See* N.Y. C.P.L.R. 213(8) (McKinney 2013).
102. *See generally* 103 A.D.3d 848, 960 N.Y.S.2d 443 (2d Dep't 2013).
103. *House of Spices*, 103 A.D.3d at 848, 960 N.Y.S.2d at 445.
104. *Id*. at 848, 960 N.Y.S.2d at 445-46.
105. *Id*. at 848, 960 N.Y.S.2d at 445.
106. *Id*. at 848, 960 N.Y.S.2d at 446.
107. *Id*.
108. *House of Spices*, 103 A.D.3d at 848-50, 960 N.Y.S.2d at 446-48.

when [the defendant] purchased the check-cashing business from [the prior owner], or at the latest, in August 2009, when the plaintiff actually discovered the fraud . . ."[109] The appellate division noted that:

> to the extent that SMJ contends that the Supreme Court should have held the plaintiff to some earlier, though unidentified, date, upon which the plaintiff should be found to have possessed knowledge of the facts on which the fraud could have reasonably been inferred, we reject this contention. An inquiry into when a plaintiff "should have discovered" an alleged fraud presents a mixed question of law and fact. However, once a plaintiff demonstrates that an action is timely, as the plaintiff has done here, it is the defendant's burden to demonstrate, prima facie, that the fraud could have been discovered earlier with reasonable diligence. Here, SMJ did not establish, as a matter of law, by its conclusory assertions, that the fraud could have been discovered by the plaintiff earlier.[110]

In the context of a medical malpractice lawsuit, one of the most frequently litigated procedural issues is when the two and one-half year clock set forth in CPLR 214-a begins to run for purposes of the statute of limitations, including the issue of whether there is "continuous treatment."[111] Through recent decisions, appellate courts appear to be trimming the scope of the statutory toll.

The plaintiff in *Dugan v. Troy Pediatrics, LLP* filed a medical malpractice action against a pediatrician for failing to properly treat the infant plaintiff.[112] Specific allegations included the pediatrician's failure to refer the child to a specialist to evaluate the development of the child's right foot.[113] Eventually, the condition worsened and the child was diagnosed with a tethered spine—a condition that caused the foot deformity.[114] The action was commenced on December 23, 2005.[115] Following discovery, the defendants moved to dismiss the action as time-barred.[116] The plaintiff, who was born in 1985, argued that the continuous treatment doctrine applied to visits between birth and 1996.[117] In support of the position, the plaintiff stated that she always told the defendant about the child's right foot problems, and the

109. *Id.* at 849, 960 N.Y.S.2d at 446.
110. *Id*. at 849, 960 N.Y.S.2d at 446 (internal citations omitted).
111. *See* N.Y. C.P.L.R. 214-a (McKinney 2013).
112. 105 A.D.3d 1188, 963 N.Y.S.2d 443 (3d Dep't 2013).
113. *Id.* at 1188-89, 963 N.Y.S.2d at 444.
114. *Id*. at 1188, 963 N.Y.S.2d at 444.
115. *Id*.
116. *Id*. at 1189, 963 N.Y.S.2d at 444.
117. *Id*. at 1190, 963 N.Y.S.2d at 445.

defendant always examined the foot.[118] The trial court concluded that the action was time-barred for care provided before December 23, 1995.[119] The Third Department affirmed, stating that "a failure to establish a course of treatment is not a course of treatment."[120] Furthermore, a "course of treatment speaks to affirmative and ongoing conduct by the physician which is recognized as such by both the patient and physician."[121]

In a similar situation, the Second Department discussed continuous treatment in *Venditti v. St. Catherine of Siena Medical Center*.[122] The plaintiff in *Venditti* filed an action for medical malpractice and wrongful death on March 27, 2009.[123] The claims arose out of care provided by the defendants from 2001 through June 12, 2008.[124] The defendants moved to dismiss a portion of the case as time-barred.[125] The plaintiff argued that the statute of limitations was tolled by the continuous treatment doctrine.[126] The trial court concluded that the plaintiff failed to carry the burden of proving the doctrine applied.[127]

The Second Department reviewed the record and concluded that the defendant treated the plaintiff between 2001 and 2007 for a number of conditions, including pelvic inflammatory disease, diabetes, sinusitis, bronchitis, knee pain, and a diabetes-related skin condition.[128] It also credited the physician's testimony that the primary purpose of care over the years was for diabetes management and medical clearance for surgeries, not treatment for high cholesterol.[129] Affirming the trial court, the appellate division held:

> [o]n the record presented, after the visit on August 1, 2001, the decedent and the physician did not mutually agree upon or anticipate future appointments for the purpose of treating the decedent's atherosclerotic coronary heart disease, elevated blood cholesterol levels, microalbuminuria, or tobacco/nicotine addiction. The decedent's visits to [the defendant] after the August 1, 2001, visit were in the nature of routine diagnostic examinations or return visits on the

118. *Dugan*, 105 A.D.3d at 1190, 963 N.Y.S.2d at 445.
119. *Id*. at 1191, 963 N.Y.S.2d at 446.
120. *Id*. at 1189, 963 N.Y.S.2d at 445.
121. *Id*. at 1190, 963 N.Y.S.2d at 445.
122. *See generally* 98 A.D.3d 1035, 950 N.Y.S.2d 759 (2d Dep't 2012).
123. *Venditti*, 98 A.D.3d at 1035-36, 950 N.Y.S.2d at 760-61.
124. *Id*. at 1036, 950 N.Y.S.2d at 761.
125. *Id*.
126. *Id*.
127. *Id*. at 1035, 950 N.Y.S.2d at 760.
128. *Venditti*, 98 A.D.3d at 1036-37, 950 N.Y.S.2d at 761-62.
129. *Id*. at 1037, 950 N.Y.S.2d at 761-62.

> patient's initiative, merely for the purpose of having [her] condition checked. A mere continuation of a general doctor-patient relationship does not qualify as a course of treatment for purposes of the statutory toll.[130]

Whether medical treatment provided by a physician's former medical group may toll the statute of limitations applicable to the physician was discussed by the Second Department in *Ozimek v. Staten Island Physicians Practice, P.C.*[131] The short answer is—yes.

The plaintiff in *Ozimek* underwent a mammogram at the defendant's medical office on March 10, 2007.[132] The study was interpreted by a radiologist who left the practice on July 6, 2007. Before leaving the practice, the physician sent the plaintiff two letters telling her that the mammogram "showed a finding" that required additional examination.[133] When the plaintiff returned to the medical office for a follow-up, she was seen by different physicians in the medical practice who attempted to provide care in connection with the mammogram findings.[134] Suit against the medical practice and the radiologist was commenced on January 11, 2010, after the plaintiff was diagnosed with breast cancer.[135] The radiologist moved to dismiss the action against him as time-barred, and the trial court agreed.[136] On appeal, the Second Department reversed, stating:

> [t]he continuous treatment doctrine may be applied to a physician who has left a medical group, by imputing to him or her the continued treatment provided by subsequently-treating physicians in that group.[137]

Where a foreign object is found inside the body, CPLR 214-a provides that a plaintiff may commence suit within one year from (1) the date of discovery of the object, or (2) the date of discover of facts which would reasonably lead to such discovery.[138]

A novel spin on the foreign object toll was discussed in *Jacobs v. University of Rochester*.[139] The plaintiff in *Jacobs* underwent spine

130. *Id.* at 1038, 950 N.Y.S.2d at 762.
131. 101 A.D.3d 833, 955 N.Y.S.2d 650 (2d Dep't 2012).
132. *Id*. at 833, 955 N.Y.S.2d at 651.
133. *Id*. at 833-34, 955 N.Y.S.2d at 651.
134. *Id*. at 834, 955 N.Y.S.2d at 651.
135. *Id*. at 834, 955 N.Y.S.2d at 652.
136. *Ozimek*, 101 A.D.3d at 834, 955 N.Y.S.2d at 652.
137. *Id*. at 835, 955 N.Y.S.2d at 652.
138. *See* N.Y. C.P.L.R. 214-a (McKinney 2013).
139. 103 A.D.3d 1205, 959 N.Y.S.2d 345 (4th Dep't 2013).

surgery in August of 1989.[140] During the surgery, a wire was intentionally implanted in the plaintiff's body to help stabilize the spine.[141] In March of 2007, an x-ray revealed that the wire was improperly protruding from the spine into the muscle.[142] A medical malpractice lawsuit was filed in March of 2008, less than one year after the plaintiff learned about the (improper) location of the wire.[143] The defendant moved to dismiss the action as untimely, i.e., filed more than two and one-half years after the 1989 surgery.[144] The trial court agreed.[145] Affirming the trial court, the Fourth Department rejected the plaintiff's argument that the wire became a foreign object because it "was not properly bent, twisted or placed when it was implanted."[146]

B. Article 3: Jurisdiction and Service

1. Long-Arm Jurisdiction

CPLR 302(a) provides that a court may exercise jurisdiction over a non-domiciliary if the cause of action arises out of the non-domiciliary's contacts with New York, such as transacting business within New York, committing a tort in New York, or committing a tort outside of New York that causes injury to a person or property within New York.[147]

Trial and appellate courts are frequently asked to evaluate the nature and quality of a defendant's contacts with the State of New York. The Fourth Department's most recent analysis is set forth in *Halas v. Dick's Sporting Goods*.[148] The plaintiff in *Halas* filed suit for injuries sustained when he fell from a tree stand manufactured by Big Dog Treestands, Inc. and sold by Dick's Sporting Goods.[149] Big Dog's motion to dismiss the complaint was denied by the trial court.[150] On appeal, the Fourth Department engaged in a thorough review of Big Dog's business model, and paid particular attention to its: (1) "exclusive distributorship agreement with Dick's," and (2) "website which

