

CIVIL PRACTICE

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INTRODUCTION

During this *Survey* year,¹ New York’s Court of Appeals and appellate divisions published hundreds of decisions that impact virtually all practitioners. These cases have been “surveyed” in this Article, meaning the authors have made an effort to alert practitioners and academicians about interesting commentary, 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 authors did not endeavor to discuss every Court of Appeals or appellate division decision.

I. LEGISLATIVE ENACTMENTS AND AMENDMENTS

A. CPLR 2111

Chapter 99, § 3 of the Laws of 2017, effective July 24, 2017, amended CPLR 2111 to extend the date for subsection (b) 2-a—i.e., the exclusion of cases from the filing of papers by facsimile and electronic means, to September 1, 2018.²

1. July 1, 2017 through June 30, 2018.

2. Act of July 24, 2017, 2017 McKinney’s Sess. Laws of N.Y., ch. 99, at 659–60 (codified at N.Y. C.P.L.R. 2111 (McKinney Supp. 2019)).

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B. CPLR 2112

Chapter 99, § 3 of the Laws of 2017, effective July 24, 2017, amended CPLR 2112, to eliminate present exclusions from mandatory e-filing in the appellate division.³

C. CPLR 4518

Chapter 229, § 1 of the Laws of 2017, effective August 21, 2017, amended CPLR 4518 to provide that hospital records located in a jurisdiction other than New York State may be admissible “by either a certification or authentication by the head of the hospital, laboratory, department or bureau of a municipal corporation or of the state or by an employee delegated for that purpose, or by a qualified physician.”⁴

II. CASE LAW DEVELOPMENTS*A. Article 2: Limitations of Time**1. CPLR 202: Cause of Action Accruing Without the State*

Pursuant to CPLR 202, “[a]n action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply.”⁵

CPLR 202 was discussed by the Court of Appeals in *2138747 Ontario Inc. v. Samsung C&T Corporation*.⁶ There, at issue before the Court was whether a broadly drawn contractual choice-of-law provision specifying that the parties’ nondisclosure agreement was to be “governed by, construed and enforced” in accordance with New York law precluded the application of CPLR 202.⁷ More specifically, a lawsuit was commenced which asserted causes of action for breach of contract and unjust enrichment, to which the defendants moved to dismiss arguing that they were time-barred pursuant to Ontario’s two-year statute of

3. Act of July 24, 2017, 2017 McKinney’s Sess. Laws of N.Y., ch. 99, at 660–61 (codified at N.Y. C.P.L.R. 2112 (McKinney Supp. 2019)).

4. Act of August 21, 2017, 2017 McKinney’s Sess. Laws of N.Y., ch. 229, at 796–97 (codified at N.Y. C.P.L.R. 4518(c) (McKinney 2007 & Supp. 2019)).

5. N.Y. C.P.L.R. 202 (McKinney 2003).

6. (*2138747 Ontario II*), 31 N.Y.3d 372, 374, 103 N.E.3d 774, 775, 78 N.Y.S.3d 703, 704 (2018).

7. *Id.* at 374, 376–77, 103 N.E.3d at 775–77, 78 N.Y.S.3d at 704–06; N.Y. C.P.L.R. 202.

limitations pursuant to the borrowing statute.⁸ The supreme court dismissed the plaintiff's claims as time-barred and the appellate division affirmed, concluding that CPLR 202 applied.⁹

On review before the Court of Appeals, the Court acknowledged the “fundamental, neutral precept of contract interpretation . . . that agreements are to be construed in accord with the parties’ intent,” and “[t]he best evidence of what parties to a written agreement intend is what they say in their writing.”¹⁰ While contractual choice-of-law provisions typically only apply to substantive issues, the parties agreed that the contract “should be interpreted as reflecting the parties’ intent to apply both the substantive and procedural law of New York State to their disputes.”¹¹

Accordingly, because “CPLR 202 is an abiding part of New York’s procedural law,” and because the choice-of-law provision does not specifically demonstrate an intent to solely adopt New York’s six-year statute of limitations in CPLR 213(2) to the exclusion of CPLR 202, the New York’s highest court affirmed dismissal of the plaintiff’s case.¹²

2. CPLR 214: Actions to Be Commenced Within Three Years: For Non-Payment of Money Collected on Execution; For Penalty Created by Statute; To Recovery Chattel; For Injury to Property; For Personal Injury; For Malpractice Other Than Medical, Dental or Podiatric Malpractice; To Annul a Marriage on the Ground of Fraud

CPLR 214(2) provides that “an action to recover upon liability, penalty or forfeiture created or imposed by statute except as provided in sections 213 and 215” must be commenced within three years.¹³

In *Contact Chiropractic, P.C. v. New York City Transit Authority*, the plaintiff provided health services to a patient (claimant), for injuries she suffered in a motor vehicle accident while she was a passenger on a

8. *2138747 Ontario II*, 31 N.Y.3d at 375, 103 N.E.3d at 776, 78 N.Y.S.3d at 705.

9. *Id.* at 376, 103 N.E.3d at 776, 78 N.Y.S.3d at 705 (citing *2138747 Ontario, Inc. v. Samsung C&T Corp. (2138747 Ontario I)*, 144 A.D.3d 122, 39 N.Y.S.3d 10 (1st Dep’t 2016)).

10. *Id.* at 377, 103 N.E.3d at 777, 78 N.Y.S.3d at 706 (alteration in original) (quoting *Greenfield v. Philles Records*, 98 N.Y.2d 562, 569, 780 N.E.2d 166, 170, 750 N.Y.S.2d 565, 569 (2002)).

11. *Id.* (internal quotations omitted) (first quoting *Portfolio Recovery Assoc., LLC v. King*, 14 N.Y.3d 410, 416, 927 N.E.2d 1059, 1061, 901 N.Y.S.2d 575, 577 (2010); and then quoting *2138747 Ontario I*, 144 A.D.3d at 126–27, 39 N.Y.S.3d at 14).

12. *Id.* at 378, 103 N.E.3d at 777–78, 78 N.Y.S.3d at 706–07 (first citing N.Y. C.P.L.R. 202; and then citing N.Y. C.P.L.R. 213(2) (McKinney 2003 & Supp. 2019)).

13. N.Y. C.P.L.R. 214(2) (McKinney 2003).

bus owned by the defendant.¹⁴ The defendant did not have no-fault coverage, but was self-insured related to that risk.¹⁵ Following assignment of the right to recover first-party benefits from the defendant, the plaintiff submitted claims for reimbursement to the defendant Transit Authority between March 14, 2001, and August 27, 2001, and on January 8, 2007, commenced an action to recover unpaid invoices.¹⁶

The defendant moved to dismiss on the ground that the three-year statute of limitations applied pursuant to CPLR 214(2), as opposed to the six-year period of limitations pursuant to CPLR 213(2), for an action based upon a contractual obligation or indemnity.¹⁷ The trial court denied the defendant's motion, relying, in part, on the Second Department's application of a six-year statute of limitations to no-fault claims regardless of whether the prospective payor has an insurance policy or is self-insured, and the appellate division affirmed.¹⁸

Reversing, the Court of Appeals adopted the First Department's approach and resolved the split between the two appellate divisions, holding that "the three-year statute of limitations as set forth in CPLR 214(2), which governs disputes with respect to liabilities created by statute," controls.¹⁹ In so holding, the Court recognized that CPLR 214(2) does not apply to all claims where a party seeks a statutory remedy, but applies if "liability would not exist but for a statute."²⁰ And, having decided *Aetna Life Ins. v. Nelson*, where the Court held that no-fault benefits "are a form of compensation unknown at common law, resting on predicates independent of the fault or negligence of the injured party,"²¹ it reversed, holding that a claim for reimbursement of no-fault benefits is purely statutory and thus subject to CPLR 214(2).²²

14. 31 N.Y.3d 187, 192–93, 99 N.E.3d 867, 869, 75 N.Y.S.3d 474, 476 (2018).

