

CIVIL PRACTICE

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INTRODUCTION

During this *Survey* year¹, 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 the author has made an effort to alert practitioners and academicians about interesting commentary about and/or noteworthy changes in New York State law and to provide basic detail about the changes in the context of the Civil Practice Law and Rules (CPLR). Whether by accident or design, the author did not endeavor to discuss every Court of Appeals or appellate division decision.

I. LEGISLATIVE ENACTMENTS AND AMENDMENTS

A. *CPLR 214-f*

In response to water contamination events in Hoosick Falls, New York, and Flint, Michigan, the New York State Legislature enacted CPLR 214-f to provide individuals exposed to toxic substances on superfund sites (i.e., unregulated perfluorinated compounds in drinking water), more time to file an action for damages.² CPLR 214-f now allows,

1. The *Survey* year is July 1, 2016 through June 30, 2017.

2. N.Y. C.P.L.R. 214-f (McKinney Supp. 2018); Legislative Memorandum of Assemb. McDonald, *reprinted* in 2016 McKinney’s Sess. Laws of N.Y., ch. 128, at 1241–42 (“The recent discovery of water contamination in Hoosick Falls, New York and Flint, Michigan has

in some instances, plaintiffs to pursue injury claims based on exposure to substances at the superfund sites within three years of the superfund designation.³

Specifically:

214-f. Action to recover damages for personal injury caused by contact with or exposure to any substance or combination of substances found within an area designated as a superfund site[.]

Notwithstanding any provision of law to the contrary, an action to recover personal damages for injury caused by contact with or exposure to any substance or combination of substances contained within an area designated as a superfund site pursuant to either Chapter 103 of Section 42 of the United States Code and/or section 27-1303 of the environmental conversation law, may be commenced by the plaintiff within the period allowed pursuant to section two hundred fourteen-c of this article or within three years of such designation of such an area as a superfund site, whichever is latest.⁴

B. CPLR 3408

Chapter 73 of the Laws of 2016, effective December 20, 2016, substantially amended CPLR 3408.⁵

CPLR 3408(a) now requires, among other things, that the parties consider “loan modification, short sale, deed in lieu of foreclosure, or any other loss mitigation option” at a mandatory settlement conference.⁶ Additionally, “each party’s representative at the conference [must] be fully authorized to dispose of the case.”⁷

The plaintiff is now required to bring several forms including “. . . the mortgage and note or copies of the same; (iv) standard application forms and a description of loss mitigation options, if any, which may be available to the defendant; and (v) any other documentation required by the presiding judge.”⁸

The defendant, “[i]f applicable,” must bring “information on current income tax returns, expenses, property taxes[,] and previously submitted applications for loss mitigation; benefits information; rental agreements or proof of rental income; and any other documentation relevant to the

raised great alarm across our country and our state.”).

3. N.Y. C.P.L.R. 214-f.

4. *Id.*

5. Act of June 17, 2016, 2016 McKinney’s Sess. Laws of N.Y., ch. 73, at 441 (codified at N.Y. C.P.L.R. 3408 (McKinney Supp. 2018)).

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

7. *Id.* 3408(c).

8. *Id.* 3408(e)(1).

proceeding required by the presiding judge.”⁹

Also, CPLR 3408(f) now provides for the guidelines to apply in measuring whether the parties are engaging in “good faith” negotiations, and remedies available to the court where it finds that a party has failed to negotiate in good faith.¹⁰

Finally, CPLR 3408(m) provides for ways to avoid defaults in answering by defendants.¹¹

C. CPLR 4503

Chapter 262 Section 1 of the Laws of 2016, effective August 19, 2016, amended CPLR 4503, subdivision (b), by extending the exception to the attorney-client privilege to require the disclosure of information as to a revocable trust after the death of the grantor.¹²

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 of the complaint for neglect to prosecute the action,” or (4) “a final judgment [on] the merits,” the plaintiff may file a new action on the same facts within six months if the new action would have been timely if commenced at the time the original action was filed and the defendant is served within six months.¹³

This provision was addressed by the Second Department in *Wells Fargo Bank, N.A. v. Eitani*.¹⁴ In *Wells Fargo Bank*, the court permitted a second mortgage foreclosure action to be commenced under CPLR 205(a), after the first action was dismissed pursuant to CPLR 3215(c).¹⁵ The specific issue before the court was whether a prior action to foreclose the same mortgage was dismissed for neglect to prosecute, a category of

9. *Id.* 3408(e)(2).

10. *Id.* 3408(f), (j).

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

12. Act of Aug. 19, 2016, 2016 McKinney’s Sess. Laws of N.Y., ch. 262, at 665 (codified at N.Y. C.P.L.R. 4503(b) (McKinney Supp. 2018)).

13. N.Y. C.P.L.R. 205(a) (McKinney Supp. 2018).

14. 148 A.D.3d 193, 194–95, 47 N.Y.S.3d 80, 81 (2d Dep’t 2017) (citing N.Y. C.P.L.R. 205(a)).

15. N.Y. C.P.L.R. 205(a); N.Y. C.P.L.R. 3215(c) (McKinney Supp. 2018)); *Wells Fargo Bank, N.A.*, 148 A.D.3d at 195–96, 47 N.Y.S.3d at 81–82.

dismissal that renders CPLR 205(a) inapplicable.¹⁶ In looking at the order that dismissed the first action, the language read “that the plaintiff ‘failed to proceed to entry of judgment within one year of default,’ and that ‘[t]he time spent prior to discharge from a mandatory settlement conference [was not] computed in calculating the one year period.’”¹⁷ Accordingly, the Second Department affirmed the supreme court’s determination that the order of dismissal was not based on a neglect to prosecute, as “[t]he order did not include any findings of specific conduct demonstrating ‘a general pattern of delay in proceeding with litigation.’”¹⁸

The Second Department also rejected any argument that the plaintiff, Wells Fargo, as a successor in interest, was “not entitled to the benefit of CPLR 205(a) because it was not the plaintiff in the prior action.”¹⁹ According to the court, as the assignee of the mortgage, Wells Fargo, had a statutory right pursuant to CPLR 1018, to continue the action, “even in the absence of a formal substitution.”²⁰ In any event, CPLR 205(a) was created “to provide a genuine bite at the apple,” by providing a second chance to a “claimant who has failed the first time around because of some error pertaining neither to the claimant’s willingness to prosecute in a timely fashion nor to the merits of the underlying claim.”²¹ Accordingly, the Second Department held “that a plaintiff in a mortgage foreclosure action which meets all of the other requirements of the statute is entitled to the benefit of CPLR 205(a) where, as here, it is the successor in interest as the current holder of the note.”²²

16. N.Y. C.P.L.R. 205(a); *Wells Fargo Bank, N.A.*, 148 A.D.3d at 195, 47 N.Y.S.3d at 81.

17. N.Y. C.P.L.R. 3215(c); *Wells Fargo Bank, N.A.*, 148 A.D.3d at 198, 47 N.Y.S.3d at 84 (alterations in original) (internal quotations omitted).

18. *Wells Fargo Bank, N.A.*, 148 A.D.3d at 198, 47 N.Y.S.3d at 84 (quoting N.Y. C.P.L.R. 205(a)) (citing *Marrero v. Crystal Nails*, 114 A.D.3d 101, 111, 978 N.Y.S.2d 257, 264 (2d Dep’t 2013)).

19. N.Y. C.P.L.R. 205(a); *Wells Fargo Bank, N.A.*, 148 A.D.3d at 199, 47 N.Y.S.3d at 84.

20. *Wells Fargo Bank, N.A.*, 148 A.D.3d at 199, 47 N.Y.S.3d at 84 (first citing N.Y. C.P.L.R. 1018 (*McKinney* 2012); then citing *U.S. Bank N.A. v. Akande*, 136 A.D.3d 887, 889, 26 N.Y.S.3d 164, 166 (2d Dep’t 2016); then citing *Brighton BK, LLC v. Kurbatsky*, 131 A.D.3d 1000, 1001, 17 N.Y.S.3d 137, 139 (2d Dep’t 2015); and then citing *Cent. Fed. Sav., F.S.B v. 405 W. 45th St., Inc.*, 242 A.D.2d 512, 512, 662 N.Y.S.2d 489, 490 (1st Dep’t 1997)).

21. *Id.* at 200, 47 N.Y.S.3d at 85 (first quoting *Winston v. Freshwater Wetlands Appeals Bd.*, 224 A.D.2d 160, 164, 646 N.Y.S.2d 565, 568 (2d Dep’t 1996); and then quoting *George v. Mount Sinai Hosp.*, 47 N.Y.2d 170, 178–79, 390 N.E.2d 1156, 1161, 417 N.Y.S.2d 231, 236–37 (1979)) (first citing *Carrick v. Cent. Gen. Hosp.*, 51 N.Y.2d 242, 245–46, 414 N.E.2d 632, 633, 434 N.Y.S.2d 130, 131 (1980); then citing *Morris Inv’rs, Inc. v. Comm’r of Fin.*, 121 A.D.2d 221, 225, 503 N.Y.S.2d 363, 366 (1st Dep’t 1986); then citing *Ivory v. Ekstrom*, 98 A.D.2d 763, 764, 469 N.Y.S.2d 478, 479 (2d Dep’t 1983); and then citing *Doyle v. Am. Home Prods. Corp.*, 583 F.3d 167, 171 (2d Cir. 2009)).