140. *Id*. at 1206, 959 N.Y.S.2d at 346.
141. *Id*.
142. *Id*.
143. *Id*. at 1205, 959 N.Y.S.2d at 346.
144. *Jacobs*, 103 A.D.3d at 1206, 959 N.Y.S.2d at 346.
145. *Id*.
146. *Id*.
147. *See* N.Y. C.P.L.R. 302(a) (McKinney 2013).
148. 105 A.D.3d 1411, 964 N.Y.S.2d 808 (4th Dep't 2013).
149. *Id*. at 1411, 964 N.Y.S.2d at 810.
150. *Id*.

provided information relating to its products, directed consumers to retail locations and allowed for direct purchasing by credit card."[151] In turn, the court concluded that Big Dog "was transacting business in New York through the use of its website, and the court properly concluded that there is long-arm jurisdiction under CPLR 302(a)(1)."[152]

After drawing this conclusion, the appellate division also held that long-arm jurisdiction was proper under CPLR 302(a)(3)(ii), stating:

> [t]he conferral of jurisdiction under [that] provision rests on five elements: First, that defendant committed a tortious act outside the State; second, that the cause of action arises from that act; third, that the act caused injury to a person or property within the State; fourth, that defendant expected or should reasonably have expected the act to have consequences in the State; and fifth, that defendant derived substantial revenue from interstate or international commerce.[153]

Holding that the first three elements were satisfied by the fact that Big Dog manufactured the product that caused injury, the court proceeded to conclude that Big Dog was on notice that its products would be used in New York via its distributorship agreement with Dick's.[154] With respect to the fifth element, the court held that the plaintiff was entitled to discovery.[155] Finding that the exercise of jurisdiction over Big Dog also "comports with due process" because of its website and distributorship agreement, the appellate division affirmed.[156]

In the context of the medical malpractice lawsuit, the transaction of business in the state of New York was discussed in *Jackson v. Sanchez-Pena*.[157] The plaintiff in *Jackson* attempted to bring an action against a New Jersey physician in New York State Supreme Court.[158] The physician was a New Jersey resident who practiced medicine only in New Jersey, has never lived in New York, does not have a New York medical license, maintains no office in New York, and pays no New York taxes.[159] To satisfy CPLR 302(a)(1), the plaintiff alleged that the defendant transacted business in the State of New York because he

151. *Id*. at 1412, 964 N.Y.S.2d at 810.

152. *Id*.

153. *Halas*, 105 A.D.3d at 1412, 964 N.Y.S.2d at 810 (quoting LaMarca v. PakMor Mfg. Co., 95 N.Y.2d 210, 214, 735 N.E.2d 883, 886, 713 N.Y.S.2d 304, 307 (2000)).

154. *Id.* at 1412-13, 964 N.Y.S.2d at 810-11.

155. *Id*. at 1413, 964 N.Y.S.2d at 811.

156. *Id*.

157. 104 A.D.3d 574, 961 N.Y.S.2d 421 (1st Dep't 2013).

158. *Id*. at 574, 961 N.Y.S.2d at 422.

159. *Id*.

accepted the referral of a New York patient from a New York doctor.[160] The trial court dismissed the plaintiff's complaint.[161] On appeal, the First Department credited the physician's affidavit in which he denied "any payment or other financial arrangement for the New York doctor's referrals."[162] After concluding that the defendant's care of the patient took place on an ad hoc basis solely in New Jersey and finding no evidence in the record indicating that the defendant paid to transport the patient from New York to New Jersey, the appellate division affirmed.[163]

On a related note, the First Department recently held in *Lawati v. Montague Morgan Slade, Ltd.* that a company's existence in New York through a virtual office—i.e., a work-environment or business location that is simulated by telecommunications, computer links and shared office space/equipment—satisfied "minimum contacts" for the exercise of jurisdiction pursuant to CPLR section 302(a)(2).[164]

Finally, in a lengthy decision largely outside the scope of this *Survey*, the Court of Appeals held in *Licci v. Lebanese Canadian Bank* that a Lebanese bank was transacting business in the state of New York by repeatedly using a banking account at a New York bank to effectuate wire transfers.[165] As part of its analysis, the Court of Appeals held that the Lebanese bank's "correspondent bank" relationship with a New York bank "without any other indicia or evidence to explain its essence, may not form the basis for long-arm jurisdiction . . . ."[166] However, the plaintiff's complaint made additional allegations about the manner of banking activity in New York that resonated with the Court, which stated:

> [a]s personal jurisdiction is fundamentally about a court's control over the person of the defendant, the inquiry logically focuses on the defendant's conduct. Again, the complaint alleges that LCB engaged in terrorist financing by using its correspondent account in New York to move the necessary dollars. Taken as true, LCB arguably thereby violated duties owed to plaintiffs under the various statutes asserted as a basis for subject matter jurisdiction. Furthermore, the alleged

160. *Id*. at 574-75, 961 N.Y.S.2d at 422-23.

161. *Id*. at 574, 961 N.Y.S.2d at 422.

162. *Jackson*, 104 A.D.3d at 574-75, 961 N.Y.S.2d at 422.

163. *Id*. at 575, 961 N.Y.S.2d at 423.

164. 102 A.D.3d 427, 429, 961 N.Y.S.2d 5, 8 (1st Dep't 2013).

165. 20 N.Y.3d 327, 339, 984 N.E.2d 893, 900, 960 N.Y.S.2d 695, 702 (2012).

166. *Id*. at 336, 984 N.E.2d at 898, 960 N.Y.S.2d at 700 (quoting Amigo Foods Corp. v. Marine Midland Bank-New York, 39 N.Y.2d 391, 396, 348 N.E.2d 581, 584, 384 N.Y.S.2d 124, 127 (1976)).

> breaches occurred when LCB used the New York account. Again, whether or not plaintiffs can prove these allegations at trial, including showing links between Shahid and Hizballah, and whether or not these allegations state a claim under the various statutes, the pleadings establish the "articulable nexus" or "substantial relationship" necessary for purposes of personal jurisdiction.
>
> While it may be that LCB could have routed the dollar transactions on behalf of Shahid elsewhere, the fact that LCB used a New York account "dozens" of times indicates desirability and a lack of coincidence. Presumably, using the AmEx account was cheaper and easier for LCB than other options, and whatever financial and other benefits LCB enjoyed as a result allowed the bank to retain Shahid as a customer and to support its allegedly terrorist activities and programs.
>
> In sum, repeated use of the correspondent account shows not only transaction of business, but an articulable nexus or substantial relationship between the transaction and the alleged breaches of statutory duties. LCB did not route a transfer for a terrorist group once or twice by mistake. Rather, plaintiffs allege that LCB deliberately used a New York account again and again to effect its support of Shahid and shared terrorist goals. Not all elements of the causes of action pleaded are related to LCB's use of the correspondent account. And the specific harms suffered by plaintiffs flowed not from LCB's alleged support of a terrorist organization, but rather from rockets. Yet CPLR 302(a)(1) does not require that every element of the cause of action pleaded must be related to the New York contacts; rather, where at least one element arises from the New York contacts, the relationship between the business transaction and the claim asserted supports specific jurisdiction under the statute.[167]

2. Commencing An Action

CPLR sections 304, 305, 306-a(a) and 306-b require a plaintiff to purchase an index number and file a petition or summons and a complaint with the county clerk to commence a lawsuit before timely serving the defendant in the appropriate manner.[168] Failing to follow the rules may be fatal to a claim.

Whether service upon a County complied with CPLR section 305(a) was discussed in *Pierce v. Village of Horseheads Police Department*.[169] The plaintiff in *Pierce* filed a lawsuit for violation of her Fourth Amendment rights against a number of defendants, including

167. *Id*. at 340-41, 984 N.E.2d at 901, 960 N.Y.S.2d at 703.
168. *See* N.Y. C.P.L.R. 304, 305, 306-a(a), 306-b (McKinney 2013).
169. 107 A.D.3d 1354, 1355, 970 N.Y.S.2d 95, 98 (3d Dep't 2013).

the County of Chemung ("County").[170] The County moved to dismiss for lack of personal jurisdiction.[171] The plaintiff opposed and cross-moved for an extension of time to effect service.[172] The trial court denied the county's motion.[173]

On appeal, the Third Department noted that the plaintiff should have "delivered [the summons and complaint] to the chair or clerk of the board of supervisors, clerk, attorney, or treasurer."[174] Instead, the plaintiff delivered the summons and complaint to a secretary at the private law office where the County Attorney was also a partner.[175] Holding that service upon the secretary was a nullity and concluding that service upon a county caseworker was invalid because the caseworker no longer worked at the location where the plaintiff attempted service, the appellate division concluded that the "Supreme Court erred in declaring that the defective service was effective to confer jurisdiction over defendants."[176] After concluding that the plaintiff's cross-motion for additional time to serve was not based upon good cause or in the interests of justice, the Third Department reversed the trial court and dismissed the claims against the County and its caseworker.[177]

While CPLR section 306-b requires service to be completed within one hundred twenty days from when the petition or summons and complaint are filed, additional time can be secured from the trial court.[178] However, there are limits.