15. *Id.* at 193, 99 N.E.3d at 869, 75 N.Y.S.3d at 476.

16. *Id.*

17. *Id.* (first citing N.Y. C.P.L.R. 214(2); and then citing N.Y. C.P.L.R. 213(2)).

18. *Id.* at 193–94, 99 N.E.3d at 870, 75 N.Y.S.3d at 477 (citing *ELRAC, Inc. v. Suero*, 38 A.D.3d 544, 545, 831 N.Y.S.2d 475, 476 (2d Dep't 2007)).

19. *Contact Chiropractic, P.C.*, 31 N.Y.3d at 196, 99 N.E.3d at 871, 75 N.Y.S.3d at 478 (citing N.Y. C.P.L.R. 214(2)).

20. *Id.* at 196, 99 N.E.3d at 872, 75 N.Y.S.3d at 478 (citing *Gaidon v. Guardian Life Ins. Co. of Am.*, 96 N.Y.2d 201, 208, 750 N.E.2d 1078, 1082, 727 N.Y.S.2d 30, 34 (2001)).

21. 67 N.Y.2d 169, 175, 492 N.E.2d 386, 389, 501 N.Y.S.2d 313, 316 (1986).

22. *Contact Chiropractic, P.C.*, 31 N.Y.3d at 196–97, 99 N.E.3d at 872, 75 N.Y.S.3d at 479; N.Y. C.P.L.R. 214(2)).

3. *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”²³

The above provision was at issue before the Court of Appeals in *Lohnas v. Luzzi*, and more specifically, whether the plaintiff raised triable issues of fact concerning the tolling of the statute of limitations based on continuous treatment.²⁴ There, the plaintiff brought a medical malpractice action against a defendant orthopedic surgeon who treated her for chronic shoulder problems beginning in 1998.²⁵ According to the Court, the defendant performed shoulder surgery in 1999, five postoperative visits the following year, and a one-year post-surgery appointment.²⁶ The plaintiff did not see the defendant until nineteen months later, at which time she experienced increased shoulder pain and was recommended injections and a second surgery, performed in January 2002, followed by a postoperative visit in April 2002.²⁷ The plaintiff did not see the defendant thereafter until her surgery was aggravated in September 2003.²⁸

Following the September 2003 surgery, there was a gap in treatment of over thirty months at which time the plaintiff returned to the defendant in April 2006 because of continued pain.²⁹ The defendant referred the plaintiff to his partner for a third surgery because he was no longer performing them, and the plaintiff ultimately began seeing a new orthopedic surgeon in July 2006.³⁰

In September 2008, the plaintiff commenced a medical malpractice action against the defendant alleging that he negligently performed her 1999 surgery and subsequently failed to diagnose his errors, resulting in continued problems with her shoulder and necessitating a subsequent surgery.³¹ Subsequent to the completion of discovery, the defendant

23. N.Y. C.P.L.R. 214-a (McKinney 2003 & Supp. 2019).

24. 30 N.Y.3d 752, 755, 94 N.E.3d 892, 893, 71 N.Y.S.3d 404, 405 (2018).

25. *Id.* at 754–55, 94 N.E.3d at 893, 71 N.Y.S.3d at 405.

26. *Id.* at 755, 94 N.E.3d at 893, 71 N.Y.S.3d at 405.

27. *Id.* at 754, 94 N.E.3d at 893, 71 N.Y.S.3d at 405.

28. *Id.* at 755, 94 N.E.3d at 893, 71 N.Y.S.3d at 405.

29. *Lohnas*, 30 N.Y.3d at 755, 94 N.E.3d at 893, 71 N.Y.S.3d at 405.

30. *Id.*

31. *Id.*

moved for summary judgment to dismiss the allegation of malpractice based on conduct before March 2006.³² The supreme court denied the motion on the ground that the plaintiff had at least raised “triable issues of fact” concerning the applicability of the continuous treatment doctrine to toll the statute of limitations, and the appellate division affirmed.³³

On appeal, the Court of Appeals noted that the continuous treatment doctrine, in “seek[ing] to maintain the physician-patient relationship” so that the patient can “receive the most efficacious medical care,” also “recogni[zes] that the doctor not only is in a position to identify and correct [the] malpractice, but is best placed to do so.”³⁴ According to the Court, while the defendant raised arguments concerning the gaps between the plaintiff’s appointments, the plaintiff raised sufficient issues of fact “as to whether she . . . intended a continuous course of treatment,” including seeing the defendant “over the course of four years, under[going] two surgeries” performed by him, not seeing any other doctor, returning to him thirty months later and discussing a third surgery with him, and accepting his referral to his partner solely because he “was no longer performing such surgeries.”³⁵

Further, the Court rejected the defendant’s argument that his telling the plaintiff “she should return ‘as needed’ foreclose[d] a finding that [they] anticipated further treatment,” noting that the “plaintiff’s injury was a chronic, long-term condition which both plaintiff and defendant understood to require continued care,” and that each of her visits related to the same issue.³⁶ The Court also reaffirmed its earlier holding in *Massie v. Crawford*, holding that a gap in treatment longer than the statute of limitations is not in and of itself dispositive that a statute has run, and rejected any holding to the contrary.³⁷

As to the dissent’s argument that the Court’s decision would result in “dire consequences” and require a “‘ghastly’ written notice from a doctor banishing a patient,” the Court held that the alternative option

32. *Id.*

33. *Id.* (quoting *Lohnas v. Luzi*, 140 A.D.3d 1717, 1718, 33 N.Y.S.3d 637, 638 (4th Dep’t 2016)).

34. *Lohnas*, 30 N.Y.3d at 756, 94 N.E.3d at 894, 71 N.Y.S.3d at 406 (internal quotations omitted) (quoting *McDermott v. Torre*, 56 N.Y.2d 399, 408, 437 N.E.2d 1108, 1112, 452 N.Y.S.2d 351, 355 (1982)).

35. *Id.*

36. *Id.* (quoting *Borgia v. New York*, 12 N.Y.2d 151, 157, 187 N.E.2d 777, 779, 237 N.Y.S.2d 319, 322 (1962)).

37. *Id.* (quoting *Massie v. Crawford*, 78 N.Y.2d 516, 519, 583 N.E.2d 935, 937, 577 N.Y.S.2d 223, 224 (1991)) (rejecting *Marmol v. Green*, 7 A.D.3d 682, 682, 777 N.Y.S.2d 512, 512 (2d Dep’t 2004) and *Bulger v. Nassau Cty. Med. Ctr.*, 266 A.D.2d 212, 212, 697 N.Y.S.2d 345, 346 (2d Dep’t 1999)).

proffered by the dissent would disadvantage plaintiffs by requiring them to get a second opinion without access to resources.³⁸ Further, the Court noted that the test being applied before it was not whether it would be “absurd” for the plaintiff to commence suit but only whether “reasonable minds may indeed differ on whether [the] plaintiff ultimately makes her case—somewhat the point in denying summary judgment.”³⁹

CPLR 214-a was also at issue before the Court of Appeals in *B.F. v. Reproductive Medicine Associates of New York, LLP*.⁴⁰ As reported in this Article’s 2015–2016 addition, in *B.F.*, 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 in vitro fertilization, resulting in the conception and birth of plaintiffs’ impaired child (i.e., a “wrongful birth” claim).⁴¹ The appellate division affirmed the trial court’s order which denied the defendants’ motion to dismiss the cause of action for medical malpractice, holding that the wrongful birth claim accrued upon the birth of the infant and was not barred by the applicable statute of limitations.⁴² The First Department affirmed and the defendants appealed.⁴³

In affirming, the Court of Appeals first noted that obviously, any cause of action permitting the parents to recover for extraordinary care and treatment expenses as a consequence of a birth of a child with a disability is restricted to instances where the parents can demonstrate that “but for the defendants’ breach of their duty to advise the parents, they would not have been required to assume [extraordinary financial] obligations” and that such a cause of action belongs to the parents alone and that the child cannot bring a claim for “wrongful life.”⁴⁴ Further, the Court held that as a matter of first impression, the limitations period on a medical malpractice claim as outlined above, begins to run on the date of the birth of the impaired child, whose care and support will occasion the pecuniary damages that parents may seek to recover.⁴⁵

38. *Id.* at 757, 94 N.E.3d at 894–95, 71 N.Y.S.3d at 406–07.