22. N.Y. C.P.L.R. 205(a); *Wells Fargo Bank, N.A.*, 148 A.D.3d at 195, 47 N.Y.S.3d at

CPLR 205(a) was also at issue in *Deadco Petroleum v. Trafigura AG*.²³ There, the “[p]laintiff, a distributor of petroleum products, entered into a business relationship . . . with [the] defendant petroleum suppliers,” and the parties operated for several months under an oral “partnership,” after which they documented certain aspects of their relationship in a product services agreement (PSA).²⁴ The relationship soured and in May 2012, the “plaintiff commenced an action . . . in California federal court.”²⁵ The lawsuit “was dismissed based on the PSA’s forum selection clause designating New York [] as the exclusive forum.”²⁶ The plaintiff then commenced the present action in New York on April 20, 2015, which was dismissed by the supreme court as time-barred by the statute of limitations.²⁷

On appeal, the First Department affirmed, holding that the breach of the partnership, “breach of implied covenant of good faith and fair dealing, breach of fiduciary duty, and fraud claims,” were “time-barred pursuant to the PSA’s two-year limitations provision”, and that “[t]he intentional interference with prospective economic advantage claim” was also beyond the three-year limitations provision.²⁸ In doing so, the First Department rejected any reliance on the tolling provision of CPLR 205(a), and held that it did “not avail [the] plaintiff, because an out-of-state action is not a ‘prior action’ within the meaning of that provision.”²⁹

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

81–82.

23. 151 A.D.3d 547, 547–48, 58 N.Y.S.3d 16, 18 (1st Dep’t), *lv. denied*, 30 N.Y.3d 907 (2017) (first citing *Guzy v. New York City*, 129 A.D.3d 614, 615, 12 N.Y.S.3d 71, 73 (1st Dep’t 2015); then citing *Midwest Goldbuyers, Inc. v. Brink’s Glob. Servs. USA, Inc.*, 120 A.D.3d 1150, 1150, 992 N.Y.S.2d 883, 883 (1st Dep’t 2014); and then citing *Baker v. Commercial Travelers Mut. Accident Ass’n*, 3 A.D.2d 265, 266, 161 N.Y.S.2d 332, 334 (4th Dep’t 1957)).

24. *Id.* at 547, 58 N.Y.S.3d at 18.

25. *Id.*

26. *Id.*

27. *Deadco Petroleum v. Trafigura AG*, No. 651305/2015, 2016 N.Y. Slip Op. 31656(U), at 9–11 (Sup. Ct. New York Cty. 2016).

28. *Deadco Petroleum*, 151 A.D.3d at 547–48, 58 N.Y.S.3d at 18–19 (first citing N.Y. C.P.L.R. 214(4) (McKinney 2003); and then citing *Susman v. Commerzbank Capital Mkts. Corp.*, 95 A.D.3d 589, 590, 945 N.Y.S.2d 5, 8 (1st Dep’t 2012)).

29. *Id.* at 547–48, 58 N.Y.S.3d at 18 (first citing *Guzy v. New York City*, 129 A.D.3d 614, 615, 12 N.Y.S.3d 71, 73 (1st Dep’t 2015); then citing *Midwest Goldbuyers, Inc. v. Brink’s Glob. Servs. USA, Inc.*, 120 A.D.3d 1150, 1150, 992 N.Y.S.2d 883, 883 (1st Dep’t 2014); and then citing *Baker v. Commercial Travelers Mut. Accident Ass’n*, 3 A.D.2d 265, 266, 161 N.Y.S.2d 332, 334 (4th Dep’t 1957)).

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”³⁰

A derivative claim accrued came before the First Department in *Reeder v. Health Insurance Plan of Greater New York*.³¹ In *Reeder*, the infant plaintiff was born at “defendant Long Island College Hospital (“LI Hosp.”) in September 1994.”³² “Before the child and her mother . . . were discharged . . . a blood sample was taken . . . for a state-mandated blood test,” and the results were consistent with sickle cell disease.³³ The New York State Department of Health (DOH) provided the results to Brooklyn Medical Group (BMG), the infant plaintiff’s pediatric group.³⁴

The infant plaintiff’s “first visit to BMG was two weeks after her birth” and the defendant physician, Akhtar Solaiman, failed to advise the mother “of the abnormal blood result or mention the need for additional blood testing.”³⁵ “Several days later, the [mother] received a call from a nurse at [LI Hosp.],” who advised her that “the child had an abnormal blood test . . . and that she needed to see a hematologist.”³⁶ However, upon bringing “the child to BMG to get a referral,” the plaintiff was apparently told by Solaiman “that the child was not ‘under crisis.’”³⁷

By “letter dated October 28, 1994, BMG informed the plaintiff of the need for a blood test” and, after bringing the infant plaintiff back to BMG on November 3, 1994, no blood test was ordered, nor was there any discussion about sickle cell disease.³⁸ In late December, the infant plaintiff “was brought to BMG” with complaints of “cold symptoms, and Solaiman, who saw her that day, still, according to the plaintiff, did not discuss” any diagnosis of sickle cell disease.³⁹ “A week later, the child returned, and Solaiman diagnosed [her with] chest congestion.”⁴⁰

“In early March 1995, the plaintiff [] brought the child to BMG, complaining that she seemed weak.”⁴¹ An examination was performed but Solaiman “determined that the child was healthy,” though blood tests

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

31. 146 A.D.3d 996, 999, 46 N.Y.S.3d 148, 152 (2d Dep’t 2017).

32. *Id.* at 997, 46 N.Y.S.3d at 150.

33. *Id.* (citing N.Y. PUB. HEALTH LAW § 2500-a (McKinney Supp. 2018)).

34. *Id.*

35. *Id.* at 997–98, 46 N.Y.S.3d at 150.

36. *Reeder*, 146 A.D.3d at 998, 46 N.Y.S.3d at 150–51.

37. *Id.* at 998, 46 N.Y.S.3d at 151.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Reeder*, 146 A.D.3d at 998, 46 N.Y.S.3d at 151.

were ordered.⁴² Later that month, the infant child “contracted bacterial meningitis and subsequently was diagnosed with loss of vision, loss of hearing, cognitive disabilities, and other injuries.”⁴³ The infant plaintiff was treated with Solaiman until September 1999, when he left, and then “at BMG until a date that was less than [two-and-a-half] years before the date the plaintiff commenced this action against BMG.”⁴⁴

“In April 2005, the plaintiff [mother], on behalf of the child and herself individually, commenced this action against, among others, the hospital and Solaiman.”⁴⁵ “In May 2005, an amended complaint was served, adding . . . BMG.”⁴⁶ The complaint against the LI Hospital was dismissed for failure “to raise a triable issue of fact as to whether [it] departed from the accepted standard of care.”⁴⁷

“In support of their respective motions, Solaiman and BMG each established” that the malpractice did not occur within two-and-a-half years of when the action was commenced against them.⁴⁸ However, the Second Department held that the plaintiff “raised a triable issue of fact as to the applicability of the continuous treatment doctrine,” and also held that “although Solaiman left BMG in 2000, the plaintiff raised triable issues of fact as to whether BMG’s [continuing] treatment . . . may be imputed to [Solaiman] for purposes of the continuous treatment doctrine.”⁴⁹ Ultimately, the Second Department held that “[t]he continuous treatment toll is personal to the child and is not available to extend the time by which the plaintiff was required to assert her derivative claim.”⁵⁰

With this decision, the Fourth Department is now the only department that applies the continuous treatment doctrine to toll the

42. *Id.*

43. *Id.*

44. *Id.* at 998–99, 46 N.Y.S.3d at 151.

45. *Id.* at 999, 46 N.Y.S.3d at 151.

46. *Reeder*, 146 A.D.3d at 999, 46 N.Y.S.3d at 151.

47. *Id.* at 1000, 46 N.Y.S.3d at 152.

48. *Id.* (first citing N.Y. C.P.L.R. 214-a (McKinney 2003); and then citing *Nisanov v. Khulpateea*, 137 A.D.3d 1091, 1092, 27 N.Y.S.3d 663, 666 (2d Dep’t 2016)).

49. *Id.* (first citing *Muscat v. Mid-Hudson Med. Grp., P.C.*, 135 A.D.3d 915, 916, 24 N.Y.S.3d 368, 369 (2d Dep’t 2016); then citing *Javaid v. Jajoo*, 127 A.D.3d 1027, 1028, 9 N.Y.S.3d 79, 80 (2d Dep’t 2015); then citing *Miccio v. Gerdis*, 120 A.D.3d 639, 640, 990 N.Y.S.2d 863, 864 (2d Dep’t 2014); then citing *Young v. N.Y.C. Health & Hosps. Corp.*, 91 N.Y.2d 291, 296–97, 693 N.E.2d 196, 200, 670 N.Y.S.2d 169, 173 (1998); then citing *Green v. Associated Med. Prof’ls of N.Y., PLLC*, 111 A.D.3d 1430, 1431–32, 975 N.Y.S.2d 319, 321 (4th Dep’t 2013); then citing *Ozimek v. Staten Island Physicians Practice, P.C.*, 101 A.D.3d 833, 834–35, 955 N.Y.S.2d 650, 652 (2d Dep’t 2012); then citing *Mule v. Peloro*, 60 A.D.3d 649, 650, 875 N.Y.S.2d 146, 148 (2d Dep’t 2009); and then citing *Solomonik v. Elahi*, 282 A.D.2d 734, 735, 725 N.Y.S.2d 49, 51 (2d Dep’t 2001)).

50. *Id.* at 1000, 46 N.Y.S.3d at 153.

statute of limitations with respect to a derivative claim (assuming it applies to the main claim).⁵¹

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, 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.”⁵² Whether a non-domiciliary is transacting business within the meaning of CPLR 302(a)(1) is a fact based determination, requiring a finding that the “activities were purposeful and established a ‘substantive relationship between the transaction and the claim asserted.’”⁵³

In *D&R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro*, the Court of Appeals considered the “transacts any business” clause of CPLR 302(a)(1).⁵⁴ In *D&R*, an action was commenced against a Spanish winery for breaching an oral agreement with the plaintiff, also a Spanish company, by failing to pay the plaintiff commissions on sales of its wine to a New York distributor located by the plaintiff for import into the United States.⁵⁵ The “defendant did not answer the complaint or otherwise appear and . . . the plaintiff obtained a default judgement.”⁵⁶ The “[d]efendant subsequently moved to vacate the default judgment . . . for lack of personal and subject matter jurisdiction.”⁵⁷ The trial court denied the motion, but the appellate division reversed, granting summary judgment to the defendant.⁵⁸

51. *Dolce v. Powalski*, 13 A.D.3d 1200, 1201, 787 N.Y.S.2d 595, 596 (4th Dep’t 2004) (first citing *Ewen-Massa v. Hemmerlein*, 237 A.D.2d 968, 968, 654 N.Y.S.2d 536, 537 (4th Dep’t 1997); and then citing *Cappelluti v. Sckolnick*, 207 A.D.2d 763, 764, 616 N.Y.S.2d 398, 398 (2d Dep’t 1994)).