A creative argument was tested recently in *Singh v. New York City Health & Hospitals Corp*.[179] The plaintiff in *Singh* attempted to commence an action for medical malpractice and wrongful death.[180] While the deadline to file the summons and complaint was one year and ninety days from the plaintiff's decedent's death on November 27, 2008, the suit was not filed until December 13, 2010.[181] The plaintiff then filed a motion in May 2011 to extend the time to serve the

170. *Id.* at 1354, 970 N.Y.S.2d at 97.
171. *Id.*
172. *Id.*
173. *Id.* at 1355, 970 N.Y.S.2d at 97.
174. 107 A.D.3d at 1355, 970 N.Y.S.2d at 98.
175. *Id.*
176. *Id.* at 1356, 970 N.Y.S.2d at 98-99.
177. *Id.* at 1357-58, 970 N.Y.S.2d at 99-100.
178. *See* N.Y. C.P.L.R. 306-b.
179. 107 A.D.3d 780, 970 N.Y.S.2d 33 (2d Dep't 2013).
180. *Id*. at 781, 970 N.Y.S.2d at 34.
181. *Id*.

defendants.[182] The defendants cross-moved to dismiss the complaint, and the trial court agreed.[183] On appeal, the Second Department rejected plaintiff's novel argument that the statute of limitations was tolled for the:

> period between December 30, 2008, when he filed a petition to obtain limited letters of administration for the decedent's estate, and January 27, 2009, when the Surrogate's Court granted that petition.[184]

In addition, the appellate division ruled that:

> the Supreme Court properly denied the plaintiff's motion pursuant to CPLR 306-b to extend the time to serve the summons and complaint upon the defendants inasmuch as the plaintiff commenced this action after the expiration of the statute of limitations period and, as a result, the filing of the complaint was a nullity.[185]

CPLR section 308 sets forth how a natural person may be personally served.[186] A case testing the boundaries of section 308(2) was recently issued from the Second Department.[187] The plaintiff in *Samuel* filed suit for medical malpractice against a hospital and physician.[188] In September and October 2008, the plaintiff's process servers went to the hospital building located at 121 DeKalb Avenue in Brooklyn to serve the physician.[189] In an effort to serve the physician, the summons and complaint eventually were delivered to an individual who worked in the hospital's risk management department.[190] At all relevant times, the physician was not an employee of the hospital.[191] However, he maintained an office in a building located at 240 Willoughby Street on the hospital campus.[192] Following a traverse hearing held to explore service upon the physician, the trial court concluded that service was proper.[193] On appeal, the Second Department rejected the plaintiff's argument that delivery of the summons and complaint to the risk manager at 121 DeKalb was valid

182. *Id*.
183. *Id*. at 781, 970 N.Y.S.2d at 35.
184. *Singh*, 107 A.D.3d at 782, 970 N.Y.S.2d at 35.
185. *Id*. at 782, 970 N.Y.S.2d at 35-36.
186. *See* N.Y. C.P.L.R. 308 (McKinney 2013).
187. Samuel v. Brooklyn Hosp. Ctr., 88 A.D.3d 979, 931 N.Y.S.2d 675 (2d Dep't 2011).
188. *Id*. at 979-80, 931 N.Y.S.2d at 675.
189. *Id*. at 980, 931 N.Y.S.2d at 675.
190. *Id*.
191. *Id*.
192. *Samuel*, 88 A.D.3d at 980, 931 N.Y.S.2d at 675.
193. *Id*. at 980, 931 N.Y.S.2d at 676.

service upon the physician "at his actual place of business" because the buildings located at 121 DeKalb Street and 240 Willoughby Street were "connected via a series of tunnels and corridors."[194] On August 30, 2012, the Court of Appeals denied leave to appeal.[195]

As a general rule, delivery of process to the defendant, or, in lieu of the defendant, to a person of suitable age and discretion on behalf of the defendant, is preferred over "nail and mail." Inadequate attempts to serve the person before attempting "nail and mail" may render service by the latter invalid.[196]

Lack of diligence was at issue in *Aurora Loan Services, LLC v. Gaines*.[197] *Aurora* involved an action to foreclose a mortgage.[198] The trial court granted the defendant's motion to intervene and determine the validity of service of process.[199] The Second Department affirmed, stating:

> Where service is effected pursuant to CPLR 308(4), the so-called "nail and mail" method, the plaintiff must demonstrate that service pursuant to CPLR 308(1) or (2) (personal service or residence service) could not be made with "due diligence." This requirement must be "strictly observed, given the reduced likelihood that a summons served pursuant to that section will be received."
>
> Here, the plaintiff produced the process server's affidavit, which satisfied its prima facie burden regarding service. However, in her responsive affidavit, Gaines rebutted that showing by stating specifically that (1) she was never personally served in this action, (2) she had never resided at the address where the process server attempted personal service and eventually affixed the papers, and (3) the summons and complaint were never affixed to the door of the subject premises where she had lived for more than 20 years. This showing was sufficient to warrant a hearing.
>
> At the hearing, the plaintiff failed to demonstrate that its process server made a genuine effort to determine Gaines's correct address or that he made "quality" efforts to serve her with process. Accordingly, the Supreme Court properly granted that branch of the plaintiff's motion which was to dismiss the complaint pursuant to CPLR 3211(a)(8) on the basis that it had failed to obtain personal jurisdiction

194. *Id*. at 980, 931 N.Y.S.2d at 675-76.

195. Samuel v. Brooklyn Hosp. Ctr., 19 N.Y.3d 810, 975 N.E.2d 914, 951 N.Y.S.2d 468 (2012).

196. *See* N.Y. C.P.L.R. 308(4) (McKinney 2013).

197. 104 A.D.3d 885, 962 N.Y.S.2d 316 (2d Dep't 2013).

198. *Id.* at 886, 962 N.Y.S.2d at 317.

199. *Id.* at 886, 962 N.Y.S.2d at 317-18.

over Gaines.[200]

Pursuant to CPLR section 308(5), trial courts have the discretion to set the manner of service despite whether the methods set forth in CPLR section 308(1), (2), and (4) are "impracticable."[201]

The exercise of discretion was at issue in *Safadjou v. Mohammadi*, a decision in which the Fourth Department approved the use of e-mail as an alternative method of service.[202] *Safadjou* was a matrimonial action in which the plaintiff was having trouble serving the defendant, who was living in Iran, with a summons with notice.[203] The trial court ordered service in a number of ways, including e-mail, and the plaintiff was granted a final judgment of divorce with custody.[204] On appeal, the Fourth Department affirmed the trial court, stating:

> the court initially ordered service of the summons by (1) personal service upon defendant's parents; (2) mail service upon defendant at her parents' address in Iran; and (3) service upon defendant by plaintiff's Iranian attorneys in accordance with Iranian law. Pursuant to that order, plaintiff mailed the summons and notice to defendant at her parents' last known address in Tehran and submitted a declaration by his Iranian attorney that at least two attempts were made to effect personal service upon defendant at that address. Although defendant contended that the address used for service was "bogus," the record reflects that the address was in fact used by defendant and/or her parents in some capacity. Indeed, defendant supplied that address to the child's pediatrician in requesting the child's medical records, and she averred that her father ultimately received the documents from a "tenant" who lived at that address.[205]

As these attempts at service were unsuccessful, the appellate division concluded that e-mail was appropriate upon "each email address that plaintiff knows defendant to have."[206] Further:

> The record reflects that, for several months prior to the application for alternative service, the parties had been communicating via email at the two email addresses subsequently used for service. Although defendant claimed that she did not receive either of the emails, she acknowledged receipt of a subsequent email from plaintiff's attorney sent to the same two email addresses. We thus conclude that, under

200. *Id.* at 886-887, 962 N.Y.S.2d at 318-319.
201. *See* N.Y. C.P.L.R. 308(5).
202. 105 A.D.3d 1423, 1424, 964 N.Y.S.2d 801, 802 (4th Dep't 2013).
203. *Id*. at 1424, 964 N.Y.S.2d at 803.
204. *Id*. at 1425, 964 N.Y.S.2d at 803.
205. *Id.*
206. *Id*. at 1425, 964 N.Y.S.2d at 803.

> the circumstances of this case, the court properly determined that service of the summons with notice upon defendant by email was an appropriate form of service.[207]

CPLR section 311 governs the manner in which a corporation is to be served.[208] Where a corporation intends to challenge the validity of service of process, it should do so with specific assertions or the challenge will fail.

A challenge to service was reviewed by the Second Department in *Indymac Federal Bank FSP v. Quattrochi*.[209] In *Indymac*, the defendant attempted to vacate a judgment of foreclosure and sale entered upon its default via an affidavit in which it denied receipt of service.[210] The trial court denied the motion because the defendant's affidavit failed to swear to "specific facts to rebut the statements in the [plaintiff's] process server's affidavits."[211] In its decision affirming the trial court, the Second Department was critical of the affidavit submitted by the defendant's agent for a number of reasons.[212] First, the affidavit failed to deny that the agent was authorized to accept service, failed to deny that the agent was working on the day service was attempted, and failed to address that the agent's appearance matched the process server's physical description.[213] Second, the appellate division was critical of the agent's general failure to "recall" being served.[214] Finally, the court discounted the agent's reliance upon the absence of an entry in the company's service log because "the pages of the Subpoena Case Record Book submitted by the appellant do not substantiate, and, in fact, negate, the assertion that the agent always followed this standard procedure inasmuch as they contain numerous entries that are date out of sequence."[215]

C. Article 5: Venue

1. Contractual Provisions Fixing Venue

Article 5 of the CPLR governs where a lawsuit should be

207. *Id*. at 1425-26, 964 N.Y.S.2d at 804.
208. *See* N.Y. C.P.L.R. 311 (McKinney 2013).
209. 99 A.D.3d 763, 952 N.Y.S.2d 239 (2d Dep't 2012).
210. *Id*.
211. *Id*.
212. *Id*. at 764-65, 952 N.Y.S.2d at 240-41.
213. *Id*. at 764, 952 N.Y.S.2d at 240.
214. *Quattrochi*, 99 A.D.3d at 764, 952 N.Y.S.2d at 240.
215. *Id*. at 765, 952 N.Y.S.2d at 240-41.

commenced.[216] Whether by accident or design, parties often file suit in the wrong forum.