39. *Id.* at 757–58, 94 N.E.3d at 895, 71 N.Y.S.3d at 407.

40. 30 N.Y.3d 608, 613, 92 N.E.3d 766, 769, 69 N.Y.S.3d 543, 546 (2017).

41. *Id.* at 612–13, 92 N.E.3d at 768–69, 69 N.Y.S.3d at 545–46; see Michael Anthony Bottar, *2015–16 Survey of New York Law*, 67 SYRACUSE L. REV. 789, 794 (2017).

42. *Id.* at 613, 92 N.E.3d at 769, 69 N.Y.S.3d at 546.

43. *Id.*

44. *Id.* at 614, 92 N.E.3d at 769–70, 69 N.Y.S.3d at 546–47.

45. *Id.* at 614–17, 92 N.E.3d at 770–71, 69 N.Y.S.3d at 547–48.

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

1. CPLR 306-b: Service of the Summons and Complaint, Summons with Notice, Third-Party Summons and Complaint, or Petition with a Notice of Petition or Order to Show Cause

CPLR 306-b provides that service of a “summons and complaint, summons with notice, third-party summons and complaint, or petition with a notice of petition or order to show cause shall be made within one hundred twenty days after the commencement of the action or proceeding,” except where the applicable statute of limitations is four months or less, on which service shall not be made later than fifteen days after the date on which the applicable statute of limitations expires.⁴⁶

The timeframe for service was at issue before the Second Department in *Holbeck v. Sosa-Berrios*.⁴⁷ There, the plaintiff commenced an action in September 2014, to recover damages for personal injuries two days before the expiration of the statute of limitations.⁴⁸ In January 2015, utilizing the affix and mail method at an address listed on the police accident report three years earlier, the plaintiff served the summons and complaint.⁴⁹ Following receipt “of the summons and complaint in May 2015, the defendant moved pursuant to CPLR 306-b and 3211(a) to dismiss” and “[t]he plaintiff cross-moved pursuant to CPLR 306-b for . . . [an extension of time] to serve.”⁵⁰ “The Supreme Court granted the defendant’s motion and denied the plaintiff’s cross-motion[;] the plaintiff appeal[ed].”⁵¹

In affirming, the plaintiff recognized that while a court may grant a motion for an extension of time upon “good cause shown or in the interest of justice,”⁵² the plaintiff failed to demonstrate good cause as he did not show that he exercised reasonable diligence in service,⁵³ resorting to affix

46. N.Y. C.P.L.R. 306-b (McKinney 2010 & Supp. 2019).

47. 161 A.D.3d 957, 77 N.Y.S.3d at 518 (2d Dep’t 2018).

48. *Id.* at 957, 77 N.Y.S.3d at 517.

49. *Id.* at 957, 77 N.Y.S.3d at 517–18.

50. *Id.* at 947, 77 N.Y.S.3d at 518; N.Y. C.P.L.R. 306-b; N.Y. C.P.L.R. 3211(a) (McKinney 2016).

51. *Holbeck*, 161 A.D.3d at 957, 77 N.Y.S.3d at 518.

52. *Id.* at 957–58, 77 N.Y.S.3d at 518 (first citing *Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95, 105–06, 761 N.E.2d 1018, 1025, 736 N.Y.S.2d 291, 298 (2001); and then citing *Bank v. Estate of Robinson*, 144 A.D.3d 1084, 1085, 44 N.Y.S.3d 48, 49 (2d Dep’t 2016)).

53. *Id.* at 958, 77 N.Y.S.3d at 518 (first citing *Hobbins v. North Star Orthopedics, PLLC*, 148 A.D.3d 784, 787, 49 N.Y.S.3d 169, 172 (2d Dep’t 2017); then citing *Kazimierski v. N.Y. Univ.*, 18 A.D.3d 820, 820, 769 N.Y.S.2d 638, 639 (2d Dep’t 2005); then citing *Leader*, 97 N.Y.2d at 107, 761 N.E.2d at 1024, 736 N.Y.S.2d at 297; and then citing *Bumpus v. N.Y.C. Trans. Auth.*, 665 A.D.3d 26, 31, 883 N.Y.S.2d 99, 105 (2d Dep’t 2009)).

and mail after only two attempts to serve on a weekday, at a time when a person could have reasonably been expected to be at work,⁵⁴ and there was no indication that any attempt was made to verify the defendant still resided at the three-year-old address.⁵⁵ As to the interest of justice prong, the Second Department held that while “a plaintiff is not required to make a showing of reasonably diligent efforts at service, ‘the court may consider diligence, or lack thereof, along with other relevant factor[s]’” including an expiring statute of limitations, a meritorious nature of the cause of action, the promptness of a request for an extension of time, and any resultant prejudice to the defendant.⁵⁶ In applying the factors to the case before it, the Fourth Department observed that as a result of the plaintiff’s failures, the defendant did not receive the summons and complaint until approximately seven and one-half months after the expiration of the statute of limitations, there was no evidence that the defendant had notice of any action until that time, the plaintiff did not submit any evidence showing a lack of prejudice to the defendant, and there was no showing of merit or support that the plaintiff sustained a serious injury including even a recitation of the allegedly sustained injuries.⁵⁷ Accordingly, the Second Department affirmed the dismissal.⁵⁸

C. Article 9: Class Actions

1. CPLR 908: Dismissal, Discontinuance or Compromise

Pursuant to CPLR 908, “[a] class action shall not be dismissed, discontinued, or compromised without the approval of the court. Notice of the proposed dismissal, discontinuance, or compromise shall be given to all members of the class in such manner as the court directs.”⁵⁹

In *Desrosiers v. Perry Ellis Menswear, LLC*, the issue of whether CPLR 908 applies only to certified class actions, or also to class actions that are settled or dismissed prior to the class has been certified was resolved by the Court of Appeals.⁶⁰ There, in the first case before it, an

54. *Id.* (first citing *Prudence v. Wright*, 94 A.D.3d 1073, 1074, 943 N.Y.S.2d 185, 187 (2d Dep’t 2012); and then citing *Estate of Waterman v. Jones*, 46 A.D.3d 63, 66, 843 N.Y.S.2d 462, 464–65 (2d Dep’t 2007)).

55. *Id.* (first citing *Prudence*, 94 A.D.3d at 1074, 943 N.Y.S.2d at 187; and then citing *Estate of Waterman*, 46 A.D.3d at 66–67, 843 N.Y.S.2d at 465).

56. *Holbeck*, 161 A.D.3d at 958, 77 N.Y.S.3d at 518 (first citing *Leader*, 97 N.Y.2d at 105–06, 761 N.E.2d at 1025, 736 N.Y.S.2d at 298; and then citing *Bumpus*, 66 A.D.3d at 32, 883 N.Y.S.2d at 106).

57. *Id.* at 958–59, 77 N.Y.S.3d at 518–19.

58. *Id.* at 957, 77 N.Y.S.3d at 517.

