No. 24
June 17, 2026

NEW YORK OFFICIAL REPORTS

ADVANCE SHEETS

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June 17, 2026

NEW YORK OFFICIAL REPORTS

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COURT OF APPEALS NEW FILINGS

Preliminary Appeal Statements processed by the Court of Appeals Clerk's Office 5/15/26-5/21/26

Each week, the Clerk's Office prepares a list of recently-filed appeals, indicating short title, jurisdictional predicate, subject matter and key issues. Some of these appeals may not reach decision on the merits because of dismissal, on motion or sua sponte, or because the parties stipulate to withdrawal. Some appeals may be selected for review pursuant to the alternative procedure of Rules of the Court of Appeals (22 NYCRR) § 500.11. For those appeals that proceed to briefing in the normal course, the briefing schedule generally will be: appellant's brief to be filed within 60 days after the appeal was taken; respondent's brief to be filed within 45 days after the due date for the filing of appellant's brief; and a reply brief, if any, to be filed within 15 days after the due date for the filing of respondent's brief.

The Court welcomes motions for amicus curiae participation from those qualified and interested in the subject matter of these newly filed appeals. Please refer to Rules of the Court of Appeals (22 NYCRR) § 500.23 and direct any questions to the Clerk's Office.

For May 15, 2026 through May 21, 2026, the following preliminary appeal statements were filed:

BLDG 44 DEVELOPERS v STATE OF NEW YORK (— AD3d —, 2026 NY Slip Op 02898):

APL-2026-00068

3rd Dept. App. Div. order of 5/7/26; reversal; sua sponte examination of whether a substantial constitutional question is directly involved in the order appealed from; **Taxation—Exemptions—Whether the provision of Real Property Tax Law § 421-a(16)(c)(x) stating that the filing of an order by the Comptroller of the City of New York following a hearing before the New York City Office of Administrative Trials and Hearings "shall have the full force and effect of a judgment duly docketed in the office of the county clerk" is unconstitutional under the separation of powers doctrine or principles of due process;** Supreme Court, Albany County, in a combined proceeding under CPLR article 78 and action for declaratory judgment, among other things, denied respondent State of New York's motion for summary judgment; App. Div. reversed, dismissed the petition, and declared that RPTL 421-a(16)(c)(x) has not been shown to be unconstitutional.

ELFAND v ADAMS (243 AD3d 472):

APL-2026-00069

1st Dept. App. Div. order of 11/18/25; affirmance; sua sponte examination of whether a substantial constitutional question is directly involved in the order appealed from; **Parties—Standing—Whether the complaint was properly dismissed; whether the individual plaintiff lacks standing to assert claims on behalf of an entity and its employees; whether the "void-statute" standing exception applies;**

Supreme Court, New York County, granted the City and State defendants' cross-motions to dismiss the complaint and denied plaintiff's motion for injunctive and declaratory relief; App. Div. affirmed.

HUNOLD v CITY OF NY (— AD3d —, 2026 NY Slip Op 02153):

APL-2026-00066

1st Dept. App. Div. order of 4/9/26; affirmance; sua sponte examination of whether a substantial constitutional question is directly involved in the order appealed from; **Judgments—Collateral Estoppel—Whether plaintiff was barred by collateral estoppel and res judicata from raising claims in a plenary action that were previously dismissed in a CPLR article 78 proceeding; whether there is a private right of action under the New York State Constitution's Free Exercise and Equal Protection Clauses;** Supreme Court, New York County, granted the motion by defendants City of New York, New York City Police Department, Melocowsky, Eichenholtz, and Meisenholder to dismiss the complaint; Supreme Court, New York County, dismissed the complaint with prejudice; App. Div. affirmed.

PEOPLE v DEVON Y. (247 AD3d 1367):

APL-2026-00056

3rd Dept. App. Div. order of 3/19/26; affirmance; leave to appeal granted by Aarons, J., 5/1/26; **Crimes—Sentence—Whether defendant's application for resentencing pursuant to the Domestic Violence Survivors Justice Act was properly denied on the ground that the abuse was not inflicted "at the time of the instant offense" within the meaning of Penal Law § 60.12 (1) (a) because the abuse occurred several years prior to the conduct underlying the criminal conviction;** County Court, Ulster County, denied defendant's motion for resentencing pursuant to CPL 440.47, after a hearing; App. Div. affirmed.

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CRIMES—Cont'd

about the altercation. Defendant remained restrained as he was searched, questioned, and repeatedly accused of theft and assault by the victim over an approximately eight-minute period. Defendant's freedom of movement was restricted to a degree comparable to a formal arrest, and he was given no reason to believe he would shortly be released or permitted to leave. In addition, it was foreseeable that the officers' words and actions would generate an incriminating response. Defendant was asked several express questions about his physical altercation with the victim. Over the course of the encounter, the officers also made defendant aware they had witnessed him punch the victim and heard the victim's version of events, and they continued asking defendant for his side of the story even after the arresting officer observed that he was "not talking." It was not dispositive that defendant was questioned in the immediate aftermath of the altercation, while the officers were still determining whether a crime had occurred.— *People v Robinson*, 45 NY3d 243.

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Reasonable Suspicion to Stop Vehicle — Anonymous Tip.—In the prosecution of defendant following the discovery of a handgun and ammunition in his vehicle's glove compartment after he was stopped by police based upon a contemporaneous report from an anonymous 911 caller that they were the victim of a crime, there was record support for the affirmed finding of reasonable suspicion for the stop of defendant's vehicle. The totality of the circumstances established that there was reasonable suspicion. The anonymous informant used the 911 system to report that he had "just been shot," necessarily claiming personal knowledge of the crime. The caller also provided a description of the alleged shooter, the make and color of the shooter's vehicle, and his location. The police were able to corroborate that information, within one minute of receiving the dispatch and within a block from the reported location, when they observed a car and suspect matching the description provided. The contemporaneous nature of the report was substantial and weighed in favor of the caller's veracity. Although the police learned information that arguably called aspects of the anonymous caller's reliability into question as the investigation continued, the review of the reasonableness of the officer's conduct was limited to the information known to the police at the time of the vehicle stop.— *People v Leighton R.*, 45 NY3d 266.

Reasonable Suspicion to Stop Vehicle — Anonymous Tip — Totality of Circumstances Test.—The appropriate test to be applied when assessing reasonable suspicion to conduct an automobile stop based upon a contemporaneous report from an anonymous 911 caller that they were the victim of a crime is whether the anonymous tip is sufficiently reliable to provide reasonable suspicion under the totality of the circumstances. In determining whether an anonymous tip provides probable cause, as opposed to reasonable suspicion, the anonymous informant's reliability and basis of knowledge are evaluated under the *Aguilar-Spinelli* framework (*see Aguilar v Texas*, 378 US 108 [1964]; *Spinelli v United States*, 393 US 410 [1969]). While the totality of the circumstances approach for determining reasonable suspicion involves an analysis of the *Aguilar-Spinelli* reliability and basis of knowledge factors, allowance must be made in applying them for the lesser showing required to meet the reasonable suspicion standard.— *People v Leighton R.*, 45 NY3d 266.

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that the bishop of the diocese knew that "employees/agents of the Diocese under their supervision and control . . . were grooming and sexually molesting children with whom the priests/brothers would have contact in their ministry, educational, and pastoral functions" and that it "was a widespread, ubiquitous, and systemic problem in the Diocese involving many priests and numerous victims," the teacher alleged to have abused plaintiff was not a priest or an ecclesiastical teacher. Thus, plaintiff failed to plead any conduct on behalf of defendant diocese that evoked a conscious disregard for the rights of others so as to warrant punitive damages.— *C.R. v Episcopal Diocese of N.Y.*, 248 AD3d 1.

Negligent Hiring, Retention and Supervision — Conscious Disregard for Rights of Others.—Supreme Court properly denied defendant parochial school's motion to dismiss plaintiff former student's demand for punitive damages in an action for negligent hiring, retention and supervision arising from allegations that a lay teacher at the school had sexually abused plaintiff over the course of six months. Punitive damages in negligent hiring, retention, or supervision actions generally require conduct evincing a high degree of moral culpability or which constitutes willful or wanton negligence or recklessness so as to evince a conscious disregard for the rights of others. A "conscious disregard" requires knowledge, or actual notice, of the potential of harm to others. The complaint alleged that defendant school was given actual notice that the teacher was sexually abusing plaintiff and then failed to adequately investigate the allegations to such an extent that suggested ulterior motives. Plaintiff's denial of the abuse during a meeting with school administrators did not negate the actual notice received by defendant. Accepting as true plaintiff's allegations that defendant school, in an effort to avoid scandal, continued to retain the teacher without any disclosure of his heinous acts to students and their parents, failed to act to prevent or limit his contacts with children, and concealed their knowledge that the teacher was unsafe, the punitive damages claim was sufficient at the prediscovery stage of the litigation.— *C.R. v Episcopal Diocese of N.Y.*, 248 AD3d 1.

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NEGLIGENT SUPERVISION.

Sexual Abuse of Student by Teacher at Religious School — Duty of Religious Diocese.—Defendant religious diocese did not establish entitlement to summary judgment dismissing an action for negligent hiring, retention and supervision arising from allegations that plaintiff former student was sexually abused over the course of six months by a lay teacher at a parochial school within the diocese. Defendant's affidavit from its archivist briefly disputing the allegations was neither conclusive nor supported by any corroborating evidence. That affidavit was refuted by one submitted by plaintiff from a former Catholic priest and theologian who, based on publicly available records, opined that there existed an affiliation and relationship between the school and its teachers and the diocese, and that the proof of the extent of that relationship was in the sole possession of defendants.— *C.R. v Episcopal Diocese of N.Y.*, 248 AD3d 1.

Sexual Abuse of Student by Teacher — Schools — Students — Injury to Student — Scope of Duty — Notice of Criminal Propensity — Sexual Abuse of Student by Teacher off School Grounds.—In an action for negligent hiring, retention and supervision against defendant parochial school, plaintiff former student's allegations that a lay teacher at the school had sexually abused her over the course of six months, including after the abuse was reported to the school by the parents of plaintiff's friends and a therapist, were sufficient to permit an inference that defendant school, had it exercised ordinary care, should have been aware of the teacher's propensity to engage in sexual abuse. Plaintiff's allegations indicated that the abuse "occurred regularly" over a six-month period; the teacher "openly and notoriously" drove her to and from the school every day; plaintiff regularly wore the teacher's jacket throughout the school; the teacher "openly touched Plaintiff in sensual and inappropriate ways" at an after-school dance program; and the teacher "openly flirt[ed] with Plaintiff during school hours" and touched her in a flirtatious manner in the hallways of the school. While plaintiff denied the sexual abuse claims when the school questioned her about them, the standard of care is based on what was customary at the time of the conduct. At that time, defendant school should have known that a 13-year-old student may deny being sexually abused by a teacher in a single meeting with school administrators out of fear, and that the report made by the friend's parents required a more robust response than the school provided.— *C.R. v Episcopal Diocese of N.Y.*, 248 AD3d 1.

SIDEWALKS.

Location of Plaintiff's Fall.— *Thomas v Mohammad Ali, LLC*, 89 Misc 3d 1203(A), 2026 NY Slip Op 50816(U).

PARENT, CHILD AND FAMILY.

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Emancipation.— *J.L. v R.L.*, 89 Misc 3d 1202(A), 2026 NY Slip Op 50813(U).

PLEADING.

SUFFICIENCY OF PLEADING.

Fraud.— *DeMorato v Maggid Ventures, LLC*, 89 Misc 3d 1202(A), 2026 NY Slip Op 50783(U).

PROPERTY.

LOST PROPERTY.

Recording Device.— *Matter of Redacted v Redacted*, 89 Misc 3d 1202(A), 2026 NY Slip Op 50787(U).

RECORDS.

FREEDOM OF INFORMATION LAW.

Exemption from Disclosure — Attorney-Client Privilege.—In a CPLR article 78 proceeding challenging respondent Office of Court Administration's denial of

RECORDS—Cont'd

petitioner's Freedom of Information Law request, in which the parties reached an agreement that a set of responsive documents existed that had been reasonably described, respondent was not entitled to a blanket exemption from disclosure based on a sweeping invocation of attorney-client privilege between its Counsel's Office and all Unified Court System (UCS) judges. Respondent failed to meet its preliminary burden of establishing an attorney-client relationship with all UCS judges. Whether a particular document is or is not protected by the attorney-client privilege is necessarily a fact-specific determination, most often requiring in camera review. Without having identified or produced any documents for in camera review, respondent could not assert a blanket privilege over the entire universe of potentially responsive documents.— *Matter of New York Civ. Liberties Union v New York State Off. of Ct. Admin.*, 45 NY3d 226.

REPLEVIN.

RECOVERY OF CHATTEL.

Temporary Plastic Partial Denture.— *Ost v Convissar*, 89 Misc 3d 1202(A), 2026 NY Slip Op 50786(U).

SALES.

WARRANTIES.

Breach—Expiration of Warranty Period.— *Melrose Fintech Ventures, LLC v MarineMax Northeast, LLC*, 89 Misc 3d 1203(A), 2026 NY Slip Op 50821(U).

SCHOOLS.

STUDENTS.

Injury to Student — Scope of Duty — Sexual Abuse of Student by Teacher off School Grounds.—Defendant parochial school was not entitled to dismissal of plaintiff former student's action for negligent hiring, retention and supervision, which arose from allegations that a lay teacher at the school had sexually abused her over the course of six months, based on defendant's claim that it did not owe a duty to plaintiff because all of the alleged sexual abuse occurred off the school's premises. While a school's custodial duty ceases once the student has passed out of its orbit of authority and a parent is free to reassume control over the child's protection, its duty continues and is breached if the student is released without further supervision into a foreseeably hazardous setting the school had a hand in creating. Plaintiff's allegations, including inappropriate physical touching during school hours and on school grounds, created the necessary nexus between defendant school and the off-campus abuse and permitted an inference that the off-campus abuse was foreseeable.— *C.R. v Episcopal Diocese of N.Y.*, 248 AD3d 1.

SURETYSHIP AND GUARANTEE.

SCOPE OF GUARANTEE.

Channel Partners Capital, LLC v Cookie Factory, LLC, 89 Misc 3d 1201(A), 2026 NY Slip Op 50777(U).

TRIAL.

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Plaintiff's Remote Criminal Convictions and Past Drug Use — Motion in Limine.— *Smith v A.O. Smith Water Prods. Co.*, 89 Misc 3d 213.

NOTE OF ISSUE AND STATEMENT OF READINESS.

Motion to Vacate.— *State Farm Fire & Cas. Co. v M. Marin Restoration Inc.*, 89 Misc 3d 1203(A), 2026 NY Slip Op 50818(U).

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Fiduciary Relationship.— *Morataya v 183 Lincoln Ave. LLC*, 89 Misc 3d 1203(A), 2026 NY Slip Op 50819(U).

TRUSTS—Cont'd

Mortgage Rescue Scheme.— *DeMorato v Maggid Ventures, LLC*, 89 Misc 3d 1202(A), 2026 NY Slip Op 50783(U).

VENDOR AND PURCHASER.

BONA FIDE PURCHASER.

Summary Judgment.— *145 Rosedale Ave. LLC v Bank of Am., N.A.*, 89 Misc 3d 1202(A), 2026 NY Slip Op 50779(U).

WORKERS' COMPENSATION.

INJURIES ARISING OUT OF AND IN COURSE OF EMPLOYMENT.

Psychological Injuries Caused by Workplace Exposure to COVID-19.—In workers' compensation proceedings brought by claimant transit workers and claimant teacher alleging psychological injuries resulting from workplace exposure to COVID-19, substantial evidence supported the Workers' Compensation Board's determination that the stress of workplace exposure experienced by claimants was comparable to the stress experienced by similarly situated workers in the normal work environment during the COVID-19 pandemic. Evidence of COVID-19's prevalence in the workplace does not relieve a claimant of the burden to establish that the injury was accidental which, in cases of emotional stress-induced psychological injury, has involved a demonstration by the claimant of stress greater than the stress experienced by similarly situated workers in the normal work environment. The Board was not required to consider each claimant's particular vulnerabilities, nor did the Board apply disparate burdens to the claims here as opposed to COVID-19 contraction claims, as the Appellate Division held. While psychological and physical injury are compensable to the same extent, neither is compensable unless the claimant satisfies the separate elements that the injury was accidental and that it arose out of and in the course of employment.— *Matter of McLaurin v New York City Tr. Auth.*, 45 NY3d 251.

REPORTS OF CASES

DECIDED IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK

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In the Matter of New York Civil Liberties Union, Appellant, v New York State Office of Court Administration, Respondent, et al., Defendant.

