

CIVIL PRACTICE

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CONTENTS

INTRODUCTION	790
I. LEGISLATIVE ENACTMENTS.....	791
A. <i>CPLR 214-b</i>	791
B. <i>CPLR 212(e)</i>	791
C. <i>CPLR 2103(b)(2)</i>	791
D. <i>CPLR 2111</i>	791
E. <i>CPLR 2112</i>	792
F. <i>CPLR 3016(i)</i>	792
G. <i>CPLR 3212</i>	792
II. CASE LAW DEVELOPMENTS.....	792
A. <i>Article 2: Limitations of Time</i>	792
1. <i>CPLR 205(a): Termination of Action</i>	792
2. <i>CPLR 214-a: Action for Medical, Dental or Podiatric Malpractice to Be Commenced Within Two Years and Six Months; Exceptions</i>	794
3. <i>CPLR 214-c: Certain Actions to Be Commenced Within Three Years of Discovery</i>	797
B. <i>Article 3: Jurisdiction and Service, Appearance and Choice of Court</i>	798
1. <i>CPLR 302: Personal Jurisdiction by Act of Non- Domiciliaries</i>	798
2. <i>CPLR 305: Summons; Supplemental Summons; Amendment</i>	799
3. <i>CPLR 313: Service Without the State Giving Personal Jurisdiction</i>	800
C. <i>Article 5: Venue</i>	801
1. <i>CPLR 506: Where Special Proceeding Commenced</i>	801
2. <i>CPLR 510: Grounds for Change of Place of Trial</i>	802
D. <i>Article 20: Mistakes, Defects, Irregularities, and Extensions of Time</i>	803
1. <i>CPLR 2001: Mistakes, Omissions, Defects, and</i>	

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	<i>Irregularities</i>	803
E.	Article 31: Disclosure	804
	1. CPLR 3101: Scope of Disclosure	804
	2. CPLR 3121: Physical or Mental Examination	807
	3. CPLR 3103: Protective Orders.....	809
	4. CPLR 3110: Where the Deposition Is to Be Taken Within the State.....	810
	5. CPLR 3116: Signing Deposition; Physical Preparation; Copies	811
	6. CPLR 3121: Physical or Mental Examination	812
	7. CPLR 3126: Penalties for Refusal to Comply with Order to Disclose.....	814
F.	Article 32: Accelerated Judgment	817
	1. CPLR 3212: Motion for Summary Judgment	817
G.	Article 34: Calendar Practice; Trial Preferences.....	824
	1. CPLR 3404: Dismissal of Abandoned Cases.....	824
H.	Article 40: Trial Generally.....	825
	1. CPLR 4404: Post-Trial Motion for Judgment and New Trial	825
I.	Article 45: Evidence	825
	1. CPLR 4503: Attorney	825
	2. CPLR 4504: Physician, Dentist, Podiatrist, Chiropractor, and Nurse.....	826
	3. CPLR 4506: Eavesdropping Evidence; Admissibility; Motion to Suppress in Certain Cases	828
J.	Article 70: Habeas Corpus.....	830
III.	COURT RULES	832
	A. OCA Rule 210.14.....	832
	B. OCA Rule 210.4(b).....	832
	CONCLUSION.....	834

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 and/or noteworthy changes in New York State law and to provide basic detail about the changes in

1. July 1, 2015 through June 30, 2016.

2017]

Civil Practice

791

the context of the Civil Practice Law and Rules (CPLR). Whether by accident or design, the author did not endeavor to discuss every Court of Appeals or appellate division decision.

I. LEGISLATIVE ENACTMENTS**A. CPLR 214-b**

Chapter 26 of the Laws of 2016, effective June 30, 2016, amended CPLR 214-b, and extended the expiration date for renewal of time-barred Agent Orange claims to June 16, 2018.²

B. CPLR 212(e)

Chapter 368 of the Laws of 2015, effective January 19, 2016, amended CPLR 212 to add subdivision (e), providing that the statute of limitations for an action by a victim of sex trafficking or aggravated labor trafficking is ten years, and does not begin to run until after or is “tolled by any period in which the victim is subject to such conduct.”³

C. CPLR 2103(b)(2)

Chapter 572 of the Laws of 2015, effective January 1, 2016, amended CPLR 2103, subdivision (b)(2) by removing the requirement that interlocutory papers served by regular mail on an attorney in pending action be mailed only within the state of New York, and providing that where interlocutory papers are served by regular mail outside of New York, but within the United States on an attorney in pending action, six days (as opposed to five for mailing in New York) are added to the prescribed period.⁴

D. CPLR 2111

Chapter 237 of the Laws of 2015, effective August 31, 2015, added CPLR 2111 to authorize facsimile/electronic transmissions in trial courts for the commencement of civil actions, proceedings, and the filing of papers and notices of appeal pursuant to CPLR 5515.⁵

2. Act of June 30, 2016, 2016 McKinney’s Sess. Laws of N.Y., ch. 75, at 455 (codified at N.Y. C.P.L.R. 214-b (McKinney Supp. 2017)).

3. Act of Jan. 19, 2016, 2015 McKinney’s Sess. Laws of N.Y., ch. 368, at 969 (codified at N.Y. C.P.L.R. 212(e) (McKinney Supp. 2017)).

4. Act of Jan. 1, 2016, 2015 McKinney’s Sess. Laws of N.Y., ch. 572, at 1243–44 (codified at N.Y. C.P.L.R. 2103(b)(2) (McKinney Supp. 2017)).

5. Act of Aug. 31, 2015, 2015 McKinney’s Sess. Laws of N.Y., ch. 237, at 791–93 (codified at N.Y. C.P.L.R. 2111 (McKinney Supp. 2017)); *see also* N.Y. C.P.L.R. 5515 (McKinney 2014).

E. CPLR 2112

Chapter 237 of the Laws of 2015, effective August 31, 2015, added CPLR 2112 to authorize appellate division's use of e-filing and to encourage uniformity of the rules of each department "to the extent practicable."⁶

F. CPLR 3016(i)

Chapter 76 of the Laws of 2015, effective October 15, 2015, amended CPLR 3016 to add subdivision (i), providing that in a proceeding against a university or college challenging its disciplinary findings, a student's last name and identifying biographical information is presumptively confidential and should be omitted from pleadings or other papers.⁷

G. CPLR 3212

Chapter 529 of the Laws of 2015, effective December 11, 2015, applies to all pending cases where a summary judgment motion is made on or after the effective date and to all cases filed on or after such effective date.⁸ It amended CPLR 3212 to provide that a court cannot refuse to consider an affidavit submitted in connection with a summary judgment motion because a CPLR 3101(d)(1)(i) expert exchange was not made before the affidavit was submitted.⁹

II. CASE LAW DEVELOPMENTS

*A. Article 2: Limitations of Time**1. CPLR 205(a): Termination of Action*

Pursuant to CPLR 205(a), 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

6. Act of Aug. 31, 2015, 2015 McKinney's Sess. Laws of N.Y., ch. 237, at 793 (codified at N.Y. C.P.L.R. 2112 (McKinney Supp. 2017)).

7. Act of July 7, 2015, 2015 McKinney's Sess. Laws of N.Y., ch. 76, at 599–600 (codified at N.Y. C.P.L.R. 3016(i) (McKinney Supp. 2017)).

8. Act of Dec. 11, 2015, 2015 McKinney's Sess. Laws of N.Y., ch. 529, at 1154 (codified at N.Y. C.P.L.R. 3212(b) (McKinney Supp. 2017)).

9. *Id.*; N.Y. C.P.L.R. 3101(d)(1)(i) (McKinney Supp. 2017).

action was commenced and the defendant is served within six months.¹⁰

This provision was addressed by the Court of Appeals in *Westchester Joint Water Works v. Assessor of Rye*.¹¹ In *Westchester Joint Water Works*, the Court was presented with the question of whether a proceeding that was dismissed because of an unexecuted failure to comply with the mailing requirements of Real Property Tax Law (RPTL) § 708(3), may be recommenced pursuant to CPLR 205(a).¹² Pursuant to RPTL § 708(3), a petitioner commencing a tax certiorari proceeding must, within ten days of service of the notice of petition and petition on the municipality-respondent in the proceeding, mail a copy of those documents to the superintendent of schools of any school district within which any part of the real property on which the assessment to be reviewed is located.¹³ RPTL § 708(3) also provides that failure to comply with the mailing requirements “shall result in the dismissal of the petition, unless excused for good cause shown.”¹⁴ In answering the question presented in the negative, the Court conducted a historical review of Real Property Tax Law, and the interplay between CPLR 205(a) and RPTL § 708(3),¹⁵ ultimately concluding the following: (1) RPTL § 708(3) comprehensively addresses the result where a proceeding is dismissed for failure to comply with the mailing requirements, namely, that it should be dismissed *only* for good cause shown and a petitioner may not reach outside the requirements of RPTL to recommence such a proceeding;¹⁶ (2) the conclusion that RPTL § 708(3) does not leave any room for operation of CPLR 205(a) is “consistent with the rule of statutory construction,” which requires that effect and meaning must be given to all parts of a statute;¹⁷ and (3) the reach of RPTL § 708(3) is consistent with the legislative intent, in that the statute was structured to allow school districts to avoid the expense of participating in every tax

10. See N.Y. C.P.L.R. 205(a) (McKinney 2003).

11. 27 N.Y.3d 566, 570, 56 N.E.3d 198, 198, 36 N.Y.S.3d 416, 416 (2016).

12. *Id.* at 569–70, 56 N.E.3d at 198, 36 N.Y.S.3d at 416; see also C.P.L.R. 205(a); N.Y. REAL PROP. TAX LAW § 708(3) (McKinney 2013).

13. *Westchester Joint Water Works*, 27 N.Y.3d at 570, 56 N.E.3d at 198, 36 N.Y.S.3d at 416; see also R.P.T.L. § 708(3).

14. *Westchester Joint Water Works*, 27 N.Y.3d at 573, 56 N.E.3d at 200, 36 N.Y.S.3d at 418; see also R.P.T.L. § 708(3).

15. See *Westchester Joint Water Works*, 27 N.Y.3d at 572–74, 56 N.E.3d at 199–201, 36 N.Y.S.3d at 417–19; see also C.P.L.R. 205(a); R.P.T.L. § 708(3).

16. *Westchester Joint Water Works*, 27 N.Y.3d at 574–75, 56 N.E.3d at 201–02, 36 N.Y.S.3d at 419–20 (first citing R.P.T.L. § 708(3); and then citing *Leader v. Maroney*, 97 N.Y.2d 95, 104, 761 N.E.2d 1018, 1024, 736 N.Y.S.2d 291, 297 (2001)).

17. *Id.* at 575, 56 N.E.3d at 201, 36 N.Y.S.3d at 419 (citing MCKINNEY’S CONSOLIDATED LAWS OF N.Y., BOOK 1, STATUTES, §§ 98, 144 (1972)).

certiorari proceeding.¹⁸

2. CPLR 214-a: Action for Medical, Dental or Podiatric Malpractice to Be Commenced Within Two Years and Six Months; Exceptions

CPLR 214-a provides that

[a]n action for medical, dental or podiatric malpractice must be commenced within two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure.¹⁹

When the proverbial clock starts to tick was at issue before the First Department in *B.F. v. Reproductive Medicine Associates of New York, LLP*.²⁰ There, the plaintiffs brought a cause of action for breach of contract arising out of the defendants' alleged failure to perform an adequate genetic screening of an egg donor for an in vitro fertilization, resulting in the conception and birth of the plaintiffs' impaired child (i.e., a "wrongful birth" claim).²¹ Specifically, the question before the court was when the plaintiffs' wrongful birth cause of action accrued (i.e., upon termination of the defendants' treatment of the plaintiff mother, shortly after implantation of the embryo, or upon the birth of the infant).²² In affirming the trial court's denial of the defendants' motion to dismiss the case, the First Department held that the wrongful birth claim accrued upon birth of the infant, and therefore was not barred by the applicable statute of limitations.²³ Relying upon Court of Appeals precedent, the First Department noted that liability for negligent conduct exists only when it is the proximate cause of legal harm to a protected interest of another, and thus,

[i]n the case of a claim for wrongful birth, "the parents' legally cognizable injury is the increased financial obligation" of raising an impaired child . . . [w]hether this legally cognizable injury will befall potential parents as the result of the gestation of an impaired fetus cannot be known until the pregnancy ends. Only if there is a live birth will the injury be suffered.²⁴

18. *Id.* at 575, 56 N.E.3d at 202, 36 N.Y.S.3d at 420 (citing R.P.T.L. § 708(3)).

19. N.Y. C.P.L.R. 214-a (McKinney 2003).

20. 136 A.D.3d 73, 77, 22 N.Y.S.3d 190, 193 (1st Dep't 2015) (quoting *Mayzel v. Moretti*, 105 A.D.3d 816, 817, 962 N.Y.S.2d 656, 658–59 (2d Dep't 2013)).

21. *Id.* at 75, 22 N.Y.S.3d at 191.

22. *Id.*

23. *Id.* at 75, 22 N.Y.S.3d at 191–92.

24. *Id.* at 79, 22 N.Y.S.3d at 194–95 (quoting *Foote v. Albany Med. Ctr. Hosp.*, 16

In other words, until there is a live birth there is no injury and, without legally cognizable damages, there is no legal right to relief and the statute of limitations cannot run.²⁵ Therefore, “the statute of limitations begins to run on a wrongful birth claim upon the live birth of an impaired child, whose care and support will occasion the pecuniary damages the parents may seek to recover.”²⁶

The continuous treatment doctrine, set forth in CPLR 214-a,²⁷ was at issue in *Nisanov v. Khulpateea*.²⁸ There, the decedent presented to her gynecologist, Lopatinsky, on several occasions throughout 2003 and 2004 with complaints of severe abdominal pain.²⁹ “On May 12, 2004, Lopatinsky discovered that the decedent had enlarged ovaries, and a sonogram taken that day revealed a thickening of the endometrial wall.”³⁰ Lopatinsky referred the decedent to Khulpateea, a gynecological oncologist.³¹ On September 7, 2004, Khulpateea performed a hysteroscopic polypectomy on the decedent and removed a polyp from the uterine cavity, which was considered benign.³² “On September 24, 2004, Khulpateea met with the decedent and told her to return to Lopatinsky for regular follow-up care.”³³

Thereafter, the decedent continued to experience pain and “Lopatinsky referred her for another ultrasound, which revealed fluid in the endometrial cavity and no adnexal masses In September 2005, Lopatinsky referred the decedent to Khulpateea again because she continued to complain of vaginal bleeding [along with] lower abdominal and back pain.”³⁴ On September 2, 2005, Khulpateea performed an endometrial biopsy, which revealed a “weakly proliferative endometrium” with “an examination on the decedent, which he found to

N.Y.3d 211, 215, 944 N.E.2d 1111, 1113, 919 N.Y.S.2d 472, 474 (2011)) (citing *O’Toole v. Greenberg*, 64 N.Y.2d 427, 431, 477 N.E.2d 445, 447, 488 N.Y.S.2d 143, 145 (1985)).

25. *B.F.*, 136 A.D.3d at 79, 22 N.Y.S.3d at 195 (citing *LaBello v. Albany Med. Ctr. Hosp.*, 85 N.Y.2d 701, 704, 651 N.E.2d 908, 909, 628 N.Y.S.2d 40, 41 (1995)).