59. N.Y. C.P.L.R. 908 (McKinney 2006).

60. 30 N.Y.3d 488, 492, 90 N.E.3d 1262, 1264, 68 N.Y.S.3d 391, 393 (2017).

unpaid intern brought a class action against the defendant alleging that he and others similarly situated should have been classified as employees.⁶¹ However, prior to the class having been certified, the intern accepted the company's offer of compromise and the supreme court granted the company's motion to dismiss, but denied the intern's cross-motion to provide notice to putative class members.⁶² The appellate division reversed.⁶³

In a separate action, a salesperson brought a putative class action against an employer for failure to pay minimum wage, but before the class was certified, the salesperson accepted the employer's settlement offer.⁶⁴ There, the supreme court granted the employer's motion to dismiss, granted the employee's motion to provide notice to the class members, and directed that the action would not be marked disposed until after notice had been issued.⁶⁵ The appellate division affirmed.⁶⁶

In answering the question of whether CPLR 908 applies only to certified class actions or also to class actions that are settled or dismissed prior to the class has been certified, the Court of Appeals noted that the text of CPLR 908 is "ambiguous."⁶⁷ The defendants argued that the statute's reference to a "class action" means a "certified" class action—but, according to the Court, the "[L]egislature did not use those words, or a phrase such as 'maintained as a class action,' which appears in CPLR 905 and 909."⁶⁸ The plaintiffs, however, asserted that the action is a "class action" from the moment the complaint is filed, but the Court did not find that the statutory text made that clear.⁶⁹ The Court also found the statute's instruction on notice of a proposed dismissal to be inconclusive.⁷⁰

In turning to legislative construction, the Court surveyed how the statute had been interpreted, finding only one appellate-level decision to address the issue: *Avena v. Ford Motor Co.*⁷¹ In *Avena*, the trial court

61. *Id.* at 492, 90 N.E.3d at 1264, 68 N.Y.S.3d at 393.

62. *Id.* at 492–93, 90 N.E.3d at 1264, 68 N.Y.S.3d at 393.

63. *Id.* at 493, 90 N.E.3d at 1264, 68 N.Y.S.3d at 393 (citing *Desrosiers v. Perry Ellis Menswear, LLC*, 139 A.D.3d 473, 474, 30 N.Y.S.3d 630, 631 (1st Dep't 2016)).

64. *Id.* at 493, 90 N.E.3d at 1264–65, 68 N.Y.S.3d at 393–94.

65. *Desrosiers*, 30 N.Y.3d at 493, 90 N.E.3d at 1265, 68 N.Y.S.3d at 394 (citing *Vasquez v. Nat'l Sec. Corp.*, 48 Misc. 3d 597, 602, 9 N.Y.S.3d 836, 839–40 (Sup. Ct. N.Y. Cty. 2015)).

66. *Id.* at 493, 90 N.E.3d at 1265, 68 N.Y.S.3d at 394 (citing *Vasquez*, 139 A.D.3d at 503, 29 N.Y.S.3d at 809).

67. *Id.* at 492, 494, 90 N.E.3d at 1264, 1265, 68 N.Y.S.3d at 393, 394.

68. *Id.* at 494, 90 N.E.3d at 1265, 68 N.Y.S.3d at 394.

69. *Id.*

70. *Desrosiers*, 30 N.Y.3d at 494, 90 N.E.3d at 1265, 68 N.Y.S.3d at 394.

71. *Id.* at 496, 90 N.E.3d at 1267, 68 N.Y.S.3d at 396; 85 A.D.2d 149, 152, 447 N.Y.S.2d 278, 279 (1st Dep't 1982).

refused to approve the settlement without first providing notice to the putative class members and the appellate division affirmed, concluding that CPLR 908 applied to settlements reached before certification; the court reasoned that the “potential for abuse by private settlement at this stage is . . . obvious and recognized.”⁷²

Also as part of its analysis, the Court considered the fact that no other appellate division expressed a contrary view, and that the Legislature did not amend the statute following judicial interpretation in *Avena*.⁷³ Accordingly, the Court held that CPLR 908 required notice to members of putative class actions when the action was settled before the class was certified.⁷⁴

D. Article 10: Parties Generally

1. CPLR 1001: Necessary Joinder of Parties

CPLR 1001 sets forth the circumstances under which parties should or must be joined in an action to avoid an inequitable judgment.⁷⁵

In *Morgan v. de Blasio*, the issue of joinder was addressed by the Court of Appeals.⁷⁶ There, the petitioners sought, by way of a proceeding pursuant to Education Law § 16-102, to challenge the Working Families Party’s designation of Bill de Blasio as a candidate in its primary election for the Mayor of the City of New York.⁷⁷ The supreme court rejected the petition and dismissed it on the ground that the petitioners had failed to name a necessary party, the Executive Board of the Working Families Party, and the appellate division affirmed.⁷⁸

In affirming, the Court of Appeals rejected petitioner’s reliance on several appellate division cases to support its argument that the Working Families Party is not a necessary party because complete relief could be obtained from the Board of Elections.⁷⁹ According to the Court, Working Families was a necessary party because a judgment could “inequitably

72. *Desrosiers*, 30 N.Y.3d at 496–97, 90 N.E.3d at 1267, 68 N.Y.S.3d at 396; *Avena*, 85 A.D.2d 151–56, 447 N.Y.S.2d 279–82.

73. *Desrosiers*, 30 N.Y.3d at 497–98, 90 N.E.3d at 1267–69, 68 N.Y.S.3d at 396–98 (quoting *Knight-Ridder Broad. Co. v. Greenberg*, 70 N.Y.2d 151, 157, 511 N.E.2d 1116, 1119, 518 N.Y.S.2d 595, 598 (1987)).

74. *Id.* at 496–99, 90 N.E.3d at 1267–69, 68 N.Y.S.3d at 396–98 (citing *Avena*, 85 A.D.2d 151, 447 N.Y.S.2d 279).

75. See N.Y. C.P.L.R. 1001 (McKinney 2006).

76. See 29 N.Y.3d 559, 559–60, 60 N.Y.S.3d 106, 107 (2017).

77. *Id.*

78. *Id.* at 560, 60 N.Y.S.3d at 107.

79. *Id.* (citing *O’Brien v. Seneca Cty. Bd. of Elections*, 22 A.D.3d 1036, 1036–37, 803 N.Y.S.2d 830, 830 (4th Dep’t 2005)).

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affect its interests,” and to the extent that there are other decisions to the contrary, the Court of Appeals held that they should not be followed.⁸⁰

E. Article 14-A: Damages Actions: Effect of Contributory Negligence and Assumption of Risk

1. CPLR 1411: Damages Recoverable when Contributory Negligence or Assumption of Risk Is Established

CPLR 1411 provides that any contributory fault of a personal injury plaintiff “shall not bar recovery, but that the amount of damages otherwise recoverable shall be diminished” by the proportionate degree of fault.⁸¹

The above provision was discussed at length by the Court of Appeals in *Rodriguez v. City of New York*.⁸² There, the plaintiff, an employee of the New York City Department of Sanitation, commenced an action against the City alleging he sustained a serious spinal injury during his employment when, while he was preparing to equip a sanitation truck for snow removal, a coworker backed into the truck which resultantly lost control, colliding with a parked car which then struck the plaintiff and pinned him against a tire rack.⁸³ The plaintiff was taken to the hospital and had to undergo spinal fusion surgery, lumbar epidural injections, extensive physical therapy, and was permanently disabled from working.⁸⁴ Following discovery, the plaintiff moved for partial summary judgment on liability which the trial court denied because, among other things, issues of fact existed on whether the plaintiff was contributorily negligent.⁸⁵ The First Department affirmed, relying in part on the Court of Appeals’ decision in *Thoma v. Ronai*, and noting that the plaintiff failed to establish the absence of comparative fault.⁸⁶

On appeal to the Court of Appeals, the court viewed the issue of “[w]hether a plaintiff must demonstrate the absence of his or her own comparative negligence to be entitled to partial summary judgment as to defendant’s liability [as] a question of statutory construction of the

80. *Id.*

81. N.Y. C.P.L.R. 1411 (McKinney 2012).

82. 31 N.Y.3d 312, 317, 101 N.E.3d 366, 369, 76 N.Y.S.3d 898, 901 (2018).