Argued September 9, 2025; decided October 21, 2025

PROCEDURAL SUMMARY

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered February 8, 2024. The Appellate Division (1) reversed, on the law, insofar as appealed from, so much of an order and judgment (one paper) of the Supreme Court, New York County (Lyle E. Frank, J.; op 76 Misc 3d 1224[A], 2022 NY Slip Op 51041[U] [2022]), entered in a hybrid proceeding pursuant to CPLR article 78 and declaratory judgment action, as had granted so much of the petition as sought to compel respondent New York State Office of Court Administration to disclose records requested by petitioner pursuant to the Freedom of Information Law to the extent of directing disclosure to petitioner, within 180 days of service, of all documents directed to judges and/or their chambers staff, from January 1, 2011, to present, in which federal or state court decisions, statutes, regulations or ordinances are summarized, analyzed, interpreted, construed, explained, clarified, and/or applied; (2) denied the petition; and (3) dismissed "the proceeding brought pursuant to CPLR article 78."

Matter of New York Civ. Liberties Union v New York State Off. of Ct. Admin., 224 AD3d 458, reversed.

HEADNOTE

Records — Freedom of Information Law — Exemption from Disclosure — Attorney-Client Privilege

In a CPLR article 78 proceeding challenging respondent Office of Court Administration's denial of petitioner's Freedom of Information Law request, in which the parties reached an agreement that a set of responsive documents existed that had been reasonably described, respondent was not entitled to a blanket exemption from disclosure based on a sweeping invocation of attorney-client privilege between its Counsel's Office and all Unified Court System (UCS) judges. Respondent failed to meet its preliminary burden of establishing an attorney-client relationship with all UCS judges. Whether a particular document is or is not protected by the attorney-client privilege is necessarily a fact-specific determination, most often requiring in camera review. Without having identified or produced any documents for in camera review, respondent could not assert a blanket privilege over the entire universe of potentially responsive documents.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

Am Jur 2d Attorneys at Law § 139; Am Jur 2d Depositions and Discovery § 28; Am Jur 2d Freedom of Information Acts §§ 2, 12, 18, 20, 43–44, 50–51, 55, 59, 69–71, 90–92, 95, 173, 176–179, 198, 205–211, 218, 222–223; Am Jur 2d Witnesses §§ 320–321, 339–340, 342, 346–347, 400.

Carmody-Wait 2d Officers of Court §§ 3:387, 3:389; Carmody-Wait 2d Disclosure §§ 42:102–42:104; Carmody-Wait 2d Presentation of the Case §§ 56:190–56:191; Carmody-Wait 2d Proceeding Against a Body or Officer §§ 145:587–145:591, 145:594, 145:602–145:603, 145:609, 145:611–145:614; Carmody-Wait 2d Testimony of Witnesses §§ 195:186–195:188, 195:190, 195:193–195:194, 195:198.

McKinney's, CPLR art 78.

NY Jur 2d Attorneys at Law §§ 193–194; NY Jur 2d Disclosure §§ 80–81, 84–85, 90–91; NY Jur 2d Evidence and Witnesses §§ 857–858, 863; NY Jur 2d Records and Recording §§ 17–19, 21, 23, 38–42, 50, 55–56, 60, 63, 65, 68.

Siegel, NY Prac (6th ed) §§ 346–347.

ANNOTATION REFERENCE

See ALR Index under Attorney-Client Privilege; Disclosures; Discovery; Freedom of Information Acts; In Camera; Records and Recording.

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Query: "freedom of information" & "attorney client privilege" & disclosure & "in camera"

POINTS OF COUNSEL

American Civil Liberties Union Foundation, New York City (*Terry Ding* and *Bridget Lavender* of counsel), and *New York Civil Liberties Union Foundation*, New York City (*Daniel R. Lambright*, *Emma Curran Donnelly Hulse* and *Robert Hodgson* of counsel), for appellant. I. The New York State Office of Court Administration has not met its burden to withhold every requested record as privileged. (*Matter of Appellate Advocates v New York State Dept. of Corr. & Community Supervision*, 40

NY3d 547; *Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616; *Matter of Priest v Hennessy*, 51 NY2d 62; *Cooke v Laidlaw Adams & Peck*, 126 AD2d 453; *Matter of Washington Post Co. v New York State Ins. Dept.*, 61 NY2d 557.) II. New York Civil Liberties Union's Freedom of Information Law request is specific, circumscribed, and reasonably describes the records sought. (*Matter of Goldstein v Incorporated Vil. of Mamaroneck*, 221 AD3d 111; *Matter of Puig v New York State Police*, 212 AD3d 1025; *Matter of Reclaim the Records v New York State Dept. of Health*, 185 AD3d 1268; *Matter of Sell v New York City Dept. of Educ.*, 135 AD3d 594; *Matter of Jewish Press v Metropolitan Transp. Auth. of the State of N.Y.*, 193 AD3d 460.) III. The First Department improperly justified its denial of the New York Civil Liberties Union's Freedom of Information Law request by dismissing the concerns that motivated the request. (*Matter of Data Tree, LLC v Romaine*, 9 NY3d 454; *Coleman v Daines*, 19 NY3d 1087; *Matter of Daily Gazette Co. v City of Schenectady*, 93 NY2d 145; *Leucadia, Inc. v Applied Extrusion Tech., Inc.*, 998 F2d 157; *Richmond Newspapers, Inc. v Virginia*, 448 US 555.)

David Nocenti, Office of Court Administration, New York City (*Robyn L. Rothman* of counsel), for respondent. I. The denial of New York Civil Liberties Union's Freedom of Information Law request on the ground that the records sought were not reasonably described in conformity with Public Officers Law § 89 (3) was not affected by an error of law. (*Mulgrew v Board of Educ. of the City School Dist. of the City of N.Y.*, 87 AD3d 506; *Matter of Gould v New York City Police Dept.*, 89 NY2d 267; *Matter of Bader v Bove*, 273 AD2d 466; *Matter of Konigsberg v Coughlin*, 68 NY2d 245; *Matter of Aron Law, PLLC v New York City Dept. of Educ.*, 192 AD3d 552.) II. The Appellate Division correctly determined, in an alternative holding, that the Freedom of Information Law request was properly denied based on the attorney-client privilege. (*Matter of Appellate Advocates v New York State Dept. of Corr. & Community Supervision*, 40 NY3d 547; *Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371; *Blue Cross & Blue Shield of Greater New York*, 73 NY2d 588; *Matter of Gilbert v Office of the Governor of the State of N.Y.*, 170 AD3d 1404; *Matter of Shooters Comm. on Political Educ., Inc. v Cuomo*, 147 AD3d 1244.)

Davis Wright Tremaine LLP, New York City (*Jeremy Chase* of counsel), and *Reporters Committee for Freedom of the Press*, Washington, D.C. (*Bruce D. Brown*, *Lisa Zycherman*, *Mara*

Gassmann and *Matthew Singer* of counsel), for Reporters Committee for Freedom of the Press and others, amici curiae. I. The Freedom of Information Law provides for information about governmental decision-making to be disclosed to the public, which is vital to news reporting, and the Court should examine claimed exceptions and privileges with caution. (*Matter of Newsday, Inc. v State Dept. of Transp.*, 5 NY3d 84; *Matter of Abdur-Rashid v New York City Police Dept.*, 31 NY3d 217; *Matter of Fink v Lefkowitz*, 47 NY2d 567; *Matter of Data Tree, LLC v Romaine*, 9 NY3d 454; *Matter of Priest v Hennessy*, 51 NY2d 62.) II. The Freedom of Information Law reflects an informed policy choice by the Legislature, and agencies are not free to disregard the law's "reasonably described" standard. (*Matter of Jewish Press, Inc. v New York State Educ. Dept.*, 212 AD3d 916; *Matter of Puig v New York State Police*, 212 AD3d 1025; *Matter of NYP Holdings, Inc. v New York City Police Dept.*, 220 AD3d 487; *Matter of Konigsberg v Coughlin*, 68 NY2d 245; *Matter of Asian Am. Legal Defense & Educ. Fund v New York City Police Dept.*, 125 AD3d 531.)

The Legal Aid Society, New York City (*Shona Hemmady*, *Alexandra Ogunsanya*, *Philip Desgranges* and *Meghna Philip* of counsel), *The Bronx Defenders*, Bronx (*Anne Venhuizen* and *Saul Zipkin* of counsel), and *Brooklyn Defender Services*, Brooklyn (*Yung-Mi Lee*, *Al O'Connor*, *Lucas Marquez* and *Jackie Gosdigian* of counsel), for The Legal Aid Society and others, amici curiae. I. The New York State Office of Court Administration's memoranda providing legal interpretations to judges must be made available to the public because strong public policy goals of equal access to justice and effective representation require disclosure. (*Matter of Appellate Advocates v New York State Dept. of Corr. & Community Supervision*, 40 NY3d 547; *Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616; *Matter of Priest v Hennessy*, 51 NY2d 62; *People ex rel. Vogelstein v Warden of County Jail of County of N.Y.*, 150 Misc 714; *Matter of Crawford v Ally*, 197 AD3d 27.) II. The New York State Office of Court Administration's secret memoranda undermine confidence and trust in the rule of law for court users, who are disproportionately low-income New Yorkers of color.

Wilmer Cutler Pickering Hale and Dorr LLP, New York City (*Peter G. Neiman* and *Tania C. Matsuoka* of counsel), for Cynthia Godsoe and others, amici curiae. I. Granting public access to New York State Office of Court Administration memo-

randa supports judicial transparency and independence. (*Richmond Newspapers, Inc. v Virginia*, 448 US 555; *Matter of Herrick v Town of Colonie*, 211 AD3d 1146; *Mosallem v Berenson*, 76 AD3d 345; *Matter of Brownstone*, 191 AD2d 167; *Hicklin Eng'g, L.C. v Bartell*, 439 F3d 346.) II. The New York State Office of Court Administration's secrecy conflicts with core principles of judicial ethics. III. The New York State Office of Court Administration's sweeping, unprecedented claim of attorney-client privilege undermines judicial deliberation and accountability. (*In re Grand Jury Proceedings*, 219 F3d 175; *Matter of Spring v County of Monroe*, 141 AD3d 1151; *Matter of Crawford v Ally*, 197 AD3d 27.)

OPINION OF THE COURT

HALLIGAN, J.

This case concerns a Freedom of Information Law (FOIL) request made by the New York Civil Liberties Union (NYCLU) to the Office of Court Administration (OCA). The request followed the leak of a 2021 internal OCA memorandum, which proposed a narrow reading of a recent court decision and had apparently been widely distributed to judges in the Unified Court System (UCS).

OCA asserts that NYCLU's request did not reasonably describe the records sought, and that any responsive materials would be subject to attorney-client privilege. On the first point, the parties now agree that an identifiable set of responsive documents exists and can be located by the agency, and NYCLU says that it wants nothing more. On the second point, OCA is not entitled to a blanket exemption for all potentially responsive documents based on a sweeping invocation of attorney-client privilege between its Counsel's Office and all UCS judges. We therefore conclude that the Appellate Division erred in dismissing the FOIL proceeding as to the identified subset of documents, based solely upon OCA's claim of a blanket attorney-client privilege exemption.

I.

In 2021, the First Department held in *Matter of Crawford v Ally* that due process requires an evidentiary hearing prior to issuance of certain temporary orders of protection (197 AD3d 27 [1st Dept 2021]). A memorandum discussing that ruling (the *Crawford* memorandum), labeled "Confidential"/"Internal Use Only," was sent by OCA's Deputy Counsel of Criminal Justice

to several Deputy Chief Administrative Judges. The memorandum later became public. In response to subsequent media inquiries concerning the memorandum, an OCA spokesperson stated that it was OCA's "normal practice" to "issue memos with context on cases that have potential significant operational impacts on the courts."

NYCLU then submitted a FOIL request to OCA, appending the *Crawford* memorandum and seeking materials that would enable NYCLU to "better understand the breadth of the OCA's practice." The request, in relevant part, sought all documents "created by the OCA (including its Counsel's Office)" between 2011 and the response date, "distributed within the OCA and/or to judges in the New York State Unified Court System," in which federal or state decisions, statutes, regulations, or ordinances are "summarized, analyzed, interpreted, construed, explained, clarified, and/or applied." The request noted that its use of the term "documents" encompassed "memoranda, directives, orders, instructions, guidance, policies, procedures, rules, regulations, and/or other statements."

OCA's records access officer denied NYCLU's request on two grounds. The officer determined that first, the request was overly broad and did not reasonably describe the records, and second, any responsive documents were exempt from disclosure as intra-agency materials and privileged as attorney-client communications and work product.

An administrative appeal followed. In the course of the appeal, NYCLU submitted a letter stating that "by way of further explanation, [the request] cover[ed] documents created by the OCA that contain instructions or guidance as to how judges should interpret and/or apply court decisions, statutes, regulations, or ordinances." NYCLU pointed to the *Crawford* memorandum as "an example of the type of documents sought" and cited the OCA spokesperson's statement "indicating that such memoranda are commonly issued." The OCA appeals officer denied the appeal, determining that the request was not reasonably described, and asserting that any responsive documents were exempt from disclosure as intra-agency materials, as well as under the work-product and attorney-client privileges.

NYCLU then commenced this proceeding pursuant to CPLR article 78. Supreme Court granted the FOIL request in part, held that the request was sufficiently specific and that neither

attorney-client nor work-product privilege applied, and ordered disclosure of all responsive documents (76 Misc 3d 1224[A], 2022 NY Slip Op 51041[U] [Sup Ct, NY County 2022]). The Appellate Division reversed, denied the petition, and dismissed the proceeding, holding that the request was overbroad, and alternatively that the records were exempt under the attorney-client and work-product privileges (224 AD3d 458 [1st Dept 2024]). We granted leave to appeal.

II.

FOIL makes "[a]ll government records . . . presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions of Public Officers Law § 87 (2)" (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 274-275 [1996]; *see also Matter of Appellate Advocates v New York State Dept. of Corr. & Community Supervision*, 40 NY3d 547, 551 [2023]). We review an agency's determination of a FOIL request for error of law (CPLR 7803 [3]), and "[j]udicial review of an administrative determination is limited to the grounds invoked by the agency" (*Matter of Madeiros v New York State Educ. Dept.*, 30 NY3d 67, 74 [2017], quoting *Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 758 [1991]).

A party seeking documents pursuant to FOIL must "reasonably describe[ ]" the records it wants (Public Officers Law § 89 [3] [a]). When an agency denies a request for failure to satisfy this requirement (i.e., as overbroad), it has the burden of establishing "that the descriptions were insufficient for purposes of locating and identifying the documents sought" (*Matter of Konigsberg v Coughlin*, 68 NY2d 245, 249 [1986] [internal quotation marks omitted]).

Throughout this litigation, OCA has challenged whether NYCLU's request satisfied the requirement to "reasonably describe" the documents sought. At oral argument, though, the parties agreed that a set of responsive documents exists which have been reasonably described (tr at 25-26; 34-38; 50-51), and we agree with that conclusion. That set encompasses documents similar in substance to the *Crawford* memorandum, circulated between Counsel's Office and UCS judges (tr at 25-27). We note OCA does not concede that NYCLU's request, either in its initial form or as clarified in the administrative appeal, is limited to that subset of documents. But OCA agreed at

oral argument and in its briefing to the Appellate Division[1] that there is a subset of responsive documents which have been reasonably described.

At argument, NYCLU represented that they are not requesting any documents beyond this universe (tr at 53-55). Given this representation, no further dispute on this point appears to lie for our resolution. That group of responsive documents should be disclosed, unless exempt (*see* Public Officers Law § 89 [3] [a] [stating that an agency may grant or deny a FOIL request "in whole or in part"]; *Matter of Reclaim the Records v New York State Dept. of Health*, 45 NY3d 1 [2025] [requiring the agency to produce certain records that were not subject to an exemption, even though other requested records were exempted]).

III.

That brings us to the question of whether OCA is entitled to a blanket exemption, based on the attorney-client privilege, to production of any documents that fall within the narrowed request. In responding to a FOIL request, "[t]he burden is on the agency to establish that an exemption applies and, to that end, it must articulate a particularized and specific justification for denying access" (*Matter of Reclaim the Records*, 45 NY3d at 12 [internal quotation marks omitted]). "To ensure maximum access to government documents, the exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption" (*Matter of Gould*, 89 NY2d at 275 [internal quotation marks omitted]).