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

53. N.Y. C.P.L.R. 302(a)(1), (3); *Paterno v. Laser Spine Inst.*, 24 N.Y.3d 370, 376, 23 N.E.3d 988, 992, 998 N.Y.S.2d 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)).

54. N.Y. C.P.L.R. 302(a)(1), (3); 29 N.Y.3d 292, 297, 78 N.E.3d 1172, 1175, 56 N.Y.S.3d 488, 491 (2017).

55. *D&R Glob. Selections*, 29 N.Y.3d at 295–96, 78 N.E.3d at 1174, 56 N.Y.S.3d at 490.

56. *Id.* at 296, 78 N.E.3d at 1174, 56 N.Y.S.3d at 490.

57. *Id.*

58. *Id.* at 296, 78 N.E.3d at 1174–75, 56 N.Y.S.3d at 490–91; *D&R Glob. Selections, S.L. v. Bodega Olegario Falcon Pineiro*, 90 A.D.3d 403, 406, 934 N.Y.S.2d 19, 22 (2011) (vacating default judgement and remanding to lower court); *D&R Glob. Selections, S.L. v. Bodega Olegario Falcon Pineiro*, 128 A.D.3d 486, 487, 9 N.Y.S.3d 234, 235 (2015) (denying

On appeal, the Court of Appeals found that the defendant did purposefully transact business in New York, holding that although the oral agreement was formed in Spain, it required the plaintiff to locate a distributor to import the defendant's wine and to achieve this goal, the "defendant accompanied the plaintiff to New York several times . . . to attend wine industry events," where the plaintiff introduced the defendant to a New York-based distributor.⁵⁹ Accordingly, the Court of Appeals found that these activities gave rise to the "purposeful creation" of the agreement with the New York distributor.⁶⁰

With respect to whether the plaintiff's cause of action had an "articulable nexus or substantial relationship"⁶¹ with the defendant's transaction, the Court of Appeals again noted the significance of the defendant's travel to New York and exclusive distribution agreement for importing the defendant's wine in the United States, as well as that those sales (and unpaid commissions) were "at the heart of the plaintiff's claim."⁶²

The Court of Appeals also considered CPLR 302(a)(1) in *Rushaid v. Pictet & Cie.*⁶³ There, a Saudi resident and corporation sought to assert jurisdiction over a private Swiss bank and its officers and general partners.⁶⁴ According to the plaintiffs, its former employees were taking kickbacks and bribes and the defendants knowingly provided assistance to them by creating a corporate entity and bank accounts to launder the illegally obtained money.⁶⁵ The defendants did not maintain an office or branch in New York, but the plaintiffs argued that jurisdiction applied pursuant to CPLR 302(a)(1), based upon the defendants' use of correspondent accounts in New York to process wire transfers.⁶⁶

As above, the analysis was twofold: (1) whether the defendant "conducted sufficient activities" constituting a business transaction in this state; and (2) whether the claims in the complaint "arise from the

motion for summary judgement); *D&R Glob. Selections, S.L. v. Bodega Olegario Falcon Pineiro*, 26 N.Y.3d 914, 914, 44 N.E.3d 937, 937, 23 N.Y.S.3d 639, 639 (2015) (granting motion for leave to appeal).

59. *D&R Glob. Selections*, 29 N.Y.3d at 298, 78 N.E.3d at 1176, 56 N.Y.S.3d at 492.

60. *Id.* (quoting *Fischbarg v. Doucet*, 9 N.Y.3d 375, 381, 880 N.E.2d 22, 28, 849 N.Y.S.2d 501, 506 (2007)).

61. *Id.* at 299, 78 N.E.3d at 1177, 56 N.Y.S. at 493.

62. *Id.* at 299, 78 N.E.3d at 1176–77, 56 N.Y.S.3d at 492–93 (quoting *Licci v. Lebanese Canadian Bank*, 20 N.Y.3d 327, 340, 984 N.E.2d 893, 901, 960 N.Y.S.2d 695, 703 (2012)).

63. 28 N.Y.3d 316, 319, 68 N.E.3d 1, 4, 45 N.Y.S.3d 276, 279 (2016).

64. *Id.* at 319–20, 68 N.E.3d at 4, 45 N.Y.S.3d at 279.

65. *Id.* at 320, 68 N.E.3d at 5, 45 N.Y.S.3d at 280.

66. *Id.* at 322, 68 N.E.3d at 6, 45 N.Y.S.3d at 281 (citing N.Y. C.P.L.R. 302(a)(1) (McKinney 2010)).

transaction[.]”⁶⁷

On the first prong, the Court found that the New York correspondent account was an integral part of the alleged money laundering scheme and “[i]t is precisely the fact that [the] defendants chose New York, when other jurisdictions were available, that makes the ‘New York connection ‘volitional’ and not ‘coincidental.’”⁶⁸ The Court further noted that “the jurisdictional analysis is the foreign bank’s conduct vis-à-vis the correspondent bank, meaning how it uses the correspondent accounts—not whether some other bank could have been used instead.”⁶⁹ For the second prong, the Court held that the allegations “easily satisfy [the] nexus requirement,” as the plaintiffs alleged that the defendants aided and abetted the employees’ breach of their fiduciary duty, conspired together to avert the plaintiffs’ property, and “[t]hese claims depend on the assertions that [the] defendants established the banking structure in New York and Geneva [to] orchestrate[] the money laundering [as] part of the bribery/kickback scheme.”⁷⁰ Four judges signed on to the majority opinion; two participating in a lengthy concurrence.⁷¹ Three judges dissented.⁷²

Whether jurisdiction is proper over a foreign corporation was at issue before the Second Department in *Fernandez v. DaimlerChrysler, AG*.⁷³ In *Fernandez*, the decedent “lost control of her 2003 Jeep Liberty” and died from severe injuries.⁷⁴ “[T]he plaintiff . . . as executor of the decedent’s estate, commenced [a] wrongful death action sounding in . . . strict products liability and negligence against, among others, DaimlerChrysler, A.G., [] a German corporation that manufactures Mercedes-Benz vehicles in Germany.”⁷⁵

When examining the grounds for jurisdiction under CPLR 301, the Second Department noted that “if it engaged in a continuous and systematic course of doing business . . . [that] jurisdiction is warranted.”⁷⁶ According to the Court, the plaintiff failed to establish that the activities of the defendant subjected it to personal jurisdiction of the

67. *Id.* at 323, 68 N.E.3d at 7, 45 N.Y.S.3d at 282 (citing N.Y. C.P.L.R. 302(a)(1)).

68. *Rushaid*, 28 N.Y.3d at 328, 68 N.E.3d at 11, 45 N.Y.S.3d at 286.

69. *Id.*

70. *Id.* at 329, 68 N.E.3d at 11–12, 45 N.Y.S.3d at 286–87.

71. *Id.* at 343, 68 N.E.3d at 22, 45 N.Y.S.3d at 297.

72. *Id.*

73. 143 A.D.3d 765, 766–67, 40 N.Y.S.3d 128, 131 (1st Dep’t 2016) (citing N.Y. C.P.L.R. 302(a)(1) (McKinney 2010)).

74. *Id.* at 765, 40 N.Y.S.3d at 130.

75. *Id.*

76. *Id.* at 766, 40 N.Y.S.3d at 130 (quoting *Goel v. Ramachandran*, 111 A.D.3d 783, 786, 975 N.Y.S.2d 428, 433 (2d Dep’t 2013)).

supreme court pursuant to CPLR 301.⁷⁷

The Second Department further held that the jurisdiction was not proper pursuant to CPLR 302(a)(1), because the plaintiff failed to establish that the defendant conducted purposeful activities which bore a “substantial relationship” or an “articulable nexus” to the subject matter of the action.⁷⁸ Indeed, the Second Department noted that the defendant “did not manufacture the [] vehicle or the allegedly defective parts [did not] sell the [] vehicle to the decedent,” and also held that the plaintiff failed to establish that any activities conducted by the defendant were related to the recalls that were issued on the allegedly defective parts of the subject vehicle.⁷⁹

Accordingly, because the plaintiff failed to demonstrate that the causes of action arose from activities in New York, the Second Department held that the trial court was not authorized to exercise personal jurisdiction over the defendant and properly denied jurisdictional discovery.⁸⁰

2. CPLR 308: Personal Service Upon a Natural Person

CPLR 308 concerns personal service upon a natural person.⁸¹ CPLR 308(4) provides that where service under CPLR 308(1) and CPLR 308(2) cannot be made with due diligence, “nail and mail”—the affixing of the summons to the door of either the actual place of business, dwelling place, or place of abode, and mailing to the last known residence by first class mail - may be appropriate.⁸² However, service of process on a Saturday can be set aside if it is “maliciously procure[d]” to be served on a person who “keeps Saturday as holy time”⁸³

The day of service was reviewed by the Second Department in *JPMorgan Chase Bank, N.A. v. Lilker*.⁸⁴ There, the plaintiff brought an

77. *Id.* (first citing *Magdalena v. Lins*, 123 A.D.3d 600, 601, 999 N.Y.S.2d 44, 45 (1st Dep’t 2014); then citing *Rachel’s Children Reclamation Found., Inc., v. Elon*, No. 501415/13, 2015 N.Y. Slip Op. 51516(U), at 7 (Sup. Ct. Kings Cty. Oct. 5, 2015)).