83. *Id.* at 315, 101 N.E.3d at 367, 76 N.Y.S.3d at 899.

84. *Id.* at 315, 101 N.E.3d at 367–68, 76 N.Y.S.3d 899–900.

85. *Id.* at 316, 101 N.E.3d at 368, 76 N.Y.S.3d at 900 (citing N.Y. C.P.L.R. 3212 (McKinney 2005 & Supp. 2019)).

86. *Id.* at 326–28, 101 N.E.3d at 375–77, 76 N.Y.S.3d at 907–09 (Garcia, J., dissenting) (citing 189 A.D.2d 635, 592 N.Y.S.3d 333 (1st Dep’t 1993)).

CPLR.”⁸⁷ In seeking to determine the Legislature’s intent, the Court of Appeals considered CPLR 1411, 1412, and 3212.⁸⁸

As to CPLR 1411, the Court of Appeals held that the defendant’s approach “defie[d] the plain language of CPLR 1411,” noting that it would allow a jury to decide whether the defendant was negligent even when such negligence should be determined as a matter of law, therefore violating CPLR 1411’s mandate that any comparative negligence “shall not bar recovery.”⁸⁹

As to CPLR 1412, the Court noted that in 1975, New York adopted a system of pure comparative negligence which “directed courts to consider a plaintiff’s comparative fault only when considering the amount of damages owed to the plaintiff.”⁹⁰ Accordingly, the Court of Appeals found that the defendant’s view which “flip[ped] the burden, requiring the plaintiff, instead of the defendant, to prove an absence of comparative fault in order to make out a prima facie case on the issue of defendant’s liability,” was at odds with the plain language of CPLR 1412.⁹¹

As to the City’s argument that CPLR 3212 required the plaintiff to prove absence of comparative negligence, the Court rejected it, noting that summary judgment is intended “to streamline and focus the factfinder on the issues that need resolution, and avoid having juries make findings that are contrary to law.”⁹²

Finally, the court looked for further support in Article 14-A’s legislative history, indicating that Article 14-A’s enactment was proposed by the 1975 Judicial Conference.⁹³ There, according to the Court, the Conference urged the adoption of the then-majority rule in this country, that “in all negligence actions . . . the defendant claiming contributory negligence of the plaintiff has the burden of showing it.”⁹⁴ Thus, the Court rejected the City’s argument that *Thoma* controlled, distinguishing it on the ground that the Court neither addressed the precise issue now

87. *Rodriguez*, 31 N.Y.3d at 317, 101 N.E.3d at 368–69, 76 N.Y.S.3d at 900–01.

88. *Id.* at 317–20, 101 N.E.3d at 368–71, 76 N.Y.S.3d at 900–03 (first citing N.Y. C.P.L.R. 1411 (McKinney 2012); then citing N.Y. C.P.L.R. 1412 (McKinney 2012); and then citing N.Y. C.P.L.R. 3212).

89. *Id.* at 319–20, 101 N.E.3d at 370, 76 N.Y.S.3d at 902 (citing N.Y. C.P.L.R. 1411).

90. *Id.* at 318, 101 N.E.3d at 369, 76 N.Y.S.3d at 901.

91. *Id.* (citing N.Y. C.P.L.R. 1412).

92. *Rodriguez*, 31 N.Y.3d at 320, 101 N.E.3d at 370–71, 76 N.Y.S.3d at 902–03 (first citing N.Y. C.P.L.R. 3212(b); and then citing N.Y. C.P.L.R. 1411).

93. *Id.* at 320, 101 N.E.3d at 371, 76 N.Y.S.3d at 903 (citing *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972)).

94. *Id.* (quoting STATE OF N.Y., THE ADMIN. BOARD OF THE JUD. CONF., 21ST ANNUAL REPORT 240, 245 (1976)).

being confronted, nor did it consider the “import of [A]rticle 14-A.”⁹⁵

Accordingly, the Court of Appeals held that “[t]o be entitled to partial summary judgment a plaintiff does not bear the double burden of establishing a prima facie case of defendant’s liability and the absence of his or her own comparative fault,” and therefore, reversed.⁹⁶

F. Article 31: Disclosure

1. CPLR 3101: Scope of Disclosure

Pursuant to CPLR 3101(a), “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of burden of proof.”⁹⁷ This provision was at issue in the Court of Appeals’ decision in *Forman v. Henkin*.⁹⁸

In *Forman*, the plaintiff brought a personal injury action arising out of injuries sustained when she fell from a horse owned by the defendant.⁹⁹ As a part of the plaintiff’s claim, she alleged that she suffered a traumatic brain injury and experienced “memory loss, difficulties with written and oral communication, and social isolation.”¹⁰⁰ The plaintiff also testified that prior to her accident she posted several photographs on Facebook, but deactivated her account six months after the accident.¹⁰¹ The defendant moved to compel the plaintiff to provide an authorization to access her Facebook, arguing that the photographs and messages were relevant to her claims.¹⁰² The supreme court granted the defendant’s motion limited to requiring the plaintiff to produce (1) all photographs of herself posted on Facebook prior to the accident that she intended to introduce at trial; (2) all photographs of herself posted on Facebook after the accident; and (3) an authorization for Facebook records showing each time the plaintiff posted a private message after the accident and the number of characters or words.¹⁰³ Notably, the supreme court did not order disclosure of any of the content of the plaintiff’s posts—authored before or after.¹⁰⁴ The plaintiff appealed and the First Department

95. *Id.* at 321–22, 101 N.E.3d at 372, 76 N.Y.S.3d at 904.

96. *Id.* at 324–25, 101 N.E.3d at 374, 76 N.Y.S.3d at 906.

97. N.Y. C.P.L.R. 3101(a) (McKinney 2018).

98. 30 N.Y.3d 656, 661, 93 N.E.3d 882, 887, 70 N.Y.S.3d 157, 162 (2018) (citing N.Y. C.P.L.R. 3101(a)).

99. *Id.* at 659, 93 N.E.3d at 885, 70 N.Y.S.3d at 160.

100. *Id.*

101. *Id.*

102. *Id.* at 659–60, 93 N.E.3d at 885–86, 70 N.Y.S.3d at 160–61.

103. *Forman*, 30 N.Y.3d at 660, 93 N.E.3d at 886, 70 N.Y.S.3d at 161 (citing *Forman v. Henkin*, No. 113059/2011, 2014 Slip Op. 30679(U), at 6 (Sup. Ct. N.Y. Cty. Feb. 28, 2014)).

104. *Id.*

modified the order by limiting disclosure to photographs posted that the plaintiff intended to introduce, eliminating the authorization for raw data.¹⁰⁵

In reversing, the Court of Appeals held that discovery of social media is not subject to a specialized discovery standard and that courts, in their application, should apply the “general principles” of discovery “in the context of a dispute over disclosure.”¹⁰⁶ The Court further noted “New York’s history of liberal discovery,” and explained that in its evaluation, trial courts should consider the likelihood that a social media account contains relevant material, including factors such as the nature of the incident, the injuries alleged, and any other relevant circumstances.¹⁰⁷ Indeed, according to the Court, New York discovery rules do not contain a showing that the item exists, but rather, “the request only need be appropriately tailored and reasonably calculated to yield relevant information,” including social media.¹⁰⁸

In consideration of the above, the Court of Appeals reversed, holding that the defendant established that the request for disclosure was reasonably calculated to yield evidence relevant to the plaintiff’s claim that her injuries interfered with her ability to engage in certain activities and impaired her written communication skills.¹⁰⁹ Of note, because only the plaintiff appealed the supreme court’s decision which denied the defendant’s request for disclosure of the plaintiff’s private messages, the Court did not have an opportunity to address whether disclosure of the messages would have been proper.¹¹⁰

CPLR 3101(d)(1)(i) deals with the disclosure of expert witnesses,¹¹¹ and was at issue before the Third Department in *Colucci v. Stuyvesant Plaza, Inc.*¹¹² There, the defendant moved for summary judgment upon the plaintiffs’ lack of expert disclosure and any proof that the injuries and damages were caused by the defendants’ actions.¹¹³ In opposition, the plaintiffs attached affidavits from four witnesses, including a treating physician.¹¹⁴ The defendants moved to strike, requesting that the affidavits be rejected as untimely as they were first disclosed over a year

105. *Id.* at 660–61, N.Y.3d at 886, N.Y.S.3d at 161.