OCA relies on Public Officers Law § 87 (2) (a), which exempts records "specifically exempted from disclosure by state or federal statute," and CPLR 4503 (a) (1), which exempts confidential attorney-client communications (*see also* CPLR

1. In its reply brief to the Appellate Division, OCA conceded that "NYCLU's clarifications to date do identify a subset of documents." Although contesting that NYCLU's administrative appeal letter constituted a clarification, OCA did not challenge NYCLU's assertion that a request may be clarified on administrative appeal. Any differences between NYCLU's description of its request in the administrative appeal and the article 78 proceeding are minimal, and thus, to the extent a subset of documents were reasonably described in the article 78 proceeding, they were reasonably described in the administrative appeal as well.

3101 [b] ["Upon objection by a person entitled to assert the privilege, privileged matter shall not be obtainable"]).[2]

The attorney-client privilege "foster[s] uninhibited dialogue between lawyers and clients in their professional engagements, thereby ultimately promoting the administration of justice" (*Rossi v Blue Cross & Blue Shield of Greater N.Y.*, 73 NY2d 588, 592 [1989]). The privilege is intended to ensure that "one seeking legal advice will be able to confide fully and freely in his attorney, secure in the knowledge that his confidences will not later be exposed to public view to his embarrassment or legal detriment" (*Matter of Priest v Hennessy*, 51 NY2d 62, 67-68 [1980]). Because the privilege "constitutes an obstacle to the truth-finding process," its scope is circumscribed by its purpose (*Matter of Jacqueline F.*, 47 NY2d 215, 219 [1979] [internal quotation marks omitted]). It is "beyond dispute that no attorney-client privilege arises unless an attorney-client relationship has been established" (*Matter of Priest*, 51 NY2d at 68). And the privilege applies only when "the communication from attorney to client [is] made for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship" and "[t]he communication itself [is] primarily or predominantly of a legal character" (*Matter of Appellate Advocates*, 40 NY3d at 552 [internal quotation marks omitted], quoting *Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 377-378 [1991]).

OCA claims a blanket attorney-client relationship with all judges in the UCS, and seeks to assert the privilege without any review of specific documents. But OCA has not demonstrated, on this record, an attorney-client relationship between Counsel's Office and all UCS judges. The case on which OCA primarily relies, *Matter of Appellate Advocates*, is distinguishable because the petitioner there did not dispute whether counsel to the Board of the Department of Corrections and Community Supervision had an attorney-client relationship with the Board (40 NY3d at 553-555).

The other cases on which OCA relies do not help, either. As with *Matter of Appellate Advocates*, they address whether particular documents are privileged where an attorney-client relationship has already been established or is not contested (*see*

2. We have no occasion to address OCA's assertions below of the attorney work-product privilege (*see* CPLR 3101 [c]) or the intra-agency exemption (*see* Public Officers Law § 87 [2] [g]) because OCA does not raise them before us.

Spectrum, 78 NY2d at 378 ["Clearly the requisite professional relationship was established"]; *Rossi*, 73 NY2d at 591-593; *Matter of Gilbert v Office of the Governor of the State of N.Y.*, 170 AD3d 1404, 1405 [3d Dept 2019]; *Matter of Shooters Comm. on Political Educ., Inc. v Cuomo*, 147 AD3d 1244, 1245-1247 [3d Dept 2017]).

Moreover, those cases involved claims of privilege as to particular, identified documents, not a sweeping claim of privilege applicable to a broad category of documents. Indeed, those cases illustrate the problem with OCA's sweeping claim here. We have explained that "whether a particular document is or is not protected is necessarily a fact-specific determination, most often requiring in camera review" (*Spectrum*, 78 NY2d at 378 [citation omitted]). Without having identified or produced any documents for in camera review, OCA cannot assert a blanket privilege over the entire universe of potentially responsive documents. In reaching this conclusion, we do not suggest that Counsel's Office could never establish such a relationship. But we decline to recognize the sweeping, ex ante privilege that OCA claims here.

We hold that OCA has failed to meet its preliminary burden of establishing an attorney-client relationship with all UCS judges. Should OCA continue to assert this privilege over any specific documents identified in response to the limited request upon which the parties have now agreed, the court on remittal should assess whether such documents fall within the asserted exemption, including by in camera review as necessary (*see Matter of M. Farbman & Sons v New York City Health & Hosps. Corp.*, 62 NY2d 75, 83 [1984]).[3]

Accordingly, the order of the Appellate Division should be reversed, with costs, and the matter remitted to Supreme Court for further proceedings in accordance with this opinion.

RIVERA, J. (dissenting in part). Two legal tenets are central to this appeal. First, government records are presumptively open to the public under the Freedom of Information Law (FOIL) (*Matter of Gould v New York City Police Dept.*, 89 NY2d

3. Contrary to the dissent's view, our determination that OCA may not invoke a blanket exemption based on its sweeping attorney-client privilege claim does not foreclose consideration of whether a viable attorney-client privilege can be asserted over any specific documents. Remittal is appropriate because OCA has not yet produced any responsive documents, and "whether a particular document is or is not protected is necessarily a fact-specific determination" (*Spectrum*, 78 NY2d at 378).

267, 274-275 [1996]). Second, statutory exemptions to disclosure are limited and narrowly interpreted because transparency and the public's right to know are the foundation of our democracy (*see Matter of Capital Newspapers, Div. of Hearst Corp. v Whalen*, 69 NY2d 246, 252 [1987], citing *Matter of Fink v Lefkowitz*, 47 NY2d 567, 571 [1979]). Petitioner, the New York Civil Liberties Union (NYCLU), requested documents under FOIL from the New York State Office of Court Administration (OCA), including OCA Counsel's Office's memoranda to Unified Court System (UCS) judges instructing them on the interpretation and application of the law in cases they preside over. OCA denied that request, asserting that the attorney-client privilege applied to all responsive records.

Contrary to OCA's claim, no such privilege encompasses the documents that NYCLU requested. No document that OCA Counsel's Office may have prepared to advise state judges in their adjudicatory capacity could implicate an attorney-client relationship with such judges. Each judge must, in their role as an unbiased adjudicator in a particular case, independently decide legal issues based on the applicable law, record of the proceedings, and the parties' arguments. A judge may not instead rely on a confidential OCA communication instructing them on how to apply the law or dispose of a case. Therefore, I agree with the majority that, for the agreed upon documents, "OCA has not demonstrated, on this record, an attorney-client relationship between Counsel's Office and all UCS judges" (majority op at 234), and that the Appellate Division's order should be reversed (majority op at 235). However, I do not agree that remittal for an in camera review of individual documents is warranted, because any possible claim of a nonexistent attorney-client privilege is meritless. I would therefore reverse and order that OCA disclose the documents without further delay.

* * *

"It is settled that FOIL is based on the overriding policy consideration that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government" (*Capital Newspapers, Div. of Hearst Corp.*, 69 NY2d at 252 [internal quotation marks omitted]). To foster public accountability and open government, FOIL makes "[a]ll government records . . . presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions of Public Officers Law § 87 (2)" (*Gould*, 89 NY2d at

274-275). FOIL is "liberally construed and its exemptions narrowly interpreted to achieve its legislative purpose of maximizing public access to government records" (*Matter of Appellate Advocates v New York State Dept. of Corr. & Community Supervision*, 40 NY3d 547, 551 [2023] [internal quotation marks and citations omitted]).

"[J]udicial review of an administrative determination [of a FOIL request] is limited to the grounds invoked by the agency" (*Matter of Madeiros v New York State Educ. Dept.*, 30 NY3d 67, 74 [2017], quoting *Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 758 [1991]). "If the reasons an agency relies on do not reasonably support its determination, the administrative order must be overturned and it cannot be affirmed on an alternative ground that would have been adequate if cited by the agency" (*Matter of National Fuel Gas Distrib. Corp. v Public Serv. Commn. of the State of N.Y.*, 16 NY3d 360, 368 [2011]). An agency wishing to deny disclosure based on a FOIL exemption must do so expressly during the administrative process, and it cannot change its justification for the denial during the course of litigation (*see Madeiros*, 30 NY3d at 74 [rejecting the agency's reliance on a FOIL exemption in a CPLR article 78 proceeding because it failed to invoke that exemption when it originally denied the FOIL request]; *see also Scherbyn*, 77 NY2d at 758 [" '(A) reviewing court, in dealing with a determination . . . which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis' "]).

On this appeal we are concerned only with OCA's invocation of the attorney-client privilege.[1] FOIL states that an "agency may deny access to records or portions thereof that . . . are specifically exempted from disclosure by state or federal statute" (Public Officers Law § 87 [2] [a]). In turn, CPLR 4503 (a) (1) codifies the attorney-client privilege and, accordingly, FOIL exempts from disclosure all documents protected by this privilege (*see also* CPLR 3101 [b] ["Upon objection by a person

1. OCA also invoked the intra-agency materials exemption and attorney work product privilege, both during the administrative appeal and in article 78 proceedings below, as justifications for denying NYCLU's request. However, it has abandoned those justifications before this Court.

entitled to assert the privilege, privileged matter shall not be obtainable"]).

"The oldest among the common-law evidentiary privileges, the attorney-client privilege 'fosters the open dialogue between lawyer and client that is deemed essential to effective representation' " (*Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616, 623 [2016], quoting *Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 377 [1991]). The privilege is intended to "ensure that one seeking legal advice will be able to confide fully and freely in [their] attorney, secure in the knowledge that [their] confidences will not later be exposed to public view to [their] embarrassment or legal detriment" (*Matter of Priest v Hennessy*, 51 NY2d 62, 67-68 [1980]). However, "the attorney-client privilege constitutes an obstacle to the truth-finding process, [and its] invocation . . . should be cautiously observed to ensure that its application is consistent with its purpose" (*id.* at 68 [internal quotation marks omitted]).

For an attorney-client privilege to attach, the party asserting it must establish "that the communication at issue was between an attorney and a client 'for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship,' that the communication is predominantly of a legal character, that the communication was confidential and that the privilege was not waived" (*Ambac Assur. Corp.*, 27 NY3d at 624, quoting *Rossi v Blue Cross & Blue Shield of Greater N.Y.*, 73 NY2d 588, 593-594 [1989]). The party invoking the attorney-client privilege must also demonstrate the existence of an attorney-client relationship (*see Priest*, 51 NY2d at 68-69). "Such a relationship arises only when one contacts an attorney in [their] capacity as such for the purpose of obtaining legal advice or services" (*id.*). The party must prove "independent facts" that establish this relationship; an attorney's "mere statement that [a] party was a 'client' does not satisfy this burden" (*id.* at 70). Among the "independent facts" that could support a finding of an attorney-client relationship are a fee arrangement or payment, a retainer agreement, the attorney's appearance in a judicial proceeding on behalf of the client, or an oral conversation in which the attorney undertook representation (*see e.g. Rand v Birbrower, Montalbano, Condon & Frank, P.C.*, 31 Fed Appx 748, 751 [2d Cir 2002]; *Cooke v Laidlaw Adams & Peck*, 126 AD2d 453, 455 [1st Dept 1987]).

As the majority explains, the parties' quarrel now centers on whether the attorney-client privilege protects from disclosure

an agreed upon subset of NYCLU's broader document request. That subset "encompasses documents similar in substance to the *Crawford* memorandum, circulated between Counsel's Office and UCS judges" (majority op at 232). The "*Crawford* memorandum" refers to the OCA memorandum to UCS judges instructing them on how to apply the Appellate Division-mandated hearing first announced in *Matter of Crawford v Ally* (197 AD3d 27 [1st Dept 2021]).

I agree with the majority that OCA's invocation of the attorney-client privilege is without legal basis. When acting in their capacity as judicial officers, charged with adjudicating legal matters in the cases before them, UCS judges are not OCA's clients for the purposes of rendering legal advice. OCA cannot instruct a judge on the disposition of a petition, motion, pending action, or future litigation, because OCA Counsel's Office is not their legal advisor in such circumstances. OCA's communications in this vein are not confidences shared in furtherance of a fiduciary relationship initiated by the judge or advice on a legal subject of personal interest to the judge.[2]

OCA's reliance on *Appellate Advocates* to support its claim is misplaced. As the majority notes, in that case, the parties agreed that an attorney-client relationship existed (majority op at 234). Moreover, the concern weighing in favor of the privilege we identified—the benefits of "[e]ncouraging proactive compliance with the law"—applies to potential parties to a dispute, not to the adjudicator (*Appellate Advocates*, 40 NY3d at 553). Thus, the privilege cannot apply to UCS judges in their role as neutral arbiters of matters filed in the New York courts.

Our state judges' role as independent adjudicators with no personal stake in the outcome of cases is at odds with OCA's claim that these judges are its clients, even in their adjudicatory capacity. Because of their independence and neutrality, judges, when acting as adjudicators, may not consider confidential legal guidance from OCA intended to instruct them on how to resolve cases. Since a privilege "applies only where necessary to achieve its purpose" (i.e., to facilitate the provision of informed legal advice) (*Fisher v United States*, 425 US 391, 403 [1976]), the attorney-client privilege does not apply to guidance

2. Petitioner NYCLU concedes that the privilege would apply to documents related to OCA Counsel's Office's advice or its representation of individual judges as named parties in litigation. I agree that OCA may invoke the attorney-client privilege in those circumstances.

that OCA Counsel's Office issued to judges in their adjudicatory capacity.

OCA's privilege claim is also at odds with ethical considerations. Judges have a "duty to conduct [themselves] in such a manner as to inspire public confidence in the integrity, fairmindedness and impartiality of the judiciary" (*Matter of Esworthy*, 77 NY2d 280, 282 [1991]). As amici legal scholars point out, OCA's confidential memoranda advising judges in their adjudicatory capacity undermine these values and present similar risks as ex parte communications, which New York bars with narrow exceptions (*see* 22 NYCRR 100.3 [B] [6]). The prohibition on ex parte communications promotes transparency and ensures that no party improperly benefits from or is disadvantaged by communications with the court for which not all parties are present. Like an ex parte communication, the *Crawford* memorandum (along with other potential confidential guidance documents) denied criminal defense attorneys an opportunity to engage with and rebut OCA's interpretation of the law in their clients' cases. Additionally, as NYCLU argues, a judge adjudicating a case in which they are also a "client," whose sources of legal authority are secret due to privilege, could implicate Judiciary Law § 14. That provision states that "[a] judge shall not sit as such in, or take any part in the decision of, an action . . . in which [they are] interested . . . ."

OCA's failure to establish the necessary attorney-client relationship to invoke the privilege over the agreed upon subset of documents ends the matter. Therefore, we should reverse and order disclosure. The majority, however, remits to Supreme Court, concluding that if "OCA continue[s] to assert this privilege over any specific documents identified in response to the limited request upon which the parties have now agreed, the court on remittal should assess whether such documents fall within the asserted exemption, including by in camera review as necessary" (majority op at 235, citing *Matter of M. Farbman & Sons v New York City Health & Hosps. Corp.*, 62 NY2d 75, 83 [1984]). There are several reasons why remittal is not only improper but also wasteful under the circumstances.

First, neither the parties nor Supreme Court deemed such review necessary, and our determination that OCA failed to establish an attorney-client relationship—as a matter of law—forecloses revisiting the question on a document-by-document basis. Second, while the majority is correct that a blanket assertion of an attorney-client privilege is generally inappropri-

ate because determining whether a particular document is "protected is necessarily a fact-specific determination," (majority op at 235 n 3, citing *Spectrum*, 78 NY2d at 378), here, OCA's assertion fails categorically. As the majority and I conclude, there is no attorney-client relationship—the sine qua non of the privilege—between OCA Counsel's Office and UCS judges as relates to the only documents at issue. Thus, by default, no attorney-client privilege could ever attach to the withheld materials. In camera review of individual documents will not change that reality.[3]

Although the majority suggests that upon remittal OCA could establish that some portion of the responsive documents is protected by attorney-client privilege, this proposition is unpersuasive. The documents, as defined, are those "circulated between Counsel's Office and UCS judges" that are similar in substance to the *Crawford* memorandum—in other words, documents drafted to instruct and guide UCS judges on how to interpret and apply the law (majority op at 232). As should be obvious, it is the intended purpose of the communication that controls the analysis—and advising judges on how to interpret and apply the law in matters before the judge is inconsistent with the attorney-client privilege.[4] Additionally, and contrary to the majority's view, because OCA asserted an attorney-client relationship with all UCS judges solely by nature of its status, OCA is limited to advancing that justification and no other for its purported attorney-client privilege upon remittal (*see* majority op at 235 n 3; *see also Matter of Madeiros*, 30 NY3d at 74, quoting *Scherbyn*, 77 NY2d at 758 [stating that judicial

3. Indeed, courts may, in some circumstances, uphold a party's blanket claim of attorney-client privilege over a specific *subset* of documents where an attorney-client relationship has been established, where the court determines that the "withheld documents fall entirely within the scope of the asserted exemption," and where the agency articulates a "particularized and specific justification" for not disclosing the requested documents (*see Gould*, 89 NY2d at 275; *cf. Matter of Lesher v Hynes*, 19 NY3d 57, 66-67 [2012] [permitting, in certain instances, a law enforcement agency to make a "generic" determination that disclosure of certain categories of records would interfere with ongoing criminal proceedings under Public Officers Law § 87 (2) (e) (i) and may thus be withheld]). Here, OCA asserted the attorney-client privilege over an entire subset of documents based on the alleged attorney-client relationship between OCA and UCS judges. However, OCA failed at the first step to establish that relationship.