78. *Fernandez*, 143 A.D.3d at 767, 40 N.Y.S.3d at 131 (first citing *Johnson v. Ward*, 4 N.Y.3d 516, 520, 829 N.E.2d 1201, 1203, 797 N.Y.S.2d 33, 35 (2005); then citing *Okeke v. Momah*, 132 A.D.3d 648, 650, 17 N.Y.S.3d 746, 748 (2d Dep’t 2015); then citing *Pichardo v. Zayas*, 122 A.D.3d 699, 701, 996 N.Y.S.2d 176, 179 (2d Dep’t 2014); then citing *Armouth Int’l, Inc., v. Haband Co.*, 277 A.D.2d 189, 190, 715 N.Y.S.2d 438, 439 (2d Dep’t 2000); and then citing *Menary v. Outward Bound, Inc.*, 262 A.D.2d 616, 617, 692 N.Y.S.2d 683, 684 (2d Dep’t 1999)); N.Y. C.P.L.R. 302(a)(1) (McKinney 2010).

79. *Fernandez*, 143 A.D.3d at 767, 40 N.Y.S.3d at 131.

80. *Id.* at 768, 40 N.Y.S.3d at 132.

81. N.Y. C.P.L.R. 308 (McKinney 2010).

82. N.Y. C.P.L.R. 308(4).

83. N.Y. GEN. BUS. LAW § 13 (McKinney 2012).

84. 153 A.D.3d 1243, 1244, 61 N.Y.S.3d 578, 580 (2d Dep’t 2017).

action against mortgagors to foreclose a consolidated mortgage on a residential property.⁸⁵ The mortgagors moved to vacate judgment of foreclosure and sale entered upon failure to answer complaint or appear at inquest, due to their failure to satisfy notice requirements of note or Real Property Actions and Proceedings Law.⁸⁶

Specifically, after four unsuccessful attempts at personal service, the defendants served process under CPLR 308(4).⁸⁷ “[S]ervice was accomplished on a Saturday afternoon.”⁸⁸ In support of their motion to vacate, the plaintiffs argued the Court did not have personal jurisdiction over them because service of process was in violation of General Business Law § 13.⁸⁹ Specifically, despite knowledge by the plaintiff’s counsel that the defendants were Orthodox Jews who adhere to the Sabbath, the affixation portion was improperly performed on a Saturday.⁹⁰ In support of their motion, the defendants submitted a letter from their counsel forwarded almost eight weeks prior to the service, together with a fax transmission report indicating successful transmission, “which advised the plaintiff’s counsel[] . . . that the defendants [were] ‘observant, Orthodox Jews,’ who [could not] be served on a Saturday.”⁹¹ According to the Second Department, such proof “was sufficient to establish, prima facie, that the plaintiff’s counsel had knowledge that the defendants were protected from Saturday service by General Business Law [§ 13].”⁹² The plaintiff’s counsel denied receiving the letter.⁹³

Accordingly, the Second Department remitted the matter to the trial court to determine whether the plaintiff’s attorney had knowledge that the defendants could not be properly served on a Saturday.⁹⁴

3. CPLR 312-a: Personal Service by Mail

CPLR 312-a(a) provides for “an alternative to methods of personal service authorized by sections 307, 308, 310, 311 or 312”, and permits a

85. *Id.* at 1243, 61 N.Y.S.3d at 580.

86. *Id.* at 1244, 61 N.Y.S.3d at 580; N.Y. REAL PROP. ACTS. LAW § 1304 (McKinney 2009).

87. *JPMorgan Chase Bank, N.A.*, 153 A.D.3d at 1243, 61 N.Y.S.3d at 580; N.Y. C.P.L.R. 308(4) (McKinney 2010).

88. *JPMorgan Chase Bank, N.A.*, 153 A.D.3d at 1243, 61 N.Y.S.3d at 580.

89. *Id.* at 1244, 61 N.Y.S.3d at 580; N.Y. GEN. BUS. LAW § 13 (McKinney 2012).

90. *JP Morgan Chase Bank, N.A.*, 153 A.D.3d at 1244, 61 N.Y.S.3d at 580.

91. *Id.* at 1245, 61 N.Y.S.3d at 581.

92. *Id.* (first citing *In re Kushner*, 200 A.D.2d 1, 2 (1st Dep’t 1994); and then citing *Jaffe Ross & Light, LLP, v. Mann*, No. 15894/2012, 2013 N.Y. Slip Op. 50825(U), at 2 (Sup. Ct. New York Cty. May 9, 2013)).

93. *Id.*

94. *Id.* at 1246, 61 N.Y.S.3d at 582.

summons and complaint, summons with notice, “or notice of petition and petition . . . to be served by, first class mail, postage prepaid, . . . together with two copies of a statement of service and acknowledgment of receipt.”⁹⁵ This method of service, however, only works if the defendant(s) send back the acknowledgment of service within thirty days after its receipt.⁹⁶

The above provision was at issue before the Third Department in *Komanicky v. Contractor*.⁹⁷ There, the plaintiff named sixteen defendants as a part of a medical malpractice action, and elected to serve all named defendants via first class mail pursuant to CPLR 312-a.⁹⁸ However, none of the defendants signed and returned the acknowledgement receipt form, as required by CPLR 312-a(b).⁹⁹ The plaintiff then attempted to serve a summons with notice by personal delivery, but did not do so within 120 days of filing the action.¹⁰⁰ The defendants made a pre-answer motion to dismiss on several grounds, including lack of personal jurisdiction due to improper service.¹⁰¹ The trial court granted the defendants’ motions.¹⁰²

“On appeal, the Third Department held that “[t]o the extent that the plaintiff’s papers in opposition to the motions can be read as requesting an extension of time to serve [the] defendants pursuant to CPLR 306-b, such affirmative relief should have been sought by way of a cross motion on notice.”¹⁰³ The court further noted that regardless, the plaintiff failed to demonstrate an “existence of facts that would support the granting of such relief,” considering the “plaintiff’s lack of diligence in attempting to effectuate service in the time period prescribed,” and his request for an extension was made more than fifteen months after the 120-day

95. N.Y. C.P.L.R. 312-a(a) (McKinney 2016).

96. N.Y. C.P.L.R. 312-a(b).

97. 146 A.D.3d 1042, 1043, 43 N.Y.S.3d 761, 762 (3d Dep’t 2017).

98. *Id.* at 1042–43, 43 N.Y.S.3d at 761–62.

99. *Id.* at 1043, 43 N.Y.S.3d at 762 (first citing N.Y. C.P.L.R. 312-a(b); then citing *Cordero v. Barreiro-Cordero*, 129 A.D.3d 899, 900, 10 N.Y.S.3d 454, 455 (2d Dep’t 2015); then citing *Strong v. Bi-Lo Wholesalers*, 265 A.D.2d 745, 745, 698 N.Y.S.2d 738, 738 (3d Dep’t 1999); then citing *Dominguez v. Stimpson Mfg. Corp.*, 207 A.D.2d 375, 375, 616 N.Y.S.2d 221, 222 (2d Dep’t 1994); and then citing *Shenko Elec. v. Comm’r of Labor*, 161 A.D.2d 1212, 1213, 558 N.Y.S.2d 859, 859 (4th Dep’t 1990)).

100. *Id.* (citing N.Y. C.P.L.R. 306-b (McKinney 2010)).

101. *Id.* at 1043, 43 N.Y.S.3d at 761.

102. *Komanicky*, 146 A.D.3d at 1043, 43 N.Y.S.3d at 761.

103. *Id.* at 1043, 43 N.Y.S.3d at 762 (first citing N.Y. C.P.L.R. 2215 (McKinney 2016); then citing *Ontario Square Realty Corp. v. Assessor of Farmington*, 100 A.D.3d 1469, 1469, 953 N.Y.S.2d 543, 544 (4th Dep’t 2012); then citing *Lee v. Colley Grp. McMontebello, LLC*, 90 A.D.3d 1000, 1001, 934 N.Y.S.2d 831, 832 (2d Dep’t 2011); then citing *DeLorenzo v. Gabbino Pizza Corp.*, 83 A.D.3d 992, 993, 921 N.Y.S.2d 565, 565 (2d Dep’t 2011); and then citing *Rinaldi v. Rochford*, 77 A.D.3d 720, 720, 908 N.Y.S.2d 592, 593 (2d Dep’t 2010)).

expiration and after the defendants moved for dismissal.¹⁰⁴ Accordingly, the Third Department affirmed the supreme court's dismissal.¹⁰⁵

C. Article 6: Joinder of Claims, Consolidation, and Severance

1. CPLR 602: Consolidation

Pursuant to CPLR 602(a),

[w]hen actions involving a common question of law or fact are pending before a court, the court . . . may order a joint trial of any or all matters [], may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.¹⁰⁶

Additionally, if an action is pending in a supreme court, the supreme court “may, upon motion, remove to itself an action pending in another court and consolidate it or have it tried together with that in the supreme court.”¹⁰⁷

In *Cocchi v. State*, a motorist brought an action in the Court of Claims against the State of New York relating to an accident in which her vehicle struck the center divider on the roadway and was then struck by another vehicle.¹⁰⁸ The plaintiff also commenced an action against two defendants in supreme court.¹⁰⁹ The defendants in the supreme court action made a motion for an injunction staying the plaintiff from proceeding in her action in supreme court until the Court of Claims matter was resolved, or, “alternatively, for the consolidation of the two actions in the Court of Claims” pursuant to CPLR 602.¹¹⁰

Although the court was sympathetic to the defendants' situation, citing two examples of the problems faced when a plaintiff is allegedly injured through the actions of a State and other tortfeasors, the court ruled that granting the relief requested would require an amendment to the State Constitution, section 19(a), which prohibits the supreme court from removing an action from the Court of Claims.¹¹¹ Accordingly, because

104. *Id.* at 1043–44, 43 N.Y.S.3d at 762 (first citing *Leader v. Maroney*, 97 N.Y.2d 95, 105–06, 761 N.E.2d 1018, 1025, 736 N.Y.S.2d 291, 298 (2001); then citing *Hine v. Bambara*, 66 A.D.3d 1192, 1193, 889 N.Y.S.2d 685, 687 (3d Dep't 2009); then citing *Anonymous v. N.Y. State Office of Children & Family Servs.*, 53 A.D.3d 810, 812, 862 N.Y.S.2d 392, 394 (3d Dep't 2008); and then citing *City of Albany v. Wise*, 298 A.D.2d 783, 784, 750 N.Y.S.2d 653, 654–55 (3d Dep't 2002)).