Forum was litigated in *Lowenbraum v. McKeon*.[217] The plaintiff in *Lowenbraum* filed an action in New York State Supreme Court, Nassau County, to recover damages for conversion.[218] The defendant moved to dismiss the case because it was not filed in New York State Supreme Court, Queens County, pursuant to a so-ordered stipulation and agreement executed by the plaintiff and defendant.[219] The trial court dismissed the case.[220] On appeal, the Second Department acknowledged that the parties could contract for forum pursuant to CPLR 501; however, it reversed the trial court's dismissal by drawing a distinction between forum and venue, stating "the action was commenced in the proper court and, thus, the action was not commenced in an incorrect forum, but only in an improper county."[221] Further, "[i]mproper venue is not a jurisdictional defect requiring dismissal of the action."[222]

2. Grounds for Venue Change

Pursuant to CPLR 510, a party may ask a court to change the place of trial where the place designed for trial is not proper, where an impartial trial cannot be had in the county selected, or where the convenience of the witnesses and ends of justice will be promoted by the change.[223]

A motion to change venue was made by the defendants in *Forbes v. Rubinovich*, a medical malpractice action filed in New York State Supreme Court, Kings County.[224] In support of the motion, the defendants argued that venue in Kings County was improper under CPLR 510(1).[225] The trial court denied the defendants' request to transfer venue to Oneida County.[226] On appeal filed by the defendants, the Second Department reviewed the plaintiff's support for venue in Kings County, stating:

216. *See generally* N.Y. C.P.L.R. 501-513 (McKinney 2013).
217. 98 A.D.3d 655, 950 N.Y.S.2d 381 (2d Dep't 2012).
218. *Id*. at 655, 950 N.Y.S.2d at 381.
219. *Id*. at 655-56, 950 N.Y.S.2d at 382.
220. *Id*. at 657, 950 N.Y.S.2d at 382.
221. *Id*. at 656-57, 950 N.Y.S.2d at 382.
222. *Lowenbraum*, 98 A.D.3d at 656, 950 N.Y.S.2d at 382.
223. *See* N.Y. C.P.L.R. 510 (McKinney 2013).
224. 94 A.D.3d 809, 809, 943 N.Y.S.2d 120, 120-21 (2d Dep't 2012).
225. *Id*. at 809, 943 N.Y.S.2d at 121.
226. *Id*.

> [T]he appellant submitted evidence establishing prima facie that the plaintiff resided in Richmond County and that the defendants resided in Oneida County. In opposition to the motion, the plaintiff was required to establish through documentary evidence that he intended to retain Kings County as a residence for some length of time and with some degree of permanency. The plaintiff's driver's license, which was issued after the commencement of the action, was irrelevant. Furthermore, aside from a conclusory statement contained in his affidavit that he resided at an address in Kings County prior to commencing this action, the plaintiff failed to present any other evidence sufficient to establish that he resided in Kings County with any degree of permanency at the time this action was commenced. Moreover, the appellant moved promptly to change venue after ascertaining the plaintiff's true residence. Accordingly, that branch of the appellant's motion which was to change the venue of the action from Kings County to Oneida County pursuant to CPLR 510(1) should have been granted.[227]

D. Article 14: Contribution

CPLR 1401 provides that "two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought."[228]

The boundaries of CPLR 1401 were tested in *Specialized Industrial Services Corp. v. Carter*.[229] *Specialized* was an action to recover for damages stemming from a violation of Judiciary Law section 487.[230] The trial court denied the plaintiff's attempt to seek contribution from other lawyers under CPLR 1401.[231] The Second Department affirmed, stating that "an attorney may not seek contribution under CPLR 1401 for any part of an award made pursuant to Judiciary Law section 487," as the Judiciary Law was designed to "punish attorneys who violate the statute and deter them from betraying their 'special obligation to protect the integrity of the court and foster their truth-seeking function.'"[232] Allowing contribution "for any part of the award would run counter to" the intent of section 487.[233]

227. *Id*. at 810, 943 N.Y.S.2d at 121 (internal citations omitted).
228. N.Y. C.P.L.R. 1401 (McKinney 2013).
229. 99 A.D.3d 692, 693, 952 N.Y.S.2d 97, 98 (2d Dep't 2012).
230. *Id*. at 692, 952 N.Y.S.2d at 97.
231. *Id*. at 693, 952 N.Y.S.2d at 98.
232. *Id*.
233. *Id*.

E. Article 20: Mistakes and Defects

1. Discretion

CPLR 2001 empowers a court to permit correction of a mistake, omission, defect, or irregularity made at any stage of an action, provided a substantial right of a party is not prejudiced.[234]

Whether a mistake in a notice of appeal could be overlooked was at issue in *Day v. Syosset Center School District*.[235] In *Day*, an order was issued granting the defendant's motion for an award of costs and attorney's fees, as well as sanctions against the plaintiffs' attorney.[236] A notice of appeal was filed only in the name of the plaintiffs and recited that the plaintiffs were appealing from an order which, in part, awarded relief against them.[237] Thereafter, the plaintiffs' attorney attempted to use the notice of appeal to challenge the award of sanctions against him.[238] The Second Department dismissed the attorney's appeal, stating "we cannot appropriately deem the notice of appeal filed in the name of the plaintiff to be a notice of appeal by their attorney" because "it would not be readily apparent to the respondent from the notice of appeal that the plaintiffs' attorney was the actual intended appellant."[239]

F. Article 21: Papers

1. Stipulations

CPLR 2104 governs stipulations between parties and provides that an "agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered."[240]

Whether an attorney who spoke in open court had sufficient authority to bind a client was at issue in *Caroli v. Allstate Insurance Co*.[241] The plaintiff in *Caroli* owned a vacation property that was destroyed by fire.[242] In 2006, she filed suit against her insurance company, which denied coverage because of an untimely proof of

234. *See* N.Y. C.P.L.R. 2001 (McKinney 2013).
235. 105 A.D.3d 888, 963 N.Y.S.2d 320 (2d Dep't 2013).
236. *Id*. at 888, 963 N.Y.S.2d at 321.
237. *Id*.
238. *Id*. at 889, 963 N.Y.S.2d at 321.
239. *Id*.
240. *See* N.Y. C.P.L.R. 2104 (McKinney 2013).
241. 100 A.D.3d 941, 955 N.Y.S.2d 128 (2d Dep't 2012).
242. *Id*. at 942, 955 N.Y.S.2d at 129.

loss.[243] On March 2, 2010, counsel for the parties appeared for a pretrial conference.[244] After an off-the-record discussion, the case was called and counsel for the defendant advised the court that "it is agreed by and between the attorney representing [the plaintiff] and myself that the matter is fully and finally settled for the sum of $10,000."[245] Thereafter, the court raised an issue with respect to a lien.[246] Counsel for the defendant then stated that "without either a discharge of the lien and/or a consent to settle, [the parties] remain in limbo."[247] The trial court discharged the lien, and the case was marked as settled.[248]

On January 28, 2011, the plaintiff moved to vacate the stipulation of settlement.[249] In support of the motion, she submitted an affidavit claiming that the "attorney who appeared on behalf of the plaintiff at the March 2, 2010, pretrial conference was a per diem attorney who was engaged only to obtain an adjournment of the pretrial conference pending ongoing discussions with [the lienholder]."[250] The plaintiff also alleged that she "did not intend to settle the matter at that conference" and asserted that the requirements of CPLR 2104 were not satisfied.[251] The trial court granted the plaintiff's motion, in part, because the per diem attorney "barely participated in the settlement."[252] The appellate division reversed, stating:

> Oral stipulations entered into in open court by counsel on behalf of their clients are binding. "Stipulations of settlement are favored by the courts and not lightly cast aside . . . . Only where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation."[253]
>
> * * *
>
> Moreover, an agreement was reached between the parties, even though the defendant's counsel placed the settlement on the record while the plaintiff's counsel initially remained silent until the Supreme Court

243. *Id*.
244. *Id*.
245. *Id*.
246. *Caroli*, 100 A.D.3d at 941, 955 N.Y.S.2d at 129.
247. *Id*.
248. *Id*. at 942-43, 955 N.Y.S.2d at 130.
249. *Id*. at 943, 955 N.Y.S.2d at 130.
250. *Id*.
251. *Caroli*, 100 A.D.3d at 943, 955 N.Y.S.2d at 130.
252. *Id*.
253. *Id.* (quoting Hallock v. State, 64 N.Y.2d 224, 230, 474 N.E.2d 1178, 1180, 485 N.Y.S.2d 510, 512 (1984)).

> started questioning counsel about Freddie Mac's lien. "[A] duty to speak generally arises . . . when the settlement is actually placed on the record." Thus, the silence of the plaintiff's attorney while the defendant's counsel was advising the Supreme Court that the matter was settled for the sum of $10,000 constituted acceptance.[254]

What constitutes a signature was at issue in *Forcelli v. Gelco Corp*.[255] The plaintiff in *Forcelli* was injured in an accident involving multiple vehicles.[256] Following discovery, the parties engaged in mediation.[257] Following mediation, the defendants called the plaintiffs' attorney and offered $230,000 to settle the case.[258] The plaintiffs' attorney orally accepted the offer.[259] That same day, the defendants sent an email message to the plaintiffs' attorney stating that "[p]er our phone conversation today, May 3, 2011, you accepted my offer of $230,000 to settle this case. Please have your client execute [sic] the attached Medicare form as no settlement check can be issued without this form."[260] On May 4, 2011, the plaintiff signed a release.[261] On May 10, 2011, the trial court issued an order granting the defendants' motion for summary judgment.[262] On May 11, 2011, plaintiffs' counsel mailed the release and stipulation to discontinue to defense counsel.[263] On May 12, 2011, the defendants "rejected" the release and stipulation by letter which stated that "there was no settlement consummated under New York CPLR 2104 between the parties."[264] The trial court granted the plaintiffs' motion to enforce the settlement agreement.[265]

A key component of the insurance carrier's argument on appeal was that the email sent by its representative was not "subscribed" under CPLR 2104, and thus, the terms were unenforceable.[266] The appellate division noted:

> [G]iven the now widespread use of email as a form of written communication in both personal and business affairs, it would be

254. *Id.* at 944, 955 N.Y.S.2d at 131 (quoting Diarassouba v. Urban, 71 A.D.3d 51, 59, 892 N.Y.S.2d 410, 416 (2d Dep't 2009)).

255. 109 A.D.3d 244, 972 N.Y.S.2d 570 (2d Dep't 2013).

256. *Id*. at 245, 972 N.Y.S.2d at 571.

257. *Id*. at 245-46, 972 N.Y.S.2d at 571-72.

258. *Id*. at 246, 972 N.Y.S.2d at 572.