4. This point is why no one disputes that a judge has formed an attorney-client relationship with counsel for the purpose of representing the judge on matters specific to that judge, as, for example, in the course of a lawsuit alleging bias.

review of an administrative determination is limited to the grounds actually invoked by the agency, rather than to some alternative ground or post hoc rationalization]).

To the extent the majority suggests that in the future the parties may dispute which documents are "potentially responsive" and fall within the defined subset of disclosable documents, such speculation is not grounds for remittal (majority op at 235). We do not know that such a dispute will develop, or that the parties will not resolve differences through good-faith negotiation now that we have declared that there is no attorney-client relationship between OCA and UCS judges based on unsolicited OCA legal advice on adjudicative matters. In any case, such disagreements would implicate enforcement of our decision, and thus should be properly addressed, if they arise, in the lower courts, and not through a preemptive remittal.[5]

In conclusion, OCA failed to establish an attorney-client relationship with UCS judges with respect to the subset of documents intended to instruct and guide them on how to interpret and apply the law to adjudicatory matters. Therefore, the subset of documents providing this information to UCS judges is not privileged, and OCA should disclose it without the delay of an unnecessary and futile exercise of individual document review. I dissent and would reverse, full stop.

Judges GARCIA, SINGAS, CANNATARO, TROUTMAN and POWERS* concur. Judge RIVERA dissents in part in an opinion. Chief Judge WILSON took no part.

Order reversed, with costs, and matter remitted to Supreme Court, New York County, for further proceedings in accordance with the opinion herein.

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5. Notably, OCA cannot refuse to disclose an entire document because some portion may be exempt, but instead may redact the exempt material, further obviating the need for remittal to conduct some undefined in camera review (*see* Public Officers Law § 87 [2]).

* Designated pursuant to NY Constitution, article VI, § 2.

[— NE3d —, — NYS3d —]

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v SAVION ROBINSON, Appellant.

Argued September 10, 2025; decided October 23, 2025

PROCEDURAL SUMMARY

APPEAL, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered November 9, 2023. The Appellate Division affirmed a judgment of the Supreme Court, New York County (Maxwell Wiley, J., at suppression hearing; Ruth Pickholz, J., at trial and sentencing), which had convicted defendant, after a nonjury trial, of robbery in the third degree.

People v Robinson, 221 AD3d 435, affirmed.

HEADNOTES

Crimes — Confession — Custodial Interrogation

1. In a criminal prosecution, defendant's at-the-scene admission to police officers that he punched the victim should have been suppressed because the statement, made while defendant was handcuffed, was the product of custodial interrogation conducted without *Miranda* warnings. The record lacked support for Supreme Court's conclusion that defendant was not in custody when he was handcuffed, surrounded by numerous officers, and questioned about the altercation. Defendant remained restrained as he was searched, questioned, and repeatedly accused of theft and assault by the victim over an approximately eight-minute period. Defendant's freedom of movement was restricted to a degree comparable to a formal arrest, and he was given no reason to believe he would shortly be released or permitted to leave. In addition, it was foreseeable that the officers' words and actions would generate an incriminating response. Defendant was asked several express questions about his physical altercation with the victim. Over the course of the encounter, the officers also made defendant aware they had witnessed him punch the victim and heard the victim's version of events, and they continued asking defendant for his side of the story even after the arresting officer observed that he was "not talking." It was not dispositive that defendant was questioned in the immediate aftermath of the altercation, while the officers were still determining whether a crime had occurred.

Crimes — Harmless and Prejudicial Error — Admission of Unwarned Statement

2. In a criminal prosecution, Supreme Court's error in admitting defendant's unwarned statement that he punched the victim was harmless beyond a reasonable doubt. The evidence at trial, including the victim's and the arresting officer's unrebutted trial testimony and the video footage, overwhelmingly established defendant's guilt of robbery in the third degree. Further, there was no reasonable possibility that the admission of defendant's statement affected the outcome of the trial.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

Am Jur 2d Appellate Review §§ 610, 620–622, 654; Am Jur 2d Criminal Law §§ 895, 898; Am Jur 2d Evidence §§ 699–700, 743, 751.

Carmody-Wait 2d Appeals in General §§ 70:428, 70:442; Carmody-Wait 2d Confessions; Privilege Against Self–Incrimination §§ 176:20, 176:30, 176:32–176:33, 176:38; Carmody-Wait 2d Particular Types of Evidence §§ 194:256–194:257; Carmody-Wait 2d Appeals in Criminal Cases § 207:125.

LaFave, et al., Criminal Procedure (4th ed) §§ 6.5–6.6, 27.6.

NY Jur 2d Criminal Law: Procedure §§ 563, 569, 574–577, 3672–3673, 3676–3677.

ANNOTATION REFERENCE

What constitutes "custodial interrogation" within rule of Miranda v Arizona requiring that suspect be informed of his federal constitutional rights before custodial interrogation. 31 ALR3d 565.

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POINTS OF COUNSEL

Jenay Nurse Guilford, Center for Appellate Litigation, New York City (*Carola M. Beeney* of counsel), for appellant. The police violated *Miranda v Arizona* (384 US 436 [1966]) when they cuffed Robinson and interrogated him for nearly 30 minutes in the middle of Times Square without administering *Miranda* warnings (US Const Amends V, XIV; NY Const, art I, § 6). (*People v Huffman*, 41 NY2d 29; *People v Johnson*, 59 NY2d 1014; *People v Alls*, 83 NY2d 94; *Dickerson v United States*, 530 US 428; *People v Cabrera*, 41 NY3d 35.)

Alvin L. Bragg, Jr., District Attorney, New York City (*Peter Rienzi, Steven C. Wu* and *Sheila O'Shea* of counsel), for respondent. I. The officers' preliminary questions did not constitute custodial interrogation requiring *Miranda* warnings. (*People v Cabrera*, 41 NY3d 35; *People v Naradzay*, 11 NY3d 460; *People*

v Medina, 40 NY3d 1022; *People v McIntosh*, 96 NY2d 521; *People v Paulman*, 5 NY3d 122.) II. Any error in admitting defendant's unwarned statement was harmless. (*People v Vargas*, 42 NY3d 983; *People v Ortiz*, 37 NY3d 1157; *People v Henderson*, 41 NY2d 233; *People v Van Norstrand*, 85 NY2d 131; *People v Scarborough*, 49 NY2d 364.)

National Association of Criminal Defense Lawyers, New York City (*Joel B. Rudin* of counsel), *Law Offices of Joel B. Rudin, P.C.*, New York City (*Jacob Loup* and *Partha Sharma* of counsel), and *Innocence Project*, New York City (*M. Christopher Fabricant* and *Laura Gottesman* of counsel), for National Association of Criminal Defense Lawyers and another, amici curiae. This Court should instruct that "investigatory" questioning falls within *Miranda*'s ambit, as any rule to the contrary is inconsistent with the holdings and underlying policy considerations of *Miranda v Arizona* (384 US 436 [1966]) and its progeny. (*People v Huffman*, 41 NY2d 29; *People v Cabrera*, 206 AD3d 479, 41 NY3d 35; *People v Defio*, 200 AD3d 1672; *Rhode Island v Innis*, 446 US 291; *People v Kollar*, 305 AD2d 295.)

OPINION OF THE COURT

CANNATARO, J.

Defendant appeals from an order upholding the admission of an incriminating statement he made to police while handcuffed following a physical altercation in Times Square with another man. The lower courts concluded that *Miranda* warnings were not required because the police were engaged in routine investigatory questioning to determine whether a crime had occurred. We hold that defendant was improperly subjected to custodial interrogation and that his statement should have been suppressed. We affirm the Appellate Division order, however, because the error was harmless.

I.

In 2020, defendant Savion Robinson was arrested for causing physical injury in the course of stealing a bicycle. In advance of his bench trial for robbery in the second degree, defendant moved to suppress his at-the-scene admission to police officers that he punched the victim, arguing that the statement was the product of custodial interrogation conducted without *Miranda* warnings (*see generally Miranda v Arizona*, 384 US 436 [1966]). Supreme Court ordered a hearing to determine admissibility.

At the hearing, Police Officer Anthony Sasso testified that he was on uniformed patrol in Times Square just before midnight when he observed two men, defendant and the victim, fighting near the intersection of Broadway and 46th Street. According to Officer Sasso, he and several other police officers intervened, handcuffed both men, and proceeded to question them about who started the fight and why. The victim asserted that the fight began when defendant stole his bicycle. After questioning, defendant eventually admitted to punching the victim. The officers did not give defendant *Miranda* warnings before obtaining his statement. Officer Sasso placed defendant under arrest after reviewing surveillance footage that corroborated the victim's allegations.

The surveillance video was introduced into evidence at the hearing, as was footage from body cameras worn by Officer Sasso and fellow Police Officer Jose Espinal. The surveillance footage shows defendant taking the bicycle and the resulting scuffle. The body camera footage captures the police intervention and questioning. After the officers pull the men apart and handcuff them, Officer Sasso can be heard assuring the victim "we're gonna figure this out" as the victim accuses defendant of attacking him. Officer Espinal initially focuses on defendant, asking him the following series of questions: "You all right? What's going on? What's going on, big guy? What's going on? Do you need medical attention? What's going on? Do you know him [the victim]? Do you guys know each other?" Defendant at one point responds, "He just grabbed me." At approximately the same time, another officer can be heard asking defendant, "Do you guys have beef? Why'd you go after him like that? I saw what you did, so why'd you do it? I saw what you did, so why'd you go after him like that? So you attacked him?" Defendant's responses to these questions, if any, are unintelligible.

Officers Sasso and Espinal then turn to the victim, who is standing only a few feet away, and ask him what happened. The victim maintains that he was assaulted by defendant after he attempted to stop defendant from stealing his bicycle. After listening to the victim for several minutes, Officer Espinal returns to defendant and asks: "What happened? I heard his side, let me hear your side, what happened?" When defendant does not immediately answer, another officer adds, "Take your time, it is what it is." Defendant finally responds that he punched the victim. This statement is made about eight minutes into the police encounter as defendant remains handcuffed and surrounded by uniformed officers.

The prosecution relied on *People v Huffman* (41 NY2d 29 [1976]) to argue that police may temporarily detain and question a suspect without administering *Miranda* warnings while they are determining—in the prosecutor's words—"whether or not there was a crime committed." Supreme Court denied defendant's motion to suppress the statement, explaining "[t]his seems to be the classic case of investigatory questioning rather than custodial interrogation," and therefore *Miranda* warnings were unnecessary. Following a bench trial, the court acquitted defendant of second-degree robbery but convicted him of the lesser-included charge of robbery in the third degree (Penal Law § 160.05). Defendant appealed.

The Appellate Division affirmed. As relevant here, the Court concluded that there was no custodial interrogation requiring *Miranda* warnings because "a reasonable innocent person in defendant's situation would have believed that the police were still in the process of gathering information about the fight at the time the officer asked 'What happened' " (221 AD3d 435, 436 [1st Dept 2023]). The Court also concluded that "any error was harmless in light of the overwhelming evidence of defendant's guilt" (*id.*). A Judge of this Court granted defendant leave to appeal (41 NY3d 1020 [2024]).

II.

Both the State and Federal Constitutions protect the privilege against self-incrimination (NY Const, art I, § 6; US Const 5th Amend). Among other things, this constitutional right prohibits the People from using a statement made by a defendant during "custodial interrogation" unless the prosecution can demonstrate use of the now-familiar *Miranda* warnings (384 US at 444; *People v Berg*, 92 NY2d 701, 704 [1999]). Whether a particular defendant was subjected to custodial interrogation presents a mixed question of law and fact over which this Court has limited powers of review. We will affirm the determination of the lower courts if there is support in the record for the conclusion reached (*People v Paulman*, 5 NY3d 122, 129 [2005]).

To ascertain custodial status, courts must consider whether a reasonable person innocent of any wrongdoing would have believed that they were not free to leave, and whether there was a forcible seizure which curtailed that person's freedom of action to the degree associated with a formal arrest (*People v Cabrera*, 41 NY3d 35, 52 [2023]). Recently, in *Cabrera*, we held

that a defendant was in custody when, after receiving a tip from law enforcement in another state, three police officers "approached him at night, on a residential street, and handcuffed him before questioning him about the firearms in his vehicle" (*id.*). Although we declined to create a per se rule that handcuffs place an individual in custody in all instances, we warned that "there may be very few circumstances where a handcuffed person is not in custody for purposes of *Miranda* given the obvious physical constraint and association with formal arrest" (*id.* at 53). Therefore, the use of handcuffs must be given "very substantial weight" in the custody inquiry (*id.*). Applying that rule, we concluded that "[t]he level to which the police restricted Cabrera's movement was of a degree associated with a formal arrest" (*id.* at 52). We also emphasized that nothing in the record "suggest[ed] that the defendant had any reason to believe that he would be handcuffed only for a limited duration" (*id.*).

[1] The decisions of the lower courts in this case predate the guidance we provided in *Cabrera*. Here, the record similarly lacks support for Supreme Court's conclusion that defendant was not in custody when he was handcuffed, surrounded by numerous officers, and questioned about the altercation. Defendant remained restrained as he was searched, questioned, and repeatedly accused of theft and assault by the victim over an approximately eight-minute period. Defendant's freedom of movement was restricted to a degree comparable to a formal arrest, and he was given no reason to believe he would shortly be released or permitted to leave. Indeed, a reasonable person in defendant's position would likely have understood that he was suspected of committing a crime, and "that removal or maintenance of the handcuffs depended on . . . [him] responding to questions posed"—a coercive circumstance federal courts have treated as indicative of custody in factually similar cases (*see United States v Newton*, 369 F3d 659, 677 [2d Cir 2004]).

The next question is whether defendant was subjected to interrogation. Under well settled law, interrogation "refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect" (*Rhode Island v Innis*, 446 US 291, 301 [1980]; *People v Ferro*, 63 NY2d 316, 322 [1984]). In this case, defendant was asked several express questions about his physical altercation with

the victim. Over the course of the encounter, the officers also made defendant aware they had witnessed him punch the victim and heard the victim's version of events. And they continued asking defendant for his side of the story even after Officer Sasso observed that he was "not talking." In these circumstances, it was foreseeable that the officers' words and actions would generate an incriminating response (*see Innis*, 446 US at 302).

Contrary to the lower courts' reasoning, it is not dispositive that defendant was questioned in the immediate aftermath of the altercation, while the officers were still determining whether a crime had occurred—circumstances Supreme Court seemingly relied on in deeming the encounter a "classic case of investigatory questioning" that did not require *Miranda* warnings. Our case law draws no categorical distinction between interrogation and so-called investigatory questioning. Interrogation is almost definitionally *investigatory* in nature. And while we have recognized a "distinction between coercive interrogation and permissible street inquiry" (*Huffman*, 41 NY2d at 32), the most salient difference between these categories is not when the questioning takes place, but the presence or absence of custody (*see id.* at 32-33, *distinguishing between People v Rodney P. [Anonymous]*, 21 NY2d 1 [1967], *and People v Shivers*, 21 NY2d 118 [1967]). As we have explained, "routine police investigation of suspicious conduct on the street generally does not entail a significant deprivation of freedom which would require *Miranda* warnings" (*Matter of Kwok T.*, 43 NY2d 213, 218 [1977]). Absent "*both* the elements of police 'custody' and police 'interrogation,' " there is no "constitutional requirement that the police recite interrogation warnings when they direct questions or comments at members of the public or solicit information and assistance" (*see Huffman*, 41 NY2d at 33 [emphasis added]). But where, as here, investigatory questions are directed to a person who is in custody, under circumstances police should know are likely to yield an incriminating response, *Miranda* warnings are required.