105. *Id.* at 1044, 43 N.Y.S.3d at 763.

106. N.Y. C.P.L.R. 602(a) (McKinney 2016).

107. N.Y. C.P.L.R. 602(b).

108. 52 Misc. 3d 561, 562, 30 N.Y.S.3d 481, 482 (Ct. Cl. 2016).

109. *Id.*

110. *Id.*

111. *Id.* at 563, 30 N.Y.S.3d at 483 (first citing *Maric Mech., Inc., v. New York*, 145 Misc.

there was no authority that would allow the Court of Claims to transfer a case, or to stay it in supreme court, the Court of Claims denied the defendants' motion.¹¹²

D. Article 16: Limited Liability of Persons Jointly Liable

1. CPLR 1601: Limited liability of persons jointly liable

CPLR 1601 provides that when a verdict or decision

is determined in favor of a claimant . . . involving two or more tortfeasors jointly liable or in a claim against the state and the liability of a defendant is found to be fifty percent or less of the total liability assigned to all persons liable, the liability of such defendant . . . for non-economic loss shall not exceed that defendant's equitable share determined in accordance with the relative culpability of each person contributing to the total non-economic loss; provided, however, that the culpable conduct of any person not a party to the action shall not be considered in determining any equitable share herein if the claimant proves that with due diligence he or she was unable to obtain jurisdiction over such person in said action (or in a claim against the state, in a court of this state) . . .¹¹³

CPLR 1601 was at issue before the Court of Appeals in *Artibee v. Home Place Corp.*¹¹⁴ There, the plaintiffs sought damages for injuries sustained when a branch from a tree fell and struck their car while driving on a state highway.¹¹⁵ The plaintiffs also sued the State of New York in the Court of Claims.¹¹⁶ The defendant in the supreme court action moved "to introduce evidence at trial of the State's negligence and for a jury charge directing the apportionment of liability for the plaintiff's injuries between the defendant and the State."¹¹⁷ The plaintiff objected, noting that nothing barred the jury from hearing evidence relating to the State's potential liability, "but objected to allowing the jury to apportion fault against the State."¹¹⁸

The supreme court held that the evidence would be admissible but denied the apportionment charge.¹¹⁹ The Third Department held that the defendant was entitled to an apportionment charge to permit it to establish

2d 287, 292, 546 N.Y.S.2d 525, 529 (Ct. Cl. 1989); and then citing DAVID D. SIEGEL, N.Y. PRACTICE § 128 n.1 (5th ed. 2011)).

112. *Id.*

113. N.Y. C.P.L.R. 1601 (McKinney 2016).

114. 28 N.Y.3d 739, 742, 71 N.E.3d 1205, 1206, 49 N.Y.S.3d 638, 639 (2017).

115. *Id.* at 742, 71 N.E.3d at 1206–07, 49 N.Y.S.3d at 639–40.

116. *Id.* at 742, 71 N.E.3d at 1207, 49 N.Y.S.3d at 640.

117. *Id.*

118. *Id.* at 742–43, 71 N.E.3d at 1207, 49 N.Y.S.3d at 640.

119. *Artibee*, 28 N.Y.3d at 743, 71 N.E.3d at 1207, 49 N.Y.S.3d at 640.

that its share of fault was fifty percent or less.¹²⁰ On appeal, the Court of Appeals reversed, holding that the factfinder in a supreme court action cannot apportion fault to the State pursuant to CPLR 1601(1), “when a plaintiff claims that both the State and a private party are liable for noneconomic losses.”¹²¹ The Court further noted that, in any event, apportionment is unavailable unless the claimant proves that “with due diligence” he or she “was unable to obtain *jurisdiction over such person in said action*.”¹²² And so, while the statutory language permits the State to seek apportionment in the Court of Claims against a private tortfeasor “[it] does not, however, contain similar, express enabling language to allow apportionment against the State in a [s]upreme [c]ourt action.”¹²³

The Court of Appeals further noted that “if a defendant believes that it has been held liable in [s]upreme [c]ourt for what is actually the State’s negligent conduct, the defendant can file suit for contribution in the Court of Claims.”¹²⁴

E. Article 21: Papers

1. CPLR 2106: Affirmation of truth of statement by attorney, physicians, osteopath or dentist.

CPLR 2106 enables an attorney admitted to practice in the court of the state, and a physician, osteopath, or dentist authorized by law to practice in the state, to execute an affirmation in lieu of an affidavit.¹²⁵

Whether the rule extends to doctors not authorized to practice medicine in New York was at issue before the Third Department in *Sul-Lowe v. Hunter*.¹²⁶ There, the defendants moved for summary judgment and in opposition, the plaintiff submitted affidavits from her treating physicians, who each stated that they were licensed in Massachusetts, but not in New York.¹²⁷ Accordingly, the Court held that the plaintiff failed to raise a triable issue of fact in opposition to the defendant’s prima facie showing, as the affidavits were without probative value.¹²⁸

120. *Artibee v. Home Place Corp.*, 132 A.D.3d 96, 100, 14 N.Y.S.3d 817, 821 (3d Dep’t 2015).

121. *Artibee*, 28 N.Y.3d at 742, 71 N.E.3d at 1206, 49 N.Y.S.3d at 639.

122. *Id.* at 745, 71 N.E.3d at 1209, 49 N.Y.S.3d at 642 (quoting N.Y. C.P.L.R. 1601 (McKinney 2016)).

123. *Id.* at 745, 71 N.E.3d at 1208, 49 N.Y.S.3d at 641 (citing SIEGEL, *supra* note 111).

124. *Id.* at 751, 71 N.E.3d at 1213, 49 N.Y.S.3d at 646 (citing *Bay Ridge Air Rights, Inc., v. New York*, 44 N.Y.2d 49, 54, 375 N.E.2d 29, 30–31, 404 N.Y.S.2d 73, 75 (1978)).

125. N.Y. C.P.L.R. 2106(a) (McKinney 2012).

126. 148 A.D.3d 1326, 1329, 48 N.Y.S.3d 844, 846 (3d Dep’t 2017).

127. *Id.*

128. *Id.* (first citing N.Y. C.P.L.R. 2106; then citing *Tomeo v. Beccia*, 127 A.D.3d 1071, 1073, 7 N.Y.S.3d 472, 475 (2d Dep’t 2015); and then citing *Worthy v. Good Samaritan Hosp.*

F. Article 22: Stay, Motions, Orders, and Mandates

1. CPLR 2221: Motion affecting prior order.

CPLR 2221(a) provides that “[a] motion for leave to renew or reargue a prior motion, for leave to appeal from, or to stay, vacate[,] or modify, an order shall be made, on notice, to the judge who signed the order, unless he or she is for any reason unable to hear it”¹²⁹ This section also provides for certain exceptions, including default and when a motion is made without notice.¹³⁰

The above provision was at issue in *Lewis v. Rutkovsky*, a medical malpractice action against a physician and medical group; the defendants moved for summary judgment, which the trial court denied as untimely.¹³¹ The defendants then made a motion to reargue, the trial court denied the motion, and the defendants appealed.¹³²

According to the First Department, although the trial court “purported to deny the motion to reargue, it nonetheless considered the merits of the defendant’s argument that the inclement weather on the motion’s due date provided good cause for the delay.”¹³³ Thus, the trial court “in effect, granted reargument.”¹³⁴ In so doing, the First Department deemed the order appealable, and in turning to the merits, the First Department held that the supreme court improvidently exercised its discretion and reversed its determination that the motion for summary judgment was untimely.¹³⁵

CPLR 2221(d)(3) provides that a motion for leave to reargue “shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry.”¹³⁶

This provision was appealed to the Second Department in *Shahid v. City of New York*.¹³⁷ In *Shahid*, the petitioner commenced a proceeding pursuant to Article 78 to vacate and set aside liens imposed by “the City of New York, upon real property, owned by the petitioner, for unpaid emergency repairs.”¹³⁸ The City moved to dismiss the petition in May

Med. Ctr., 50 A.D.3d 1023, 1024, 857 N.Y.S.2d 178, 179–80 (2d Dep’t 2008)).

129. N.Y. C.P.L.R. 2221(a) (McKinney 2010).

130. *Id.*

131. 153 A.D.3d 450, 451, 58 N.Y.S.3d 391, 392 (1st Dep’t 2017).

132. *Id.*

133. *Id.* at 453, 58 N.Y.S.3d at 394.

134. *Id.* (citing 1234 Broadway, LLC v. N.Y. State Div. of Hous. & Cmty. Renewal, 102 A.D.3d 628, 629, 958 N.Y.S.2d 393, 394 (1st Dep’t 2013)).

135. *Id.*

136. N.Y. C.P.L.R. 2221(d)(3) (McKinney 2010).

137. 144 A.D.3d 1163, 1163, 43 N.Y.S.3d 393, 394 (2d Dep’t 2016).

138. *Id.* at 1163, 43 N.Y.S.3d at 394.

2011.¹³⁹ Initially, the motion was granted; however, after reargument, the supreme court vacated its prior determination and denied the motion to dismiss.¹⁴⁰ The City then moved to reargue.¹⁴¹ By order and judgment dated May 2014, the court vacated its prior determination and granted the City's motion to dismiss for failure to exhaust administrative remedies.¹⁴² "Thereafter, the petitioner again moved for leave to reargue," and in an order dated September 2014, "the [s]upreme [c]ourt reexamined the parties' contentions and concluded that its determination in the order and judgment of May [2014] was not erroneous."¹⁴³ The petitioner appealed.¹⁴⁴

In rejecting the petitioner's argument that the supreme court erred in granting respondent's leave to reargue because the motion was untimely under CPLR 2221(d)(3), the court held that "[w]here, as here, the prior order was never served with notice of entry, 'the 30-day period set forth in CPLR 2221(d)(3) has not been triggered.'"¹⁴⁵

CPLR 2221(e) provides the requisite showing for a motion for leave to renew, including a "reasonable justification for the failure to present such facts on the prior motion."¹⁴⁶

"Reasonable justification" was reviewed by the Second Department in *Priant v. New York City Transit Authority*.¹⁴⁷ There, the plaintiff moved for leave to serve a late notice of claim and the supreme court granted the plaintiff's motion.¹⁴⁸ The defendant appealed, and the Second Department reversed.¹⁴⁹ "The plaintiff then moved for leave to renew . . . his prior motion."¹⁵⁰ The supreme court denied the motion and the plaintiff appealed.¹⁵¹

The Second Department noted that "[o]n a postappeal motion for leave to renew, the movant bears a heavy burden of showing due diligence in presenting the new evidence to the [s]upreme [c]ourt."¹⁵²

139. *Id.*

140. *Id.*

141. *Id.*

142. *Shahid*, 144 A.D.3d at 1163, 43 N.Y.S.3d at 394.