26. *Id.*

27. N.Y. C.P.L.R. 214-a (McKinney 2003).

28. 137 A.D.3d 1091, 1093, 27 N.Y.S.3d 663, 666 (2d Dep’t 2016) (first citing *Schwelnus v. Urological Assocs. of L.I., P.C.*, 94 A.D.3d 971, 973, 943 N.Y.S.2d 141, 143 (2d Dep’t 2012); then citing *Ceglio v. BAB Nuclear Radiology, P.C.*, 120 A.D.3d 1376, 1377, 992 N.Y.S.2d 580, 581 (2d Dep’t 2014); and then citing *Baptiste v. Harding-Marin*, 88 A.D.3d 752, 753, 930 N.Y.S.2d 670, 672 (2d Dep’t 2011)).

29. *Id.* at 1091, 27 N.Y.S.3d at 665.

30. *Id.*

31. *Id.* at 1091–92, 27 N.Y.S.3d at 665.

32. *Id.* at 1092, 27 N.Y.S.3d at 665.

33. *Nisanov*, 137 A.D.3d at 1092, 27 N.Y.S.3d at 665.

34. *Id.*

be ‘unremarkable.’”³⁵ He advised the decedent to have another pelvic and transvaginal sonogram in three months, and if the fluid re-accumulated or she bled again, he would perform a hysteroscopy.³⁶ “On November 30, 2005, the decedent underwent another ultrasound, which revealed a mass on the left adnexa.³⁷ In December 2005, the decedent underwent a total abdominal hysterectomy and bilateral salpingo-oophorectomy, and was diagnosed with stage IIIC fallopian tube carcinoma.³⁸ She died on September 18, 2009.”³⁹

An action was commenced on May 24, 2007 against Khulpateea and Lopatinsky, alleging medical malpractice and lack of informed consent.⁴⁰ An amended complaint was later served, “reflecting the decedent’s death and asserting an additional cause of action for wrongful death. The plaintiff alleged that Khulpateea had failed to timely diagnose and treat the decedent’s fallopian tube cancer, . . . result[ing] in the spread of [her] disease and her eventual death.”⁴¹ Khulpateea and Lopatinsky separately moved for summary judgment, which was denied.⁴² Khulpateea appealed.⁴³

The Second Department held that Khulpateea established that the acts occurring prior to November 24, 2004 were time-barred, and that the burden had shifted to the plaintiff to establish the applicability of the continuous treatment doctrine.⁴⁴ According to the appellate division, the diagnostic services of the defendant were discrete and complete and not a part of the course of treatment.⁴⁵ It also concluded that the plaintiff failed to submit evidence showing that treatment following the visit on September 24, 2004 was contemplated and, therefore, the complaints of medical malpractice occurring prior to November 24, 2005 should have

35. *Id.*

36. *Id.*

37. *Id.*

38. *Nisanov*, 137 A.D.3d at 1092, 27 N.Y.S.3d at 665.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 1092, 27 N.Y.S.3d at 665–66.

43. *Nisanov*, 137 A.D.3d at 1092, 27 N.Y.S.3d at 666.

44. *Id.* at 1092–93, 27 N.Y.S.3d at 666 (first citing N.Y. C.P.L.R. 214-a (McKinney 2003); then citing *Hofsiss v. Goodman*, 128 A.D.3d 898, 899–90, 9 N.Y.S.3d 614, 615 (2d Dep’t 2015); then citing *Schwelnus v. Urological Assocs. of L.I., P.C.*, 94 A.D.3d 971, 973, 943 N.Y.S.2d 141, 143 (2d Dep’t 2012); and then citing *Cox v. Kingsboro Med. Grp.*, 88 N.Y.2d 904, 907, 669 N.E.2d 817, 818, 646 N.Y.S.2d 659, 659 (1996)).

45. *Id.* at 1093, 27 N.Y.S.3d at 666 (first citing *Chambers v. Mirkinson*, 68 A.D.3d 702, 705, 890 N.Y.S.2d 99, 101–02 (2d Dep’t 2009); and then citing *Robertson v. Bozza & Karafoil*, 242 A.D.3d 613, 615–16, 622 N.Y.S.2d 324, 326 (2d Dep’t 1997)).

been dismissed.⁴⁶ However, with the latter occurring encounters, the court found that the defendant's affirmation was conclusory in asserting that those actions were not a proximate cause of the decedent's injuries and that the plaintiff's expert affirmation raised issues of fact as to whether the defendant departed from accepted standards.⁴⁷ As such, that part of the trial court's ruling, that denied the defendant's motion, was affirmed.⁴⁸

3. CPLR 214-c: Certain Actions to Be Commenced Within Three Years of Discovery

Pursuant to CPLR 214-c,

[n]otwithstanding the provisions of section 214, the three-year period in which an action to recover damages for personal injury or injury to property caused by the latent effects of exposure to any substance or combination of substances . . . shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier.⁴⁹

In *Wells v. 3M Co.*, the Third Department visited the issue of the statute of limitations applicable to an exposure claim.⁵⁰ The plaintiff in *Wells* commenced an action on November 5, 2012, for damages for personal injury caused by exposure to various asbestos-containing products.⁵¹ The plaintiff alleged that on August 5, 2010 she was diagnosed with malignant epithelial mesothelioma (MEM), which she claimed was caused by her secondary exposure to asbestos through her father, who brought asbestos dust home on his clothes while working with and around asbestos-containing products.⁵² The defendants moved to dismiss the complaint as time-barred under CPLR 214-c(2).⁵³ In support of their motion, the defendants submitted the affidavit of a pathologist who stated that the plaintiff's medical records, and a slide from 2011, established that the plaintiff had the same tumor in 2011 that had been

46. *Id.*

47. *Id.* at 1094, 27 N.Y.S.3d at 667 (first citing *Seiden v. Sonstein*, 127 A.D.3d 1158, 1162, 7 N.Y.S.3d 565, 569 (2d Dep't 2015); then citing *Trauring v. Gendal*, 121 A.D.3d 1097, 1098, 995 N.Y.S.2d 182, 184 (2d Dep't 2014); then citing *Matos v. Khan*, 119 A.D.3d 909, 910, 991 N.Y.S.2d 83, 84 (2d Dep't 2014); and then citing *Petrik v. Pilat*, 119 A.D.3d 760, 761, 989 N.Y.S.2d 348, 349 (2d Dep't 2014)).

48. *Nisanov*, 137 A.D.3d at 1094–95, 27 N.Y.S.3d at 667.

49. N.Y. C.P.L.R. 214-c (McKinney 2003).

50. 137 A.D.3d 1556, 1557, 28 N.Y.S.3d 746, 747 (3d Dep't 2016).

51. *Id.* at 1557, 28 N.Y.S.3d at 747.

52. *Id.*

53. *Id.*

discovered in 2003.⁵⁴ The supreme court granted the motion and dismissed the complaint as time-barred.⁵⁵

On appeal, the Third Department found that the defendants failed to meet their initial burden establishing that there were no genuine issues of material fact, noting that when considering claims governed by CPLR 214-c(2), “separate and distinct diseases . . . may constitute different injuries, each with its own time of discovery.”⁵⁶ Applying this principle, the Third Department concluded that because the expert pathologist did not mention MEM, the symptoms of the disease as compared to symptoms of the plaintiff’s prior illnesses, or that the plaintiff only has the disease that was discovered in 2003, the defendants failed to exclude the possibility that the plaintiff developed a separate and distinct disease.⁵⁷ As such, there was insufficient proof to establish that the MEM diagnosed in 2010 was not a separate and distinct disease from the plaintiff’s prior conditions.⁵⁸ The trial court decision was reversed.⁵⁹

B. Article 3: Jurisdiction and Service, Appearance and Choice of Court

1. CPLR 302: Personal Jurisdiction by Act of Non-Domiciliaries

CPLR 302 empowers a court to exercise personal jurisdiction over any non-domiciliary, or his or her executor or administrator, under certain circumstances including if he or she, or an agent, transacted business, made contracts to supply goods or services in the state, or commits a tortious act without the state, causing injury to a person or property within the state.⁶⁰

“Whether a non-domiciliary is transacting business within the meaning of CPLR 302(a)(1) is a fact based determination, and requires a finding that the non-domiciliary’s activities were purposeful and established a substantial relationship between the transaction and the claim asserted.”⁶¹

54. *Id.* at 1558, 28 N.Y.S.3d at 748.

55. *Wells*, 137 A.D.3d at 1557, 28 N.Y.S.3d at 747.

56. *Id.* at 1558, 28 N.Y.S.3d at 748 (quoting *Sweeney v. Gen. Printing, Inc.*, 210 A.D.2d 865, 866, 621 N.Y.S.2d 132, 133 (3d Dep’t 1994)) (first citing *Griffin v. Garratt-Callahan Co.*, 74 F.3d 36, 40 (2d Cir. 1996); then citing *Bimbo v. Chromalloy Am. Corp.*, 226 A.D.2d 812, 814, 640 N.Y.S.2d 623, 625 (3d Dep’t 1996); and then citing *Golod v. Hoffman La Roche*, 964 F. Supp. 841, 852 (S.D.N.Y. 1997)).

57. *Id.* at 1558, 28 N.Y.S.3d at 748–49.

58. *Id.* at 1559, 28 N.Y.S.3d at 749.

59. *Id.*

60. *See* N.Y. C.P.L.R. 302(a)(1), (3) (McKinney 2010).

61. *Paterno v. Laser Spine Inst.*, 24 N.Y.3d 370, 376, 23 N.E.3d 988, 992, 998 N.Y.S.2d

In *Stern v. Four Points by Sheraton Ann Arbor Hotel*, the plaintiff alleged that while in New York, she reserved a room at a Sheraton hotel located in Michigan, owned by the defendant ZLC, using an interactive website maintained by Starwood Hotels and Resorts Worldwide, Inc.⁶² During her stay at the hotel, the plaintiff tripped over a walkway in the hotel lobby and sued the defendants for her injuries.⁶³ The defendant, ZLC, a Michigan owned company, moved to dismiss the complaint for lack of jurisdiction.⁶⁴ The trial court granted the motion.⁶⁵

On appeal, the First Department held that although the hotel's participation in the interactive website may demonstrate that it transacted business in New York, the relationship between the website activities and the plaintiff's negligence claim was "too remote to support the exercise of long-arm or specific jurisdiction under CPLR 302(a)(1)."⁶⁶ Accordingly, the First Department affirmed the dismissal.⁶⁷

2. CPLR 305: Summons; Supplemental Summons; Amendment

Pursuant to CPLR 305(c), a court may, in its discretion, "allow any summons or proof of service of a summons to be amended, if a substantial right of a party against whom the summons issued is not prejudiced."⁶⁸

CPLR 305(c) was the focus of the Second Department's decision in *Fridman v. New York City Transit Authority*.⁶⁹ There, an action was commenced by the decedent's estate against, *inter alia*, the New York City Transit Authority (NYCTA) and the Metropolitan Transportation Authority (MTA).⁷⁰ The defendants moved for summary judgment and the plaintiff cross-moved "to amend the caption to substitute MTA Bus Company as the defendant, and to deem the summons and complaint served upon MTA Bus Company."⁷¹ The trial court granted the

720, 724 (2014) (quoting *Fischbarg v. Doucet*, 9 N.Y.3d 375, 380, 880 N.E.2d 22, 26, 849 N.Y.S.2d 501, 505 (2007)).

62. (*Stern II*), 133 A.D.3d 514, 514, 19 N.Y.S.3d 289, 290 (1st Dep't 2015).

63. *Id.*

64. *Stern v. Four Points by Sheraton Ann Arbor Hotel (Stern I)*, No. 108672/2011, 2013 N.Y. Slip Op. 32091(U), at 14 (Sup. Ct. N.Y. Cty. Sept. 5, 2013), *aff'd*, 133 A.D.3d 514, 19 N.Y.S.3d 289 (1st Dep't 2015).

65. *Id.*

66. *Stern II*, 133 A.D.3d at 514, 19 N.Y.S.3d at 290 (first citing *Paterno*, 24 N.Y.3d at 377, 23 N.E.3d at 994, 998 N.Y.S.2d at 726; and then citing *Mejia-Haffner v. Killington, Ltd.*, 119 A.D.3d 912, 914, 990 N.Y.S.2d 561, 564 (2d Dep't 2014)).

67. *Id.*

68. N.Y. C.P.L.R. 305(c) (McKinney 2010).

69. 131 A.D.3d 1202, 1204, 17 N.Y.S.3d 467, 469 (2d Dep't 2015).

70. *Id.* at 1203, 17 N.Y.S.3d at 468.

71. *Id.*

defendants' motion and denied the plaintiff's cross motion.⁷²

On appeal, the Second Department noted that "Pursuant to the Public Authorities Law, the MTA and the NYCTA are separate public benefit corporations with different functions" and that the defendants demonstrated "that neither the MTA nor the NYCTA was responsible for the operation, maintenance, or control of the bus on which the decedent allegedly was injured."⁷³ The court also noted that the plaintiff's cross-motion to amend the caption was properly denied because there was "no evidence that the MTA Bus Company was served with process," and thus this was not a case where a party was misnamed but, rather, was an attempt by the plaintiff to add and/or substitute an entirely new party defendant.⁷⁴

3. CPLR 313: Service Without the State Giving Personal Jurisdiction

CPLR 313 provides for service outside New York in the same manner as service within the state, when the defendant is a New York domiciliary or a basis for jurisdiction exists under CPLR 301 or 302.⁷⁵ The statute allows service to be made by anyone "authorized to make service" by the laws of New York, or by the laws of the state in which service will be affected, and any "duly qualified attorney, solicitor, barrister, or equivalent" may also make service outside New York.⁷⁶

When a defendant must be served in another country, CPLR 313 and the Hague Convention (the "Convention") likely apply.⁷⁷ The Convention requires each signatory-nation to establish a central authority to receive and process international service requests, and allows a signatory-nation to consent to additional methods of service within its boundaries.⁷⁸ Additionally, article 10(a) of the Convention permits, in

72. *Id.*

73. *Id.* at 1203, 17 N.Y.S.3d at 468–69 (first citing N.Y. PUB. AUTH. LAW § 1263(1)(a)(1) (McKinney Supp. 2015); then citing N.Y. PUB. AUTH. LAW § 1201(1) (McKinney Supp. 2015); and then citing *Soto v. N.Y.C. Transit Auth.*, 19 A.D.3d 579, 581, 800 N.Y.S.2d 419, 421 (2d Dep't 2005)).

74. *Fridman*, 131 A.D.3d at 1204, 17 N.Y.S.3d at 469 (first citing *Associated Geriatric Info. Network, Inc. v. Split Rock Multi-Care Ctr., LLC*, 111 A.D.3d 861, 861, 976 N.Y.S.2d 149, 150 (2d Dep't 2013); and then citing *Smith v. Garo Enters., Inc.*, 60 A.D.3d 751, 751–52, 875 N.Y.S.2d 167, 169 (2d Dep't 2009)).

75. *See* N.Y. C.P.L.R. 313 (McKinney 2010).

76. *Id.*

77. 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS § 2:50 (Robert L. Haig ed., 4th ed. 2015).

78. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 698–99 (1988) (citing Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters arts. 2, 5, 8–11, 19, Nov. 15, 1965, 20 U.S.T. 361, 362–65 [hereinafter

absence of an objection by the nation to which the document will be sent, a litigant to send judicial documents by postal channels directly to persons abroad.⁷⁹

In *Mutual Benefits Offshore Fund v. Zeltser*, the First Department considered whether service of process by mail “directly to persons abroad” is authorized by article 10(a).⁸⁰ In joining New York’s other appellate divisions, the First Department answered in the affirmative, so long as the destination state does not object to service in this manner.⁸¹

C. Article 5: Venue

1. CPLR 506: Where Special Proceeding Commenced

Pursuant to CPLR 506(b), “a proceeding against a body or officer shall be commenced in any county within the judicial district where the respondent made the determination complained of.”⁸² CPLR 506(b)(1) contains certain exceptions to CPLR 506, which limit proceedings commenced against a justice of the supreme court or a judge of a county court or the court of general sessions, which must be commenced in the appellate division.⁸³

In *Tonawanda Seneca Nation v. Noonan*, the Court of Appeals addressed CPLR 506 in detail.⁸⁴ Specifically, the Court was asked to decide whether the Article 78 proceeding, brought against the respondent judge in his capacity as a surrogate’s court judge, was properly commenced in the appellate division.⁸⁵ Concluding that the action was not properly commenced, the Court conducted a review of the legislative history of CPLR 506(b)(1) and held that although the judge was a county court judge, he was acting as a surrogate’s court judge when probating

Hague Service Convention]).

79. *Id.* (citing Hague Service Convention, *supra* note 78, at 363).

80. 140 A.D.3d 444, 445, 37 N.Y.S.3d 1, 2 (1st Dep’t 2016) (first citing *Sardanis v. Sumitomo Corp.*, 279 A.D.2d 225, 228–29, 718 N.Y.S.2d 66, 68 (1st Dep’t 2001); and then citing Hague Service Convention, *supra* note 78, at 363).

81. *Id.* (first citing *N.Y. State Thruway Auth. v. Fenech*, 94 A.D.3d 17, 19, 938 N.Y.S.2d 654, 655 (3d Dep’t 2012); then citing *Fernandez v. Univan Leasing*, 15 A.D.3d 343, 344, 790 N.Y.S.2d 155, 156 (2d Dep’t 2005); and then citing *Rissew v. Yamaha Motor Co.*, 129 A.D.2d 94, 97, 515 N.Y.S.2d 352, 354 (4th Dep’t 1987)).

82. N.Y. C.P.L.R. 506(b) (McKinney 2006).

83. *Id.*

84. *See generally* 27 N.Y.3d 713, 715, 57 N.E.3d 1073, 1074, 37 N.Y.S.3d 36, 37 (2016) (discussing how CPLR 506(b)(1) applies in an Article 78 proceeding commenced against supreme court justices and county court judges).

85. *Id.* at 715 n.1, 57 N.E.3d at 1074 n.1, 37 N.Y.S.3d at 37 n.1 (quoting *Bickwid v. Deutsch*, 87 N.Y.2d 862, 863, 662 N.E.2d 250, 250, 638 N.Y.S.2d 932, 932 (1995)).

the will of a deceased member of Indian Nation.⁸⁶ Therefore, the Article 78 proceeding challenging his actions should have been brought in supreme court, rather than in the appellate division.⁸⁷ In other words, “[v]enue for an [A]rticle 78 proceeding against a multi-bench judge is determined by the capacity in which the judge was serving when that action was taken.”⁸⁸

2. CPLR 510: Grounds for Change of Place of Trial

Pursuant to CPLR 510, a party may ask a court to change the place of trial where the venue designed 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.⁸⁹

A motion to change venue was made in *Healthcare Professionals Insurance Co. v. Parentis*.⁹⁰ There, an Erie County jury returned an \$8.6 million verdict against the defendant Michael A. Parentis.⁹¹ At the time of the verdict, Parentis had \$1.3 million in liability insurance through defendant Medical Liability Mutual Insurance Company and \$1 million in excess coverage with the plaintiff.⁹² The plaintiff commenced a declaratory judgment action in Albany County for a judgment that its obligation to indemnify Parentis was limited to \$1 million because it acted in good faith.⁹³ Upon submission of affidavits by both Parentis and his attorney that averred they would be inconvenienced and burdened by a trial of the action in Albany County, Parentis moved to change venue to Erie County and the trial court granted the motion.⁹⁴

On appeal to the Third Department, the appellate division noted that the discretion afforded by CPLR 510(3) is for non-party witnesses, and that the convenience of the parties and their agents carries little to no weight.⁹⁵ Further, the court stated that even in a transitory action (i.e., an action that does not affect real property),⁹⁶ the moving party must submit the required detailed information that the convenience of the non-party

86. *Id.* at 715–17, 57 N.E.3d at 1074–76, 37 N.Y.S.3d at 37–39.

87. *Id.* at 715, 57 N.E.3d at 1074, 37 N.Y.S.3d at 37.

88. *Id.* at 717, 57 N.E.3d at 1076, 37 N.Y.S.3d at 39.

89. See N.Y. C.P.L.R. 510 (McKinney 2006).

90. 132 A.D.3d 1138, 1139, 18 N.Y.S.3d 741, 742 (3d Dep’t 2015).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 1139–40, 18 N.Y.S.3d at 742–43.

95. *Healthcare Prof’ls Ins.*, 132 A.D.3d at 1139, 18 N.Y.S.3d at 742 (citing *State v. Quintal, Inc.*, 79 A.D.3d 1357, 1357–58, 915 N.Y.S.2d 169, 169 (3d Dep’t 2010)).

96. *Id.* at 1140 n.1, 18 N.Y.S.3d at 743 n.1 (citing *O’Brien v. Vassar Bros. Hosp.*, 207 A.D.2d 169, 173, 622 N.Y.S.2d 284, 287 (2d Dep’t 1995)).

witnesses would be enhanced by the change of venue.⁹⁷ Thus, because each of the affiants were a party or an agent of the party, that none confirmed that he would be willing to testify, and that the events at issue “principally involve[ed] the parties and their respective employees and/or agents,” the motion should have been denied.⁹⁸

D. Article 20: Mistakes, Defects, Irregularities, and Extensions of Time

1. CPLR 2001: Mistakes, Omissions, Defects, and Irregularities

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 and any applicable fees are paid.⁹⁹

The applicability of CPLR 2001 was at issue in *Fox v. City of Utica*.¹⁰⁰ There, the plaintiff filed a verified claim and, before answering, the defendant filed a CPLR 3211 motion to dismiss on the grounds that the plaintiff had failed to file a summons of complaint.¹⁰¹ The trial court, in relying upon CPLR 2001 “deemed the claim to be a complaint and excused the failure” as an irregularity.¹⁰² Reversing the trial court, the Fourth Department held that CPLR 2001 did not permit the court to disregard this failure and that, per the language from the Senate Introducer’s Memorandum, “the statute may be invoked as a basis to correct or clarify ‘a mistake in the method of filing, *as opposed to a mistake in what is filed.*’”¹⁰³

In *Putrelo Construction Co. v. Town of Marcy*, the provision of CPLR 3025(b) requiring that the proposed amendment or supplemental pleading be attached to motion papers was at issue.¹⁰⁴ There, the plaintiff commenced an action seeking damages for breach of contract and sought leave to amend the ad damnum clause from \$77,585.50 to \$111,331.13.¹⁰⁵

97. *Id.* at 1139–40, 18 N.Y.S.3d at 742–43 (first citing *Hyman v. Schwartz*, 114 A.D.3d 1110, 1112, 981 N.Y.S.2d 468, 471 (3d Dep’t 2014); then citing *Quintal, Inc.*, 79 A.D.3d at 1358, 915 N.Y.S.2d at 170; and then citing *O’Brien*, 207 A.D.2d at 170, 622 N.Y.S.2d at 285).

98. *Id.* at 1140, 18 N.Y.S.3d at 743 (citing *Supplier Distrib. Concepts, Inc. v. Richards*, 80 A.D.3d 869, 870–71, 915 N.Y.S.2d 671, 672 (3d Dep’t 2011)).

99. *See* N.Y. C.P.L.R. 2001 (McKinney 2012).

100. 133 A.D.3d 1229, 1230, 18 N.Y.S.3d 918, 918 (4th Dep’t 2015).

101. *Id.* at 1230, 18 N.Y.S.3d at 918.

102. *Id.*

103. *Id.* (quoting *Goldenberg v. Westchester Cty. Health Care Corp.*, 16 N.Y.3d 323, 328, 946 N.E.2d 717, 719, 921 N.Y.S.2d 619, 621 (2011)).

104. 137 A.D.3d 1591, 1592, 27 N.Y.S.3d 760, 762 (4th Dep’t 2016).

105. *Id.* at 1591–92, 27 N.Y.S.3d at 761–62.

The supreme court denied the motion and the Fourth Department reversed, citing CPLR 2001 and holding that the failure to include an amended pleading was “merely a technical defect that the court should have disregarded,” inasmuch as the amendment was outlined in the papers and did not prejudice the defendants.¹⁰⁶

E. Article 31: Disclosure

1. CPLR 3101: Scope of Disclosure

CPLR 3101(a) requires full disclosure of all matter both material and necessary to the prosecution or defense of an action.¹⁰⁷ The definition of material and necessary depends upon the case.¹⁰⁸

In *Forman v. Henkin*, the defendant sought an order compelling the plaintiff to provide an unlimited authorization to obtain records from her Facebook account, including all photographs, status updates and instant messages.¹⁰⁹ In joining both the Second and Fourth Departments, the First Department reiterated the factual-predicate standard and held that a different discovery rule does not exist for social media information.¹¹⁰ Consequently, according to the First Department, “a party must be able to demonstrate that the information sought is likely to result in the disclosure of relevant information bearing on the claims.”¹¹¹ Accordingly, the court concluded that just because the plaintiff “previously used Facebook to post pictures of herself or to send messages is insufficient to warrant discovery of this information.”¹¹² Likewise, the court concluded that the defendant’s speculation that the information could be relevant in rebutting the plaintiff’s claims of injury or disability

106. *Id.* at 1592–93, 27 N.Y.S.3d at 762 (first citing N.Y. C.P.L.R. 2001 (McKinney 2012); then citing *Medina v. City of New York*, 134 A.D.3d 433, 433, 19 N.Y.S.3d 732, 732 (1st Dep’t 2015); and then citing *Barone v. Concert Servs. Specialists Inc.*, 127 A.D.3d 1119, 1120, 8 N.Y.S.3d 358, 359 (2d Dep’t 2015)).

107. *See* N.Y. C.P.L.R. 3101(a) (McKinney Supp. 2017).

108. *See, e.g.*, *Allen v. Crowell-Collier Publ’g Co.*, 21 N.Y.2d 403, 406, 235 N.E.2d 430, 432, 288 N.Y.S.3d 449, 452 (1968).

109. 134 A.D.3d 529, 529, 22 N.Y.S.3d 178, 179 (1st Dep’t 2015).

110. *Id.* at 532, 22 N.Y.S.3d at 181.

111. *Id.* (first citing *GS Plasticos Limitada v. Bureau Veritas Consumer Prods. Servs., Inc.*, 112 A.D.3d 539, 540, 977 N.Y.S.2d 245, 246 (1st Dep’t 2013); then citing *Budano v. Gurdon*, 97 A.D.3d 497, 498, 948 N.Y.S.2d 612, 615 (1st Dep’t 2012); then citing *Sexter v. Kimmelman*, 277 A.D.2d 186, 187, 716 N.Y.S.2d 661, 662 (1st Dep’t 2000); and then citing *Manley v. N.Y.C. Hous. Auth.*, 190 A.D.2d 600, 600, 593 N.Y.S.2d 808, 809 (1st Dep’t 1993)).

112. *Id.* at 531, 22 N.Y.S.3d at 181 (citing *Tapp v. N.Y. State Urban Dev. Corp.*, 102 A.D.3d 620, 620, 958 N.Y.S.2d 392, 393 (1st Dep’t 2013)).

was insufficient to warrant such a fishing expedition.¹¹³ As such, because the defendant failed to demonstrate a factual predicate for the disclosure of the plaintiff's postings, the First Department held he was not entitled to photographs posted after the accident giving rise to the lawsuit, or authorizations related to private messaging.¹¹⁴

In *D'Alessandro v. Nassau Health Care Corp.*, the plaintiff in a wrongful death action appealed a denial of her motion pursuant to CPLR 3124 to compel the defendant driver to provide authorizations for complete records of his cellular telephone use.¹¹⁵ The defendant driver opposed disclosure on the ground that the disclosure request was "overly broad, unduly burdensome, irrelevant [sic] and improper."¹¹⁶

According to the Second Department, the plaintiff's request "was not premised on 'bare allegations of relevancy,'" but rather "adequately demonstrated that the issue of whether the defendant driver was using her cellular telephone at the time of the accident was relevant to the plaintiff's contention that the defendant driver was negligent in the operation of her motor vehicle."¹¹⁷ As such, the request was "reasonably calculated" to lead to the discovery of issues in litigation and as such, the Second Department reversed with respect to the defendant driver.¹¹⁸ However, the court held that the plaintiff's contentions relating to an authorization for the complete records of the defendant driver's husband were without merit, and affirmed that branch of the trial court's order.¹¹⁹

CPLR 3101(d)(1)(i) deals with the disclosure of expert witnesses,¹²⁰ and was at issue in *Conway v. Elite Towing & Flatbedding Corp.*¹²¹ In *Conway*, the plaintiff made a motion to compel the defendants to provide further disclosure regarding the anticipated testimony of their expert witnesses.¹²² The trial court denied the motion.¹²³ On appeal to the

113. *Id.* (first citing *Tapp*, 102 A.D.3d at 621, 958 N.Y.S.2d at 393; and then citing *Pecile v. Titan Capital Grp., LLC*, 113 A.D.3d 526, 527, 979 N.Y.S.2d 303, 304-05 (1st Dep't 2014)).

114. *Forman*, 134 A.D.3d at 529, 22 N.Y.S.3d at 179.

115. 137 A.D.3d 1195, 1195-96, 29 N.Y.S.3d 382, 383 (2d Dep't 2016).

116. *Id.* at 1196, 29 N.Y.S.3d at 383.

117. *Id.* at 1197, 29 N.Y.S.3d at 384 (quoting *Crazytown Furniture v. Brooklyn Union Gas Co.*, 150 A.D.2d 420, 421, 541 N.Y.S.2d 30, 32 (2d Dep't 1989)) (citing N.Y. VEH. & TRAF. LAW §§ 1225-c, 1225-d (McKinney Supp. 2016)).

118. *Id.* (quoting *Crazytown*, 150 A.D.2d at 421, 541 N.Y.S.2d at 32).

119. *Id.*

120. See N.Y. C.P.L.R. 3101(d)(1)(i) (McKinney Supp. 2017).

121. (*Conway II*), 135 A.D.3d 893, 22 N.Y.S.3d 911 (2d Dep't 2016).

122. *Id.* at 893, 22 N.Y.S.3d at 911.

123. *Conway v. Elite Towing & Flatbedding Corp. (Conway I)*, No. 63134/2012, 2014 N.Y. Slip Op. 3336(U), at 3 (Sup. Ct. Westchester Cty. Dec. 24, 2014), *aff'd*, 135 A.D.3d 893, 22 N.Y.S.3d 911 (2d Dep't 2016).