Huffman does not support a different rule. There, the defendant and a number of other individuals were gathered behind a deli in the middle of the night when police officers approached, causing them to scatter. The officers found the defendant hiding in a bush, drew their weapons, and asked, "What are you doing back here?" to which the defendant replied, "We were trying to break into that store" (*see Huffman*,

41 NY2d at 30). In holding that the officer's question did not constitute interrogation, we emphasized that the statement was made not only at the scene but at a particularly volatile moment (*see id.* at 34 [describing the situation confronting the officers as "a potential assault from an unknown person fleeing from what appeared to be the scene of criminal activity" and noting that "immediate clarification was necessary before taking drastic action"]). In the almost half-century since *Huffman* was decided, the United States Supreme Court has made clear that the existence of interrogation turns on the *foreseeability of an incriminating response* (*see Innis*, 446 US at 301-302). The volatile circumstances we referenced in *Huffman* are more relevant, instead, to a public safety exception to the *Miranda* rule (*see New York v Quarles*, 467 US 649 [1984]). *Huffman* must be read with these jurisprudential developments in mind, but at no point has it ever supported a rule that questions asked at the scene of a suspected crime, during or shortly after the suspected crime's commission, are categorically exempt from *Miranda*.

[2] Notwithstanding this constitutional error, the Appellate Division correctly concluded that the admission of defendant's unwarned statement was harmless beyond a reasonable doubt. The evidence at trial, including the victim's and Officer Sasso's unrebutted trial testimony and the video footage, overwhelmingly established defendant's guilt. Further, there is no reasonable possibility that the admission of defendant's statement affected the outcome of the trial (*see People v Best*, 19 NY3d 739, 744 [2012]; *People v Crimmins*, 36 NY2d 230, 240-241 [1975]).

Accordingly, the order of the Appellate Division should be affirmed.

Chief Judge WILSON and Judges RIVERA, GARCIA, SINGAS, TROUTMAN and HALLIGAN concur.

Order affirmed.

[— NE3d —, — NYS3d —]

In the Matter of the Claim of Kimberly McLaurin, Respondent, v New York City Transit Authority, Appellant. Workers' Compensation Board, Respondent.

In the Matter of the Claim of Sheldon Matthews, Respondent, v New York City Transit Authority, Appellant. Workers' Compensation Board, Respondent.

In the Matter of the Claim of Melissa Anderson, Respondent, v City of Yonkers, Appellant. Workers' Compensation Board, Respondent.

In the Matter of the Claim of Bolot Djanuzakov, Respondent, v Manhattan & Bronx Surface Transit Operating Authority, Appellant. Workers' Compensation Board, Respondent.

Argued October 15, 2025; decided November 24, 2025

PROCEDURAL SUMMARY

Appeal, in the first above-entitled proceeding, by permission of the Appellate Division of the Supreme Court in the Third Judicial Department, from an order of that Court, entered March 28, 2024. The Appellate Division (1) reversed a decision of the Workers' Compensation Board, which had affirmed a decision of a Workers' Compensation Law Judge ruling, among other things, that claimant did not sustain a compensable injury and disallowing the claim for workers' compensation benefits; and (2) remitted the matter to the Workers' Compensation Board for further proceedings not inconsistent with the Court's decision. The following question was certified by the Appellate Division: "Did this Court err, as a matter of law, in reversing the decision of the Workers' Compensation Board and remitting the matter to the Board for further proceedings not inconsistent with this Court's decision?"

Appeal, in the second above-entitled proceeding, by permission of the Appellate Division of the Supreme Court in the Third Judicial Department, from an order of that Court, entered March 28, 2024. The Appellate Division (1) reversed a decision of the Workers' Compensation Board, which had (a) modified a decision of a Workers' Compensation Law Judge ruling that claimant did not sustain a compensable injury and disallowing the claim for workers' compensation benefits "solely to rescind the characterization of the claimant as an 'essential

worker,' " and (b) otherwise affirmed; and (2) remitted the matter to the Workers' Compensation Board for further proceedings not inconsistent with the Court's decision. The following question was certified by the Appellate Division: "Did this Court err, as a matter of law, in reversing the decision of the Workers' Compensation Board and remitting the matter to the Board for further proceedings not inconsistent with this Court's decision?"

APPEAL, in the third above-entitled proceeding, by permission of the Appellate Division of the Supreme Court in the Third Judicial Department, from an order of that Court, entered March 28, 2024. The Appellate Division (1) reversed a decision of the Workers' Compensation Board, which had affirmed a decision of a Workers' Compensation Law Judge ruling, among other things, that claimant did not sustain a compensable injury and disallowing the claim for workers' compensation benefits; and (2) remitted the matter to the Workers' Compensation Board for further proceedings not inconsistent with the Court's decision. The following question was certified by the Appellate Division: "Did this Court err, as a matter of law, in reversing the decision of the Workers' Compensation Board and remitting the matter to the Board for further proceedings not inconsistent with this Court's decision?"

APPEAL, in the fourth above-entitled proceeding, by permission of the Appellate Division of the Supreme Court in the Third Judicial Department, from an order of that Court, entered March 28, 2024. The Appellate Division (1) reversed a decision of the Workers' Compensation Board, which had (a) modified a decision of a Workers' Compensation Law Judge ruling that claimant did not sustain a compensable injury and disallowing the claim for workers' compensation benefits "solely to rescind the characterization of the claimant as an 'essential worker,' " and (b) otherwise affirmed; and (2) remitted the matter to the Workers' Compensation Board for further proceedings not inconsistent with the Court's decision. The following question was certified by the Appellate Division: "Did this Court err, as a matter of law, in reversing the decision of the Workers' Compensation Board and remitting the matter to the Board for further proceedings not inconsistent with this Court's decision?"

Matter of McLaurin v New York City Tr. Auth., 225 AD3d 1105, reversed.

Matter of Matthews v New York City Tr. Auth., 225 AD3d 1109, reversed.

Matter of Anderson v City of Yonkers, 227 AD3d 63, reversed.

Matter of Djanuzakov v Manhattan & Bronx Surface Tr. Operating Auth., 225 AD3d 1107, reversed.

HEADNOTE

Workers' Compensation — Injuries Arising out of and in Course of Employment — Psychological Injuries Caused by Workplace Exposure to COVID-19

In workers' compensation proceedings brought by claimant transit workers and claimant teacher alleging psychological injuries resulting from workplace exposure to COVID-19, substantial evidence supported the Workers' Compensation Board's determination that the stress of workplace exposure experienced by claimants was comparable to the stress experienced by similarly situated workers in the normal work environment during the COVID-19 pandemic. Evidence of COVID-19's prevalence in the workplace does not relieve a claimant of the burden to establish that the injury was accidental which, in cases of emotional stress-induced psychological injury, has involved a demonstration by the claimant of stress greater than the stress experienced by similarly situated workers in the normal work environment. The Board was not required to consider each claimant's particular vulnerabilities, nor did the Board apply disparate burdens to the claims here as opposed to COVID-19 contraction claims, as the Appellate Division held. While psychological and physical injury are compensable to the same extent, neither is compensable unless the claimant satisfies the separate elements that the injury was accidental and that it arose out of and in the course of employment.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

Am Jur 2d Workers' Compensation §§ 117, 149, 194, 203, 220, 222, 292, 300–301, 303–304, 311.

Carmody-Wait 2d Parties § 19:168.

NY Jur 2d Workers' Compensation §§ 191, 233, 327, 364, 367, 369, 372, 374–375, 691, 695, 700.

ANNOTATION REFERENCE

Right to Workers' Compensation for Emotional Distress or Like Injury Suffered by Claimant as Result of Nonsudden Stimuli—Compensability Under Certain Circumstances. 108 ALR5th 1.

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POINTS OF COUNSEL

Weiss, Wexler & Wornow, P.C., New York City (*J. Evan Perigoe* of counsel), for appellant in the first, second, and fourth above-entitled proceedings. I. *Matter of Anderson v City of Yonkers* (227 AD3d 63 [3d Dept 2024]) is incorrect because it ignores *Matter of Wolfe v Sibley, Lindsay & Curr Co.* (36 NY2d 505 [1975]) text and context, ignores that *Matter of Wolfe* was intended solely to make claims for purely psychological injury compensable and ignores that *Matter of Wolfe* was incapable of overturning *Matter of Santacroce v 40 W. 20th St.* (9 AD2d 985 [3d Dept 1959]). (*Fowler v Risedorph Bottling Co.*, 175 App Div 224; *Matter of Masse v Robinson Co.*, 301 NY 34; *Matter of Zahm v National Fuel*, 72 AD3d 1311; *Matter of Schechter v State Ins. Fund*, 6 NY2d 506; *Matter of Volinsky v Reliable Waste & Rag Co., Inc.*, 263 App Div 221.) II. That *Matter of Anderson* is incorrect to say *Matter of Wolfe* overturned *Matter of Santacroce* is clear from nearly five decades of legislative and judicial interpretation reaching a contrary conclusion. (*Matter of Sakanovic v Utica Mut. Ins. Co.*, 219 AD3d 998; *Matter of Grace v Bronx Mun. Hosp. Ctr., City of N.Y. Health & Hosps. Corp.*, 272 AD2d 799; *Matter of Charlotten v New York State Police*, 286 AD2d 849; *Matter of Cooley v New York State Police*, 158 AD2d 828; *Matter of Cook v East Greenbush Police Dept.*, 114 AD3d 1005.) III. *Matter of Anderson* is plainly incorrect because its finding that *Matter of Santacroce*'s "prior standard" places a "disparate burden" on claimants alleging a "psychological injury" is based on confusing key concepts, using the wrong comparator group to establish disparate treatment and to misunderstanding the "prevalence" doctrine. (*Matter of Masse v Robinson Co.*, 301 NY 34; *Matter of Schechter v State Ins. Fund*, 6 NY2d 506; *Matter of Loh Lin v Burroughs Corp.*, 75 AD2d 702; *Matter of Parrinello v New York City Tr. Auth.*, 47 AD3d 980; *Matter of McDonough v Whitney Point Cent. School*, 15 AD2d 191.) IV. Affirming the Board's finding that these fear-of-COVID-19 claims are non-accidental is the result most in keeping with the needs and values of our society. (*Matter of Loh Lin v Burroughs Corp.*, 75 AD2d 702; *Matter of Cox v Saks Fifth Ave.*, 130 AD3d 1236; *Matter of Spillers v Health & Hosp. Corp.*, 225 AD3d 1100; *Matter of Pecora v County of Westchester*, 13 AD3d 916; *Matter of Kaliski v Fairchild Republic Co.*, 151 AD2d 867, 76 NY2d 1002.) V. Alternatively, the Board's *Matter of Matthews v New York City Tr. Auth.* and *Matter of McLaurin v New York City Tr. Auth.* decisions should be affirmed on the independent ground that the Board found the

claimants were not credible. (*Matter of Turner v New York City Dept. of Juvenile Justice*, 159 AD3d 1236; *Matter of Siennikov v Professional Grade Constr., Inc.*, 137 AD3d 1440; *Matter of Dixon v Almar Plumbing*, 111 AD3d 1230; *Matter of Wen Liu v Division of Gen. Internal Medicine, Mount Sinai Sch. of Medicine*, 186 AD3d 1770, 36 NY3d 904.)

Cherry, Edson & Kelly, LLP, Tarrytown (*Ralph E. Magnetti* of counsel), for appellant in the third above-entitled proceeding. I. The March 28, 2024 decision by the Third Department is premised on an incorrect reading of this Court's decision in *Matter of Wolfe v Sibley, Lindsay & Curr Co.* (36 NY2d 505 [1975]). (*Matter of Chernin v Progress Serv. Co.*, 9 NY2d 880; *Matter of Straws v Fail*, 17 AD2d 998; *Matter of Rackley v County of Rensselaer*, 141 AD2d 232; *Matter of Matthews v New York City Tr. Auth.*, 225 AD3d 1109; *Matter of Djanuzakov v Manhattan & Bronx Surface Tr. Operating Auth.*, 225 AD3d 1107.) II. The March 28, 2024 decision is premised upon a misunderstanding of how and when the theory of prevalence in COVID-19 cases is applicable. (*Matter of Holder v Office for People with Dev. Disabilities*, 215 AD3d 1201; *Matter of Leroy v Brookdale Hosp. Med. Ctr.*, 222 AD3d 1160.) III. The March 28, 2024 decision to reverse a Workers' Compensation Board decision that was supported by substantial evidence was improper. (*Matter of Smith v Steuben County Highway Dept.*, 199 AD2d 590; *Matter of Holder v Office for People with Dev. Disabilities*, 215 AD3d 1201; *Matter of Everett v A. S. Steel Rule Die Corp.*, 66 NY2d 683, 106 AD2d 181; *Matter of Casey v United Ref. Co. of Pa.*, 194 AD3d 1300.)

Schotter Millican, LLP, Brooklyn (*Geoffrey Schotter* of counsel), for Kimberly McLaurin, respondent in the first-above entitled proceeding, Sheldon Matthews, respondent in the second-above entitled proceeding, Melissa Anderson, respondent in the third-above entitled proceeding, and Bolot Djanuzakov, respondent in the fourth above-entitled proceeding. I. The Appellate Division correctly interpreted and applied *Matter of Wolfe v Sibley, Lindsay & Curr Co.* (36 NY2d 505 [1975]), when deciding the appeals presently before this Court. (*Matter of Schechter v State Ins. Fund*, 6 NY2d 506; *Matter of Klimas v Trans Caribbean Airways*, 10 NY2d 209; *Matter of Santacroce v 40 W. 20th St.*, 10 NY2d 855; *Matter of Cramer v Barney's Clothing Store*, 15 AD2d 329; *Matter of Rizzo v Lexington Realty Co.*, 46 AD2d 981.) II. The Appellate Division properly applied the prevalence doctrine to the present claims for psychological

injuries. (*Matter of Wolfe v Sibley, Lindsay & Curr Co.*, 36 NY2d 505; *Matter of Anderson v City of Yonkers*, 227 AD3d 63; *Matter of Wood v Laidlaw Tr.*, 77 NY2d 79; *Matter of Richards v Allied Universal Sec.*, 199 AD3d 1207; *Matter of Friedlander v New York City Health & Hosps. Corp.*, 246 AD2d 937.) III. The issues that were before the Appellate Division and that are before this Court are pure questions of law, not questions of whether substantial evidence supports the Board's credibility determinations. (*Matter of Anderson v City of Yonkers*, 227 AD3d 63; *Matter of Matthews v New York City Tr. Auth.*, 225 AD3d 1109.)

Letitia James, Attorney General, Albany (*Andrea Oser*, *Laura Etlinger* and *Barbara D. Underwood* of counsel), for Workers' Compensation Board, respondent in all of the above-entitled proceedings. The Board does not object to a clarification from the Court that stress from potential exposures to COVID-19 during the early stages of the pandemic was extraordinary. (*Matter of Johannesen v New York City Dept. of Hous. Preserv. & Dev.*, 84 NY2d 129; *Matter of Middleton v Coxsackie Correctional Facility*, 38 NY2d 130; *Matter of Gardner v New York Med. Coll.*, 280 App Div 844; *Matter of McDonough v Whitney Point Cent. School*, 15 AD2d 191; *Matter of Leroy v Brookdale Hosp. Med. Ctr.*, 222 AD3d 1160.)

Grey & Grey, LLP, Farmingdale (*Robert E. Grey* of counsel), for Injured Workers' Bar Association, amicus curiae in all of the above-entitled proceedings. I. The Court should overrule the "similarly situated worker test" because it violates the rule in *Matter of Wolfe v Sibley, Lindsay & Curr Co.* (36 NY2d 505 [1975]) that physical and psychological injuries must be treated equally. (*Matter of Knight-Ridder Broadcasting v Greenberg*, 70 NY2d 151; *Matter of Ottomanelli v Ottomanelli Bros.*, 80 AD2d 688; *Matter of La Mendola v Butler*, 179 AD2d 862; *Matter of Keane v New York State Elec. & Gas Co.*, 272 AD2d 802; *Matter of Marillo v Cantalician Ctr. for Learning*, 263 AD2d 719.) II. The Court should adopt the standard created by the legislature in its amendment to Workers' Compensation Law § 10 (3) (c) for application to all cases of psychological injury. (*Matter of Lerner v Rump Bros*, 241 NY 153; *Matter of Lanphier v Air Preheater Corp.*, 278 NY 403; *Matter of Connelly v Samaritan Hosp.*, 259 NY 137; *Matter of Masse v Robinson Co.*, 301 NY 34; *Matter of Broderick v Liebmann Breweries, Inc.*, 277 App Div 422.)

Rivkin Radler LLP, Uniondale (*Evan H. Krinick, Barry I.*

Levy and *Merril S. Biscone* of counsel), for American Property Casualty Insurance Association, amicus curiae in the third above-entitled proceeding. The opinion and order should be reversed and the Board's determination reinstated. (*Crosby v State of N.Y., Workers' Compensation Bd.*, 57 NY2d 305; *Shanahan v Monarch Eng'g Co.*, 219 NY 469; *Matter of Santacroce v 40 W. 20th St.*, 10 NY2d 855; *Matter of Leggio v Suffolk County Police Dept.*, 96 NY2d 846; *Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577.)