143. *Id.*

144. *Id.*

145. *Id.* at 1164, 43 N.Y.S.3d at 394 (quoting *Churchill v. Malek*, 84 A.D.3d 446, 446, 922 N.Y.S.2d 341, 342 (1st Dep't 2011)).

146. N.Y. C.P.L.R. 2221(e) (McKinney 2010).

147. 142 A.D.3d 491, 491, 36 N.Y.S.3d 201, 202 (2d Dep't 2016).

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Priant*, 142 A.D.3d at 491–92, 36 N.Y.S.3d at 202 (first citing *In re Crane*, 127 A.D.3d 747, 748, 8 N.Y.S.3d 219, 221 (2d Dep't 2015); then citing *Derby v. Bitan*, 112

Unfortunately for the plaintiff, the Second Department held that “the plaintiff failed to establish that the new evidence offered in support of his motion for leave to renew could not have been discovered earlier through the exercise of due diligence,” and therefore, the supreme court’s denial to review his prior motion for leave to serve a late notice of claim was properly denied.¹⁵³

However, in *In re Defendini*, a decision delivered on the same day as *Priant*, the Second Department observed that

[t]he requirement that a motion for renewal be based on new facts is a flexible one, and it is within the court’s discretion to grant renewal upon facts known to the moving party at the time of the original motion “if the movant offers a reasonable excuse for the failure to present those facts on the prior motion.”¹⁵⁴

In *In re Defendini*, a probate proceeding was brought in surrogate’s court and the petitioner was awarded summary judgment.¹⁵⁵ “After obtaining new counsel, the appellants moved, by order to show cause . . . to renew their opposition to the prior motion for summary judgment . . . based upon new facts that had not been offered in the prior motion.”¹⁵⁶ The surrogate’s court denied the motion for leave to renew, finding “that the appellants failed to demonstrate a reasonable justification for their failure to present the facts in opposition to the prior motion,” and the respondents appealed.¹⁵⁷

In reversing the surrogate’s court denial, the Second Department concluded that the respondents provided a reasonable justification for their failure to present the new facts in opposition to the prior motion for summary judgment, and held that “[u]pon renewal, the [s]upreme [c]ourt should have denied the motion for summary judgment on the petition, since the new facts offered by the appellants were sufficient to raise a triable issue of fact in opposition to the prima facie showing”¹⁵⁸

A.D.3d 881, 882, 977 N.Y.S.2d 405, 406 (2d Dep’t 2013); and then citing *Andrews v. N.Y.C. Hous. Auth.*, 90 A.D.3d 962, 963, 934 N.Y.S.2d 840, 841 (2d Dep’t 2011)).

153. *Id.* at 492, 36 N.Y.S.3d at 203 (first citing *Andrews*, 90 A.D.3d at 963, 934 N.Y.S.2d at 841; then citing *Ferdico v. Zweig*, 82 A.D.3d 1151, 1152, 919 N.Y.S.2d 521, 523 (2d Dep’t 2011); then citing *Sicurelli v. Sicurelli*, 73 A.D.3d 735, 735, 901 N.Y.S.2d 305, 306 (2d Dep’t 2010); and then citing *Levitt v. Cty. of Suffolk*, 166 A.D.2d 421, 423, 560 N.Y.S.2d 487, 488 (2d Dep’t 1990)).

154. 142 A.D.3d 500, 502, 35 N.Y.S.3d 495, 497 (2d Dep’t 2016) (quoting *JRP Holding, Inc. v. Pratt*, 113 A.D.3d 823, 824, 978 N.Y.S.2d 902, 903 (2d Dep’t 2014)) (citing *Surdo v. Levittown Pub. Sch. Dist.*, 41 A.D.3d 486, 486, 837 N.Y.S.2d 315, 317 (2d Dep’t 2007)).

155. *Id.* at 501, 35 N.Y.S.3d at 496.

156. *Id.* at 501, 35 N.Y.S.3d at 497.

157. *Id.*

158. *Id.* at 502, 35 N.Y.S.3d at 497 (first citing *Sharp v. Kosmalski*, 40 N.Y.2d 119, 123, 351 N.E.2d 721, 724, 386 N.Y.S.2d 72, 76 (1976); and then citing *Rowe v. Kingston*, 94

*G. Article 23: Subpoenas, Oaths, and Affirmations**1. CPLR 2304: Motion to quash, fix conditions or modify.*

CPLR 2304 provides that “[a] motion to quash, fix conditions[,] or modify a subpoena shall be made promptly in the court in which the subpoena is returnable.”¹⁵⁹

The above provision was at issue before the Third Department in *Empire Wine & Spirits LLC v. Colon*.¹⁶⁰ In *Empire Wine*, the petitioner, a wine retailer, was charged with sixteen counts of improper conduct for shipping wine to customers in states that prohibit their residents from receiving such shipments, and commenced a special proceeding to compel respondents, senior officials in the State Liquor Authority, to comply with nonjudicial subpoenas seeking their testimony at an administrative hearing.¹⁶¹ The respondents cross-moved to quash pursuant to CPLR 2304, on the grounds that the information sought was “privileged, irrelevant, and beyond the scope of the administrative hearing, cumulative and burdensome.”¹⁶²

With respect to whether the information was privileged, the Third Department noted that “although a subpoena duces tecum can be vacated in advance on the basis of privilege, a different analysis applied to a subpoena that seeks testimony rather than documents,” and if a “witness has been served with a subpoena ad testificandum, ‘a claim of privilege cannot be asserted until the witness appears before the requisite tribunal and is presented with a question that implicates protected information.’”¹⁶³ Thus, the Third Department found that in the case before it, the respondent was

entitled to invoke the attorney-client privilege if and when [the] petitioner propounds questions that implicate protected information, but . . . must first comply with the subpoena by appearing at the administrative hearing. “Only in this context can an intelligent appraisal be made as to the legitimacy of the claim of privilege.”¹⁶⁴

A.D.3d 852, 853–54, 942 N.Y.S.2d 161, 163 (2d Dep’t 2012)).

159. N.Y. C.P.L.R. 2304 (McKinney 2010).

160. 145 A.D.3d 1157, 1157, 43 N.Y.S.3d 542, 544 (3d Dep’t 2016).

161. *Id.* at 1157, 43 N.Y.S.3d at 543–44.

162. *Id.* at 1158, 43 N.Y.S.3d at 544.

163. *Id.* at 1158, 43 N.Y.S.3d at 544–45 (quoting *Holmes v. Winter*, 22 N.Y.3d 300, 319, 3 N.E.3d 694, 706, 980 N.Y.S.2d 357, 369 (2013)) (citing *Beach v. Shanley*, 62 N.Y.2d 241, 248, 465 N.E.2d 304, 307, 476 N.Y.S.2d 765, 768 (1984)).

164. *Id.* at 1158, 43 N.Y.S.3d at 545 (quoting *Pennock v. Lane*, 18 A.D.2d 1043, 1044, 238 N.Y.S.2d 588, 590 (3d Dep’t 1963)) (first citing *Desai v. Blue Shield of Northeastern N.Y., Inc.*, 128 A.D.2d 1021, 1022, 513 N.Y.S.2d 562, 564 (3d Dep’t 1987); and then citing *Ocean-Clear, Inc. v. Cont’l Cas. Co.*, 94 A.D.2d 717, 718–19, 462 N.Y.S.2d 251, 253 (2d Dep’t 1983)).

*H. Article 30: Remedies and Pleading**1. CPLR 3012: Service of pleadings and demand for complaint.*

CPLR 3012(b) provides that “[i]f a complaint is served without the summons, the defendant may serve a written demand,” within twenty days after service, “for the complaint within the time provided in subdivision (a) of Rule 320 for an appearance.”¹⁶⁵

At issue before the First Department in *Wimbledon Financing Master Fund, Ltd. v. Weston Capital Management, LLC*, was whether the defendant was permitted to serve a demand for a complaint after being served, notwithstanding that service of the summons was not technically complete.¹⁶⁶ More specifically, the plaintiff commenced an action against twenty-six defendants by filing a summons with notice and service pursuant to CPLR 308(2) (i.e., nail-and-mail).¹⁶⁷ Before the plaintiff had filed proof of service, one of the defendants served a demand for a complaint on November 3, 2015, and the “[p]laintiff, in taking the position that the demand was a nullity, asked the defendant to agree to accept a complaint by the end of December.”¹⁶⁸ The defendant then moved to dismiss on the twenty-first day after service of its demand and the plaintiff ultimately served a complaint, approximately one month later.¹⁶⁹

The supreme court granted the defendants’ motion to dismiss and denied the plaintiff’s cross-motion pursuant to CPLR 3012(d), for an extension of time to serve its complaint.¹⁷⁰ On appeal to the First Department, the appellate division agreed that CPLR 3012(b) permitted the defendant to serve a demand for a complaint after being served with the summons and notice, and recognizing that although service was not technically complete, “[t]he time frames applicable to [the] defendants set forth in CPLR 3012(b) are deadlines, not mandatory start dates.”¹⁷¹ Ultimately, the appellate division reversed the trial court, granting the plaintiff’s cross-motion under CPLR 3012(d) for an extension of time to serve the complaint.¹⁷²

CPLR 3012(d) concerns an “[e]xtension of time to appear or plead” and allows a court to extend the “time to appear or plead . . . upon such

165. N.Y. C.P.L.R. 3012(b) (McKinney 2010).

166. 150 A.D.3d 427, 427–28, 55 N.Y.S.3d 1, 1 (1st Dep’t 2017).