Second Department, the court held that the “defendants’ expert disclosure statements sufficiently disclosed in reasonable detail the subject matter and [reasonable] facts and opinions on which the experts were expected to testify, and a summary of the grounds for their opinions.”¹²⁴ Further, the court clarified that the CPLR has “no requirement that the expert set forth the specific facts and opinions upon which he or she is expected to testify, but rather only the substance of those facts and opinions.”¹²⁵

CPLR 3101 was also at issue before the Third Department in *Boyer v. Kathman*.¹²⁶ There, the plaintiff commenced a medical malpractice action against several defendants.¹²⁷ Following service of the plaintiff’s expert disclosure, two of the defendants “unsuccessfully moved for summary judgment dismissing the complaint.”¹²⁸ The case went to trial and the jury found one of the defendants negligent.¹²⁹ The other defendant was held vicariously liable.¹³⁰ Both defendants appealed.¹³¹

Among several issues before the Third Department was whether the trial court “erred by allowing the plaintiff to introduce evidence supporting a theory of liability during the trial that was not explicitly set forth in his complaint and bills of particulars.”¹³² In answering the question in the negative, the court noted that the case concerned a theory of liability based “on the allegedly erroneous interpretation of [the] plaintiff’s . . . CT scan.”¹³³

In noting that the complaint and bills of particulars did not contain an express articulation of the theory, “the better practice certainly would have been for [the] plaintiff to seek leave to amend his pleadings in

124. *Conway II*, 135 A.D.3d at 894, 22 N.Y.S.3d at 911 (first citing N.Y. C.P.L.R. 3101(d)(1)(i) (McKinney Supp. 2016); then citing *Mary Imogene Bassett Hosp. v. Cannon Design, Inc.*, 97 A.D.3d 1030, 1031, 949 N.Y.S.2d 229, 231 (3d Dep’t 2012); then citing *Cocca v. Conway*, 283 A.D.2d 787, 788, 725 N.Y.S.2d 125, 127 (3d Dep’t 2001); then citing *Hoberg v. Shree Granesh, LLC*, 85 A.D.3d 965, 966, 926 N.Y.S.2d 578, 580 (2d Dep’t 2011); and then citing *Gagliardotto v. Huntington Hosp.*, 25 A.D.3d 758, 759, 808 N.Y.S.2d 430, 431 (2d Dep’t 2006)).

125. *Id.* (first citing *Mary Imogene Bassett Hosp.*, 97 A.D.3d at 1032, 949 N.Y.S.2d at 231; then citing *Barrowman v. Niagra Mohawk Power Corp.*, 252 A.D.2d 946, 946–47, 675 N.Y.S.2d 734, 736 (4th Dep’t 1998); then citing *Foley v. Am. Indian Paper Mills Supply Co.*, 222 A.D.2d 401, 402, 635 N.Y.S.2d 515, 515 (2d Dep’t 1995); then citing *Krygier v. Airweld, Inc.*, 176 A.D.2d 700, 700–01, 574 N.Y.S.2d 790, 791 (2d Dep’t 1991); and then citing *Renucci v. Mercy Hosp.*, 124 A.D.2d 796, 797, 508 N.Y.S.2d 518, 519 (2d Dep’t 1986)).

126. 130 A.D.3d 1176, 13 N.Y.S.3d 653 (3d Dep’t 2015).

127. *Id.* at 1177, 13 N.Y.S.3d at 655.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Boyer*, 130 A.D.3d at 1177, 13 N.Y.S.3d at 655.

132. *Id.*

133. *Id.* at 1178, 13 N.Y.S.3d at 655.

advance of trial,” or at least, move to amend the pleading to conform to the proof at trial.¹³⁴ Nevertheless, the Third Department found that the determination to allow the plaintiff to advance the theory at trial, and permitting the plaintiff’s expert to offer testimony on the theory, did not constitute reversible error because the complaint, the plaintiff’s expert disclosures, and the plaintiff’s expert affidavit in opposition to the defendants’ motion for summary judgment, referenced the CT scan as a basis for a departure from accepted medical practice and as such, were sufficient to notify the defendants of the theory.¹³⁵ Indeed, “[s]imply put, [the Third Department was] unpersuaded by [the] defendants’ position that they were not aware of the . . . theory as a basis for a potential finding of medical malpractice.”¹³⁶ However, the Third Department did find that a new trial was warranted because the plaintiff was unable to prove that one of the defendants acted “willfully, deliberately or contumaciously in omitting from its expert disclosure its intent to call an expert who would testify about the [plaintiff’s] theory [of liability] so as to warrant the drastic remedy of preclusion of [the plaintiff’s] medical expert.”¹³⁷

2. CPLR 3121: Physical or Mental Examination

CPLR 3121 provides that when a plaintiff places his or her medical condition in controversy, he or she may be required to execute authorizations permitting parties to obtain records relating to the plaintiff’s mental or physical condition.¹³⁸

What it means to put a physical condition “in controversy” was at issue before the First Department in *Almonte v Mancuso*.¹³⁹ There, the plaintiff commenced an action for personal injuries allegedly suffered in a motor vehicle accident and the defendant moved to compel an unrestricted authorization for the production of his entire employment file.¹⁴⁰ Preliminarily, the court held that “[b]y bringing this action to recover for personal injuries allegedly suffered in a motor vehicle accident, [the] plaintiff placed his medical condition in controversy and waived the physician-patient privilege with respect to pertinent medical

134. *Id.* at 1178, 13 N.Y.S.3d at 656.

135. *Id.*

136. *Boyer*, 130 A.D.3d at 1178, 13 N.Y.S.3d at 656.

137. *Id.* (first citing N.Y. C.P.L.R. 3126(2) (McKinney 2005); then citing *Abselet v. Satra Realty, LLC*, 85 A.D.3d 1406, 1407–08, 926 N.Y.S.2d 178, 181 (3d Dep’t 2011); then citing *Armstrong v. Armstrong*, 72 A.D.3d 1409, 1410–11, 900 N.Y.S.2d 476, 480 (3d Dep’t 2010); and then citing *BDS Copy Inks, Inc. v. Int’l Paper*, 123 A.D.3d 1255, 1256–57, 999 N.Y.S.2d 234, 236 (3d Dep’t 2014)).

138. *See* N.Y. C.P.L.R. 3121(a) (McKinney 2005).

139. 132 A.D.3d 529, 529, 17 N.Y.S.3d 857, 858 (1st Dep’t 2015).

140. *Id.*

records.”¹⁴¹ The court further noted that the plaintiff failed to articulate any reason why he refused to comply with the preliminary conference order, which “directed him to provide a written authorization for the release of medical records in his employment file.”¹⁴² Accordingly, the court affirmed the trial court’s ruling requiring the plaintiff to provide an authorization for any medical records related to the claimed injuries in his employment file dating from one year prior to the motor vehicle accident to the present (minus any disciplinary records).¹⁴³

Similarly, in *Heary v. Hibit*, the Fourth Department held that the trial court erred in denying a post-note of issue orthopedic independent medical examination (IME).¹⁴⁴ There, the plaintiff was injured in a motor vehicle accident, claiming both orthopedic and neurological injuries.¹⁴⁵ A defense neurology IME was conducted before the note of issue was filed and subsequent to the filing of the note of issue, the plaintiff underwent a spinal fusion.¹⁴⁶ As such, the defendant requested a post-note of issue IME and the plaintiff refused the request.¹⁴⁷ On motion to the trial court, the trial court denied the defendant’s motion and the defendant appealed.¹⁴⁸ During the pendency of the appeal, a jury trial was conducted and the jury rendered a verdict in the plaintiff’s favor on liability and awarded damages for past pain and suffering.¹⁴⁹ The plaintiff appealed the damages and both appeals were considered by the Fourth Department.¹⁵⁰

According to the appellate division, the trial court erred in denying the defendant’s motion for a post-note of issue IME, as the defendant demonstrated a substantial change in circumstances and the plaintiff failed to demonstrate that an examination would prejudice the prosecution of her case.¹⁵¹ However, the Fourth Department found that the trial court’s error in no way affected the jury’s determination on

141. *Id.* (first citing *Dillenbeck v. Hess*, 73 N.Y.2d 278, 287, 536 N.E.2d 1126, 1132, 539 N.Y.S.2d 707, 713 (1989); and then citing *Pirone v. Castro*, 82 A.D.3d 431, 432, 917 N.Y.S.2d 860, 860 (1st Dep’t 2011)).

142. *Id.* (first citing C.P.L.R. 3121(a); and then citing *Cynthia B. v. New Rochelle Hosp. Med. Ctr.*, 60 N.Y.2d 452, 456–57, 458 N.E.2d 363, 366, 470 N.Y.S.2d 122, 125 (1983)).

143. *Id.*

144. 138 A.D.3d 1385, 1386, 30 N.Y.S.3d 415, 417 (4th Dep’t 2016).

145. *Id.* at 1385, 30 N.Y.S.3d at 416.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Heary*, 138 A.D.3d at 1385, 30 N.Y.S.3d at 416.

150. *Id.* at 1385–86, 30 N.Y.S.3d at 416–17.

151. *Id.* at 1386, 30 N.Y.S.3d at 417 (citing *Streicker v. Adir Rent A Car, Inc.*, 279 A.D.2d 385, 385, 719 N.Y.S.2d 562, 562 (1st Dep’t 2001)).

liability or serious injury, and therefore, a new trial on those issues was not necessary.¹⁵² Rather, the court agreed that the lack of an orthopedic IME had a bearing on the issue of damages, and ordered a new trial on that point.¹⁵³

3. CPLR 3103: Protective Orders

A court may prevent abusive discovery or suppress information improperly obtained by issuing a protective order that denies, limits, conditions, or otherwise regulates discovery.¹⁵⁴

In *Cascardo v. Cascardo*, the Second Department reviewed whether the trial court properly denied the plaintiff's motion for a protective order, requiring that she appear for oral deposition.¹⁵⁵ Specifically,

[s]ix days before her scheduled deposition, the plaintiff sought to have the deposition adjourned and thereafter moved for a protective order pursuant to CPLR 3103(a) directing that her deposition be conducted by written interrogatories. The plaintiff claimed that due to a traumatic brain injury, she had trouble processing oral information and difficulty in sequencing, accessing language, and recalling information.¹⁵⁶

In affirming the trial court's denial of the plaintiff's motion, the court cited the broad discretion of the trial court and the necessity of a factual showing entitling a party to a protective order.¹⁵⁷ According to the Second Department, the evidence before the court

demonstrated that the plaintiff was a party in prior unrelated proceedings in other courts in New York, and in those proceedings, similar relief requested by the plaintiff had been denied, [the plaintiff] had been found competent to handle her own affairs, [the plaintiff] had a history of appearing pro se and taking depositions of the parties she was suing. . . . [and that], in promotional material advertising her business on the Internet, she was presented as an "expert speaker" and offered participants in her live webinar the opportunity to pose oral questions to her in real time.¹⁵⁸

Therefore, the Second Department held that the trial court properly exercised its discretion in determining that the plaintiff failed to make the requisite showing pursuant to CPLR 3103(a) to warrant a protective

152. *Id.*

153. *Id.*

154. *See* N.Y. C.P.L.R. 3103(a) (McKinney Supp. 2017).

155. 136 A.D.3d 729, 729, 24 N.Y.S.3d 742, 742 (2d Dep't 2016).

156. *Id.* at 729, 24 N.Y.S.3d at 743.

157. *Id.* (quoting *Hartheimer v. Clipper*, 288 A.D.2d 263, 263, 732 N.Y.S.2d 866, 866 (2d Dep't 2001)).

158. *Id.* at 730, 24 N.Y.S.3d at 743.

order.¹⁵⁹

4. CPLR 3110: Where the Deposition Is to Be Taken Within the State

CPLR 3110 provides that a party should be deposed in a county in which they reside, or has a business office, or in a county where an action is pending.¹⁶⁰ However, courts have permitted exceptions to the situs of the deposition where undue hardship is established.¹⁶¹

In *Wang v. A&W Travel, Inc.*, the Second Department considered whether the supreme court properly exercised its discretion in denying a motion pursuant to CPLR 3103(a) for a protective order directing that his deposition be conducted via remote electronic means.¹⁶² In *Wang*, the plaintiff commenced an action against several defendants to recover damages for personal injuries sustained while a passenger on a bus.¹⁶³ The plaintiff appeared for a deposition, which was not completed and was continued to a later date.¹⁶⁴ Prior to the continuation of the plaintiff's deposition, he moved to China allegedly due to his inability to care for himself.¹⁶⁵ Sometime thereafter, the defendants/third-party plaintiffs moved to dismiss the complaint pursuant to CPLR 3126 for failure to appear for the continuation of his deposition and an IME; or, alternatively, to compel him to appear or preclude him from testifying as to damages at trial unless, within thirty days, he appeared in the United States for a deposition and IME or stipulates to pay for the parties' airfare and accommodations for the same in China.¹⁶⁶ In response, the plaintiff cross-moved for the protective order directing that his deposition be

159. *Id.* (first citing *Hartheimer*, 288 A.D.2d at 263, 732 N.Y.S.2d at 866; then citing *Willis v. Cassia*, 255 A.D.2d 800, 801, 680 N.Y.S.2d 313, 314 (3d Dep't 1998); then citing *State v. Gen. Elec. Co.*, 215 A.D.2d 928, 929, 626 N.Y.S.2d 861, 862 (3d Dep't 1995); and then citing *Brignola v. Pei-Fei Lee, M.D., P.C.*, 192 A.D.2d 1008, 1009, 597 N.Y.S.2d 250, 251 (3d Dep't 1993)); *see also* C.P.L.R. 3103(a).

160. *See* N.Y. C.P.L.R. 3110 (McKinney 2005).

161. *See, e.g.*, *Yu Hui Chen v. Chen Li Zhi*, 81 A.D.3d 818, 818, 916 N.Y.S.2d 525, 525 (2d Dep't 2011) (first citing *Gartner v. Unified Windows, Doors & Siding, Inc.*, 68 A.D.3d 815, 816, 890 N.Y.S.2d 608, 610 (2d Dep't 2009); then citing *Wygocki v. Milford Plaza Hotel*, 38 A.D.3d 237, 237, 831 N.Y.S.2d 381, 381 (1st Dep't 2007); then citing *Rogovin v. Rogovin*, 3 A.D.3d 352, 353, 770 N.Y.S.2d 342, 343 (1st Dep't 2004); then citing *In re Singh*, 22 Misc. 3d 288, 290, 865 N.Y.S.2d 902, 904 (Surr. Ct. Bronx Cty. 2008); then citing *Hoffman v. Kraus*, 260 A.D.2d 435, 437, 688 N.Y.S.2d 575, 577 (2d Dep't 1999); and then citing *In re Albarino*, 27 A.D.3d 556, 556, 810 N.Y.S.2d 352, 353 (2d Dep't 2006)).

162. 130 A.D.3d 974, 976, 14 N.Y.S.3d 459, 462 (2d Dep't 2015).

163. *Id.* at 975, 14 N.Y.S.3d at 461.

164. *Id.*

165. *Id.* at 975–76, 14 N.Y.S.3d at 461.