OPINION OF THE COURT

TROUTMAN, J.

Claimants, three transit workers and one teacher, filed for Workers' Compensation Law benefits in 2020, alleging psychological injuries—e.g., posttraumatic stress disorder (PTSD)—resulting from workplace exposure to COVID-19. The Workers' Compensation Board (Board) found that claimants were exposed to similar stress as their coworkers. The Board thus affirmed the disallowance of the claims because claimants failed to demonstrate that the stress they experienced constituted a compensable "accident" within the meaning of the Workers' Compensation Law.

The Appellate Division reversed the decisions, concluding that they were inconsistent with *Matter of Wolfe v Sibley, Lindsay & Curr Co.* (36 NY2d 505 [1975]), where we held that " 'psychological or nervous injury precipitated by psychic trauma is compensable to the same extent as physical injury' " (*Matter of Anderson v City of Yonkers*, 227 AD3d 63, 65 [3d Dept 2024], quoting *Wolfe*, 36 NY2d at 510). According to the Appellate Division, the Board erred (1) in failing to consider each claimant's "particular vulnerabilities" (*id.* at 68-70), and (2) in "appl[ying] disparate burdens to claimants seeking benefits for contracting the virus—a physical injury—as compared to those seeking benefits for psychological injuries alleged to stem from exposure to the virus in the workplace" (*id.* at 71-73).[1] Concerning the purported "disparate burdens," the Appellate Division observed that, under the Board's "preva-

1. The Appellate Division's discussion is contained in *Anderson* (227 AD3d at 66-74). Its decisions in the other three cases all refer to *Anderson* for that discussion (*see Matter of McLaurin v New York City Tr. Auth.*, 225 AD3d 1105, 1106-1107 [3d Dept 2024]; *Matter of Matthews v New York City Tr. Auth.*, 225 AD3d 1109, 1110 [3d Dept 2024]; *Matter of Djanuzakov v Manhattan & Bronx Surface Tr. Operating Auth.*, 225 AD3d 1107, 1108-1109 [3d Dept 2024]).

lence rule," claimants seeking benefits for contracting the virus may meet their burden to show that " 'an injury arose in the course of employment by demonstrating either a specific exposure to COVID-19 or prevalence of COVID-19 in the work environment so as to present an elevated risk of exposure constituting an extraordinary event' " (*id.* at 71, quoting *Matter of Holder v Office for People with Dev. Disabilities*, 215 AD3d 1201, 1202 [3d Dept 2023]). The Appellate Division ruled that the Board must also apply this "special rule" to claimants seeking benefits for "psychological injuries from exposure to COVID-19" (*id.* at 72-73). We reverse and reinstate the decisions of the Board.

The Board is not required to consider each claimant's "particular vulnerabilities." In holding that emotional stress-induced psychological and physical injury are "compensable to the same extent," we explained that

> "there is nothing in the nature of a stress or shock situation which ordains physical as opposed to psychological injury. The *determinative factor* is the *particular vulnerability* of an individual by virtue of his physical makeup. In a given situation one person may be susceptible to a heart attack while another may suffer a depressive reaction. In either case the result is the same—the individual is incapable of functioning properly because of an accident and should be compensated under the Work[ers'] Compensation Law" (*Wolfe*, 36 NY2d at 510 [emphasis added]).

The expression "determinative factor" does not refer to a factor in a legal test for determining whether an accident occurred but instead to a factor in a psychophysiological process that determines what type of injury results from exposure to emotional stress. Our point was that, where a workplace accident causes a debilitating injury, there is no reason to treat a claimant whose vulnerability causes a psychological injury differently from one whose vulnerability causes a physical injury. Thus, claimants' particular vulnerabilities are immaterial to the merits of their claims.

Nor did the Board apply disparate burdens to the claims here as opposed to COVID-19 contraction claims. While psychological and physical injury are "compensable to the same extent" (*id.*), neither is compensable unless the claimant satisfies the separate elements that the injury was "accidental" and

that it "ar[ose] out of and in the course of employment" (Workers' Compensation Law § 2 [7]; *see* § 10 [1]). At the time of the Board's decisions, emotional stress-induced psychological injury was considered accidental only if the claimant established that the stress they experienced in the workplace was " 'greater than that which other similarly situated workers experienced in the normal work environment' " (*Matter of Lozowski v Wiz*, 134 AD3d 1177, 1178 [3d Dept 2015]; *see Matter of Block v Stroheim & Romann*, 203 AD2d 833, 834 [3d Dept 1994]; *Matter of Santacroce v 40 W. 20th St.*, 9 AD2d 985, 985 [3d Dept 1959], *affd* 10 NY2d 855 [1961]; *see also Matter of Leggio v Suffolk County Police Dept.*, 96 NY2d 846, 847 [2001]; *Matter of Kaliski v Fairchild Republic Co.*, 151 AD2d 867, 867 [3d Dept 1989], *affd for the reasons stated below* 76 NY2d 1002 [1990]). By disallowing the claims on that ground, the Board, in effect, concluded that claimants had failed to establish that the injuries were accidental. Because the injuries were nonaccidental, it is of no moment that the injuries may have arisen "in the course of employment" (*Holder*, 215 AD3d at 1202; *see* Workers' Compensation Law §§ 2 [7]; 10 [1]; *Matter of Aungst v Family Dollar*, 45 NY3d 114, 120 [2025] [decided today]), and thus the "prevalence" rule is no help to claimants.

To put it another way, evidence of COVID-19's prevalence in the workplace does not relieve a claimant of the burden to establish that the injury was accidental which, in cases of emotional stress-induced psychological injury, has involved a demonstration by the claimant of stress greater than the stress experienced by similarly situated workers in the normal work environment. Here, substantial evidence supports the Board's determination that the stress of workplace exposure experienced by claimants was comparable to the stress experienced by similarly situated workers in the normal work environment during the COVID-19 pandemic (*see Leggio*, 96 NY2d at 847).

Neither our decision today nor the approach of our dissenting colleagues could be expected to have a significant impact on the development of the law. After the Appellate Division decided these appeals, the legislature amended the Workers' Compensation Law to provide that the Board "may not disallow a claim" for PTSD, acute stress disorder, or major depressive disorder "upon a factual finding that the stress was not greater than that which usually occurs in the normal work environment" (Workers' Compensation Law § 10 [3] [c]). By amending the statute in this manner, the legislature has

determined that claims of psychological injuries should be evaluated under a standard more favorable than even the dissent's novel standard.[2] Claimants do not argue that the newly amended language applies retroactively to the Board decisions, which predate the effective date of the legislation.

The fact that the Board "does not object" to the dissent's approach is, as the dissent acknowledges, "unusual" (dissenting op at 264-265). The Board enjoys "very wide latitude in determining whether a disabling condition is an accident" (*Matter of Johannesen v New York City Dept. of Hous. Preserv. & Dev.*, 84 NY2d 129, 134 [1994]; *see Matter of Middleton v Coxsackie Correctional Facility*, 38 NY2d 130, 135 [1975]). It is peculiar practice indeed for the Board to disallow claims on the ground that the claimants' conditions are nonaccidental but fail to take a position as to whether the appellate courts should uphold its own decisions. We do not encourage the practice.

Accordingly, in each case, the order of the Appellate Division should be reversed, with costs, and the decision of the Workers' Compensation Board reinstated.

HALLIGAN, J. (dissenting in part). I agree with the majority's explanation of the errors in the Appellate Division's decision. But in my view there is a path here for the claimants to obtain benefits. The Workers' Compensation Board tells us that it had "felt constrained" by precedent to deny benefits because the claimants had not shown workplace stress which exceeded stress experienced by similarly situated workers, but now recognizes "a reasonable argument" for treating stress during the early stages of the COVID-19 pandemic as "extraordinary." The majority appears to agree with the Board's initial understanding (majority op at 259). I do not read the Workers' Compensation Law or relevant case law so narrowly.

As the majority notes, at the time of the Board's decisions, a claimant was required to establish stress "greater than that which other similarly situated workers experienced in the normal work environment" (majority op at 259). I believe we can construe that standard as encompassing these claimants, and that we should do so given the extraordinary circumstances of the COVID-19 pandemic, particularly in its early stages—a time when many New Yorkers were falling seriously ill and dy-

2. Because of the statutory amendments, it is unclear if the Board would even have the power to apply the dissent's standard if we were to remit.

ing, and testing, prevention, and treatment options were exceedingly limited. To that end, I would confirm that in these cases the Board can frame the "similarly situated" inquiry in temporal terms; that is, whether stress experienced by public-facing workers during the early stages of the pandemic was greater than stress experienced by similarly situated workers in a normal work environment prior to the pandemic.

The "normal work environment" standard finds roots in *Matter of Santacroce v 40 W. 20th St.* (9 AD2d 985 [3d Dept 1959]). There, an elevator operator died of heart failure after arguing with the building superintendent. The Appellate Division denied workers' compensation benefits, concluding that the situation was not "so 'exceptional' " as to constitute a compensable accident (*id*. at 985). Central to its holding was the determination that the claim "neither involv[ed] nor induc[ed] emotional strain or tension greater than the countless differences and irritations to which all workers are occasionally subjected without untoward result" (*id*.). This Court affirmed without an opinion (*see* 10 NY2d 855 [1961]).

The animating principle in *Santacroce* was a frank recognition that work may at times be, and indeed often is, stressful. Disagreements happen; deadlines must be met; problems must be solved. Thus, only workplace stress that is truly "exceptional" is considered accidental, and therefore compensable, under the Workers' Compensation Law. As a general matter, comparing a claimant's stress with that experienced by similarly situated workers during the same time period is a useful way to determine whether the claimant's stress was exceptional—that is, "more than that normally encountered in the workplace" (*Matter of Leggio v Suffolk County Police Dept.*, 96 NY2d 846, 847 [2001]). But I see no reason why this particular comparison is the only option available to the Board. Instead, I would hold that amidst the exceptional challenges of COVID-19, particularly for public-facing workers, the Board can assess whether workplace stress was exceptional by comparing the stress experienced by those workers to stress experienced by the same group of workers before and after the early stages of the pandemic.

This approach finds support in our case law. In *Matter of Schechter v State Ins. Fund* (6 NY2d 506 [1959])—the case cited by the Appellate Division in *Santacroce*—an attorney suffered a heart attack after his caseload increased significantly during a seven-week period. We determined that this event

constituted an accident because the attorney was subjected to "unusual strain and exertion in the course of his duties" over this particular stretch of time (*id.* at 511). The comparison was temporal, rather than measuring the claimant's stress against the stress level of other employees during the same time period. Nor did it matter that the work the attorney was engaged in was "of the same general type as that in which he [was] regularly involved" (*id.* at 510).

The Board could have applied similar reasoning here. The pandemic was certainly an extraordinary event. During the early stages, businesses were required to close, people were instructed to stay inside and socially distance, and health guidance warned that COVID-19 could lead to death or severe health outcomes. And yet public-facing workers like claimants were required to continue showing up to work in person, with limited options to protect themselves. Before personal protective equipment (PPE), testing, vaccines, and treatments were widely available, these employees had to run the daily risk of contracting a novel and potentially deadly disease to keep earning their paychecks. Under these circumstances, the stress that public-facing workers experienced was far greater than that which they would have typically encountered in a normal work environment before the onset of the pandemic. The stress they encountered at work was categorically different from the "countless differences and irritations to which all workers are occasionally subjected without untoward result" (*Santacroce*, 9 AD2d at 985).

This stress was grounded in real health risks. During the first 16 months of the pandemic, essential workers like the claimants were diagnosed with COVID-19 at a rate 25% higher than the general population (*see* Center for Research on HOME, NYC Dept of Housing Preservation & Development, *Essential every day: The lives of NYC's essential workforce during COVID-19* at 13 [2023]). A study of New York City transit workers in particular found that they were "at increased risk for [COVID-19] infection and more likely to have risk factors for [COVID-19]-related complications" (*see* Suzanne E. Tomasi et al., *COVID-19 mortality among Amalgamated Transit Union [ATU] and Transport Workers Union [TWU] workers—March-July 2020, New York City metro area*, 64 Am J Indus Medic 723, 723 [2021]). And a survey found that, as of August 2020, 76% of New York City bus and subway workers personally knew someone who died from COVID-19 (*see* Robyn R. Ger-

shon et al., *Impact of occupational exposure to COVID-19 on the physical and mental health of an essential workgroup: New York City transit workers*, 19 J Emergency Mgmt 133, 139 [July 2021]).

Compensating claimants for injuries sustained due to these kinds of extraordinary workplace health risks would be fully consistent with the purpose of the Workers' Compensation Law. The Legislature first enacted the Workers' Compensation Law in 1910 in response to concerns that employees injured by workplace hazards should have the right to "prompt and certain compensation," and that the tort-based system of liability then in place "need[ed] radical change" in order to accomplish that goal (Rep to Legis of St of NY by Commn appointed under Chapter 518 of the Laws of 1909 to inquire into the question of employers' liability and other matters, First Rep, Mar. 19, 1910 at 7; *see also Crosby v State of N.Y., Workers' Compensation Bd.*, 57 NY2d 305, 313 [1982] [the purpose of this "broad scheme of compensation" is to provide "a swift and sure source of benefits" and avoid "the delay and expense to the claimant caused by the protracted litigation involved in pursuing a negligence claim"]). The Legislature thus decided to replace tort liability with a regime that would hold an employer responsible for every accident in the course of employment, "whether the employer is at fault or not, and whether the employee is at fault or not" (*Ives v South Buffalo Ry. Co.*, 201 NY 271, 285 [1911]).

One day after this Court invalidated that law on constitutional grounds (*see id.* at 317), the infamous Triangle Shirtwaist Factory fire killed 146 employees (*see* Robert E. Grey, *The Rise and Fall of Workers' Compensation in New York*, 86 Albany L Rev 713, 715-716 [2022-2023]). The fire was a galvanizing event that culminated in an amendment to the State Constitution designed to allow for the enactment of a workers' compensation law (*see id.*; NY Const, art I, § 18). As Governor John A. Dix emphasized in supporting the amendment, due to "changes in conditions of labor and the increased risks incident to many employments . . . the principle of compulsory compensation for all industrial accidents, cannot fairly be questioned" (Public Papers of John A. Dix, Governor, 1912 at 29 [1913]). The Legislature then reenacted the Workers' Compensation Law. In upholding it, this Court declared that the compensation system created a "more just and economical system of providing compensation for accidental injuries to employees as a

substitute for wasteful and protracted damage suits" (*Matter of Jensen v Southern Pac. Co.*, 215 NY 514, 528 [1915]).

The crux of this history is that the Workers' Compensation Law exists to provide employees with benefits for injuries sustained at work, without regard to fault. We have described it as a "compulsory scheme of insurance" designed to protect workers against health and safety risks encountered in the workplace (*id.* at 526). The "underlying theory is that industrial risks are apparently inseparable concomitants of modern industrial enterprise," and any "[a]ttempt to decide who is at fault proves in most instances to be futile" (J. Hampden Dougherty, The Future of the Workmen's Compensation Amendment, Proceedings of the Academy of Political Science in the City of New York, vol 5, No. 2 at 121 [1915]). Thus, the Workers' Compensation Law requires employers to "pay or provide compensation for [an employee's] disability or death from injury arising out of and in the course of the employment without regard to fault" (Workers' Compensation Law § 10 [1]). Consistent with this long-standing objective, the claimants here should be able to recover for the injuries they sustained from the extraordinary and undeniable risks they faced during the early stages of the pandemic.

I would thus remit to the Board so that it might reconsider these claims and determine whether claimants had shown that they were subjected to extraordinary stress as compared with similarly situated workers in a normal work environment pre-pandemic and whether they demonstrated the existence of psychological injuries that were causally related to workplace stress.* Notably, the Board "does not object to" this outcome. Indeed, at argument, the Board's attorney encouraged this Court to hold that stress from the risk of COVID-19 during the pandemic's early stages could qualify as a compensable injury and emphasized that such a ruling would not "open the floodgates" to a high volume of additional claims. That position is unusual absent an acknowledgment that the Board erred in denying recovery, but it does allay any concerns that ruling for

* The majority suggests that if this Court were to remit to the Board, recent amendments to the Workers' Compensation Law, if applied retroactively, might exempt the claimants from the "similarly situated" requirement. That possibility does not obviate the issue before us, which is whether the Board erred in denying benefits under the statutory scheme then in effect. In my view, the answer is yes. On remand, the claimants could pursue their claims under the terms I propose, or under the amended statute if it were deemed applicable.

claimants here would impose any significant additional liability on employers.