106. *Id.* at 662, 93 N.E.3d at 888, 70 N.Y.S.3d at 163.

107. *Id.* at 663–64, 93 N.E.3d at 888–89, 70 N.Y.S.3d at 163–64.

108. *Forman*, 30 N.Y.3d at 664, 93 N.E.3d at 889, 70 N.Y.S.3d at 164.

109. *Id.* at 666–67, 93 N.E.3d at 891, 70 N.Y.S.3d at 166.

110. *Id.* at 667, 93 N.E.3d at 891, 70 N.Y.S.3d at 166.

111. *See* N.Y. C.P.L.R. 3101(d)(1)(i) (McKinney 2018).

112. 157 A.D.3d 1095, 69 N.Y.S.3d 410 (3d Dep’t 2018).

113. *Id.* at 1096, 69 N.Y.S.3d at 411.

114. *Id.* at 1097, 69 N.Y.S.3d at 412.

and a half after the court-ordered deadline.¹¹⁵ In affirming the supreme court's decision which granted the defendant's motion for summary judgment, the Third Department noted that the plaintiffs could not provide a viable or good excuse for failing to comply with the numerous adjournments for court-ordered discovery.¹¹⁶

As to the treating physician, the Third Department held that it "has interpreted CPLR 3101(d)(1)(i) as 'requiring disclosure of any medical professional, even a treating physician or nurse, who is expected to give expert testimony.'"¹¹⁷ Therefore, according to the appellate division, although the treating physician was listed on plaintiffs' bill of particulars as one of the medical providers, and the medical records were disclosed, "this at most indicated to defendant that [he] might have been called as an expert by plaintiffs; it did not obviate the need for plaintiffs to comply with CPLR 3101(d)(1)(i)."¹¹⁸ "To that end," said the Court, even if the physician had been permitted to offer an opinion which was "limited to his care, treatment, observations and opinions as reflected in his medical records," his records were inadequate and could not establish causation.¹¹⁹ Accordingly, the Third Department affirmed the trial court's implicit finding that the plaintiff's failure to provide any expert disclosure for over one year was willful and warranted the sanction of preclusion of their experts, requiring summary judgment.¹²⁰

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

CPLR 3126 provides, "[i]f any party . . . refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed, pursuant to this article, the court may make such orders with regard to the failure or refusal as are just," including striking out pleadings or parts thereof.¹²¹

In *Watson v. City of New York*, the plaintiff brought a claim for false arrest and malicious prosecution against multiple defendants including

115. *Id.*

116. *Id.* at 1097, 1099, 69 N.Y.S.3d at 412–13.

117. *Colucci*, 157 A.D.3d at 1099, 69 N.Y.S.3d at 414 (quoting *Schmitt v. Oneonta City Sch. Dist.*, 151 A.D.3d 1254, 1255, 55 N.Y.S.3d 834, 836 (3d Dep't 2017)).

118. *Id.* at 1099–1100, 69 N.Y.S.3d at 414 (citing *Schmitt*, 151 A.D.3d at 1255–56, 55 N.Y.S.3d at 836–37).

119. *Id.* at 1100, 69 N.Y.S.3d at 414.

120. *Id.* at 1101, 69 N.Y.S.3d at 415 (citing *Cornell v. 360 W. 51st St. Realty, LLC*, 22 N.Y.3d 762, 783–84 (2014)).

121. N.Y. C.P.L.R. 3126 (McKinney 2005 & Supp. 2019).

the City of New York.¹²² Among other issues before the Court was whether the trial court's order granting the plaintiff's motion for a default judgment against the City and striking its answer was improper.¹²³ There, the City failed to respond or provide records notwithstanding a preliminary conference order which required it to provide various documents within sixty days; failed to respond to a second order nearly a year later; served responses days after the deadline set forth under the second order, but redacted certain material alleging it was privileged and confidential while failing to provide a privilege log; and did not timely respond to a subsequent order granting the plaintiff's motion to compel, requiring the City to disclose an entire file without redaction.¹²⁴

In review, the Second Department held that given the dilatory conduct and the City's failure to comply with multiple court orders, the striking of the City defendants' answer was warranted.¹²⁵ In disagreeing with the dissent, the majority held that prejudice "is not the standard by which a court determines whether to strike the answer Rather the standard is whether the conduct of the offending party is willful, contumacious and in bad faith."¹²⁶ Additionally, the Second Department held that even if the trial court's order improperly held that privileged material should be produced, the motion court still did not abuse its discretion in striking the answer because the City defendants could have appealed from the order to the extent it believed that it was issued in error, or timely sought a protective order from the court prior to the deadline for discovery, but "[i]nstead they willfully and purposefully ignored the court's order on the ground that they disagreed with the scope of discovery the order required them to produce."¹²⁷ However, according to the Second Department, "the law does not leave it up to litigants to decide which portions of the court order they will follow and which portions they will ignore," and their "very belated attempt to obtain a protective order," following issuance of the order, was improper.¹²⁸

For consistency's sake, the Second Department modified an order of a supreme court which denied, in part, a defendant's motion to strike the plaintiff's complaint.¹²⁹ In *Honghui Kuang v. MetLife*, a beneficiary

122. 157 A.D.3d 510, 511, 69 N.Y.S.3d 294, 296 (1st Dep't 2018).

123. *Id.* at 512, 69 N.Y.S.3d at 297.

124. *Id.* at 513–14, 69 N.Y.S.3d at 297–98.

125. *Id.* at 514, 69 N.Y.S.3d at 298.

126. *Id.*

127. *Watson*, 157 A.D.3d at 514–15, 69 N.Y.S.3d at 298–99.

128. *Id.* at 515, 69 N.Y.S.3d at 299.

129. *Honghui Kuang v. MetLife*, 159 A.D.3d 878, 878, 74 N.Y.S.3d 88, 90 (2d Dep't 2018).

(plaintiff) under a life insurance policy brought an action against defendant, MetLife, to recover proceeds of a policy following an insured's death.¹³⁰ MetLife interposed counterclaims against the plaintiff and the insured's two siblings who were originally each twenty-five percent beneficiaries under the policy.¹³¹ The siblings then asserted cross-claims against the beneficiary, alleging the she fraudulently changed the policy to make her the sole beneficiary and sought a judgment that they were entitled to the full proceeds of the life insurance policy.¹³²

Discovery ensued and the supreme court granted a motion by the siblings to compel the plaintiff to appear at the deposition, and while she did appear, she refused to answer any of the questions, yelled at counsel, tore up and refused to return exhibits, and threatened the siblings' counsel before eventually walking out.¹³³ After being ordered to appear for a second deposition, she appeared but would not answer the questions until the siblings' attorney showed proof that he actually represented them, and when the attorney was attempting to reach the court by telephone, the plaintiff left.¹³⁴ Upon a third order for a deposition, the plaintiff failed to appear.¹³⁵

The siblings' attorney subsequently moved pursuant to CPLR 3126 to strike the complaint, which was granted in part by the supreme court, only to the extent of precluding the plaintiff from offering testimony at trial.¹³⁶ The siblings appealed and the Second Department modified the order, holding that the supreme court should have granted the siblings' motion to strike the plaintiff's complaint.¹³⁷ According to the Second Department, the remedy of preclusion had already been granted in a conditional order which required the party to provide certain discovery by a date, and thereafter became absolute when the plaintiff failed to comply.¹³⁸ Consequently, the Second Department found that the supreme

130. *Id.* at 879, 74 N.Y.S.3d at 90.