166. *Id.* at 975–76, 14 N.Y.S.3d at 461–62.

conducted by electronic means, and also for an order pursuant to CPLR 3117(a)(3), for permission to use a video transcription of his deposition testimony at trial in lieu of appearing.¹⁶⁷ The trial court denied the plaintiff's cross-motions and held that he should return to New York for his deposition or his complaint would be dismissed.¹⁶⁸

According to the Second Department, the trial court improvidently exercised its discretion by denying the plaintiff's cross-motion.¹⁶⁹ The court stated that generally, when a party is to be deposed, "the deposition should take place 'within the county . . . where the action is pending,'" unless there is an exception where a party demonstrates that the examination there would cause undue hardship.¹⁷⁰ Given "the evidence that the plaintiff's applications for a visa to return to the United States had been denied," and that he was ineligible to be admitted, he had clearly demonstrated undue hardship.¹⁷¹ Further, the appellate division concluded that the trial court erred in denying the plaintiff his cross-motion for leave to employ the video transcription in lieu of appearing at trial.¹⁷² Finally, it noted that the plaintiff should not be required to pay business class airfare and accommodations for the defendant's IME physician, but noted that the plaintiff consented to pay the reasonable costs, in China.¹⁷³

5. CPLR 3116: Signing Deposition; Physical Preparation; Copies

CPLR 3116 concerns the signing of a deposition transcript.¹⁷⁴ 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."¹⁷⁵

In *Torres v. Board of Education of New York*, the Second Department considered a defendants' appeal from an order which denied their motion to strike the errata sheets for the plaintiff's depositions.¹⁷⁶ In

167. *Wang*, 130 A.D.3d at 976, 14 N.Y.S.3d at 461–62; *see also* N.Y. C.P.L.R. 3103, 3117(a)(3) (McKinney 2005 & Supp. 2017).

168. *Wang*, 130 A.D.3d at 976, 14 N.Y.S.3d at 462.

169. *Id.*; *see also* C.P.L.R. 3103, 3117(a)(3).

170. *Wang*, 130 A.D.3d at 976, 14 N.Y.S.3d at 462 (quoting *LaRusso v. Brookstone, Inc.*, 52 A.D.3d 576, 577, 860 N.Y.S.2d 179, 180 (2d Dep't 2008)).

171. *Id.* (citing *Yu Hui Chen v. Chen Li Zhi*, 81 A.D.3d 818, 818, 916 N.Y.S.2d 525, 525 (2d Dep't 2011)).

172. *Id.* at 977, 14 N.Y.S.3d at 462.

173. *Id.*

174. *See* N.Y. C.P.L.R. 3116 (McKinney 2005).

175. *Id.* 3116(a).

176. 137 A.D.3d 1256, 1256, 29 N.Y.S.3d 396, 397 (2d Dep't 2016).

their papers, the defendants argued that “the plaintiff made numerous and significant corrections to his depositions testimony on his errata sheets. Such corrections sought to substantively change portions of [his] testimony which would have been in conflict with his earlier testimony at his General Municipal Law § 50-h hearing.”¹⁷⁷ Further, they argued that the plaintiff’s stated reason for amending the transcript was that he “mis-spoke” and was clarifying his testimony.¹⁷⁸

Preliminarily, the Second Department noted that “[a] correction will be rejected where the proffered reason for the change is inadequate. . . . [and] [f]urther, material or critical changes to testimony through the use of an errata sheet is also prohibited.”¹⁷⁹ In reversing the trial court’s decision, the Second Department rejected the plaintiff’s explanation and found it inadequate to warrant corrections.¹⁸⁰ The Second Department also held that simply because the defendants failed to annex the errata sheets as exhibits to their initial moving papers did not warrant a denial, since the plaintiff submitted a copy as an exhibit to his opposition papers and the defendant annexed a copy to their reply affirmation, therefore there was no substantial right of the plaintiff prejudiced thereby.¹⁸¹

6. CPLR 3121: Physical or Mental Examination

Pursuant to CPLR 3121(a), if a plaintiff’s physical condition is in controversy, any party may serve a notice requiring the plaintiff to submit to a physical examination.¹⁸² “There is no restriction in CPLR 3121 limiting the number of examinations to which a party may be subjected, and a subsequent examination is permissible provided the party seeking the examination demonstrates the necessity for it.”¹⁸³

177. *Id.* at 1257, 29 N.Y.S.3d at 398.

178. *Id.* (first citing *Ashford v. Tannenhauser*, 108 A.D.3d 735, 736–37, 970 N.Y.S.2d 65, 67 (2d Dep’t 2013); then citing *Shell v. Kone Elec. Co.*, 90 A.D.3d 890, 891, 935 N.Y.S.2d 132, 132 (2d Dep’t 2011); and then citing *Kelley v. Empire Roller Skating Rink, Inc.*, 34 A.D.3d 533, 534, 827 N.Y.S.2d 70, 71 (2d Dep’t 2006)).

179. *Id.* (first citing *Ashford*, 108 A.D.3d at 736, 970 N.Y.S.2d at 67; then citing *Shell*, 90 A.D.3d at 891, 935 N.Y.S.2d at 132–33; then citing *Kelley*, 34 A.D.3d at 534, 827 N.Y.S.2d at 71; and then citing *Horn v. 197 5th Ave. Corp.*, 123 A.D.3d 768, 770, 999 N.Y.S.2d 111, 112 (2d Dep’t 2014)).

180. *Id.*

181. *Torres*, 137 A.D.3d at 1257, 29 N.Y.S.3d at 398 (first citing *Long Island Pine Barrens Soc’y Inc. v. County of Suffolk*, 122 A.D.3d 688, 691, 996 N.Y.S.2d 162, 166 (2d Dep’t 2014); then citing *Avalon Gardens Rehab. & Health Care Ctr., LLC v. Morsello*, 97 A.D.3d 611, 612, 948 N.Y.S.2d 377, 378 (2d Dep’t 2012); and then citing *N.Y. C.P.L.R. 2001* (McKinney 2012)).

182. *See* N.Y. C.P.L.R. 3121(a) (McKinney 2005).

183. *Bermejo v. N.Y.C. Health & Hosps. Corp.*, 135 A.D.3d 116, 142, 21 N.Y.S.3d 78, 94 (2d Dep’t 2015) (first citing *Rinaldi v. Evenflo Co.*, 62 A.D.3d 856, 856, 881 N.Y.S.2d

In *Bermejo v. New York City Health & Hospitals Corp.*, the plaintiff's attorney videotaped an IME conducted by an orthopedist retained by the defendant.¹⁸⁴ The plaintiff's attorney, however, did not disclose the existence of the recording to defense counsel, and only revealed its existence for the first time at trial, during redirect of his paralegal, who took the witness stand to testify as to the brevity of the orthopedist's examination.¹⁸⁵ Subsequent to the testimony, the trial court declared a mistrial and the orthopedist refused to appear voluntarily at a retrial.¹⁸⁶ As such, because the defendants would be required to "serve a subpoena upon the orthopedist to secure his testimony at the new trial, they . . . moved . . . for leave to have the plaintiff [undergo a new IME] and for an award of costs against [the] plaintiff's counsel pursuant to 22 NYCRR 130-1.1."¹⁸⁷ The trial court denied their motions and the defendants appealed.¹⁸⁸

On appeal to the Second Department, the court considered "whether a plaintiff's attorney must obtain approval from the court before making a video recording of an IME of the plaintiff, and whether CPLR 3101 requires that [the recording] be disclosed to opposing counsel before trial," and whether a second IME was warranted.¹⁸⁹ In answering in the affirmative, the court first noted that although a plaintiff is normally permitted to have their attorney present at an IME, "permission to employ the additional measure of videotaping the examination will be granted only where the plaintiff establishes the existence of special and unusual circumstances."¹⁹⁰ Indeed, according to the Second Department, the law does not allow for an attorney to "surreptitiously videotape an IME" without court approval or even notice to the court or opposing counsel.¹⁹¹ The court then went on to hold that the plaintiff's counsel's failure to disclose the videotape to defense counsel violated CPLR 3101, which requires disclosure of "any . . . video tapes or audio tapes' of a party, regardless of who created [it and/or for what purpose]."¹⁹² According to

104, 105 (2d Dep't 2009); then citing *Huggins v. N.Y.C. Transit Auth.*, 225 A.D.2d 732, 733, 640 N.Y.S.2d 199, 200 (2d Dep't 1996); and then citing *Young v. Kalow*, 214 A.D.2d 559, 559, 625 N.Y.S.2d 231, 232 (2d Dep't 1995)).

184. *Id.* at 118–19, 21 N.Y.S.3d at 80.

185. *Id.* at 119, 21 N.Y.S.3d at 80.

186. *Id.*

187. *Id.* at 119, 21 N.Y.S.3d at 80–81.

188. *Bermejo*, 135 A.D.3d at 119, 21 N.Y.S.3d at 80–81.

189. *Id.* at 119, 145, 21 N.Y.S.3d at 81, 97.

190. *Id.* at 145, 21 N.Y.S.3d at 96.

191. *Id.* at 145, 21 N.Y.S.3d at 96–97.

192. *Id.* at 145–46, 21 N.Y.S.3d at 97 (quoting N.Y. C.P.L.R. 3101(d)(1)(i) (McKinney Supp. 2017)).

the Second Department, the failure to disclose the videotape not only violated CPLR 3101, but also the “spirit of New York’s open disclosure policy, which, to a large extent, ‘was intended to mark an end to the presentation of totally unexpected evidence and to substitute honesty and forthrightness for gamesmanship.’”¹⁹³ Finally, the Second Department commented that the trial court’s conduct toward the orthopedist following the revelation, including saying that he “lied” and committed “perjury” was “so thoroughly intimidating . . . that regardless of any corrective measures taken at a retrial, it [was] likely that [the orthopedist would] remain unwilling to testify.”¹⁹⁴ And, although the defendants could subpoena the expert, doing so would place him in an adversarial posture with them.¹⁹⁵ Accordingly, the Second Department held that an award of costs against the plaintiff’s counsel was warranted, though he need not be disqualified at the retrial, that the recording was not admissible at any retrial, and that a second IME by a different physician was necessary to ensure that the focus of the medical testimony would be on the nature and extent of the plaintiff’s alleged injuries, rather than on any taint or irregularity surrounding the prior examination.¹⁹⁶

7. CPLR 3126: Penalties for Refusal to Comply with Order to Disclose

CPLR 3126 provides that if a party or person “refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed,” certain orders (i.e., sanctions) may be made by the court with regard to the failure or refusal, as are just.¹⁹⁷

At issue before the Court of Appeals in *Pegasus Aviation I, Inc. v. Varig Logistica S.A.* was the standard for determining a claim of spoliation of evidence.¹⁹⁸ In *Pegasus*, the plaintiff served a notice to produce documents pursuant to CPLR 3120, seeking electronically stored information (ESI) concerning its claims.¹⁹⁹ Some documents were produced, but the production was unsatisfactory to the plaintiff, requiring

193. *Bermejo*, 135 A.D.3d at 147, 21 N.Y.S.3d at 98 (quoting *DiMichel v. S. Buffalo Ry. Co.*, 80 N.Y.2d 184, 193, 604 N.E.2d 63, 66, 590 N.Y.S.2d 1, 4 (1992), *superseded by statute*, C.P.L.R. 3101(i), *as recognized in Zegarelli v. Hughes*, 3 N.Y.3d 64, 68, 814 N.E.2d 795, 797, 781 N.Y.S.2d 488, 490 (2004)).

194. *Id.* at 149, 21 N.Y.S.3d at 99–100.

195. *Id.* at 151, 21 N.Y.S.3d at 101.

196. *Id.* at 152, 154–55, 21 N.Y.S.3d at 102–03.

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

198. (*Pegasus Aviation II*), 26 N.Y.3d 543, 547, 46 N.E.3d 601, 602, 26 N.Y.S.3d 218, 219 (2015).

199. *Id.* at 549, 46 N.E.3d at 603, 26 N.Y.S.3d at 220.

the appointment of a discovery referee by the trial court to assist with resolving the dispute.²⁰⁰ After computer crashes and unsuccessful data recovery efforts, the plaintiff moved for the imposition of sanctions.²⁰¹ The trial court granted the plaintiff's motion.²⁰² On appeal, the appellate division reversed, finding that the defendants had sufficient control over the other defendant to trigger a duty to preserve the electronic data, but it could not be said that their failure to discharge their duty rose to the level of gross negligence and, further, because the plaintiff failed to prove that the lost data would have supported their claims, an adverse inference sanction could not stand.²⁰³

On appeal, the Court of Appeals adopted the standard for determining a claim of spoliation evidence, as set forth in *Zubulake v. UBS Warburg*.²⁰⁴ Specifically, the Court held that a party asserting a claim of spoliation of ESI must establish that the alleged spoliator had "an obligation to preserve [information] at the time of its destruction, that the evidence was destroyed with a 'culpable state of mind,' and 'that the destroyed evidence was relevant to the party's claim or defense.'"²⁰⁵ It explained that where evidence has been intentionally or willfully destroyed, the relevancy of the destroyed documents is presumed; however, if the evidence was negligently destroyed, the party seeking spoliation sanctions must establish that the destroyed documents were relevant to the party's claim or defense.²⁰⁶

With respect to the defendant's failure to issue a litigation hold to members of its organization, the Court held this was not gross negligence per se.²⁰⁷ Rather, it noted that whether a party was grossly negligent in allowing the evidence to be destroyed is determined based on a totality of the circumstances, and the failure to issue a written litigation hold is but one of those factors.²⁰⁸ According to the Court, although the defendants failed to issue a litigation hold, the totality of its conduct

200. *Id.*

201. *Id.* at 549, 46 N.E.3d at 603–04, 26 N.Y.S.3d at 220–21.

202. *Pegasus Aviation I, Inc. v. Varig Logistica S.A. (Pegasus Aviation I)*, 118 A.D.3d 428, 430, 987 N.Y.S.2d 350, 352 (1st Dep't 2014), *aff'd*, 26 N.Y.3d 543, 46 N.E.3d 601, 26 N.Y.S.3d 218 (2015).

203. *Id.* at 432, 987 N.Y.S.2d at 354.

204. *Pegasus Aviation II*, 26 N.Y.3d at 547, 46 N.E.3d at 602, 26 N.Y.S.3d at 219 (citing *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 220 (S.D.N.Y. 2003)).

205. *Id.* at 547, 46 N.E.3d at 602, 26 N.Y.S.3d at 219 (quoting *VOOM HD Holdings LLC, v. EchoStar Satellite LLC*, 93 A.D.3d 33, 45, 939 N.Y.S.2d 321, 330 (1st Dep't 2012)).

206. *Id.* at 547–48, 46 N.E.3d at 602, 26 N.Y.S.3d at 219 (citing *Zubulake*, 220 F.R.D. at 220).

207. *Id.* at 553, 46 N.E.3d at 606, 26 N.Y.S.3d at 223.

208. *Id.*

amounted to simple negligence, at most.²⁰⁹ Thus, the plaintiff could not benefit from the presumption of prejudice afforded when the spoliator engaged in gross negligence, and was therefore required to demonstrate prejudice.²¹⁰ Accordingly, the Court of Appeals remitted the matter to the trial court for a determination as to whether the negligently destroyed ESI was relevant to the plaintiff's claims against the defendants.²¹¹

Also, in *Maggio v. Dougherty*, the defendants in a medical malpractice action made a motion pursuant to CPLR 3126, seeking to preclude the plaintiff from offering any expert evidence at trial because of defects in the plaintiff's expert disclosure and dismissing the complaint.²¹² The trial court granted the defendants' motion.²¹³ On appeal to the Fourth Department, the court rejected the plaintiff's contention that the trial court erred in granting the motions for preclusion.²¹⁴ According to the Fourth Department, the "report of [the] plaintiff's expert was prepared in a draft format prior to [the] plaintiff's cross motion for an extension of time to provide expert disclosure and that [the] plaintiff delayed disclosing that report for approximately eight months after its preparation," and "the report failed to disclose information required by CPLR 3101(d)(1)."²¹⁵ However, the Fourth Department reversed the supreme court's decision dismissing the complaint "on the ground that [the] plaintiff cannot establish a prima facie case without the benefit of expert testimony."²¹⁶

Finally, in *Sarach v. M&T Bank Corp.*, the plaintiff filed suit against the defendant bank after allegedly sustaining injuries when he slipped and fell on ice while walking on the premises.²¹⁷ Prior to commencement of the action, the plaintiff sought an order for pre-action discovery and preservation of evidence, and the defendant represented that it had voluntarily undertaken preservation of certain evidence, including accident reports, photographs, and surveillance tapes, and ultimately

209. *Pegasus Aviation II*, 26 N.Y.3d at 553, 46 N.E.3d at 606, 26 N.Y.S.3d at 223 (quoting *Pegasus Aviation I*, 118 A.D.3d 428, 433, 987 N.Y.S.2d 350, 355 (1st Dep't 2014)).