167. *Id.* at 427, 55 N.Y.S.3d at 1 (citing N.Y. C.P.L.R. 308(2) (McKinney 2010)).

168. *Id.* at 428, 55 N.Y.S.3d at 2.

169. *Id.*

170. *Id.* at 427, 55 N.Y.S.3d at 1.

171. *Wimbledon Fin. Master Fund, Ltd.*, 150 A.D.3d at 428, 55 N.Y.S.3d at 2 (Micro-Spy, Inc., v. Small, 9 A.D.3d 122, 125, 778 N.Y.S.2d 86, 88 (2d Dep’t 2004)).

172. *Id.*

terms as may be just and upon a showing of reasonable excuse for the delay or default.”¹⁷³

In *HSBC Bank USA, N.A. v. Powell*, however, the Second Department appeared to go a step further, holding that a defendant must not only provide a reasonable excuse but must also “demonstrate a potentially meritorious defense to the action.”¹⁷⁴

2. CPLR 3012-a: Certificate of merit in medical, dental, and podiatric malpractice actions.

CPLR 3012-a requires that in any action for medical, dental or podiatric malpractice, a complaint be accompanied by a certificate, executed by the attorney for the plaintiff, stating that the attorney for the plaintiff consulted with a “physician,” “dentist,” or “podiatrist.”¹⁷⁵

The certification was appealed to the Third Department in *Calcagno v. Orthopedic Associates of Dutchess County, PC*.¹⁷⁶ In *Calcagno*, the “plaintiffs’ counsel filed a complaint accompanied by a document indicating that the required certificate of merit . . . would be . . . filed within ninety days after service of the complaint.”¹⁷⁷ Despite several requests from the defendants, the certificate of merit remained outstanding, and the defendants moved to dismiss the complaint.¹⁷⁸ The plaintiff then “filed a certificate of merit and cross-moved seeking leave for late service.”¹⁷⁹ “Without addressing the issue of timeliness, [the] supreme court granted [the] defendants’ motion . . . and denied the plaintiffs’ cross-motion, finding that [the] plaintiffs’ certificate of merit was inadequate.”¹⁸⁰

On appeal, the Third Department affirmed, holding that the plaintiff’s certificate, which was “based upon an affidavit of [the plaintiff’s] physical therapist, who opined, ‘as a physical therapist,’ that the defendants’ actions were ‘departures from good and accepted medical practice,’” was defective because “a physical therapist cannot diagnose

173. N.Y. C.P.L.R. 3012(d) (McKinney 2010).

174. *HSBC Bank USA, N.A. v. Powell*, 148 A.D.3d 1123, 1124, 51 N.Y.S.3d 116, 118 (2d Dep’t 2017) (quoting *JPMorgan Chase Bank, N.A. v. Comfort Boampong*, 145 A.D.3d 981, 982, 44 N.Y.S.3d 189, 190 (2d Dep’t 2016)) (first citing N.Y. C.P.L.R. 3012(d); then citing *TCIF REO GCM, LLC, v. Walker*, 139 A.D.3d 704, 705, 32 N.Y.S.3d 223, 225 (2d Dep’t 2016); then citing *Bank of N.Y. Mellon v. Colucci*, 138 A.D.3d 1047, 1047, 30 N.Y.S.3d 667, 668 (2d Dep’t 2016); and then citing *HSBC Bank USA, N.A. v. Lafazan*, 115 A.D.3d 647, 648, 983 N.Y.S.2d 32, 32 (2d Dep’t 2014)).

175. N.Y. C.P.L.R. 3012-a (McKinney 2010).

176. 148 A.D.3d 1279, 1279, 48 N.Y.S.3d 832, 833 (3d Dep’t 2017).

177. *Id.* at 1280, 48 N.Y.S.3d at 833.

178. *Id.*

179. *Id.*

180. *Id.*

and is incompetent to attest to the standard of care applicable to physicians and surgeons.”¹⁸¹ Further, with respect to the timing of the certificate, the court noted that while the mere failure to timely file a CPLR 3012-a certificate does not support dismissal of the action, because the plaintiff could not provide a reasonable excuse for the delay and failed to establish the merits of the action, the Third Department held that they were not entitled to an extension of time pursuant to CPLR 2004.¹⁸²

3. CPLR 3016: Particularity in specific actions.

CPLR 3016(a) requires that, in an action for libel or slander, “the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally.”¹⁸³

However, in *Arvanitakis v. Lester*, the Second Department held that in addition to the above language, the complaint also must “set forth the particular words allegedly constituting defamation . . . and it must also allege the time, place, and manner of the false statement and specify to whom it was made.”¹⁸⁴

I. Article 31: Disclosure

1. CPLR 3101: Scope of disclosure.

CPLR 3101(d)(1)(i) deals with the disclosure of expert witnesses, and was at issue in *Schmitt v. Oneonta City of School District*.¹⁸⁵ There, the “plaintiffs filed a notice to take the deposition of [a] treating physician” and, upon inquiry by the defendant, advised “that the purpose of the deposition was to preserve” the provider’s videotaped testimony for trial.¹⁸⁶ The defendant objected, citing the plaintiffs’ failure to provide any expert disclosure under CPLR 3101(d)(1)(i), the plaintiffs argued that no such disclosure was required, and the examination progressed over the

181. *Calcagno*, 148 A.D.3d at 1280, 48 N.Y.S.3d at 833 (first citing *Howard v. Espinosa*, 70 A.D.3d 1091, 1094, 898 N.Y.S.2d 267, 270 (3d Dep’t 2010); then citing *Glasgow v. Chou*, 33 A.D.3d 959, 962, 826 N.Y.S.2d 303, 306 (2d Dep’t 2006); and then citing *Tornatore v. Haggerty*, 307 A.D.2d 522, 522–23, 763 N.Y.S.2d 344, 345 (3d Dep’t 2003)).

182. *Id.* at 1281, 48 N.Y.S.3d at 834 (first citing N.Y. C.P.L.R. 2004 (McKinney 2012); then citing *Horn v. Boyle*, 260 A.D.2d 76, 79, 699 N.Y.S.2d 572, 574–75 (3d Dep’t 1999); then citing *Sisario v. Amsterdam Mem’l Hosp.*, 146 A.D.2d 837, 838, 536 N.Y.S.2d 242, 243 (3d Dep’t 1989); and then citing *Dorgan v. Dunda*, 165 A.D.2d 949, 949, 561 N.Y.S.2d 110, 111 (3d Dep’t 1990)).

183. N.Y. C.P.L.R. 3016(a) (McKinney 2010).

184. 145 A.D.3d 650, 651, 44 N.Y.S.3d 71, 72–73 (2d Dep’t 2016) (emphasis added) (first citing N.Y. C.P.L.R. 3016(a); and then citing *Dillon v. City of New York*, 261 A.D.2d 34, 38, 704 N.Y.S.2d 1, 5 (1st Dep’t 1999)).

185. N.Y. C.P.L.R. 3101(d)(1)(i) (McKinney 2005); 151 A.D.3d 1254, 1254, 55 N.Y.S.3d 834, 835 (3d Dep’t 2017).

186. *Id.* at 1254, 55 N.Y.S.3d at 836.

defendant's continuing objection.¹⁸⁷

According to the Third Department, “[u]nlike the First, Second and Fourth Departments, this [c]ourt interprets CPLR 3101(d)(1)(i) as ‘requir[ing] disclosure to any medical professional, even a treating physician or nurse, who is expected to give expert testimony.’”¹⁸⁸ The court further noted that

[a]lthough the demand is a continuing request, with no set time period for its compliance, where a party hires an expert in advance of trial and then fails to comply [with] or supplement an expert disclosure demand, preclusion may be appropriate if there is prejudice and a willful failure to disclose.¹⁸⁹

With respect to the remedy, the court did not find any willful violation and therefore found preclusion inapplicable.¹⁹⁰ Instead, the court held that if the plaintiff wanted to use the treating doctor as an expert witness, and not a fact witness, they must tender an expert disclosure that satisfies all the requirements of CPLR 3101(d)(1)(i) and produce the doctor, at their expense, to be deposed as an expert.¹⁹¹

The same provision was at issue before the Court of Appeals in *Rivera v. Montefiore Medical Center*.¹⁹² There, the plaintiff moved to strike all trial testimony from the defendant's expert that the decedent's death was caused by a sudden cardiac arrest, contending that the expert's testimony should be precluded based on the lack of specificity of the defendant's disclosure—namely, that the expert would testify “on the issue of causation” and “as to the possible causes of decedent's injuries and contributing factors.”¹⁹³ The First Department affirmed the supreme court's order denying the plaintiff's motion to exclude such testimony as untimely,¹⁹⁴ and the Court of Appeals affirmed.¹⁹⁵

According to the Court, the supreme court did not abuse its discretion as a matter of law, noting that even if the

187. *Id.*

188. *Id.* at 1255, 44 N.Y.S.3d at 836 (quoting *Norton v. Nguyen*, 49 A.D.3d 927, 929, 853 N.Y.S.2d 671, 673 (3d Dep't 2008)) (first citing *Hamer v. City of New York*, 106 A.D.3d 504, 509, 965 N.Y.S.2d 99, 104 (1st Dep't 2013); then citing *Jing Xue Jiang v. Dollar Rent a Car, Inc.*, 91 A.D.3d 603, 604, 938 N.Y.S.2d 90, 92 (2d Dep't 2012); and then citing *Andrew v. Hurh*, 34 A.D.3d 1331, 1331, 824 N.Y.S.2d 546, 547 (4th Dep't 2006)).

189. *Id.* (alteration in original) (quoting *Mead v. Rajadhyax' Dental Grp.*, 34 A.D.3d 1139, 1140, 824 N.Y.S.2d 790, 792 (3d Dep't 2006)).

190. *Schmitt*, 151 A.D.3d at 1256, 55 N.Y.S.3d at 837.

191. *Id.* at 1256–57, 55 N.Y.S.3d at 837.