131. *Id.*

132. *Id.* at 879, 74 N.Y.S.3d at 90–91.

133. *Id.* at 880, 74 N.Y.S.3d at 91.

134. *Honghui Kuang*, 159 A.D.3d at 880, 74 N.Y.S.3d at 91.

135. *Id.*

136. *Id.* at 880–81, 74 N.Y.S.3d at 91.

137. *Id.* at 881, 883, 74 N.Y.S.3d at 91, 93 (first citing *Lucas v. Stam*, 147 A.D.3d 921, 926, 48 N.Y.S.3d 150, 155 (2d Dep't 2017); then citing *Apladenaki v. Greenpoint Mortg. Funding, Inc.*, 117 A.D.3d 976, 977, 986 N.Y.S.2d 589, 591 (2d Dep't 2014); then citing *Orgel v. Stewart Title Ins. Co.*, 91 A.D.3d 922, 924, 938 N.Y.S.2d 131, 133–24 (2d Dep't 2012); and then citing *Bort v. Perper*, 82 A.D.3d 692, 695, 918 N.Y.S.2d 151, 154 (2d Dep't 2011)).

138. *Id.* at 881–82, 74 N.Y.S.3d at 92 (quoting *Hu v. Sadiqi*, 83 A.D.3d 820, 821, 921 N.Y.S.2d 133, 134 (2d Dep't 2011)) (citing *Rothman v. Westfield Grp.*, 101 A.D.3d 703, 704, 955 N.Y.S.2d 204, 205 (2d Dep't 2012)).

court imposed no additional sanctions for the plaintiff's "ongoing practice of flouting discovery orders."¹³⁹ Given this history of the case and the plaintiff's conduct in trying to frustrate the discovery process, the Second Department held the supreme court should have granted that branch of the siblings' motion to strike the plaintiff's complaint, and modified accordingly.¹⁴⁰

G. Article 32: Accelerated Judgment

1. CPLR 3211: Motion to Dismiss

CPLR 3211 provides a mechanism for a court to dispose of a cause of action for several reasons.¹⁴¹ Among them, a defendant can move to dismiss on the ground that "the pleading fails to state a cause of action."¹⁴²

In *Connolly v. Long Island Power Authority*, property owners brought separate actions for negligence against multiple defendants including Long Island Power Authority (LIPA), a public authority created by the Legislature to provide a "safer, more efficient, reliable and economical supply of electric energy" in the Long Island area.¹⁴³ According to the plaintiff, the defendants failed to "preemptively de-energize the Rockaway Peninsula prior to or after Hurricane Sandy made landfall" which, in combination with salt water from the surge that came into contact with its electrical system, caused short circuit, fires, and ultimately the destruction of the plaintiffs' property.¹⁴⁴ LIPA moved to dismiss, asserting that it was immune from liability based on the doctrine of governmental function immunity, and arguing that, among other things, its actions "were taken in the exercise of its governmental capacity and were discretionary, and, even if they were not discretionary, plaintiffs' failure to allege a special duty in the complaints amounted to a failure to state viable claims."¹⁴⁵

In assessing the motions to dismiss, the Court of Appeals accepted all of the plaintiffs' allegations as true, affording every possible favorable inference to the plaintiff and distilling its inquiry to "whether the defendants have established that the challenged action, or failure to act, was governmental, as a matter of law, based solely on the plaintiffs'

139. *Honghui Kuang*, 159 A.D.3d at 882, 74 N.Y.S.3d at 93.

140. *Id.* at 882, 74 N.Y.S.3d at 93.

141. *See* N.Y. C.P.L.R. 3211(a) (McKinney 2016).

142. *Id.* 3211(a)(7).

143. 30 N.Y.3d 719, 724–25, 94 N.E.3d 471, 473–74, 70 N.Y.S.3d 909, 911–12 (2018).

144. *Id.* at 725, 94 N.E.3d at 474, 70 N.Y.S.3d at 912.

145. *Id.* at 726, 94 N.E.3d at 474–75, 70 N.Y.S.3d at 913.

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amplified pleadings.”¹⁴⁶ The plaintiffs’ complaints alleged that the Governor declared a state of emergency in all counties across New York State; the National Hurricane Center warned of the storm surge and extended periods of flooding; the Mayor of the City of New York ordered the evacuation of an area which included the Rockaway Peninsula; and the likelihood that salt water was to come into contact with its system, which they knew created a risk of fire and which, in fact, caused such fires.¹⁴⁷ Despite this, the plaintiffs’ complaint averred that LIPA did not shut down the power to the area, even though the utility provider for the five boroughs of New York City preemptively did so to avoid the salt water coming into contact with its systems, and further alleged that “notwithstanding [their] actual knowledge of downed live electrical lines, [the defendants] persisted in their failure to de-energize the area.”¹⁴⁸

In affirming the denial of the defendants’ motion, the Court of Appeals held that it could not say as a matter of law, based on the allegations as plead in the complaint, that LIPA was acting in a governmental capacity (versus proprietary) and further rejected the defendants’ claim that “the magnitude of the disaster, without any reference to the circumstances and nature of the specific act or omission alleged—i.e., the failure to de-energize—renders LIPA’s conduct governmental as a matter of law.”¹⁴⁹ Significantly, however, in a footnote the Court held that while the threshold issue concerning the governmental function immunity defense was not capable of resolution at this pre-answer stage, it did not “foreclose the possibility” that it could be in other, appropriate cases.¹⁵⁰

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.¹⁵¹

In *Gomez v. Cabatic*, a medical malpractice action, the Second

146. *Id.* at 728, 94 N.E.3d at 476, 70 N.Y.S.3d at 915.

147. *Id.* at 725, 729, 94 N.E.3d at 474, 477, 70 N.Y.S.3d at 912, 915.

148. *Connolly*, 30 N.Y.3d at 725, 729, 94 N.E.3d at 474, 477, 70 N.Y.S.3d at 912, 915.

149. *Id.* at 729–30, 94 N.E.3d at 477–78, 70 N.Y.S.3d at 915–16.

150. *Id.* at 730 n.2, 94 N.E.3d at 477 n.2, 70 N.Y.S.3d at 916 n.2.

151. *See* N.Y. C.P.L.R. 4404 (McKinney 2007).