210. *See id.* at 553–54, 46 N.E.3d at 606–07, 26 N.Y.S.3d at 223–24.

211. *Id.* at 555, 46 N.E.3d at 607, 26 N.Y.S.3d at 224.

212. 130 A.D.3d 1446, 1446, 13 N.Y.S.3d 744, 745 (4th Dep't 2015).

213. *Id.*

214. *Id.*

215. *Id.* at 1447, 13 N.Y.S.3d at 745; *see also* N.Y. C.P.L.R. 3101(d)(1) (McKinney Supp. 2017).

216. *Id.* (first citing *Grassel v. Albany Med. Ctr. Hosp.*, 233 A.D.2d 803, 805, 636 N.Y.S.2d 154, 156 (3d Dep't 1996); and then citing *Monahan v. Weichert*, 82 A.D.2d 102, 107, 442 N.Y.S.2d 295, 298 (4th Dep't 1981)).

217. 140 A.D.3d 1721, 1721, 34 N.Y.S.3d 303, 303–04 (4th Dep't 2016).

“consented to an order of preservation.”²¹⁸ During discovery, the plaintiff requested the surveillance videos that were instructed under the order to be preserved, and when the defendant failed to produce such evidence and indicated it did not, in fact, preserve it, the plaintiff moved to strike the defendant’s answer and affirmative defenses.²¹⁹ The trial court granted the plaintiff’s motion and the defendant appealed.²²⁰

On appeal, the Fourth Department noted that because the trial court directed that the defendant preserve the surveillance footage, it was “unable to conclude that [the] defendant’s failure to comply with the order was anything but willful.”²²¹ Nonetheless, it held that the less drastic remedy of an adverse inference charge given at trial with respect to the unavailable surveillance footage was an appropriate sanction because the plaintiff was not “‘prejudicially bereft’ of the means of prosecuting his action.”²²²

F. Article 32: Accelerated Judgment

1. CPLR 3212: Motion 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.²²³ 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.²²⁴

In *Kimberlee M. v. Jaffe*, the First Department was presented with the question of whether the trial court erred in considering the affirmation of the plaintiff’s previously undisclosed expert.²²⁵ Specifically, the defendants moved for summary judgment against the parent of a child born with developmental delays on the grounds that the child was not injured.²²⁶ In support of their motion, the defendants submitted the infant’s hospital records, revealing normal APGAR scores and a prompt discharge, entitling them to summary judgment.²²⁷ In opposition, the

218. *Id.* at 1721, 34 N.Y.S.3d at 304.

219. *Id.* at 1721–22, 34 N.Y.S.3d at 304.

220. *Id.* at 1722, 34 N.Y.S.3d at 304.

221. *Id.*

222. *Sarach*, 140 A.D.3d at 1722, 34 N.Y.S.3d at 304 (quoting *Rodman v. Ardsley Radiology, P.C.*, 80 A.D.3d 598, 598–99, 914 N.Y.S.2d 304, 305 (2d Dep’t 2011)).

223. See N.Y. C.P.L.R. 3212(h) (McKinney Supp. 2017).

224. See C.P.L.R. 3212(b).

225. 139 A.D.3d 508, 509, 30 N.Y.S.3d 631, 632 (1st Dep’t 2016).

226. *Id.*

227. *Id.* at 508–09, 30 N.Y.S.3d at 632 (citing *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 501 N.E.2d 572, 574, 508 N.Y.S.2d 923, 925 (1986)).

plaintiff's expert pediatric neurologist's opined that the infant experienced developmental delays and dyspraxia, which was supported by the pediatrician's records reflecting concerns about walking development, the infant's parents' deposition testimony, and the expert's findings following a neurological examination.²²⁸

On appeal, the First Department held that the motion court "did not improvidently exercise its discretion in considering the affirmation of [the] plaintiff's previously undisclosed expert."²²⁹ Indeed, the court noted that CPLR 3101(d), which concerns expert disclosure, "does not require a party to retain an expert at any particular time";²³⁰ that the expert's affirmation was promptly served within forty-five days of the examination of the infant plaintiff;²³¹ that the preliminary conference order only required the plaintiff to serve expert disclosures at least sixty days before trial;²³² and that the trial court justice cured any prejudice by granting the defendants leave to perform an IME of the infant-plaintiff.²³³

In *Garcia v. 549 Inwood Associates*, the plaintiff alleged that she was injured as a result of a trip and fall on a crack between pavement flags in a walkway owned by the defendants.²³⁴ In upholding the trial court's decision granting summary judgment to the defendants, the First Department held that the defendants had established their entitlement to judgment as a matter of law by submitting "deposition testimony, an affidavit of an inspector who measured the crack as one-fourth-inch deep, and photographs" showing that the crack was in a well-illuminated location, all of which demonstrated that the "subject defect was trivial and thus, not actionable."²³⁵ The First Department noted that the affidavits submitted in opposition were not of a person who measured the crack, but only estimates from the plaintiff and her daughter, which were insufficient to raise an issue of fact demonstrating that the crack was a dangerous condition and therefore, summary judgment was

228. *Id.* at 509, 30 N.Y.S.3d at 632.

229. *Id.* (citing *Gallo v. Linkow*, 255 A.D.2d 113, 117, 679 N.Y.S.2d 377, 380 (1st Dep't 1998)).

230. *Kimberlee M.*, 139 A.D.3d at 509, 30 N.Y.S.3d at 632 (quoting *LaMasa v. Bachman*, 56 A.D.3d 340, 341, 869 N.Y.S.2d 17, 17 (1st Dep't 2008)); *see also* N.Y. C.P.L.R. 3101(d) (McKinney Supp. 2017).

231. *Kimberlee M.*, 139 A.D.3d at 509, 30 N.Y.S.3d at 632 (citing 22 N.Y.C.R.R. § 202.17(c) (2016)).

232. *Id.* at 509, 30 N.Y.S.3d at 632–33.

233. *Id.*

234. 136 A.D.3d 555, 556, 25 N.Y.S.3d 182, 183 (1st Dep't 2016).

235. *Id.* (first citing *Hutchinson v. Sheridan Hill House Corp.*, 26 N.Y.3d 66, 77, 41 N.E.3d 766, 772, 19 N.Y.S.3d 802, 808 (2015); and then citing *Stylianou v. Ansonia Condo.*, 49 A.D.3d 399, 399, 853 N.Y.S.2d 342, 343 (1st Dep't 2008)).

appropriate.²³⁶

Also, in *Peralta-Santos v. 350 West 49th Street Corp.*, another slip and fall, the First Department reversed the trial court's decision denying summary judgment to the defendants.²³⁷ Specifically, the First Department held that the defendants shifted the burden of proof.²³⁸ The court found that the plaintiff failed to raise a triable issue of fact because his affidavit, which "claimed that he slipped and fell on paper restaurant menus strewn on [the] defendants' stairs, was inadmissible [because the] plaintiff testified he neither spoke, read nor wrote in English, yet his affidavit was unaccompanied by a translator's affidavit attesting to its accuracy, as required by CPLR 2102(b)." ²³⁹ And, the First Department noted that even if the affidavit was admissible, it only raised "feigned issues of fact," because it "contradicted [the] plaintiff's deposition testimony, and was tailored [solely] to avoid the consequences of [the same]." As such, the First Department affirmed.²⁴⁰

In *DeGiorgio v. Racanelli*, the Second Department considered an appeal of an order of the supreme court granting summary judgment to the defendants in a medical malpractice action.²⁴¹ In *DeGiorgio*, the plaintiff alleged that the defendants failed to timely diagnose a fracture of the talus bone resulting in an ankle fusion.²⁴² In moving for summary judgment, the defendant radiologist and his practice submitted the affirmation of a physician board certified in radiology and vascular/interventional radiology, which stated that the defendant did not depart from the standard of care in his interpretation of the films.²⁴³ The affirmation also noted that even assuming the fracture had been timely diagnosed, the treatment would have been the same and thus, the plaintiff could not establish proximate cause.²⁴⁴ The defendant orthopedist and his practice also moved for summary judgment, relying on the affirmation of

236. *Id.*

237. 139 A.D.3d 536, 536, 30 N.Y.S.3d 553, 553 (1st Dep't 2016).

238. *See id.* at 537, 30 N.Y.S.3d at 553 (citing *Lee v. Ana Dev. Corp.*, 110 A.D.3d 479, 479, 973 N.Y.S.2d 116, 117 (1st Dep't 2013)).

239. *Id.* (first citing *Eustaquio v. 860 Cortlandt Holdings, Inc.*, 95 A.D.3d 548, 548, 944 N.Y.S.2d 78, 79 (1st Dep't 2012); and then citing *Reyes v. Arco Wentworth Mgmt. Corp.*, 83 A.D.3d 47, 54, 919 N.Y.S.2d 44, 50 (1st Dep't 2011)); *see also* N.Y. C.P.L.R. 2102(b) (McKinney 2012).

240. *Peralta-Santos*, 139 A.D.3d at 537, 30 N.Y.S.3d at 553 (citing *Phillips v. Bronx Lebanon Hosp.*, 268 A.D.2d 318, 320, 701 N.Y.S.2d 403, 405 (1st Dep't 2000)).

241. 136 A.D.3d 734, 734, 25 N.Y.S.3d 282, 284 (2d Dep't 2016).

242. *Id.* at 736, 25 N.Y.S.3d at 285.

243. *Id.*

244. *Id.*

the radiologist.²⁴⁵ In opposition to the defendants' motions, the plaintiff submitted an expert affirmation from a board certified orthopedic surgeon, who stated that both defendants deviated from the standard of care, and that timely diagnosis could have prevented the need for a fusion.²⁴⁶

In reversing the trial court's order granting summary judgment to the defendants, the court noted that the defendant's radiology expert established that the radiologist did not depart from good and accepted practices, but "failed to lay any foundation for the reliability of his opinion" with respect to causation/treatment, and was commenting on an area outside his medical specialty.²⁴⁷ Therefore, the plaintiff only had to address deviations, and the affirmation of the plaintiff's orthopedist was sufficient, as it noted that part of his residency consisted of training in interpretation of radiology studies, and that he had reviewed the plaintiff's films.²⁴⁸

Also, in *Bongiovanni v. Cavagnuolo*, the Second Department affirmed the denial of summary judgment for the defendant chiropractor, holding that an expert physician may provide an opinion as to proximate cause in certain cases where the action is based upon a field not within their specialty, but the opinion on causation is based upon experience from their own specialty.²⁴⁹ In *Bongiovanni*, the plaintiff filed a claim against her chiropractor alleging that certain manipulations caused injuries to her cervical spine, requiring surgery.²⁵⁰ In moving for summary judgment, the defendant submitted his own affidavit, which stated that "none of the treatments deviated from the defined and accepted standards of chiropractic care."²⁵¹ Additional affirmations were also submitted in support of the motion by an orthopedic surgeon and a radiologist, addressing proximate cause and stating that the plaintiff's injuries were pre-existing.²⁵² In opposition, the plaintiff submitted an affidavit from a radiologist who stated that the central location of the disc herniation as reflected in the MRI was consistent with the exertion of a

245. *Id.*

246. *DeGiorgio*, 136 A.D.3d at 736, 25 N.Y.S.3d at 285.

247. *Id.* at 737, 25 N.Y.S.3d at 286 (first citing *Petrik v. Pilat*, 119 A.D.3d 760, 761, 989 N.Y.S.2d 348, 349 (2d Dep't 2014); and then citing *Stukas v. Streiter*, 83 A.D.3d 18, 31, 918 N.Y.S.2d 176, 186 (2d Dep't 2011)).

248. *Id.* (citing *Leavy v. Merriam*, 133 A.D.3d 636, 637–38, 20 N.Y.S.3d 117, 119 (2d Dep't 2015)).

249. (*Bongiovanni II*), 138 A.D.3d 12, 14, 24 N.Y.S.3d 689, 691 (2d Dep't 2016).

250. *Id.*

251. *Id.* at 15, 24 N.Y.S.3d at 691.

252. *Id.* at 15, 24 N.Y.S.3d at 691–92.

significant amount of force, and if the medical history was accurate, the injury was caused by the defendant's chiropractic adjustment.²⁵³

The trial court denied the defendant's motion on the ground that the experts did not demonstrate knowledge of chiropractic treatment and the Second Department affirmed, for reasons different from those articulated by the trial court.²⁵⁴ According to the Second Department, the affidavits of the orthopedic surgeon and a radiologist would "not be admissible on the issue of the defendant's alleged deviation from the standard of chiropractic care, [because the physicians had not] indicated any familiarity with the standards of chiropractic practice."²⁵⁵ However, the court found that they were not proffered to address departure but rather clearly and narrowly drawn to address the separate element of proximate cause, and for the same, they were admissible.²⁵⁶ Even so, the court held that the plaintiff's evidence in opposition was successful in defeating the defendant's summary judgment motion with respect to the issue of proximate cause.²⁵⁷

With respect to the evidence in support of summary judgment for deviation from the standard of care, the court found that although a "defendant healthcare practitioner's own affidavit may be used to establish his or her prima facie entitlement to summary judgment, even if it is self-serving," the affidavit was nevertheless insufficient because the defendant chiropractor was conclusory in failing to proffer standards of care from which he claimed were not violated.²⁵⁸ As such, the court affirmed the supreme court's denial of the defendant's summary judgment motion.²⁵⁹

CPLR 3212(f) restricts premature summary judgment motions where the opposing party has not had sufficient time or opportunity to obtain the necessary disclosure.²⁶⁰ Specifically, when "facts essential to

253. *Id.* at 15, 24 N.Y.S.3d at 692.

254. *Bongiovanni v. Cavagnuolo (Bongiovanni I)*, No. 17701/11, 2013 N.Y. Slip Op. 34027(U), at 5 (Sup. Ct. Nassau Cty. Sept. 18, 2013), *aff'd*, 138 A.D.3d 12, 24 N.Y.S.3d 689 (2d Dep't 2016); *see also Bongiovanni II*, 138 A.D.3d at 16, 24 N.Y.S.3d at 692.

255. *Bongiovanni II*, 138 A.D.3d at 18, 24 N.Y.S.3d at 694.

256. *Id.* at 17–18, 24 N.Y.S.3d at 693.

257. *Id.* at 19, 24 N.Y.S.3d at 695.

258. *Id.* at 20, 24 N.Y.S.3d at 695 (first citing *Swezey v. Montague Rehab & Pain Mgmt., P.C.*, 59 A.D.3d 431, 433, 872 N.Y.S.2d 199, 202 (2d Dep't 2009); then citing *Videnovic v. Goodman*, 54 A.D.3d 937, 939, 864 N.Y.S.2d 496, 498 (2d Dep't 2008); then citing *Wager v. Hainline*, 29 A.D.3d 569, 569–70, 815 N.Y.S.2d 121, 122 (2d Dep't 2006); then citing *Colao v. St. Vincent's Med. Ctr.*, 65 A.D.3d 660, 662, 885 N.Y.S.2d 306, 308 (2d Dep't 2009); and then citing *Mackey v. Sangani*, 238 A.D.2d 919, 920, 661 N.Y.S.2d 124, 125 (4th Dep't 1997)).