192. 28 N.Y.3d 999, 1000, 64 N.E.3d 274, 274, 41 N.Y.S.3d 454, 454 (2016).

193. *Id.* at 1000, 64 N.E.3d at 275, 41 N.Y.S.3d at 455.

194. *Rivera v. Montefiore Med. Ctr.*, 123 A.D.3d 424, 425, 998 N.Y.S.2d 321, 323 (1st Dep't 2014).

195. *Rivera*, 28 N.Y.3d at 1003, 64 N.E.3d at 276, 41 N.Y.S.3d at 456.

defendant's disclosure was deficient, such deficiency was readily apparent; the disclosure identified 'causation' as a subject matter but did not provide any indication of the theory or basis for the expert's opinion . . .

. . . [and t]he lower courts were entitled to determine . . . that the time to challenge the statement's content had passed because the objection was readily apparent from the face of the disclosure and could have been raised—and potentially cured—before trial.¹⁹⁶

To note, practitioners who take issue with an expert disclosure should object to the defects before trial and, perhaps, should file a motion in limine to preclude proof. In the absence of a pretrial objection and defects in the disclosure—raised for the first time at trial—may be waived.

2. Protective Orders

A court may prevent abusive discovery or suppress information improperly obtained by issuing a protective order that denies, limits, conditions, or regulates discovery.¹⁹⁷

In *DiCostanzo v. Schwed*, the “plaintiff commenced [an] action sounding in, among other things, medical malpractice . . . for injuries [] allegedly sustained” during a laparoscopic sigmoid colectomy.¹⁹⁸ After commencing the action, the plaintiff served the defendants with a request for the production of documents and the defendant “objected to the plaintiff's production request in its entirety and subsequently moved for a protective order vacating [the] request on the basis that most of the [] demands made by [the] plaintiff were overly broad, burdensome, immaterial, duplicative[,] or otherwise improper.”¹⁹⁹ The supreme court granted the defendant's request for the protective order, the plaintiff appealed, and the Third Department affirmed.²⁰⁰

According to the Third Department, “a majority of [the] plaintiff's production demands were not adequately limited in time, as many sought information spanning over two decades, and they were not limited to only those items relevant to the particular claims asserted . . .”²⁰¹ Further, they “were duplicative, unduly vague, or overly broad,” and sought privileged information under Education Law § 6527(3) and Public Health

196. *Id.* at 1002, 64 N.E.3d at 276, 41 N.Y.S.3d at 456.

197. N.Y. C.P.L.R. 3103(a) (McKinney 2016 & Supp. 2018).

198. 146 A.D.3d 1044, 1044, 45 N.Y.S.3d 625, 626 (3d Dep't 2017).

199. *Id.* (citing N.Y. C.P.L.R. 3103).

200. *Id.* at 1045, 45 N.Y.S.3d at 626.

201. *Id.* at 1045, 45 N.Y.S.3d at 627.

Law § 2805-m(2).²⁰² The court further rejected the plaintiff’s argument that the applicability of the privileged information “was limited to her medical malpractice claims and . . . did not apply to her claims against [the defendant] for its allegedly deceptive business practices, false advertising, and negligent credentialing”²⁰³ The court noted that “to allow plaintiff to ‘circumvent the confidentiality provisions . . . would undermine the policy underlying those statutes—to encourage thorough and candid peer review of physicians.”²⁰⁴

J. Article 32: Accelerated Judgment

1. CPLR 3217: Voluntary discontinuance.

CPLR 3217(a)(1) provides that, “[a]ny party asserting a claim may discontinue it without an order . . . by serving upon all parties to the action a notice of discontinuance at any time before a responsive pleading is served”²⁰⁵

In *Harris v. Ward Greenberg Heller & Reidy LLP*, the Fourth Department considered whether a voluntary discontinuance was untimely.²⁰⁶ There, the plaintiff commenced an action asserting causes of action arising out of prior litigation, and several of the defendants made CPLR 3211 pre-answer motions to dismiss.²⁰⁷ “Prior to the return date on the motions, [the] plaintiff filed voluntary notice of discontinuance pursuant to CPLR 3217)(respect to all defendants,” but the supreme court “determined that the plaintiff’s voluntary discontinuance was untimely and granted the relief sought [by the defendants].”²⁰⁸

On appeal, the Fourth Department reversed, holding that the CPLR 3217 notices were “not untimely because a motion to dismiss pursuant to CPLR 3211 is not a ‘responsive pleading’ for purposes of CPLR 3217(a)(1)” and therefore did not cut off the plaintiff’s option of voluntarily discontinuing as of right.²⁰⁹ The court therefore reversed the supreme court’s dismissal (and impositions of sanctions) as “academic,” holding “that a determination that a motion to dismiss is a responsive

202. *Id.*; N.Y. EDUC. LAW § 6527(3) (McKinney 2016 & Supp. 2018); N.Y. PUB. HEALTH LAW § 2805-m(2) (McKinney 2016 & Supp. 2018).

203. *DiCostanzo*, 146 A.D.3d at 1046, 45 N.Y.S.3d at 628.

204. *Id.* at 1046–47, 45 N.Y.S. at 628 (quoting *Logue v. Velez*, 92 N.Y.2d 13, 17, 699 N.E.2d 365, 367, 677 N.Y.S.2d 6, 8 (2d Dep’t 1998)) (citing *Stalker v. Abraham*, 69 A.D.3d 1172, 1173–74, 897 N.Y.S.2d 250, 252–53 (3d Dep’t 2010)).

205. N.Y. C.P.L.R. 3217(a) (McKinney 2005 & Supp. 2018).

206. 151 A.D.3d 1808, 1808, 58 N.Y.S.3d 769, 770 (4th Dep’t 2017).

207. *Id.*; N.Y. C.P.L.R. 3211 (McKinney 2016).

208. *Id.*

209. *Id.* at 1809, 58 N.Y.S.3d at 770.

pleading is contrary to the statute . . . [and] if the Legislature intended for a motion to dismiss to defeat a plaintiff's absolute right to serve a notice of discontinuance, it could have easily said so."²¹⁰

K. 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 an own initiative, the court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may 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 as long as deemed reasonable by the court.²¹¹

In *Smith v. Rudolph*, a pedestrian brought an action against a bus driver and city transit authority for injuries sustained when she was struck by a bus.²¹² Following a verdict which found the defendants seventy percent at fault, the plaintiff moved to set aside the jury's verdict and for a new trial on the ground of improper conduct by defense counsel.²¹³ The trial court granted the plaintiff's motion and the defendants appealed.²¹⁴

When affirming the trial court, the First Department noted that "[w]e all admire the work of an advocate who performs his or her duties with competence and diligence on behalf of a client. Competent and diligent representation [] does not meant a lawyer should strive to 'win' a case at all costs."²¹⁵ The First Department observed the "multiple instances of defense counsel's misconduct," including several speaking objections, unfair and false denigration of the plaintiff's surgeon when the plaintiff's injuries were in significant dispute, his pattern of interrupting and speaking over the court, the volume of his voice, and his assertion that the plaintiff was pursuing the lawsuit only because she wanted to "take the rest of her life off."²¹⁶

According to the First Department, defense counsel's conduct "created a climate of hostility that so obscured the issues as to have made the trial unfair," and "undoubtedly served to leave the intended, indelible

210. *Id.* at 1810, 58 N.Y.S.3d at 771.

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

212. 151 A.D.3d 58, 59, 51 N.Y.S.3d 507, 509 (1st Dep't 2017).

213. *Id.* at 61, 51 N.Y.S.3d at 510.

214. *Id.*

215. *Id.* at 59, 51 N.Y.S.3d at 508.

216. *Id.* at 61–63, 51 N.Y.S.3d at 510–11.

impression upon the mind of jurors.”²¹⁷ The First Department also rejected the defendants’ argument that the fact that the jury found them seventy percent liable “indicated that the jury was capable of fairly evaluating the evidence and arguments”²¹⁸ Indeed, the First Department noted that while “an apportionment of liability may support a finding of careful deliberation by the jury, . . . it is more likely that the jury reached a compromised verdict due to defense counsel’s pervasive misconduct.”²¹⁹

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. Part 202.70(g), Rule 32-a

Effective October 17, 2016, section 202.70(g) of Rule 32-a of the Uniform Rules for the supreme and county courts²²⁰ was adopted to read as follows:

Rule 32-a. Direct testimony by affidavit. The court may require that direct testimony of a party’s own witness in a non-jury trial or evidentiary hearing shall be submitted in affidavit form, provided, however, that the court may not require the submission of a direct testimony affidavit from a witness who is not under the control of the party offering testimony. The submission of direct testimony in affidavit form shall not affect any right to conduct cross-examination or re-direct examination of the witness.²²¹

B. Part 202.70(g), Rule 30(c)

Effective May 1, 2017, section 202.70(g) of Rule 30(c) of the Uniform Rules for the supreme and county courts (Rules of Practice for the Commercial Division)²²² was adopted to read as follows:

Consultation regarding expert testimony. The court may direct that prior to the pre-trial conference, counsel for the parties consult in good faith to identify those aspects of their respective experts’ anticipated testimony that are not in dispute. The court may further direct that any

217. *Smith*, 151 A.D.3d at 63–64, 51 N.Y.S.3d at 511–12 (citing *Duran v. Ardee Assocs.*, 290 A.D.2d 366, 367, 736 N.Y.S.2d 597, 598 (1st Dep’t 2002)).

218. *Id.* at 66, 51 N.Y.S.3d at 513.

219. *Id.*

220. 38 N.Y. Reg. 87 (Nov. 23, 2016) (codified at 22 N.Y.C.R.R. § 202.70(g), R. 32-a (2016)).

221. 22 N.Y.C.R.R. § 202.70(g) (2016).

222. 39 N.Y. Reg. 88 (Apr. 19, 2017) (codified at 22 N.Y.C.R.R. § 202.70(g), R. 30(c) (2016)).

agreements reached in this regard shall be reduced to a written stipulation.²²³

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.

223. 22 N.Y.C.R.R. § 202.70(g).