259. *Id*.

260. *Forcelli*, 109 A.D.3d at 246, 972 N.Y.S.2d at 572.

261. *Id*.

262. *Id*. at 246-27, 972 N.Y.S.2d at 572.

263. *Id*. at 247, 972 N.Y.S.2d at 572.

264. *Id*.

265. *Forcelli*, 109 A.D.3d at 247, 972 N.Y.S.2d at 573.

266. *Id*. at 249, 972 N.Y.S.2d at 574.

> unreasonable to conclude that email messages are incapable of conforming to the criteria of CPLR 2104 simply because they cannot be physically signed in a traditional fashion. Indeed, such a conclusion is buttressed by reference to the New York State Technology Law, former article 1, "Electronic Signatures and Records Act," which was enacted by the Legislature in 2002.[267]
>
> * * *
>
> In the case at bar, Greene's email message contained her printed name at the end thereof, as opposed to an "electronic signature" as defined by the Electronic Signatures and Records Act. Nevertheless, the record supports the conclusion that Greene, in effect, signed the email message. In particular, we note that the subject email message ended with the simple expression, "Thanks Brenda Greene," which appears at the end of the email text. This indicates that the author purposefully added her name to this particular email message, rather than a situation where the sender's email software has been programmed to automatically generate the name of the email sender, along with other identifying information, every time an email message is sent. In addition, the circumstances which preceded Greene's email message, and in particular, the face-to-face mediation at which settlement was attempted and the subsequent follow-up telephone calls between Greene and the plaintiff's counsel, support the conclusion that Greene intended to "subscribe" the email settlement for purposes of CPLR 2104.[268]

The appellate division affirmed the trial court, stating:

> where, as here, an email message contains all material terms of a settlement and a manifestation of mutual accord, and the party to be charged, or his or her agent, types his or her name under circumstances manifesting an intent that the name be treated as a signature, such an email message may be deemed a subscribed writing within the meaning of CPLR 2104 so as to constitute an enforceable agreement.[269]

G. Article 22: Stays, Motions and Orders

1. Motion Papers; Service; Time

CPLR 2214(c) provides that "[o]nly papers serve in accordance with the provisions of this rule shall be read in support of, or in opposition to, the motion, unless the court for good cause shall

267. *Id*. at 250, 972 N.Y.S.2d at 575.
268. *Id*. at 251, 972 N.Y.S.2d at 575.
269. *Id*. at 251, 972 N.Y.S.2d at 575-76.

otherwise direct."[270]

A court's consideration of papers not submitted in connection with a motion was at issue in *Biscone v. JetBlue Airways Corp*.[271] The plaintiffs in *Biscone* brought suit for intentional tort and fraud stemming from their confinement on a JetBlue airplane grounded for approximately eleven hours.[272] A CPLR 902 motion for class certification was filed and denied as premature.[273] Thereafter, the plaintiffs moved for leave to renew or reargue the motion for class certification.[274] As this case was venued in an electronic filing jurisdiction, the plaintiffs' attorney did not attach exhibits to his affirmation.[275] Instead, he simply referred to previously e-filed documents by electronic docket entry numbers.[276] The trial court denied the motion.[277]

On appeal, the Second Department noted that CPLR and trial court rules do not mirror federal practice and affirmed, stating "[t]here is no authority for compelling [a court] to consider papers which were not submitted in connection with the motion on which it is ruling."[278] Moreover:

> [i]f a party simply refers to docket entry numbers, the motion court would still be forced to expend time locating those documents in the system, a task that could easily be complicated by a voluminous record or incorrect citations to docket entry numbers. Consequently, just as a court should not be compelled to retrieve the clerk's file in connection with its consideration of subsequent motions, a court should likewise not be compelled, absent a rule providing otherwise, to locate previously submitted documents in the electronic record in considering subsequent motions.
>
> Here, the plaintiff only submitted an attorney's affirmation referring to the docket entry numbers of previously submitted documents and a memorandum of law in support of her motion for leave to renew or reargue, and failed to submit any of the documents necessary for the determination of the subject motion.[279]

270. N.Y. C.P.L.R. 2214(c) (McKinney 2013).
271. 103 A.D.3d 158, 957 N.Y.S.2d 361 (2d Dep't 2012).
272. *Id.* at 160-61, 957 N.Y.S.2d at 364-65.
273. *Id.* at 164, 957 N.Y.S.2d at 367.
274. *Id.*
275. *Id.*
276. *Biscone*, 103 A.D.3d at 164, 957 N.Y.S.2d at 367.
277. *Id.*
278. *Id*. at 177-78, 957 N.Y.S.2d at 377-78.
279. *Id*. at 179-80, 957 N.Y.S.2d at 378 (citations omitted) (internal quotation marks

H. Article 30: Remedies and Pleading

1. Declaratory Judgment

A trial court may "render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed."[280]

The scope of a "justiciable controversy" was addressed in *Green Thumb Lawn Care, Inc. v. Iwanowicz*.[281] In *Green Thumb*, the New York State Department of Environmental Conservation ("DEC") alleged that Green Thumb Lawn Care, Inc. ("Green Thumb") had violated a 2002 consent order, as well as various statutes and regulations, by performing residential lawn care without a signed contract specifying the dates for pesticide application.[282] Following an administrative hearing, the DEC assessed a penalty.[283] Green Thumb commenced a CPLR article 78 proceeding and declaratory judgment action to challenge the ruling.[284] The DEC dismissed all charges related to the alleged violations of the 2002 consent order.[285] In turn, the appellate division noted that:

> . . . . no active controversy remained with respect to it. Petitioners' remaining requests seek a declaration that petitioners may act in a certain manner in the future when interacting with other, unidentified consumers, and thus presented hypothetical issues concerning future events which may or may not occur. Consequently, no justiciable controversy was present, and the court was required to dismiss the amended petition/complaint insofar [as] it sought declaratory relief.[286]

I. Article 31: Disclosure

1. Scope of Disclosure

CPLR 3101(a) requires full disclosure of all matter material and necessary to the prosecution or defense of an action.[287] The definition of material and necessary depends upon the case.

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omitted).

280. N.Y. C.P.L.R. 3001 (McKinney 2013).

281. 107 A.D.3d 1402, 1402, 967 N.Y.S.2d 542, 544 (4th Dep't 2013).

282. *Id.* at 1402-03, 967 N.Y.S.2d at 544.

283. *Id.* at 1403, 967 N.Y.S.2d at 544.

284. *Id.*

285. *Id*. at 1405, 967 N.Y.S.2d at 546.

286. *Green Thumb*, 107 A.D.3d at 1405, 967 N.Y.S.2d at 546 (citations omitted) (internal quotation marks omitted).

287. *See* N.Y. C.P.L.R. 3101(a) (McKinney 2012).

Witness protection programs records were the subject of a motion to compel in *M.C. v. Sylvia Marsh Equities, Inc*.[288] The plaintiff in *M.C.* filed suit for injuries sustained when the bathroom ceiling in her apartment collapsed.[289] During a deposition of the plaintiff, she refused to answer certain questions on the ground that she was a participant in the federal witness protection program.[290] After the deposition, the defendant served a notice to produce seeking records from the program including, specifically, "copies of records pertaining to psychological testing and physical evaluations of the plaintiff."[291] The plaintiff refused to respond, and the trial court denied the defendant's motion.[292] On appeal, the Second Department noted that medical records should have been disclosed because:

> the defense is entitled to review records showing the nature and severity of the plaintiff's prior medical conditions which may have an impact upon the amount of damages, if any, recoverable for a claim of loss of enjoyment of life.[293]

Moreover, the appellate division also concluded that mental health records should have been disclosed:

> due to the plaintiff's allegation that her physical injuries caused a loss of enjoyment of life, medical records which reflect the plaintiff's mental condition prior to the date that she allegedly sustained the injuries which are the subject of this action are material and necessary to the issue of damages recoverable on that claim.[294]

Access to social media was limited in *Kregg v. Maldonaldo*.[295] The defendants in *Kregg* sought the "entire contents" of any social media accounts "maintained by or on behalf of" the injured plaintiff.[296] While the plaintiff objected that the request was an improper fishing expedition, the trial court agreed with the defendants.[297] On appeal, the Fourth Department reversed stating that the request for the information was "made without a factual predicate with respect to the relevancy of the evidence" as there was "no contention that the information in the

288. 103 A.D.3d 676, 676, 959 N.Y.S.2d 280, 282 (2d Dep't 2013).

289. *Id.* at 677, 959 N.Y.S.2d at 282.

290. *Id*.

291. *Id*.

292. *Id*. at 677-78, 959 N.Y.S.2d at 282.

293. *Sylvia Marsh*, 103 A.D.3d at 679, 959 N.Y.S.2d at 283 (citations omitted) (internal quotation marks omitted).

294. *Id.* at 679, 959 N.Y.S.2d at 284.

295. 98 A.D.3d 1289, 1289, 951 N.Y.S.2d 301, 301 (4th Dep't 2012).

296. *Id.* at 1289-90, 951 N.Y.S.2d at 301-02.