259. *Id.*

260. *See* N.Y. C.P.L.R. 3212(f) (McKinney Supp. 2017).

justify opposition may exist but cannot then be stated” on a motion for summary judgment, a court may deny the motion or order a continuance to permit the opposing party an opportunity to obtain the disclosure or affidavits.²⁶¹

Whether a summary judgment motion was premature was at issue before the Third Department in *Gitman v. Martinez*.²⁶² In *Gitman*, the plaintiff sustained injuries following a motor vehicle accident.²⁶³ While disclosure was underway, and before any depositions had been conducted, the plaintiff moved for partial summary judgment on the issue of liability.²⁶⁴ The trial court granted the motion and the defendant appealed.²⁶⁵

On appeal, the Third Department held that the plaintiff’s motion for summary judgment should have been denied as premature because the

issue had been joined for only about seven months . . . [The defendant] had not received full responses to its disclosure demands and had written follow-up letters regarding the demands. Significantly, no depositions had yet been conducted, and the scheduling order still allowed more three months before all depositions were to be completed.

The importance of depositions [was] readily apparent from the varying versions of the accident.²⁶⁶

Similarly, in *Vikram Construction, Inc. v. Everest National Insurance Co.*, the Second Department visited the standard for evaluating a premature motion for summary judgment.²⁶⁷ There, during the course of his employment by Teji Construction Inc. (“Teji”), Jesus Perdomo allegedly was injured.²⁶⁸ Teji was a subcontractor of the plaintiff, Vikram Construction, Inc. (“Vikram”), which alleged

that during the relevant time period, Teji was required to maintain a commercial general liability insurance policy naming Vikram as an additional insured. Vikram contended that Teji delivered to it a “certificate of liability insurance” stating that Teji had liability insurance with Atlantic Casualty Insurance Company [(“Atlantic”),] . . .

261. *Id.*

262. 139 A.D.3d 1175, 1175, 32 N.Y.S.3d 340, 340 (3d Dep’t 2016).

263. *Id.*

264. *Id.*

265. *Id.* at 1175–76, 32 N.Y.S.3d at 341.

266. *Id.* at 1176, 32 N.Y.S.3d at 341–42 (citing *Judd v. Vilardo*, 57 A.D.3d 1127, 1131, 870 N.Y.S.2d 485, 489 (3d Dep’t 2008)).

267. 139 A.D.3d 720, 721, 32 N.Y.S.3d 203, 205 (2d Dep’t 2016) (first citing N.Y. C.P.L.R. 3212(f) (McKinney Supp. 2016); and then citing *Binyan Shel Chessed, Inc. v. Goldberger Ins. Brokerage*, 18 A.D.3d 590, 592, 795 N.Y.S.2d 619, 621 (2d Dep’t 2005)).

268. *Id.* at 720, 32 N.Y.S.3d at 204.

that Vikram was an additional named insured[, and that] Vikram had in its possession a certificate of insurance . . . and stated that the policy number was BINDER121307.²⁶⁹

Perdomo commenced a separate action “seeking damages for his alleged personal injuries against, among others, Vikram” (“the underlying action”) and Vikram subsequently commenced an action against Atlantic, among others, seeking a defense and indemnification in the underlying action.²⁷⁰ “Atlantic moved for summary judgment [and] [t]he [s]upreme [c]ourt denied the motion as premature, with leave to renew after the completion of discovery.”²⁷¹

On appeal to the Second Department, the court reversed, finding that “Atlantic had established its prima facie entitlement to judgment as a matter of law declaring that it [was] not obligated to defend or indemnify Vikram in the underlying action by submitting evidence demonstrating that it did not issue a policy of insurance to Teji.”²⁷² Indeed,

Atlantic submitted the affidavit of its Vice President of Claims, who averred that Atlantic had no records indicating that a policy was ever issued by Atlantic to Teji and that it never issued a policy that began with the letters “BINDER.”²⁷³

In opposition . . . , Vikram failed to raise a triable issue of fact. Even if the certificate of the insurance produced by Vikram [was sufficient to prevent summary judgment] . . . , the effective date noted on the face of that certificate was after the date of the incident upon which the underlying action [was] based.²⁷⁴

Finally, the court held that any contention that summary judgment was premature is without merit, because

[a] party who seeks a finding that a summary judgment motion is premature is required to put forth some evidentiary basis to suggest that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant.²⁷⁵

Indeed, “[m]ere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the

269. *Id.* at 720, 32 N.Y.S.3d at 204–05.

270. *Id.* at 720–21, 32 N.Y.S.3d at 205.

271. *Id.* at 721, 32 N.Y.S.3d at 205.

272. *Vikram Constr., Inc.*, 139 A.D.3d at 721, 32 N.Y.S.3d at 205.

273. *Id.* (citing *Binyan Shel Chessed, Inc. v. Goldberger Ins. Brokerage*, 18 A.D.3d 590, 592, 795 N.Y.S.2d 619, 621 (2d Dep’t 2005)).

274. *Id.*

275. *Id.* (first citing N.Y. C.P.L.R. 3212(f) (McKinney Supp. 2016); and then citing *Binyan*, 18 A.D.3d at 592, 795 N.Y.S.2d at 621)).

discovery process is insufficient to deny the motion.”²⁷⁶ Accordingly, the court reversed and granted summary judgment to the plaintiff.²⁷⁷

G. Article 34: Calendar Practice; Trial Preferences

1. CPLR 3404: Dismissal of Abandoned Cases

CPLR 3404 provides,

A case in the supreme court or a county court marked “off” or struck from the calendar or unanswered on a clerk’s calendar call, and not restored within one year thereafter, shall be deemed abandoned and shall be dismissed without costs for neglect to prosecute. The order shall make an appropriate entry without the necessity of an order.²⁷⁸

The above provision was at issue in *Paradiso v. St. John’s Episcopal Hospital*.²⁷⁹ There, a note of issue was vacated but the plaintiff was not served with a ninety-day demand pursuant to CPLR 3216.²⁸⁰ Over a year later, the defendant moved pursuant to CPLR 3404 to dismiss the complaint as abandoned, and the plaintiff opposed, asserting that CPLR 3404 was inapplicable.²⁸¹ The supreme court granted the defendant’s motion.²⁸²

On appeal, the Second Department reversed, observing that “when the note of issue was vacated, the case reversed to its pre-note of issue status, and [thus] CPLR 3404 did not apply.”²⁸³ In other words, where a prior court order returned an action to pre-note of issue status, CPLR 3404 is inapplicable and a CPLR 3216 demand is a prerequisite to obtaining dismissal.²⁸⁴

276. *Id.* (quoting *Lopez v. WS Distrib., Inc.*, 34 A.D.3d 759, 760, 825 N.Y.S.2d 516, 517 (2d Dep’t 2006)) (citing *Williams v. Spencer-Hall*, 113 A.D.3d 759, 760, 979 N.Y.S.2d 157, 159 (2d Dep’t 2014)).

277. *Vikram Constr., Inc.*, 139 A.D.3d at 722, 32 N.Y.S.3d at 205.

278. N.Y. C.P.L.R. 3404 (McKinney 2007).

279. 134 A.D.3d 1002, 1003, 20 N.Y.S.3d 913, 913 (2d Dep’t 2015).

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.* (first citing *Goodman v. Lempa*, 124 A.D.3d 581, 581, 997 N.Y.S.2d 912, 913 (2d Dep’t 2015); then citing *Dokaj v. Ruxton Tower Ltd. P’ship*, 55 A.D.3d 661, 662, 865 N.Y.S.2d 653, 654 (2d Dep’t 2008); and then citing *Suburban Restoration Co. v. Viglotti*, 54 A.D.3d 750, 750, 863 N.Y.S.2d 724, 724 (2d Dep’t 2009)).

284. *Paradiso*, 134 A.D.3d at 1003, 20 N.Y.S.3d at 913.

*H. Article 40: Trial Generally**1. CPLR 4404: Post-Trial Motion for Judgment and New Trial*

Pursuant to CPLR 4404 upon the motion of any party, or on its own initiative, a court may set aside a verdict or judgment and direct that it be entered in favor of the party entitled to judgment as a matter of law or order a new trial where the verdict is contrary to the weight of the evidence, in the interest of justice, or where the jury cannot agree after being kept together for a reasonable time as determined by the court.²⁸⁵

In *Kearney v. Papish*, a medical malpractice action, the Second Department affirmed the trial court's denial of the plaintiff's motion pursuant to CPLR 4404(a) to set aside the jury verdict in favor of the defendants on the issue of liability.²⁸⁶ According to the Second Department, the court did not err in permitting the use of a publication from the American College of Emergency Physicians to be used during cross-examination of the plaintiff's expert physician noting that, during cross-examination, an expert may be confronted with scientific publications for impeachment purposes if the material has been deemed authoritative by the expert.²⁸⁷ In the instant case, the expert had testified that he relied on it in rendering his opinions, described it as "useful, clinically relevant, and well thought out, well researched"; however, refused to acknowledge that it was "authoritative" because he had "issues with the word authoritative."²⁸⁸ According to the Second Department, "a physician may not foreclose full-cross examination by the semantic trick of announcing that he did not find the work authoritative where he has already relied upon the text and testified in substance that he finds it reliable and trustworthy."²⁸⁹

*I. Article 45: Evidence**1. CPLR 4503: Attorney*

Pursuant to CPLR 4503(a)(1),

[u]nless the client waives the privilege, an attorney or his or her employee, or any person who obtain[ed] without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of

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

286. 136 A.D.3d 690, 690, 24 N.Y.S.3d 708, 709 (2d Dep't 2016).

287. *Id.* at 690, 24 N.Y.S.3d at 709–10.

288. *Id.* at 690, 24 N.Y.S.3d at 710.

289. *Id.* (citing *Spiegel v. Levy*, 201 A.D.3d 378, 379, 607 N.Y.S.2d 344, 345 (1st Dep't 1994)).

professional employment, shall not disclose, or be allowed to disclose such communication.²⁹⁰

However, it is well established that attorney client communications made in the presence of third parties, when their presence is known to the client, are not privileged from disclosure.²⁹¹ Similarly, a client waives the privilege if the communication is made in confidence but subsequently revealed to a third party.²⁹² As an exception to the general rule, under the common interest doctrine the communication remains privileged if the third party shares *a common legal interest* with the client, and the communication pertained to that common legal interest.²⁹³

Attorney-client privilege was at issue before the Court of Appeals in *Ambac Assurance Corp. v. Countrywide Homes Loans, Inc.*²⁹⁴ Specifically, the Court considered whether it should modify the existing requirement that shared communications be in furtherance of *a common legal interest*, by expanding the common interest doctrine to protect shared communications in furtherance of *any common legal interest*.²⁹⁵

The court declined to expand the doctrine, holding that communication must relate to litigation, either pending or impending, in order for the doctrine to apply and that “any added benefits that may attend such an expansion of the doctrine are outweighed by the substantial loss of relevant evidence, as well as the potential for abuse.”²⁹⁶ Thus, communications relating to a “commercial transaction or other common problem” will not be shielded by the common interest doctrine.²⁹⁷

2. CPLR 4504: Physician, Dentist, Podiatrist, Chiropractor, and Nurse

Pursuant to CPLR 4504(a), also known as the physician-patient privilege, “[u]nless the patient waives the privilege, a person authorized to practice medicine . . . shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity.”²⁹⁸

290. N.Y. C.P.L.R. 4503(a)(1) (McKinney Supp. 2017).

291. *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 620, 57 N.E.3d 30, 32, 36 N.Y.S.3d 838, 840 (2016).

292. *Id.* at 624, 57 N.E.3d at 35, 36 N.Y.S.3d at 843.

293. *Id.* at 620, 57 N.E.3d at 32, 36 N.Y.S.3d at 840.

294. *Id.*

295. *Id.* at 628, 57 N.E.3d at 37, 36 N.Y.S.3d at 845.

296. *Ambac Assurance Corp.*, 27 N.Y.3d at 629, 57 N.E.3d at 38, 36 N.Y.S.3d at 846.

297. *Id.* at 628, 57 N.E.3d at 38, 36 N.Y.S.3d at 846.

298. N.Y. C.P.L.R. 4504(a) (McKinney 2007).

The above provision was at issue before the Court of Appeals on a pre-answer motion to dismiss for failure to state a cause of action in *Chanko v. American Broadcasting Cos.*²⁹⁹ There, a complaint was brought against a defendant hospital on several grounds, including

[t]hat [the] defendants[] unnecessarily, recklessly, willfully, maliciously and in conscious disregard of [the decedent's] rights disclosed and discussed his medical condition with cast members of NY MED and allowed them to videotape said conversations and videotape his medical treatment for broadcast and dissemination to the public in an episode of that television show,³⁰⁰

and that the dissemination constituted a violation of the physician-patient confidentiality necessitating damages.³⁰¹ In its pre-answer motion to dismiss, the defendants alleged, inter alia, that in order to support a cause of action sounding in breach of physician-patient confidentiality, “the disclosed medical information must be embarrassing or something that patients would naturally wish to keep a secret,”³⁰² that the decedent plaintiff was not identifiable on the aired episode of the television program,³⁰³ and that the plaintiffs have not alleged any specific damages.³⁰⁴

In denying the defendants’ motion, the Court first held that whether the privilege is breached “does not depend on the nature of the medical treatment or diagnosis about which information is revealed,” but rather, the “broad rule protects all types of medical information and provides consistency, avoiding the case-by-case determinations of what is considered embarrassing to any particular patient.”³⁰⁵ Next, the Court held that even if no one could recognize the decedent, the complaint expressly alleged an improper disclosure of medical information to the ABC employees, and the allegations in the complaint are to be viewed very liberal at such stage of litigation.³⁰⁶ Finally, with respect to the defendants’ argument that there were no alleged specific damages, the

299. 27 N.Y.3d 46, 51–52, 49 N.E.3d 1171, 1174–75, 29 N.Y.S.3d 879, 882–83 (2016) (first citing C.P.L.R. 4504(a); then citing *In re Grand Jury Investigation in N.Y. Cty.*, 98 N.Y.2d 525, 529, 779 N.E.2d 173, 175, 749 N.Y.S.2d 462, 464 (2002); and then citing *Dillenbeck v. Hess*, 73 N.Y.2d 278, 284, 536 N.E.2d 1126, 1130, 539 N.Y.S.2d 707, 711 (1989)).

300. *Id.* at 54, 49 N.E.3d at 1176–77, 29 N.Y.S.3d at 884–85 (first and second alterations in original) (quoting complaint).

301. *Id.*

302. *Id.* at 54, 49 N.E.3d at 1177, 29 N.Y.S.3d at 885.

303. *Id.* at 55, 49 N.E.3d at 1177, 29 N.Y.S.3d at 885.

304. *Chanko*, 27 N.Y.3d at 56, 49 N.E.3d at 1178, 29 N.Y.S.3d at 886.

305. *Id.* at 54, 49 N.E.3d at 1177, 29 N.Y.S.3d at 885.

306. *Id.* at 55, 49 N.E.3d at 1177, 29 N.Y.S.3d at 885.