* * *

These claimants performed essential work during an immensely challenging time. While many of us were able to retreat to our homes and work remotely during the pandemic, these workers continued to perform their vital duties in person, risking their health and safety. Transit system workers quite literally kept the wheels of society turning; teachers ensured our children could continue to learn while the world shifted under their feet. When the extraordinary stress of working under conditions that involved ongoing exposure to a deadly disease caused these workers to develop serious psychological conditions, they turned to our century-old system of workers' compensation. Consistent with the purpose of the Workers' Compensation Law, I would allow these claimants to pursue their claims for benefits.

Judges GARCIA, SINGAS and CANNATARO concur. Judge HALLIGAN dissents in part in an opinion, in which Chief Judge WILSON and Judge RIVERA concur.

Order reversed, with costs, and decision of the Workers' Compensation Board reinstated.

[— NE3d —, — NYS3d —]

The People of the State of New York, Respondent, v Leighton R., Appellant.

Argued October 14, 2025; decided November 25, 2025

PROCEDURAL SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered January 25, 2024. The Appellate Division affirmed a judgment of the Supreme Court, Bronx County (Albert Lorenzo, J., at suppression motion; Robert Torres, J., at plea and sentence), which had convicted defendant, upon a plea of guilty, of attempted criminal possession of a weapon in the second degree.

People v Leighton R., 223 AD3d 597, affirmed.

HEADNOTES

Crimes — Unlawful Search and Seizure — Reasonable Suspicion to Stop Vehicle — Anonymous Tip — Totality of Circumstances Test

1. The appropriate test to be applied when assessing reasonable suspicion to conduct an automobile stop based upon a contemporaneous report from an anonymous 911 caller that they were the victim of a crime is whether the anonymous tip is sufficiently reliable to provide reasonable suspicion under the totality of the circumstances. In determining whether an anonymous tip provides probable cause, as opposed to reasonable suspicion, the anonymous informant's reliability and basis of knowledge are evaluated under the *Aguilar-Spinelli* framework (*see Aguilar v Texas*, 378 US 108 [1964]; *Spinelli v United States*, 393 US 410 [1969]). While the totality of the circumstances approach for determining reasonable suspicion involves an analysis of the *Aguilar-Spinelli* reliability and basis of knowledge factors, allowance must be made in applying them for the lesser showing required to meet the reasonable suspicion standard.

Crimes — Unlawful Search and Seizure — Reasonable Suspicion to Stop Vehicle — Anonymous Tip

2. In the prosecution of defendant following the discovery of a handgun and ammunition in his vehicle's glove compartment after he was stopped by police based upon a contemporaneous report from an anonymous 911 caller that they were the victim of a crime, there was record support for the affirmed finding of reasonable suspicion for the stop of defendant's vehicle. The totality of the circumstances established that there was reasonable suspicion. The anonymous informant used the 911 system to report that he had "just been shot," necessarily claiming personal knowledge of the crime. The caller also provided a description of the alleged shooter, the make and color of the shooter's vehicle, and his location. The police were able to corroborate that information, within one minute of receiving the dispatch and within a block from the reported location, when they observed a car and suspect matching

the description provided. The contemporaneous nature of the report was substantial and weighed in favor of the caller's veracity. Although the police learned information that arguably called aspects of the anonymous caller's reliability into question as the investigation continued, the review of the reasonableness of the officer's conduct was limited to the information known to the police at the time of the vehicle stop.

Crimes — Unlawful Search and Seizure — Probable Cause to Search Glove Compartment

3. In the prosecution of defendant following the discovery of a handgun and ammunition in his vehicle's glove compartment after he was stopped by police based upon a contemporaneous report from an anonymous 911 caller that they were the victim of a crime, there was record support for the affirmed finding of probable cause to search the locked glove compartment. Defendant was found to have consented to a search of the vehicle by offering to let an officer "check" the car when asked by the officer if there was anything in the car the officers should know about. Even if defendant may not have reasonably expected that his consent extended to the locked glove compartment, once the officer observed the gun and smelled gunpowder through a gap in the glove compartment, probable cause was established and the officer could search the locked container under both the Fourth Amendment and the automobile exception to the warrant requirement.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

Am Jur 2d Searches and Seizures §§ 1, 4, 12, 14, 60–61, 81–83, 116, 129–130, 133–134, 136, 205–206, 244, 277, 285–287.

Carmody-Wait 2d Search and Seizure §§ 173:3–173:4, 173:19–173:20, 173:22, 173:29–173:31, 173:43, 173:254, 173:294, 173:297, 173:325, 173:346–173:347, 173:355, 173:363–173:364.

LaFave, et al., Criminal Procedure (4th ed) §§ 3.3, 3.7, 9.1, 9.4.

NY Jur 2d Criminal Law: Procedure §§ 212, 214–215, 217–219, 221–222, 226–228, 237, 424, 448, 492–493, 514.

US Const 4th Amend.

ANNOTATION REFERENCE

See ALR Index under Anonymous Informers; Arrests; Automobiles and Highway Traffic; Constitutional Law; Criminal Law; Drugs and Narcotics; Fourth Amendment; Glove Compartment; Police and Law Enforcement Officers; Probable Cause; Search and Seizure; Smell and Odor; Traffic Stop.

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Query: "reasonable suspicion" /5 stop! /p (anonymous /3 caller or tip)

POINTS OF COUNSEL

Twyla Carter, The Legal Aid Society, New York City (*Clara Hammond-Oakley* of counsel), for appellant. I. The anonymous tip did not provide reasonable suspicion because the officer only confirmed that Leighton R.'s location and appearance matched the information in the unreliable anonymous tip; the officer did not corroborate, to any degree, the tipster's allegation that there had been a shooting or that Leighton R. was involved in one. (*People v De Bour*, 40 NY2d 210; *People v Benjamin*, 51 NY2d 267; *People v Elwell*, 50 NY2d 231; *People v Hetrick*, 80 NY2d 344; *People v Andrews*, 243 AD2d 321.) II. The officer's search of the locked glove compartment was not supported by probable cause: there was still no corroboration of the alleged criminality and the reliability of the tip was undermined when it was revealed to not be a contemporaneous report; alternatively, Leighton R.'s consent to a "check" of the car did not give the officer permission to pull open a locked glove compartment and peer through a small gap. (*People v Ellis*, 62 NY2d 393; *California v Carney*, 471 US 386; *People v Torres*, 74 NY2d 224; *People v Pettigrew*, 161 AD3d 1306; *People v Griswold*, 155 AD3d 1658.)

Darcel D. Clark, District Attorney, Bronx (*Nicole Neckles* and *Yael V. Levy* of counsel), for respondent. I. An identifiable crime victim's 911 call reporting personal observations of criminal conduct provided reasonable suspicion for a vehicle stop, even absent police corroboration of the caller's assertions of illegality. (*People v Shabazz*, 99 NY2d 634; *People v Harrison*, 57 NY2d 470; *People v Bigelow*, 66 NY2d 417; *People v Brown*, 25 NY3d 973; *People v Hinshaw*, 35 NY3d 427.) II. The police lawfully searched defendant's vehicle glove compartment after he invited them to "check the car" and because they had probable cause to believe it might contain a recently fired gun. (*People v Hardee*, 30 NY3d 991; *People v Thatch*, 71 NY2d 906; *People v Elmer*, 19 NY3d 501; *Schneckloth v Bustamonte*, 412 US 218; *People v Cosme*, 48 NY2d 286.)

OPINION OF THE COURT

CANNATARO, J.

The primary issue on this appeal is the standard that must

be applied to determine whether police have reasonable suspicion to conduct an automobile stop based upon a contemporaneous report from an anonymous 911 caller that they were the victim of a crime. We hold that whether such a stop is justified should be evaluated under the totality of the circumstances. Moreover, since there was record support for the affirmed finding of both reasonable suspicion for the stop of defendant's vehicle and probable cause to search the locked glove compartment, the Appellate Division order should be affirmed.

On June 7, 2014, an anonymous individual called 911 and reported that "somebody just shot at me" resulting in a wound to his right arm. He gave his location as East 233rd Street and White Plains Road in the Bronx and described the perpetrators as two Black males in a white Mercedes-Benz. The caller also provided the address of one of the perpetrators. In response to further questioning, the caller advised the 911 operator that the perpetrators were people he knew and "ha[d] beef with." He told the 911 operator that his name was "Brian" and stated that he did not know his callback number because it was a new phone. He declined the 911 operator's offers to send an ambulance or police assistance.

The police dispatcher then broadcasted the report of shots fired at East 233rd and White Plains Road. An officer posted at that location immediately responded, "there's no shots fired over here." The dispatcher responded, a "male caller states he was shot, he was hit in his arm." The dispatcher also provided the description of the alleged shooters and vehicle over the radio. The dispatcher then attempted to call the 911 caller back, but was initially unable to reach the victim. Meanwhile, Officer Bennett Shelley, who was patrolling with his partner in a marked car about four blocks away, headed toward the location of the reported shooting. Within 30 seconds to a minute of the broadcast, Officer Shelley observed a white Mercedes matching the description of the shooter's vehicle and its occupants coming from the direction of the reported shooting. Officer Shelley executed a stop of defendant's vehicle, during which he asked to see defendant's driver's license and inquired as to where defendant was coming from.[1] Defendant provided his license and stated that he was coming from a baby shower in Mount Vernon.

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1. Officer Shelley testified at the suppression hearing that he initially told defendant he was being stopped for the Vehicle and Traffic Law violation of excessive window tint because he wanted defendant to think it was a "rou-

(n. cont'd)

During the stop, Officer Shelley asked the dispatcher for the location information for the 911 caller, and she confirmed, based on cell tower location, that the 911 call had been made near the area of East 233rd and White Plains Road. The dispatcher contacted the 911 caller, who again provided the perpetrator's home address, including apartment number, permitting Officer Shelley to verify that the address on defendant's driver's license matched that given by the caller. The caller also advised that the alleged shooting had not taken place in the Bronx, but in Mount Vernon. The caller indicated to the dispatcher that he was going to a local hospital for treatment.

When asked by Officer Shelley if there was anything in the car the officers should know about, defendant responded, "[N]o, you can check the car." During the search, Officer Shelley pulled on the handle of the locked glove compartment and was able to see a handgun and smell gunpowder through a "gap." He then unlocked the glove compartment using defendant's key fob, found a handgun and ammunition, and placed defendant under arrest. The police were never able to locate the 911 caller.

Following a hearing at which Officer Shelley was the sole witness, Supreme Court denied defendant's motion to suppress the gun. The court found that the proximity of defendant's vehicle to the alleged shooting within moments of the 911 call, and the officers' observations corroborating the description of the suspects given by the caller, provided reasonable suspicion to stop the vehicle. The court further concluded that defendant voluntarily consented to the search of the vehicle and that, once the officer was able to see the firearm and smell gun powder, there was probable cause to search the glove compartment under the automobile exception.

Defendant was convicted, upon his guilty plea, of attempted criminal possession of a weapon in the second degree. The Appellate Division affirmed, finding that suppression was properly denied, as the anonymous tip was sufficiently corroborated to provide reasonable suspicion for the vehicle stop and defendant consented to a search of the vehicle, which led to probable

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tine car stop," rather than an investigation of a reported shooting. Although the officer testified that he issued defendant a summons for the excessively tinted windows, no summons was produced. Supreme Court rejected the proposition that the vehicle stop was based on the officer's observation of a traffic infraction (*cf. People v Hinshaw*, 35 NY3d 427, 430 [2020]).

cause to open the locked glove compartment (223 AD3d 597, 598 [1st Dept 2024]). A Judge of this Court granted defendant leave to appeal (42 NY3d 928 [2024]).

We have historically been skeptical of authorizing police action on the basis of an anonymous tip. In *People v De Bour*, we "characterized the use of anonymous information to justify intrusive police action as 'highly dangerous' " and observed that tips from unknown informants "are of the weakest sort since no one can be held accountable if the information is in fact false and there is no way to assure, by way of intangibles such as voice, facial expression or emotional state, that the information was communicated and received accurately and was believable" (40 NY2d 210, 224-225 [1976] [citations omitted]). In recognition of the risks presented by anonymous reports of criminal activity, we have evaluated an anonymous informant's reliability and basis of knowledge under the *Aguilar-Spinelli* framework (*see Aguilar v Texas*, 378 US 108 [1964]; *Spinelli v United States*, 393 US 410 [1969]) to determine whether a tip provides probable cause (*see People v Griminger*, 71 NY2d 635 [1988]).

Where an informant has not revealed their basis of knowledge, as, for example, by personal observation,

> "it is not enough that a number, even a large number, of details of noncriminal activity supplied by the informer be confirmed. Probable cause for such an arrest or search will have been demonstrated only when there has been confirmation of sufficient details suggestive of or directly related to the criminal activity informed about to make reasonable the conclusion that the informer has not simply passed along rumor, or is not involved (whether purposefully or as a dupe) in an effort to 'frame' the person informed against" (*People v Elwell*, 50 NY2d 231, 234-235 [1980]).

By contrast, the reliability prong can be established either by past instances of the individual's reliability or by independent observation of corroborative details by the police that are noncriminal in nature (*see* 50 NY2d at 237; *People v DiFalco*, 80 NY2d 693, 698-699 [1993]).

We have continued to apply the principles of *Aguilar-Spinelli* in the probable cause context, even after the United States Supreme Court abandoned it in favor of the totality-of-the-circumstances approach (*see Illinois v Gates*, 462 US 213, 233

[1983] [limiting the reliability and basis-of-knowledge prongs of *Aguilar-Spinelli* to "relevant considerations in the totality-of-the-circumstances analysis that traditionally has guided probable-cause determinations"]), in recognition that *Aguilar-Spinelli* is more protective of our citizens' rights under the State Constitution (*see Griminger*, 71 NY2d at 640-641; *People v Johnson*, 66 NY2d 398, 406-407 [1985]). At issue here, however, is whether that same analysis is required for the lesser intrusion of an investigatory stop requiring reasonable suspicion.

For its part, the Supreme Court in *Alabama v White* (496 US 325 [1990]) applied the *Gates* totality-of-the-circumstances test to determine whether an anonymous tip can support a stop based on reasonable suspicion. Our precedent is somewhat more unsettled. For example, in *People v Moore*, we concluded that "[a]n anonymous tip cannot provide reasonable suspicion to justify a seizure, except where that tip contains predictive information—such as information suggestive of criminal behavior—so that the police can test the reliability of the tip" (6 NY3d 496, 499 [2006], citing *Florida v J.L.*, 529 US 266, 272 [2000]). And in *People v William II* (98 NY2d 93, 99 [2002]), we held that anonymous tips that provided only "readily observable characteristics" and "lacked predictive information that would permit the police to test the caller's knowledge" were insufficient to establish reasonable suspicion. Those decisions followed the Supreme Court's decision in *Florida v J.L.*, which emphasized the importance of "predictive information" as a means for police to test a tipster's knowledge and credibility (*see* 529 US at 271). Significantly, neither *Moore* nor *William II* referenced *Aguilar-Spinelli* in determining that the respective tips did not provide reasonable suspicion for the stops.

More recently, in *People v Argyris*, we held that reasonable suspicion was established by a 911 call from an anonymous individual and the confirmatory observations by the police of information provided by the caller that was noncriminal in nature (24 NY3d 1138, 1140-1141 [2014]). Although there were multiple writings in *Argyris*, the brief majority opinion in that case holding that the police had reasonable suspicion to stop the defendants' vehicle based on the tip also stated that "the absence of predictive information in the tip was not fatal to its reliability" (*see* 24 NY3d at 1140-1141, citing *Moore*, 6 NY3d at 499). On this point, the majority cited to *Prado Navarette v California* (572 US 393 [2014]), a Supreme Court case decided

the same year, in which the Supreme Court appeared to retreat from *J.L.*'s emphasis on predictive information, at least in the context of 911 calls reporting drunk driving. *Navarette* held that an anonymous 911 call was sufficiently reliable to justify a traffic stop where the caller reported that another vehicle had run her off the road and provided a description of the vehicle, including its license plate, as well as the vehicle's approximate location and direction of travel (*see* 572 US 393). The Court reasoned that, by reporting a specific vehicle, "the caller necessarily claimed eyewitness knowledge of the alleged dangerous driving. That basis of knowledge lends significant support to the tip's reliability" (572 US at 399). As further indicia of reliability, the Court emphasized the report's contemporaneous nature and the 911 system's capacity to identify and locate callers (*see* 572 US at 400-401).