297. *Id.* at 1290, 951 N.Y.S.2d at 302.

social medical accounts contradicts plaintiff's claims for the diminution . . . of [his] enjoyment of life."[298]

A lengthy decision relating to the disclosure of social media data was also authored by a trial court in *Fawcett v. Altieri*.[299] The defendants in *Fawcett* sought discovery of all of the plaintiff's social media accounts.[300] After an analysis that included a review of a Huffington Post article with quotes from Facebook's founder, Mark Zukerberg, the trial court denied the defendant's motion to compel as well as the plaintiff's cross-motion for a protective order.[301] The reasoning follows:

> Electronic discovery issues were once nearly the exclusive province of commercial litigation involving corporate players. However, with the expansion of the use of mobile phones that are connected to the Internet, and the overall ease of access to broadband Internet connections at home, electronic discovery will quickly enter into actions where it was once thought irrelevant. Facebook's Mark Zuckerberg is correct that members of society continue to share more of their thoughts, secrets, mundane musings, photos and videos of their personal lives on social media sites. Perhaps this phenomenon is driven by feelings of anonymity in the online environment, where social media giants perpetuate the mantra that "your privacy is important." But, as courts have previously determined this privacy is not absolute. Information posted in open on social media accounts are freely discoverable and do not require court orders to disclose them. However, this court will not go so far as to hold that all social media records are material and necessary based solely on the fact that many people avail themselves to these social media sites. In order to obtain a closed or private social media account by a court order for the subscriber to execute an authorization for their release, the adversary must show with some credible facts that the adversary subscriber has posted information or photographs that are relevant to the facts of the case at hand. The courts should not accommodate blanket searches for any kind of information or photos to impeach a person's character, which may be embarrassing, but are irrelevant to the facts of the case at hand.
>
> The party requesting the discovery of an adversary's restricted social media accounts should first demonstrate a good faith basis to make the request. Absent some facts that the person disclosed some information

298. *Id.*

299. 38 Misc. 3d 1022, 1023, 960 N.Y.S.2d 592, 594 (Sup. Ct. Richmond Cnty. 2013).

300. *Id.* at 1023, 960 N.Y.S.2d at 594.

301. *Id.* at 1025-29, 960 N.Y.S.2d at 596-98.

> about the subject matter of the pending law suit, granting carte blanche discovery of every litigant's social media records is tantamount to a costly, time consuming "fishing expedition," which the courts ought not condone. Moreover, asking courts to review hundreds of transmissions "in camera" should not be the all purpose solution to protect the rights of litigants. Courts do not have the time or resources to be the researchers for advocates seeking some tidbit of information that *may* be relevant in a tort claim. While several courts have frequently assigned the "in camera" review to "special masters," the fees to be paid those special masters should be paid by the party seeking such discovery in a tort case, but which may be shared by the parties in a commercial or matrimonial matter.
>
> With the volume of cases pending before our courts, simply requesting authorizations for all social media from all or most of the litigants will create an unmanageable volume of documents to be reviewed in the hope that some information directly relevant to the case will be uncovered. More likely, the information obtained would be irrelevant to the actual facts of the case, but may be used in an attempt to discredit the adversary with collateral matters. As a matter of judicial policy, such a fishing expedition is not a sufficient basis to open the flood gates of meandering thoughts or silly postings to be used to impeach a party in a simple assault or negligence action without any good cause to believe that any incriminating statement was ever made and publicized in the social media. These are not matters of national security or part of a criminal investigation. This is a civil tort matter of a minor assault that should have a good faith basis other than supposition, hope or speculation that some comment was made that may be relevant to the case at hand.
>
> Therefore, the parties should proceed to discover the facts of the case by way of depositions or other investigatory or surveillance means.[302]

2. Protective Orders

A court may prevent abusive discovery or suppress information improperly obtained by issuing a protective order that denies, limits, conditions, or regulates discovery.[303]

The scope of CPLR 3103 was discussed in *Giles v. A. Gi Yi*, an action in which the plaintiff filed suit against his landlords for injuries allegedly sustained as a result of exposure to lead paint.[304] Thirty-five injuries were listed in the plaintiff's bill of particulars, including

302. *Id.* at 1027-28, 960 N.Y.S.2d at 597-98.

303. *See* N.Y. C.P.L.R. 3103 (McKinney 2013).

304. 105 A.D.3d 1313, 1314, 964 N.Y.S.2d 319, 320 (4th Dep't 2013).

neurological damage and diminished cognitive function.[305] While the plaintiff produced medical records from treating physicians, none of the records related the plaintiff's injuries to exposure to lead paint.[306] The defendants moved to compel the plaintiff to produce "medical reports of treating or examining medical service providers detailing a diagnosis of all injuries alleged to have been sustained by plaintiff as a result of exposure to lead-based paint."[307] The plaintiff opposed the motion, arguing that the defendants were improperly seeking an expert report pursuant to CPLR 3101(d).[308] The trial court granted the defendants' motion and the Fourth Department affirmed, stating that although "CPLR 3121 and 22 N.Y.C.R.R. 202.17 do not require the disclosure directed in this case, they likewise do not preclude a trial judge from proceeding in the manner at issue herein."[309] In sum, the appellate division reasoned that the unique nature of the claimed damages made it unfair for the defendants to proceed without some documentation from the plaintiff that the damages stemmed from the alleged negligence.[310] It noted that its holding was limited and did not "impose unduly burdensome obligations not contemplated by 22 N.Y.C.R.R. 202.17 upon all personal injury plaintiffs."[311]

3. Signing Deposition

It is well-known that a deponent may make changes to his or her deposition testimony upon receipt of the transcript "with a statement of the reasons given by the witness for making them."[312]

In the absence of an explanation, the proposed changes will be rejected. Missing reasoning was the topic of appellate review in *Garcia-Rosales v. Bais Rochel Resort*.[313] The plaintiff in *Garcia-Rosales* filed an action to recover for personal injuries.[314] When the defendant moved for summary judgment, the plaintiff opposed with an affidavit and copy of his deposition transcript.[315] The deposition transcript was accompanied by an errata sheet which "presented feigned

305. *Id.* at 1314, 964 N.Y.S.2d at 320.
306. *Id.*
307. *Id.*
308. *Id*. at 1315, 964 N.Y.S.2d at 320.
309. *Giles*, 105 A.D.3d at 1317, 964 N.Y.S.2d at 322.
310. *Id.* at 1317, 964 N.Y.S.2d at 322.
311. *Id*.
312. *See* N.Y. C.P.L.R. 3116(a) (McKinney 2013).
313. 100 A.D.3d 687, 687, 954 N.Y.S.2d 148, 150 (2d Dep't. 2012).
314. *Id*. at 687, 954 N.Y.S.2d at 149.
315. *Id*. at 687, 954 N.Y.S.2d at 150.

issues of fact tailored to avoid the consequence of his earlier deposition testimony."[316] The trial court granted the defendant's motion and the appellate division affirmed, stating that the errata sheet did not raise a triable issue of fact because "[t]he correction sheet contained no statement of reasons for making the corrections."[317]

The quality of a reason for making a change to deposition testimony under CPLR 3116(a) was discussed in *Ashford v. Tannenhauser*.[318] In *Ashford*, the plaintiff's proposed material changes to her deposition testimony on the grounds that he had been "nervous."[319] The appellate division reversed the trial court's denial of the defendant's motion for summary judgment stating that "the injured plaintiff failed to offer an adequate reason for materially altering the substance of his deposition testimony," and, therefore, "the altered testimony could not properly be considered in determining the existence of a triable issue of fact as to whether a defect in, or the inadequacy of, the ladder caused his fall."[320]

4. Physical or Mental Examination

CPLR 3121 permits a party to compel another party to attend a physical, mental, or blood examination by a designated physician. Customarily, this examination is called an independent medical examination ("IME") or defense medical examination ("DME").

Occasionally, the party being compelled to attend an IME or DME seeks to have it recorded on videotape. In *Flores v. Vescera*, the Fourth Department concluded that a neuropsychological IME could not be recorded.[321] The plaintiff in *Flores* filed a motion for a protective order permitting her to videotape a neuropsychological evaluation using a one-way mirror.[322] The trial court denied the request.[323] On appeal, the appellate division noted that "there is no express statutory authority to videotape medical examinations," and it is a request customarily denied in the absence of "special and unusual circumstances."[324] While it affirmed denial of the plaintiff's motion for video recording, the appellate division held that plaintiff's counsel or other representative

316. *Id*.
317. *Id.*
318. 108 A.D.3d 735, 736, 970 N.Y.S.2d 65, 67 (2d Dep't. 2013).
319. *Id*.
320. *Id*.
321. 105 A.D.3d 1340, 1340, 963 N.Y.S.2d 884, 884 (4th Dep't 2013).
322. *Id*.
323. *Id*.
324. *Id*.

could attend the testing, as there was no showing by the defendant that this would "impair the validity and effectiveness" of the test.[325]

5. Admissions as to Matters of Fact, Papers, Documents, and Photographs

CPLR 3123 permits a party to serve a written request for admission of the "genuineness of any papers or documents, or the correctness or fairness of representation of any photographs . . . or of the truth of any matters of fact set forth in the request."[326] Where the recipient of a proper notice to admit fails to respond within twenty days, the substance of the notice is deemed admitted.[327]

Counsel must remember that answers to a notice to admit cannot be "upon information and belief."[328]

J. Article 32: Accelerated Judgment

1. Motions to Dismiss

CPLR 3211 sets forth a number of grounds upon which a party can move for judgment dismissing claims or defenses.[329] The most frequently litigated grounds are lack of subject matter or personal jurisdiction,[330] lack of capacity to sue,[331] and failure to state a claim.[332]

In *Goodwin v. Pretorius*, a motion to dismiss was made by the defendants because the plaintiff (1) did not serve the physician defendants with the notice of claim, and (2) did not list the names of individual physicians in the notice of claim she timely served upon Erie County Medical Center Corporation (ECMCC).[333] The trial court denied the defendant's motion.[334] On appeal, the Fourth Department affirmed, stating that section 50-e of the General Municipal Law does not require service of the notice of claim upon individual employees.[335] Further, the appellate division rejected prior case law[336] and stated that

325. *Id*. at 1340-41, 963 N.Y.S.2d at 884.

326. N.Y. C.P.L.R. 3123 (McKinney 2013).

327. *See id.*

328. *See* Stanger v. Morgan, 100 A.D.3d 545, 546, 954 N.Y.S.2d 95, 96 (1st Dep't 2012).

329. *See* N.Y. C.P.L.R. 3211(a).

330. *See* N.Y. C.P.L.R. 3211(a)(2), (a)(8).

331. *See* N.Y. C.P.L.R. 3211(a)(3).

332. *See* N.Y. C.P.L.R. 3211 (a)(7).