Court held that although the allegations lacked in detail, they were sufficient pre-discovery.³⁰⁷

In *Bellamy v. State of New York*, the Third Department reviewed an “appeal from an order of the Court of Claims . . . which partially denied claimants’ motion to, among other things, compel disclosure of certain records.”³⁰⁸ Specifically, the claimant alleged that he was assaulted by another patient while being treated at a psychiatric center operated by the State Office of Mental Health.³⁰⁹ During discovery, claimants requested the medical and mental health history records of the assailant and the Court of Claims directed the State to turn over the records, noting “that the interests of justice would significantly outweigh the . . . need for confidentiality.”³¹⁰ In response, the State disclosed redacted records, including an incident report that was prepared by an employee of the psychiatric center, Ms. Dolacky.³¹¹ However, when Ms. Dolacky was deposed, her counsel directed her “not to answer certain questions regarding the assailant and the degree to which the center was aware of his prior history.”³¹²

Claimants moved to compel disclosure and the Court of Claims ordered Ms. Dolacky to answer questions related to whether the State had notice of the threat posed by the assailant, and further ordered the State to disclose a page of the redacted document which revealed that the State was aware of threats having been made by the assailant.³¹³ On appeal to the Third Department, the court affirmed finding that upon their in camera inspection of the non-redacted documents, all “relevant information of a nonmedical nature relating to any prior assaults or similar violent behavior,” had already been disclosed and the claimant was entitled to information bearing on the assailant’s propensity for assaultive behavior.³¹⁴

3. CPLR 4506: Eavesdropping Evidence; Admissibility; Motion to Suppress in Certain Cases

CPLR 4506 provides, in pertinent part, that the contents of any

307. *Id.* at 56, 49 N.E.3d at 1178, 29 N.Y.S.3d at 886.

308. 136 A.D.3d 1247, 1247, 25 N.Y.S.3d 739, 740 (3d Dep’t 2016).

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.* at 1247, 25 N.Y.S.3d at 740.

313. *B. v. State*, No. M-78900 (Ct. Cl. 2011).

314. *Bellamy*, 136 A.D.3d at 1248, 25 N.Y.S.3d at 740–41 (first citing *J.Z. v. S. Oaks Hosp.*, 67 A.D.3d 645, 646, 886 N.Y.S.2d 915, 915 (2d Dep’t 2009); and then citing *Mayer v. Albany Med. Ctr. Hosp.*, 37 A.D.2d 1011, 1011, 325 N.Y.S.2d 517, 519 (3d Dep’t 1971)).

recorded communication which has been obtained in violation of Penal Law 250.05 “may not be received in evidence at any trial.”³¹⁵ Penal Law 250.05 prohibits eavesdropping unless a party to the conversation consented to the recording.³¹⁶

The above provision of the CPLR was at issue in the Court of Appeals’ case of *People v. Badalamenti*.³¹⁷ There, a father who lived separate from his child, used a voice memo function on his cellphone to record the child’s mother and her boyfriend yelling at the child over an open phone line.³¹⁸ The recording revealed that the mother’s boyfriend, the defendant, threatened to hit the five-year-old boy fourteen times, and that this beating would hurt more than a prior beating.³¹⁹ Later that year, the defendant was charged with assault, criminal possession of a weapon, and endangering the welfare of a child when a landlady heard the child screaming and called the police.³²⁰

The trial court allowed the recording to be admitted into evidence with respect to the endangering of the welfare of a child count, and the defendant was convicted.³²¹ On appeal, the defendant argued that the recording amounted to eavesdropping and was therefore in violation of Penal Law 250.05 because no party to the conversation consented to the recording, and as such, that the evidence was inadmissible under CPLR 4506.³²²

The Court of Appeals affirmed the defendant’s conviction, finding that although the recording of the conversation rose to the level of eavesdropping, the father vicariously “gave consent to the recording on behalf of his child.”³²³ Indeed, the Court found that the doctrine of vicarious consent “recognizes the long-established principle that the law protects the right of a parent or guardian to take actions he or she considers to be in his or her child’s best interests.”³²⁴ The Court further reasoned that

if a parent or guardian has a good faith, objectively reasonable basis to believe that it is necessary, in order to serve the best interests of his or her minor child, to create an audio or video recording of a conversation

315. See N.Y. C.P.L.R. 4506 (McKinney 2007).

316. N.Y. PENAL LAW § 250.05 (McKinney 2017).

317. 27 N.Y.3d 423, 428, 54 N.E.3d 32, 35, 34 N.Y.S.3d 360, 363 (2016).

318. *Id.* at 427, 54 N.E.3d at 34, 34 N.Y.S.3d at 362.

319. *Id.*

320. *Id.* at 427–28, 54 N.E.3d at 35, 34 N.Y.S.3d at 363.

321. *Id.* at 429–30, 54 N.E.3d at 35–36, 34 N.Y.S.3d at 363–64.

322. *Badalamenti*, 27 N.Y.3d at 430, 54 N.E.3d at 36, 34 N.Y.S.3d at 364.

323. *Id.* at 431–32, 54 N.E.3d at 37–38, 34 N.Y.S.3d at 365–66.

324. *Id.* at 435, 54 N.E.3d at 39–40, 34 N.Y.S.3d at 367–68.

to which the child is a party, the parent or guardian may vicariously consent on behalf of the child to the recording.³²⁵

J. Article 70: Habeas Corpus

Generally, Article 70 of the CPLR governs special proceedings for a writ of habeas corpus—the historic common-law writ that protects individuals from unlawful restraint or imprisonment and provides a means for them to obtain release.³²⁶ CPLR 7001 provides the following: “Except as otherwise prescribed by statute, the provisions of this article are applicable to common law or statutory writs of habeas corpus”³²⁷ CPLR 7002(a) provides that “[a] person illegally imprisoned or otherwise restrained in his liberty within the state, or one acting on his behalf . . . may petition without notice for a writ of habeas corpus to inquire into the cause of such detention and for deliverance.”³²⁸ Pursuant to CPLR 7010(a), “[i]f the person is illegally detained a final judgment shall be directed discharging him forthwith.”³²⁹

In *DeLia v. Munsey*, the Court of Appeals was “asked to determine whether a patient who is involuntarily committed under Article 9 of the Mental Hygiene Law and is unlawfully held beyond the authorized retention period may seek a writ of habeas corpus under Article 70 of the CPLR.”³³⁰ Article 9 of the Mental Hygiene Law “governs the procedures and standards for the involuntary commitment of mentally ill persons who are in need of inpatient care and treatment but are unable to understand the necessity of such treatment.”³³¹ When a patient is involuntarily admitted, the facility may hold that person for only a limited period of time, and if more time is needed, the director of the facility must apply to the court for an order authorizing continued retention within sixty days of the admission.³³² A patient may challenge his or her retention under several specific avenues provided by Article 9 of the Mental Hygiene Law, including the ability to request a hearing prior to the expiration of the sixty-day admission period.³³³

In the case before the Court, a habeas corpus proceeding was

325. *Id.* at 435, 54 N.E.3d at 40, 34 N.Y.S.3d at 368.

326. *See People ex rel. Duryee v. Duryee*, 188 N.Y. 440, 445, 81 N.E. 313, 315 (1907).

327. N.Y. C.P.L.R. 7001 (McKinney 2013).

328. *See* N.Y. C.P.L.R. 7002(a) (McKinney 2013).

329. *See* N.Y. C.P.L.R. 7010(a) (McKinney 2013).

330. 26 N.Y.3d 124, 126, 41 N.E.3d 1119, 1121, 20 N.Y.S.3d 304, 306 (2015) (first citing C.P.L.R. 7001; and then citing N.Y. MENTAL HYG. LAW § 9.31(a) (McKinney 2011)).

331. *Id.* (citing MENTAL HYG. § 9.31(a)).

332. MENTAL HYG. § 9.31(a).

333. *See, e.g., id.*

brought on behalf of a patient who was involuntarily committed under Mental Hygiene Law and was unlawfully held beyond the authorized retention period.³³⁴ In response, the Hospital applied for an order authorizing his continued involuntary retention for a period of six months, conceding that although it had erroneously retained the patient without a court order, he could not be released without a hearing.³³⁵ In response, the petitioner argued that he was entitled to immediate release upon a writ of habeas corpus under CPLR Article 70.³³⁶

In reversing the appellate division's determination that the petitioner was not entitled to immediate release without a determination of his mental fitness, and that the habeas corpus petition was not governed by CPLR Article 70 but rather, Mental Hygiene Law § 33.15, the Court held that such a construction "abrogates the common-law writ of habeas corpus for mentally ill patients and is not supported by . . . case law, the rules of statutory construction, or principles of due process."³³⁷ According to the Court, "the right to invoke habeas corpus, 'the historic writ of liberty,' 'the greatest of all writs,'" is a 'primary and fundamental one.' Due to its constitutional roots, '[t]his writ cannot be . . . curtailed[] by legislative action,' except in certain emergency situations."³³⁸

Reading CPLR 7001 together with Mental Hygiene Law § 33.15, the Court of Appeals held that section 33.15 does not limit the availability of the common law writ in Mental Hygiene Law proceedings.³³⁹ Rather, it "allows patients to seek a writ of habeas corpus when they are being held pursuant to a court order but, nevertheless, believe they have sufficiently recovered from their mental illness so that their continued retention is unwarranted"—requiring an inquiry into their mental state.³⁴⁰ "On the other hand, patients whose detention is otherwise unauthorized may proceed under the habeas corpus provisions of CPLR Article 70 since the legality of their detention can be determined . . . without the

334. *DeLia*, 26 N.Y.3d at 128, 41 N.E.3d at 1122, 20 N.Y.S.3d at 307.

335. *Id.* (citing N.Y. MENTAL HYG. LAW § 33.15(b) (McKinney 2011)).

336. *Id.* (citing N.Y. C.P.L.R. 7001 (McKinney 2013)).

337. *Id.* at 129–30, 41 N.E.3d at 1123, 20 N.Y.S.3d at 308 (first citing C.P.L.R. 7001; and then citing MENTAL HYG. § 33.15(a)).

338. *Id.* at 130, 41 N.E.3d at 1123–24, 20 N.Y.S.3d at 308–09 (first alteration in original) (first quoting *People v. Schildhaus*, 8 N.Y.2d 33, 36, 167 N.E.2d 640, 641, 201 N.Y.S.2d 97, 99 (1960); and then quoting *People ex rel. Tweed v. Liscomb*, 60 N.Y. 559, 566 (1875)) (first citing U.S. CONST. art. I, § 9; then citing N.Y. CONST. art. I, § 4; then citing *Hoff v. State*, 279 N.Y. 490, 492, 18 N.E.2d 671, 672 (1939); and then citing *People ex rel. Sabatino v. Jennings*, 246 N.Y. 258, 261, 158 N.E. 613, 614 (1927)).

339. *DeLia*, 26 N.Y.3d at 130, 41 N.E.3d at 1124, 20 N.Y.S.3d at 309 (first citing C.P.L.R. 7001; and then citing MENTAL HYG. § 33.15(d)).

340. *Id.*

need for a hearing into their mental state.”³⁴¹

III. COURT RULES

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

A. OCA Rule 210.14

Effective March 1, 2016, 22 N.Y.C.R.R. § 210.14 (relating to the dismissal and restoration of actions from the trial calendar) was amended to read as follows:

(a) At any scheduled call of a calendar or at any conference, if all parties do not appear and proceed or announce their readiness to proceed immediately or subject to the engagement of counsel, the judge may note the default on the record and enter an order as follows:

(1) if the plaintiff appears but the defendant does not, the judge may grant judgment by default or order an inquest;

(2) if the defendant appears but the plaintiff does not, the judge may dismiss the action and may order a severance of counterclaims or cross-claims or strike the action from the trial calendar; or

(3) if no party appears, the judge may make such order as appears just.

(b) *An action stricken from the trial calendar and not restored within one year thereafter shall be deemed abandoned and shall be dismissed by the clerk, without costs, for neglect to prosecute.*

(c) *Actions stricken from the trial calendar may be restored to the calendar only upon stipulation of all parties so ordered by the court or by motion on notice to all parties made within one year after the action is stricken. Such motion must be supported by affidavit by a person having firsthand knowledge, satisfactorily explaining the reasons for the action having been stricken and showing that it is presently ready for trial.*³⁴²

B. OCA Rule 210.4(b)

Effective March 1, 2016, 22 N.Y.C.R.R. § 210.4 (relating to papers filed in court), was amended to read as follows:

(a) Index Number; Form; Label

The party causing the first paper to be filed shall obtain an index number and communicate it forthwith to all other parties to the action.

341. *Id.* at 130–31, 41 N.E.3d at 1124, 20 N.Y.S.3d at 309 (citing C.P.L.R. 7001).

342. *See* 22 N.Y.C.R.R. § 210.14 (2016) (emphasis added).

2017]

Civil Practice

833

(b) Omission or Redaction of Confidential Personal Information in Civil Actions and Proceedings. (1) Except for any action or proceeding arising under the Vehicle and Traffic Law, or prosecution of a violation of an ordinance of a city, town or village, or in a petition for change of name under the Civil Rights Law, or as otherwise provided by rule or law or court order, and whether or not a sealing order is or has been sought, the parties shall omit or redact confidential personal information in papers submitted to the court for filing. For purposes of this rule, confidential personal information (“CPI”) means:

- i. the taxpayer identification number of an individual or an entity, including a social security number, an employer identification number, and an individual taxpayer identification number, except the last four digits thereof;*
- ii. the date of an individual’s birth, except the year thereof;*
- iii. the full name of an individual known to be a minor, except the minor’s initials; and*
- iv. a financial account number, including a credit and/or debit card number, a bank account number, an investment account number, and/or an insurance account number, except the last four digits or letters thereof.*

(2) The court sua sponte or on motion by any person may order a party to remove CPI from papers or to resubmit a paper with such information redacted; order the clerk to seal the papers or a portion thereof containing CPI in accordance with the requirement of 22 NYCRR § 216.1 that any sealing be no broader than necessary to protect the CPI; for good cause permit the inclusion of CPI in papers; order a party to file an unredacted copy under seal for in camera review; or determine that information in a particular action is not confidential. The court shall consider the pro se status of any party in granting relief pursuant to this provision.

(3) Where a person submitting a paper to a court for filing believes in good faith that the inclusion of the full confidential personal information described in subparagraphs (i) to (iv) of paragraph (1) of this subdivision is material and necessary to the adjudication of the action or proceeding before the court, he or she may apply to the court for leave to serve and file together with a paper in which such information has been set forth in abbreviated form a confidential affidavit or affirmation setting forth the same information in unabbreviated form, appropriately referenced to the page or pages of the paper at which the abbreviated form appears.

(4) The redaction requirement does not apply to the last four digits of the relevant account numbers, if any, in an action arising out of a consumer credit transaction, as defined in subdivision (f) of section one

hundred five of the civil practice law and rules. In the event the defendant appears in such an action the defendant may without leave of court submit papers disclosing full account numbers to the extent necessary to ensure that an order or judgment issued by the court contains proof satisfactory to a credit reporting agency. In the event the defendant appears in such an action and denies responsibility for the identified account, the plaintiff may without leave of court amend his or her pleading to add full account or CPI by:

(i) submitting such amended paper to the court on written notice to defendant for in camera review; or

(ii) filing such full account or other CPI under seal in accordance with rules promulgated by the chief administrator of the courts.³⁴³

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.

343. See 22 N.Y.C.R.R. § 210.4 (2016) (emphasis added).