Department considered a CPLR 4404(a) motion to set aside a jury verdict on the issue of punitive damages and for judgment as a matter of law dismissing the demand for punitive damages, or, alternatively, to set aside the verdict on punitive damages as contrary to the weight of the evidence or in the interest of justice and for a new trial solely on punitive damages.¹⁵² There, a medical malpractice action was brought by the father of a deceased child against an endocrinologist for her failure to diagnose the child's type I diabetes, resulting in her developing diabetic ketoacidosis and ultimately dying.¹⁵³

As to the first question, the appellate division held that while New York courts were split on whether punitive damages may be recovered for a medical professional's act of altering or destroying medical records in an effort to evade potential liability, it answered the question in the positive, finding that where a plaintiff recovers compensatory damages for a malpractice, a plaintiff may also recover punitive damages for that medical professional's act.¹⁵⁴

As to the question regarding sufficiency of the evidence, the appellate division held that the evidence—which indicated (1) that the endocrinologist destroyed the original, handwritten records of two of the three occasions she treated the child after receiving a letter from the father's attorney, (2) that the typewritten record of the third visit included information not reflected in the handwritten record of the visit, and (3) that there was a discrepancy regarding when the child was to follow up with the endocrinologist between the typewritten records and an appointment card retained by child's mother—supported the jury's verdict awarding punitive damages.¹⁵⁵ Further, the appellate division remained unpersuaded that a new trial was warranted on the interest of justice.¹⁵⁶

Nonetheless, the Second Department found that the punitive damages award of \$7,500,000 was excessive in light of the jury's \$500,000 compensatory damages, and thus granted a new trial on the issue of punitive damages unless counsel stipulated to reducing the award to \$500,000.¹⁵⁷

CPLR 4404 was also at issue before the Fourth Department in *Bolin*

152. 159 A.D.3d 62, 64, 70 N.Y.S.3d 19, 20 (2d Dep't 2018); N.Y. C.P.L.R. 4404(a).

153. *Gomez*, 159 A.D.3d at 65, 70 N.Y.S.3d at 20.

154. *Id.* at 76, 70 N.Y.S.3d at 28.

155. *Id.* at 78–79, 70 N.Y.S.3d at 30.

156. *Id.* at 80, 70 N.Y.S.3d at 30.

157. *Id.* at 81, 70 N.Y.S.3d at 31.

v. Goodman.¹⁵⁸ There, a widow brought a medical malpractice and wrongful death action against her husband's primary care physician for failing to recognize the severity of the patient's condition and failing to explain it to the patient before he declined to go to the hospital.¹⁵⁹ The case went to trial and the supreme court granted the defendant's motion for a directed verdict.¹⁶⁰

On appeal to the Fourth Department, the court noted that the plaintiff presented evidence that the decedent was a "family man who was well-attuned to his cardiac health, having lost his father to a sudden cardiac incident," and when "presented with the possibility of a heart-related issue, decedent had no problem going to a hospital emergency room, which he did only a month before his death."¹⁶¹ The court further noted that when the plaintiff presented to the defendant, he complained he had been unable to walk the length of his driveway without stopping three times for shortness of breath, that he had been sweating profusely the morning of his appointment, and felt pressure when he attempted to climb a ladder.¹⁶²

Both the plaintiff and defendant's experts testified that such evidence established that the plaintiff's decedent was suffering from unstable angina—a "life-threatening acute coronary condition"—but the defendant testified at trial that he recognized this and conveyed to the plaintiff's decedent that he should go to the hospital, though his notes did not reflect any urgency.¹⁶³ In support of her case, the plaintiff's expert testified that the standard of care was to inform the patient of the immediate life-threatening condition, that if the patient refuses hospitalization the doctor must discern the reason why, and all of the details of the conversation should be documented.¹⁶⁴ Her expert further testified that the defendant "either did not understand the severity of the condition or did not convey the severity of the condition to the decedent . . . [and i]f that information was not conveyed to decedent," it was a substantial factor in the plaintiff's decedent's death.¹⁶⁵

In reversing the directed verdict, the court observed the *Noseworthy* doctrine, recognizing that the case before it was complicated by the death of the decedent and therefore, pursuant to the doctrine, a plaintiff "is not

158. 160 A.D.3d 1350, 76 N.Y.S.3d 282 (4th Dep't 2018); N.Y. C.P.L.R. 4404.

159. *Bolin*, 160 A.D.3d at 1350–51, 76 N.Y.S.3d at 283.

160. *Id.* at 1351, 76 N.Y.S.3d at 283.

161. *Id.* at 1351, 76 N.Y.S.3d at 284.

162. *Id.*

163. *Id.* at 1351–52, 76 N.Y.S.3d at 284.

164. *Bolin*, 160 A.D.3d at 1352, 76 N.Y.S.3d at 284.

165. *Id.*

held to as high a degree of proof of the cause of action as where an injured plaintiff can himself describe”¹⁶⁶ The court further noted that the only direct testimony regarding whether the severity of the plaintiff decedent’s symptoms were recognized by the defendant came from the defendant which, according to the Court, “should not have been determined by the court” and was a credibility determination for the jury.¹⁶⁷ Accordingly, the court held this was not a case in which there was “absolutely no showing of facts from which negligence may be inferred,” and reversed.¹⁶⁸

III. COURT RULES

The New York State Office of Court Administration (OCA) made material changes to the rules relating to the electronic filing of actions in the supreme court, consensual program, during this *Survey* year.

A. Section 202.5-b(b)(2)(ii)

Effective December 15, 2017, 22 N.Y.C.R.R. § 202.5-b was amended to read as follows:

Consent to e-filing; how obtained. . . . Except for an unrepresented litigant, a party served with [a notice of e-filing] shall promptly *record his or her consent electronically in the manner provided at the NYSCEF site or file* with the court and serve on all parties of record a declaration of consent The filing of consent to e-filing hereunder shall not constitute an appearance in the action *under CPLR 320*.¹⁶⁹

B. Section 202.5-b (b)(2)(iv)

Effective December 15, 2017, 22 N.Y.C.R.R. § 202.5-b was amended to read as follows:

Conversion of pending actions. *Where procedurally permitted, upon court direction, an application by a party to the court, or a stipulation among the parties, a pending action may be converted to electronic form. Such direction, application, or stipulation must be served on all parties to the action and filed with proof of service. The county clerk may require the parties to furnish previously filed hard copy documents*

166. *Id.* at 1352–53, 76 N.Y.S.3d at 284 (quoting *Noseworthy v. City of New York*, 298 N.Y. 76, 80, 80 N.E.2d 744, 746 (1948)) (citing *Holiday v. Huntington Hosp.*, 164 A.D.2d 424, 427, 563 N.Y.S.2d 444, 446 (2d Dep’t 1990)).

167. *Id.* at 1353, 76 N.Y.S.3d at 284 (citing *Spano v. Cty. of Onondaga*, 135 A.D.2d 1091, 1092, 523 N.Y.S.2d 310, 311 (4th Dep’t 1987)).

168. *Id.* at 1353, 76 N.Y.S.3d at 285 (quoting *Mildner v. Wagner*, 89 A.D.2d 638, 638, 453 N.Y.S.2d 100, 101 (3d Dep’t 1982)).

169. 22 N.Y.C.R.R. § 202.5-b(b)(2)(ii) (2019) (emphasis added).

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*in electronic form.*¹⁷⁰

C. Section 202.5-b (d)(3)(iii)

Effective December 15, 2017, 22 N.Y.C.R.R. § 202.5-b was amended to read as follows:

*Correction. If a document filed electronically is subsequently discovered to contain confidential data - including but not limited to trade secrets, information protected by confidentiality agreement, or personal confidential information as defined by statute or court rule - or otherwise to have been filed in error, the filer or another party or affected person may: (1) notify the parties and any nonparty filers in the action of the confidentiality issue or other error raised by the filing, and of his or her intention to seek judicial relief to correct the filing; (2) following such notification, request that the appropriate county clerk, exercising his or her administrative discretion, place the document temporarily in “restricted” status on the NYSCEF site, to be made available for viewing by court staff and the parties but not the general public; and (3) file an application to correct the filing by order to show cause within five business days of such notification (or such time as the court may direct), including a request for preliminary injunctive relief limiting interim disclosure of the document at issue. Unless otherwise directed by the court, any document placed in restricted status in response to such a request shall be returned to public view upon expiration of this five-day period. The Chief Administrator of the Courts shall promulgate forms to implement this process.*¹⁷¹

IV. 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.

170. 22 N.Y.C.R.R. § 202.5-b(b)(2)(iv) (2019) (emphasis added).

171. 22 N.Y.C.R.R. § 202.5-b(d)(3)(iii) (2019) (emphasis added).