333. 105 A.D.3d 207, 209, 962 N.Y.S.2d 539, 541 (4th Dep't 2013).

334. *Id*.

335. *Id*.

336. *See* Rew v. Cnty. of Niagara, 73 A.D.3d 1464, 900 N.Y.S.2d 234 (4th Dept.

"to the extent that our [prior] decisions . . . held that General Municipal Law section 50-e bars an action against individuals who have not been named in a notice of claim, where such a notice is required by law, those cases are no longer to be followed."[337]

2. Motions for Summary Judgment

CPLR 3212 provides a mechanism for a court to dispose of a claim, defense, or entire action if there are no genuine issues of fact for jury resolution.[338] Generally, a motion for summary judgment shall be supported by an affidavit, a copy of the pleadings, and other available proof, such as documentary evidence.[339]

The validity of "new" evidence submitted by the plaintiff in opposition to a motion for summary judgment was discussed in *Santana v. 3410 Kingsbridge, LLC*.[340] The plaintiff in *Santana* was injured when she slipped and fell down a wet interior staircase.[341] When the defendant moved for summary judgment, the plaintiff opposed the motion with an affidavit from her sister.[342] The trial court rejected the affidavit and the First Department reversed, stating that the affidavit "should have been considered by the motion court, since [the sister's] . . . name and address had been previously made known to defendants by plaintiff at her deposition."[343]

3. Want of Prosecution

CPLR 3216 governs what happens when a party unreasonably fails to proceed with the prosecution of an action, including when and how a court may dismiss the party's pleadings.[344] Typically, a demand issues for a party to resume prosecution or file the trial note of issue within ninety days.[345]

Occasionally, a party will file the trial note of issue even though discovery is not complete. The effect of premature filing was discussed

2010); Cropsey v. Cnty. of Orleans Indus. Dev. Agency, 66 A.D.3d 1361, 886 N.Y.S.2d 290 (4th Dep't 2009).

337. *Goodwin*, 105 A.D.3d at 216, 962 N.Y.S.2d at 546.

338. *See* N.Y. C.P.L.R. 3212 (McKinney 2013).

339. *See id*.

340. 110 A.D.3d 435, 435, 973 N.Y.S.2d 23, 24 (1st Dep't 2013).

341. *Id.* at 435, 973 N.Y.S.2d at 23.

342. *Id*.

343. *Id*.

344. *See* N.Y. C.P.L.R. 3216(a) (McKinney 2013).

345. *See* N.Y. C.P.L.R. 3216(b)(3).

in *Furrukh v. Forest Hills Hosp*.[346] The plaintiff in *Furrukh* received a 90-day demand pursuant to CPLR 3216.[347] The plaintiff timely filed a trial note of issue, but, in the accompanying certificate of readiness, stated that "discovery proceedings now known to be necessary were not completed, that there were outstanding requests for discovery, and that the case was not ready for trial."[348] The defendants moved to dismiss the complaint for failure to prosecute and the trial court denied the motion.[349] The Second Department reversed, stating:

> [h]aving received a 90-day demand pursuant to CPLR 3216, the plaintiffs were required to file a proper note of issue or move, before the default date, to vacate the 90-day demand or to extend the 90-day period pursuant to CPLR 2004. The plaintiffs failed to timely file a proper note of issue or make a motion in response to the 90-day demand . . . . Accordingly, that branch of the appellant's motion which was pursuant to CPLR 3216 to dismiss the complaint for failure to prosecute should have been granted.[350]

A trial court's issuance of a 70-day demand received appellate review in *Guy v. Hatsis*.[351] In sum, the Second Department held that the trial court's order "did not constitute a valid 90-day demand pursuant to CPLR 3216 because it directed the plaintiff to file a note of issue within 70 days, rather than 90 days," and, therefore, the order "failed to conform with a statutorily mandated condition precedent to dismissal of the action."[352]

K. Article 41: Trial By a Jury

1. Jury Demand

CPLR 4102 governs the demand for a jury trial. Where a trial note of issue was filed without a jury demand, and a jury is desired, the adversary must make a demand within fifteen days after service of the note of issue.

Before fighting over the timeliness of a jury demand, counsel is reminded that a trial court may "relieve a party from the effect of failing to comply" with the requirements of CPLR 4102, unless the party

346. 107 A.D.3d 668, 668, 966 N.Y.S.2d 497, 498 (2d Dep't 2013).
347. *Id*. at 669, 966 N.Y.S.2d at 498.
348. *Id*.
349. *Id*. at 668, 966 N.Y.S.2d at 498.
350. *Id*. at 669-70, 966 N.Y.S.2d at 498-99 (internal citations omitted).
351. 107 A.D.3d 671, 671, 966 N.Y.S.2d 212, 213 (2d Dep't 2013).
352. *Id*. at 671, 966 N.Y.S.2d at 213.

opposed to a jury trial can establish "undue prejudice."[353]

2. General and Special Verdicts

Pursuant to CPLR 4111(c), when a jury returns a verdict with answers that are inconsistent, the court "shall require the jury to further consider its answers and verdict or it shall order a new trial."[354]

An inconsistent verdict was the subject of appellate review in *Applebee v. County of Cayuga*.[355] The plaintiff in *Applebee* filed suit for injuries sustained when the vehicle in which he was riding hit a bump.[356] Following deliberations, the jury found that the plaintiff's conduct was a superseding cause of his own injuries, and the County was 45% at fault for those injuries.[357] No party objected to the inconsistent verdict, and the jury was discharged.[358] One week later, the County obtained a ministerial judgment from the Cayuga County Clerk pursuant to CPLR 5016(b) that dismissed the complaint.[359] Plaintiff's motion to vacate the judgment was denied.[360] On the plaintiff's appeal, the Fourth Department noted that the jury's verdict was "legally impossible."[361] Reversing the trial court, the appellate division held that "no judgment may be rendered in favor of either party under these circumstances."[362]

L. Article 45: Evidence

1. Compromise and Offers to Compromise

CPLR 4547 allows parties to discuss settlement without the risk of settlement discussions being admissible at trial.[363] An often overlooked exception to the inadmissibility of settlement discussions is whether the evidence is being offered for another purpose, such as proving a fact, bias, or prejudice.[364]

In *PRG Brokerage Inc. v. Aramarine Brokerage, Inc.*, the defendant sought to introduce into evidence at trial a mediation

353. *See* Debevoise & Plimpton LLP v. Candlewood Timber Grp. LLC, 102 A.D.3d 571, 573, 959 N.Y.S.2d 43, 45 (1st Dep't 2013).

354. N.Y. C.P.L.R. 4111(c) (McKinney 2013).

355. 103 A.D.3d 1267, 1268, 962 N.Y.S.2d 533, 534 (4th Dep't 2013).

356. *Id*. at 1268, 962 N.Y.S.2d at 534.

357. *Id*.

358. *Id*.

359. *Id*.

360. *Applebee*, 103 A.D.3d at 1268, 962 N.Y.S.2d at 534.

361. *Id*.

362. *Id*. at 1269, 962 N.Y.S.2d at 534.

363. *See* N.Y. C.P.L.R. 4547 (McKinney 2013).

364. *See id*.

memorandum created by the plaintiff in a prior litigation for purposes of settlement discussions.[365] The trial court excluded the memorandum.[366] After analyzing the contents of the memorandum, the appellate division noted that the "defendant did not seek to introduce the mediation statement because it admitted some fact."[367] Rather, the defendant sought to utilize numbers and calculations prepared solely for purposes of settlement discussions."[368] As the defendant's motive was improper, the trial court's decision was affirmed.[369]

M. Article 55: Appeals

1. Time to take Appeal

CPLR 5513 contains the time limits available to move for permission to appeal and take an appeal as of right.[370] Generally, a party has thirty days from service of the judgment or order being appealed from.[371] Recently, the Court of Appeals held in no uncertain terms that a "motion for reconsideration at the Appellate Division did not extend [the party's] . . . time to move for leave to appeal to the Court of Appeals."[372]

2. Record on Appeal

CPLR 5526 outlines what materials must be part of a record on appeal, including the notice of appeal, judgment-roll, corrected transcript of the proceedings, and relevant exhibits.[373]

The contents of the record on appeal were reviewed in *Aurora Indus., Inc. v. Halwani*.[374] *Aurora* was an action to recover damages for conversion.[375] The trial court denied the defendant's motion for summary judgment, and the defendant appealed.[376] On appeal, the plaintiff argued that the record was incomplete because the defendant failed to include ten exhibits, which were part of its opposition to the

365. 107 A.D.3d 559, 560, 968 N.Y.S.2d 439, 441 (1st Dep't 2013).

366. *Id*. at 560, 968 N.Y.S.2d at 441.

367. *Id*.

368. *Id*.

369. *See id*.

370. *See* N.Y. C.P.L.R. 5513 (McKinney 2013).

371. *See id*.

372. *See* Tafari v. Fischer, 19 N.Y.3d 1007, 1008, 976 N.E.2d 231, 231, 951 N.Y.S.2d 704, 704 (2012).

373. N.Y. C.P.L.R 5526 (McKinney 2014).

374. 102 A.D.3d 900, 900, 958 N.Y.S.2d 479, 480 (2d Dep't 2013).

375. *Id*. at 900, 958 N.Y.S.2d at 480.

376. *Id*.

defendant's motion.[377] The defendant countered that the trial court rejected those exhibits.[378] To secure an answer, the Second Department remitted the matter to the trial court for an answer on whether the exhibits were considered.[379] Unfortunately, the trial judge had retired and a newly assigned justice could not reach a conclusion one way or the other.[380] Noting that the trial court order stated that it "read the various submissions and exhibits submitted . . . by each side," the appellate division concluded that they were part of the record and, because they were missing, the "defendant's appeal must be dismissed."[381]

A similar result was reached in *Modawar v. Staten Island Med. Group, P.C.*[382] The plaintiffs in *Modawar* challenged the consistency of a jury verdict, but failed to include a transcript of the trial court's charge in the record on appeal.[383] The Second Department concluded that this omission made it unable for the appellate court to consider the plaintiffs' contentions.[384]

N. Article 80: Fees

1. Persons Subpoenaed

CPLR 8001(a) governs mandatory payments to a person subpoenaed for testimony before or at trial.[385] The mandatory fees are modest, e.g., $15.00 a day for the appearance and $0.23 cents a mile to the place of attendance from the place where the witness was served and back.[386]

Whether a witness can be paid more than the fees contained in CPLR 8001(a) was discussed in *Caldwell v. Cablevision Systems Corp.*[387] The plaintiff in *Caldwell* commenced a negligence action for personal injuries caused by the defendant's alleged creation of a hazardous condition in a roadway.[388] As part of her proof, the plaintiff

377. *Id*.
378. *Id*. at 900, 958 N.Y.S.2d at 480-81.
379. *Aurora Indus., Inc.*, 102 A.D.3d at 900, 958 N.Y.S.2d at 481.
380. *Id*.
381. *Id*.
382. 105 A.D.3d 1021, 1021, 964 N.Y.S.2d 220, 221 (2d Dep't 2013).
383. *Id*. at 1021-22, 964 N.Y.S.2d at 221.
384. *Id*. at 1022, 964 N.Y.S.2d at 221.
385. *See* N.Y. C.P.L.R. 8001(a) (McKinney 2013).
386. *See id.*
387. 20 N.Y.3d 365, 368, 984 N.E.2d 909, 910, 960 N.Y.S.2d 711, 712 (2013).
388. *Id*. at 368-69, 984 N.E.2d at 911, 960 N.Y.S.2d at 713.

testified that she stepped into a "dip in the trench" that caused her to fall.[389] To rebut the testimony, the defendant subpoenaed the emergency room physician who cared for the plaintiff, who testified that the plaintiff told him that she "tripped over a dog."[390] During cross-examination, plaintiff's counsel elicited from the doctor that the defendant had paid him $10,000 to appear and testify.[391] Thereafter, plaintiff's counsel requested that the testimony be stricken or that a charge be read to the jury about the significant fee.[392] Plaintiff's requests were denied, and the jury returned a verdict that the defendant was negligent, but that the negligence was not a substantial factor in causing the plaintiff's injuries.[393]

While the Second Department voiced concern over the "substantial payment to a fact witness in exchange for minimal testimony," it affirmed the verdict.[394]

The Court of Appeals also affirmed, stating that payment outlined in CPLR 8001(a) "is only the minimum that must be paid to a subpoenaed fact witness . . . ."[395] However, this "does not mean that an attorney may pay a witness whatever fee is demanded, however exorbitant it might be."[396] After an analysis of the physician's testimony, which the Court of Appeals concluded was "limited to what he had written on his consultation note less than 12 hours after the accident" and could not have been "tailored . . . in exchange for the fee," the payment at issue was not against public policy.[397]

With respect to the jury charge, the Court of Appeals also opined:

> [w]e agree with plaintiff that Supreme Court should have issued a bias charge specifically tailored to address the payment CSI made to the doctor. Supreme Court generally instructed the jury that bias or prejudice was a consideration that it should consider in weighing the testimony of *any* of the witnesses, but this was insufficient as it pertained to CSI's payment to the doctor. To be sure, Supreme Court properly acted within its discretion in concluding that the fee payment was fertile ground for cross-examination and comment during summation. But because CSI did not even attempt to justify the

389. *Id*. at 369, 984 N.E.2d at 911, 960 N.Y.S.2d at 713.
390. *Id*.
391. *Id*.
392. *Caldwell*, 20 N.Y.3d at 369, 984 N.E.2d at 911, 960 N.Y.S.2d at 713.
393. *Id*. at 369-70, 984 N.E.2d at 911, 960 N.Y.S.2d at 713.
394. *Id*. at 370, 984 N.E.2d at 911-12, 960 N.Y.S.2d at 713-14.
395. *Id*. at 370, 984 N.E.2d at 912, 960 N.Y.S.2d at 714.
396. *Id*.
397. *Caldwell*, 20 N.Y.3d at 371, 984 N.E.2d at 912, 960 N.Y.S.2d at 714.

> $10,000 payment for one hour of testimony, Supreme Court should have also crafted a charge that went beyond CPLR 8001 requirements. Supreme Court should have instructed the jury that fact witnesses may be compensated for their lost time but that the jury should assess whether the compensation was disproportionately more than what was reasonable for the loss of the witness's time from work or business. Should the jury find that the compensation is disproportionate, it should then consider whether it had the effect of influencing the witness's testimony (*see* PJI 1:90.4). Of course, such a charge must be requested in a timely fashion. Additionally, it is within the trial court's discretion to determine whether the charge is warranted in the context of a particular payment to a witness, and to oversee how much testimony should be permitted relative to the fact witness's lost time and other expenses for which he is being compensated.[398]

Notwithstanding, it concluded that the absence of a more specific jury charge, in this case, was harmless error.[399]

III. COURT RULES

The New York State Office of Court Administration ("OCA") made few material changes to the rules of court during this *Survey* year outside of electronic filing mandates.

A. OCA Rule 118.1

Effective May 1, 2013, section 118.1 was amended to include section (e)(14).[400] The rule now requires attorneys registered in New York to provide a registration statement that includes the following information, attested to by affirmation:

(1) name of attorney;
(2) date of birth;
(3) name when admitted to the bar;
(4) law school from which degree granted;
(5) year admitted to the bar;
(6) judicial department of admission to the bar;
(7) office addresses (including department);
(8) home address;
(9) business telephone number,
(10) social security number;
(11) e-mail address(optional);
(12) race, gender, ethnicity and employment category (optional);

398. *Id*. at 372, 984 N.E.2d at 913, 960 N.Y.S.2d at 715.
399. *Id*.
400. *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 118.1(e) (2013).

(13) compliance with child support obligations;
(14) (a) voluntary unpaid pro bono services and (b) voluntary financial contributions made to organizations primarily or substantially engaged in the provision of legal services to the underserved and to the poor during the previous biennial registration period.401

B. OCA Rule 202.10

Effective May 20, 2013, section 202.10 was created.[402] The new section provides that "[a]ny party may request to appear at a conference by telephonic or other electronic means. Where feasible and appropriate, the court is encouraged to grant such requests."[403]

C. OCA Rule 202.12

Effective September 23, 2013, sections 202.12(b) and 202.12(c)(3) were amended to include additional language about preliminary conferences and electronic discovery.[404] They now read as follows:

(b) The court shall notify all parties of the scheduled conference date, which shall be not more than 45 days from the date the request for judicial intervention is filed unless the court orders otherwise, and a form of a stipulation and order, prescribed by the Chief Administrator of the Courts, shall be made available which the parties may sign, agreeing to a timetable which shall provide for completion of disclosure within 12 months of the filing of the request for judicial intervention for a standard case, or within 15 months of such filing for a complex case. If all parties sign the form and return it to the court before the scheduled preliminary conference, such form shall be "so ordered" by the court, and, unless the court orders otherwise, the scheduled preliminary conference shall be cancelled. If such stipulation is not returned signed by all parties, the parties shall appear at the conference. Except where a party appears in the action pro se, an attorney thoroughly familiar with the action and authorized to act on behalf of the party shall appear at such conference. Where a case is reasonably likely to include electronic discovery, counsel for all parties who appear at the preliminary conference must be sufficiently versed in matters relating to their clients' technological systems to discuss competently all issues relating to electronic discovery: counsel may bring a client representative or outside expert to assist in such e-discovery discussions.

(1) A non-exhaustive list of considerations for determining

401. *Id.*
402. *See id.* § 202.10.
403. *Id.*
404. *See id.* §§ 202.12(b)-(c)(3).

whether a case is reasonably likely to include electronic discovery is:

(i) Does potentially relevant electronically stored information ("ESI") exist;

(ii) Do any of the parties intend to seek or rely upon ESI;

(iii) Are there less costly or less burdensome alternatives to secure the necessary information without recourse to discovery of ESI;

(iv) Are the cost and burden of preserving and producing ESI proportionate to the amount in controversy; and

(v) What is the likelihood that discovery of ESI will aid in the resolution of the dispute.

* * *

(c)(3) Where the court deems appropriate, it may establish the method and scope of any electronic discovery. In establishing the method and scope of electronic discovery, the court may consider the following non-exhaustive list, including but not limited to:

(i) identification of potentially relevant types or categories of ESI and the relevant time frame;

(ii) disclosure of the applications and manner in which the ESI is maintained;

(iii) identification of potentially relevant sources of ESI and whether the ESI is reasonably accessible;

(iv) implementation of a preservation plan for potentially relevant ESI;

(v) identification of the individual(s) responsible for preservation of ESI;

(vi) the scope, extent, order, and form of production;

(vii) identification, redaction, labeling, and logging of privileged or confidential ESI;

(viii) claw-back or other provisions for privileged or protected ESI;

(ix) the scope or method for searching and reviewing ESI; and

(x) the anticipated cost and burden of data recovery and proposed initial allocation of such cost.[405]

405. *See* N.Y. COMP. CODES R. & REGS. tit. 22, §§ 202.12(b)-(c)(3) (2013).

D. OCA Rule 202.28

Effective May 20, 2013, section 202.28 was amended to create new obligations to notify the court about settlements.[406] The amended rule provides as follows:

> (a) In any discontinued action, the attorney for the defendant shall file a stipulation or statement of discontinuance with the county clerk within 20 days of such discontinuance. If the action has been noticed for judicial activity within 20 days of such discontinuance, the stipulation or statement shall be filed before the date scheduled for such activity.
>
> (b) If an action is discontinued under paragraph (a), or wholly or partially settled by stipulation pursuant to CPLR 2104, or a motion has become wholly or partially moot, or a party has died or become a debtor in bankruptcy, the parties promptly shall notify the assigned judge in writing of such an event.[407]

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.

406. *See id.* § 202.28.
407. *Id*.