[1] In our most recent cases addressing whether there was reasonable suspicion to stop a vehicle based on an anonymous tip, we have been presented with fact patterns under which the result would have been the same whether we evaluated the reliability of the anonymous tip under the totality of the circumstances or applied the *Aguilar-Spinelli* framework (*see People v Walls*, 37 NY3d 987, 989 [2021]; *Argyris*, 24 NY3d at 1140-1141).[2] We retreated somewhat from the requirement of predictive information emphasized in *Moore* and *William II*, stating in *Argyris* that such information was not required "under the[ ] circumstances" of that case (24 NY3d at 1141). To the extent that there is an open issue as to which test should be applied when assessing reasonable suspicion, as opposed to probable cause (*see People v Chase*, 85 NY2d 493, 501 [1995]; *People v Landy*, 59 NY2d 369, 375-377 [1983]; 1 Barry Kamins, New York Search and Seizure § 2.04, n 22 [2025]), we now hold that the appropriate test is whether an anonymous tip is sufficiently reliable to provide reasonable suspicion under the

2. The dissent's characterization of our holding in *Argyris* as a four-Judge majority adopting *Aguilar-Spinelli* lacks any support in the plain language of the opinion. To the contrary, the majority opinion expressly states, "Regardless of whether we apply a totality of the circumstances test or the *Aguilar-Spinelli* standard, there is record support for the lower courts' findings that the stops were lawful" (24 NY3d at 1140 [citations omitted]), thereby expressly leaving open the issue of what test would ultimately be adopted. The dissent offers no authority for the proposition that we would go behind a majority opinion to count votes from concurring and dissenting opinions to create binding precedent on an issue that was not necessary to the Court's holding.

totality of the circumstances. While this approach involves an analysis of the *Aguilar-Spinelli* reliability and basis of knowledge factors, "allowance must be made in applying them for the lesser showing required" to meet the reasonable suspicion standard (*White*, 496 US at 328-329).[3]

[2] Here, the totality of the circumstances establishes that there was reasonable suspicion to stop defendant's vehicle. The anonymous informant used the 911 system to report that he had "just been shot," necessarily claiming personal knowledge of the crime. The caller also provided a description of the alleged shooter, the make and color of the shooter's vehicle, and his location. The police were able to corroborate that information, within one minute of receiving the dispatch and within a block from the reported location, when they observed a car and suspect matching the description provided. The contemporaneous nature of the report is substantial here and weighs in favor of the caller's veracity.[4]

The police were duty-bound to investigate the radio report of a shooting, and they could not ignore their own contemporaneous observation of a vehicle matching the caller's description and location. Nor was the duty to investigate extinguished when another police officer failed to hear gunshots at the reported location (*see People v Benjamin*, 51 NY2d 267, 270 [1980]). And, although the police learned information that arguably called aspects of the anonymous caller's reliability into question as the investigation continued, our review of the reasonableness of the officer's conduct is limited to the information known to the police at the time of the vehicle stop. Had they been aware that the alleged shooting happened in Mount Vernon prior to making the stop, for instance, the result here

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3. It remains the case that our courts do not "blithely accept as true the accusations of an informant unless some good reason for doing so has been established," and therefore a finding of reasonable suspicion must still be based on "some minimum, reasonable showing" that the anonymous tip is reliable (*see Griminger*, 71 NY2d at 639 [internal quotation marks and citation omitted]). Given the risks inherent in relying on anonymous tips, a tipster's basis of knowledge and veracity remain "highly relevant in determining the value of [their] report" (*Gates*, 462 US at 230) and should be considered in the totality-of-the-circumstances analysis. Likewise, although corroboration of a tip's assertions of criminality may not be strictly required in every case, it remains a relevant factor that may be considered in making reliability determinations.

4. We do not address whether a vehicle stop would be warranted to investigate *any* report of a completed offense (*see Navarette*, 572 US at 402 n 2; *United States v Hensley*, 469 US 221, 229 [1985]).

might be different. Under the circumstances presented, however, there is record support for the affirmed finding of reasonable suspicion.

[3] Finally, there is record support for the affirmed finding of probable cause to search the glove compartment (*see People v McRay*, 51 NY2d 594, 601 [1980]). The courts below found that defendant consented to a search of the vehicle by offering to let the officer "check" the car. Even if defendant may not have reasonably expected that his consent extended to the locked glove compartment (*see People v Gomez*, 5 NY3d 416, 419 [2005]; *Florida v Jimeno*, 500 US 248, 251-252 [1991]), once the officer observed the gun and smelled gunpowder through a gap in the glove compartment, probable cause was established and the officer could search the locked container under both the Fourth Amendment and the automobile exception to the warrant requirement (*see People v Ellis*, 62 NY2d 393, 398 [1984]).

Accordingly, the order of the Appellate Division should be affirmed.

RIVERA, J. (dissenting). The majority holds that the police can stop anyone on the road based on an anonymous phone caller's allegation that they committed a crime, simply because the caller described the model and color of the car, and the race and gender of the driver, even when an officer at the scene contradicted the caller's allegations. To the extent the majority hints that the tipster in this appeal provided additional information before the police initiated a car stop (*see* majority op at 269), it misrepresents the record. Moreover, the majority's suggestion that our state law is unclear as to whether an anonymous tip may provide reasonable suspicion to justify a physical intrusion is contrary to precedent. The Court has previously concluded that an anonymous tip may only provide the police with reasonable suspicion of criminality if it satisfies the two-pronged *Aguilar-Spinelli* test by providing the informant's basis of knowledge and indicia of the informant's reliability (*see People v Argyris*, 24 NY3d 1138, 1143-1144 [2014, Abdus-Salaam & Graffeo, JJ., concurring]; *id.* at 1182 [Rivera, J., & Lippman, Ch. J., concurring in part & dissenting in part]). The majority is therefore wrong on the facts and the law. The result is the majority's policy-driven and largely unexplained adoption of the federal totality of the circumstances test (*see* majority op at 273-274), the same test this Court has long rejected because it fails to adequately protect New Yorkers from malicious tipsters who act under the guise of anonymity, and from

unsubstantiated allegations based on pure rumor (*see Argyris*, 24 NY3d at 1157-1159 [Abdus-Salaam, J., concurring]; *id.* at 1168 [Read, J., concurring in part & dissenting in part]; *id.* at 1182 [Rivera, J., concurring in part & dissenting in part]; *see also People v Johnson*, 66 NY2d 398, 406-407 [1985] [rejecting the federal totality of the circumstances standard in the probable cause context]).

While an anonymous tip may supply the police with grounds for further investigation, it cannot justify a stop unless it provides adequate indicia of reliability. I would reverse the Appellate Division's order because the anonymous tip here lacked any such indicia.

I.

The events leading to defendant's seizure and arrest are undisputed. At approximately 11:00 p.m., two officers on patrol received a radio dispatch indicating that someone called 911 to report that a man was shot at a specific intersection a few blocks from the officers' location. The caller described the perpetrators as two Black men in a white Mercedes Benz. As the officers drove toward the intersection, they received a radio dispatch from another officer, posted at the intersection, reporting "no shots fired over here." When they were approximately one block from the alleged scene, one of the officers saw a white Mercedes Benz occupied by two Black men. The car was not speeding or violating any other rule of the road. Nonetheless, the officers activated their patrol car lights and siren to initiate a car stop. Defendant was driving the Mercedes Benz, and he immediately pulled over in response to the police signal. As I discuss below, under our well-established case law, the anonymous caller's tip did not provide the officers with reasonable suspicion to stop the car, and Supreme Court should have granted defendant's motion to suppress the contraband that the police subsequently recovered.[1]

II.

A vehicular stop is lawful "when [it is] based on a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime" (*People*

1. As I conclude that the police had no lawful basis to stop defendant's car, I would not reach the question of whether the police validly searched the glove compartment after the stop.

v Hinshaw, 35 NY3d 427, 430 [2020]). Unlike the more demanding standard of probable cause, which is required to justify an arrest (*People v Moore*, 6 NY3d 496, 498-499 [2006]), reasonable suspicion is "that quantum of knowledge sufficient to induce an ordinarily prudent and cautious person under the circumstances to believe criminal activity is at hand" (*People v Messano*, 41 NY3d 228, 232 [2024], quoting *People v Martinez*, 80 NY2d 444, 448 [1992]).

Under limited circumstances, an anonymous tip may supply the police with information justifying an arrest or seizure (*see e.g. Argyris*, 24 NY3d at 1140-1141). However, the Court has warned against overreliance on such tips, explaining that "the use of anonymous information to justify intrusive police action [i]s 'highly dangerous' " (*People v De Bour*, 40 NY2d 210, 225 [1976], quoting *People v Taggart*, 20 NY2d 335, 343 [1967]). Indeed, an anonymous tip is inherently suspect, and warrants careful scrutiny, because of the difficulty in confirming information from a source who keeps their identity secret. Such a tip is even more suspect when provided over a telephone, because the police cannot visually assess the caller's credibility. Unsurprisingly, then, "[c]ourts have uniformly held that one of the weakest justifications for a stop of a defendant is a radio transmission based on an anonymous tip" (Barry Kamins, New York Search and Seizure § 2.04 [2] [b] [2025]).

In *Argyris*, a majority of the Court adopted the two-part test drawn from the United States Supreme Court's decisions in *Aguilar v Texas* (378 US 108 [1964]) and *Spinelli v United States* (393 US 410 [1969]) to determine whether, as a matter of state constitutional law, the anonymous tips at issue provided the police with reasonable suspicion to initiate car stops of each defendant (24 NY3d at 1144 [Abdus-Salaam, J., concurring]; *id.* at 1182 [Rivera, J., concurring in part & dissenting in part]). Under that test, an informant must provide sufficiently detailed information to separately establish both their reliability as an informant, and that they have a reliable basis for their knowledge of the alleged criminal activity (*id.* at 1150 [Abdus-Salaam, J., concurring]; *id.* at 1170-1171 [Rivera, J., concurring in part & dissenting in part]). Although the Supreme Court abandoned the *Aguilar-Spinelli* test in *Illinois v Gates* (462 US 213 [1983]) in exchange for a totality of the circumstances test, this Court has long continued to apply it in

the probable cause context (*see Johnson*, 66 NY2d at 400).[2] Although some members of the *Argyris* Court reached different conclusions as to whether the anonymous tips at issue were sufficiently reliable to allow the police to initiate the car stops, a majority of the Court concluded that the heightened test applies in the reasonable suspicion context, just as that required for probable cause (*see* 24 NY3d at 1144 [Abdus-Salaam, J., concurring]; *id.* at 1182 [Rivera, J., concurring in part & dissenting in part]). Moreover, a majority of the Court concluded that a tip that includes predictive information of criminality supplies reasonable suspicion to justify a stop (*see id.* at 1160 [Abdus-Salaam, J., concurring]; *id.* at 1168 [Read, J., concurring in part & dissenting in part]; *id.* at 1177-1180 [Rivera, J., concurring in part & dissenting in part]).

Notably, this approach provides heightened protection against harassment by malevolent individuals who hide behind a shroud of anonymity, addressing the Court's long-standing concern that the totality of the circumstances test is insufficiently protective (*Argyris*, 24 NY3d at 1163 [Abdus-Salaam, J., concurring]; *id.* at 1173-1174 [Rivera, J., concurring in part & dissenting in part]; *see also People v Griminger*, 71 NY2d 635, 641 [1988] [explaining that continuing to apply the *Aguilar-Spinelli* test "will . . . prevent the disturbance of the rights of privacy and liberty upon the word of an unreliable hearsay informant, a danger we perceive under the *Gates* totality-of-the-circumstances test"]). The test does so by ensuring, in every case, that an informant is neither relying on "incomplete secondhand knowledge" nor is using the accurate information they do possess to falsely accuse someone of a crime (*Argyris*, 24 NY3d at 1158 [Abdus-Salaam, J., concurring]). It also furthers "the aims of predictability and precision in judicial review of search and seizure cases" and "provide[s] bright line guidance to police personnel in performing their duties" (*Johnson*, 66 NY2d at 407 [internal quotation marks omitted]).

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2. Notably, the facts in *Johnson*, where the Court decided to continue applying the stricter *Aguilar-Spinelli* test, involved the less suspect circumstances of a non-anonymous tip (66 NY2d at 400; *see also Argyris*, 24 NY3d at 1177 [Rivera, J., concurring in part & dissenting in part] ["Unlike a known informant, an anonymous informant has no history with law enforcement, and no track record of having provided reliable information in the past. Deprived of the informant's identity, the police have no basis upon which to conclude that the tipster may be trusted"]).

The majority here rejects this approach and instead adopts the less protective federal totality of the circumstances test as the proper standard for determining whether an anonymous tip supplies reasonable suspicion, thus overruling our precedent without providing any explanation for why it believes the federal approach is superior (*see* majority op at 273-274, 274 n 3).[3] Nor could the majority provide a persuasive explanation, because this Court has already rejected the totality of the circumstances test as inadequate as a matter of state constitutional law. Indeed, refusal to adopt that test is an express point of agreement among the concurring and partial dissenting opinions in *Argyris* (*see* 24 NY3d at 1157 [Abdus-Salaam, J., concurring]; *id.* at 1168 [Read, J., concurring in part & dissenting in part]; *id.* at 1182 [Rivera, J., concurring in part & dissenting in part]).

In a concurrence, Judge Abdus-Salaam, joined by Judge Graffeo, explained that the Court's "long-standing practice of granting New York citizens enhanced protection against unwarranted police intrusions based on hearsay . . . supports the extension of the *Aguilar-Spinelli* rule to the evaluation of" whether an anonymous tip gives the police reasonable suspicion (24 NY3d at 1157). Judge Abdus-Salaam reasoned:

> "[T]he same concern that caused [the Court] to follow the *Aguilar-Spinelli* rule in the arrest context is still valid today and applies with equal force to investigatory stops precipitated by anonymous tips. As is true of an arrest premised on uncorroborated anonymous hearsay, a stop based on an unreliable tip may unjustly expose an individual to a high degree of physical intrusion without any credible cause for suspicion. If such stops were permitted, the police could freely abuse the people on authority of the most preposterous reports, and malicious tipsters could easily use incredible rumors to

3. The majority goes so far as to render the corroboration of criminality a peripheral consideration to a court's determination of whether an anonymous tip is sufficiently reliable to provide reasonable suspicion for a stop (*see* majority op at 274 n 3). Under the majority's watered down standard, corroboration of criminality—historically, the single most telling factor in the analysis—is now of little to no consequence at all. That standard contravenes our consistent admonition that anonymous tips are unreliable sources of information, and that police overreliance on such tips is "highly dangerous" (*De Bour*, 40 NY2d at 225 [internal quotation marks omitted]; *Taggart*, 20 NY2d at 343; *People v Russ*, 61 NY2d 693, 695 [1984] [noting the "weakness of information received from an anonymous source"]).

> convince the police to physically harass the targets of the tipsters' ire. As in the arrest context, the State Constitution must reduce these dangers by precluding the police from physically seizing an individual based on a tip that does not meet *Aguilar-Spinelli*'s reliability criteria" (*id.*).

Moreover, Judge Abdus-Salaam observed that New York courts had applied the *Aguilar-Spinelli* test for nearly 40 years, that New Yorkers and the police alike had become accustomed to it, and that there was no evidence that it was "incomprehensible or unusually burdensome" (*id.* at 1158). Finally, Judge Abdus-Salaam identified the independent and critical benefits that each prong of the *Aguilar-Spinelli* test provides in assessing the reliability of an anonymous tip:

> "[E]ach prong of the *Aguilar-Spinelli* test acts as a vital independent safeguard against unwarranted governmental intrusions based on unreliable hearsay. The basis-of-knowledge prong guarantees that the police do not forcibly detain a citizen pursuant to the report of an informant who is honest but has relied on incomplete secondhand knowledge of the relevant events. The veracity prong separately ensures that the police will not stop someone simply because an unscrupulous informant, who possesses plenty of accurate personal knowledge of what happened, twists the facts to falsely accuse the suspect of a crime" (*id.* at 1158 [internal quotation marks and citations omitted]).

Thus, Judges Abdus-Salaam and Graffeo unambiguously rejected the totality of the circumstances test in the reasonable suspicion context.

Judge Read, in partial concurrence and dissent, also declined to adopt the totality of the circumstances test in *Argyris*. She wrote that "the [prosecution] urge[s] us to dispense with the requirement for predictive information and adopt a totality-of-the-circumstances or some other more expansive test to justify a forcible stop based on an anonymous tip," but that she "would adhere to our *Moore* precedent and answer 'No' " (24 NY3d at 1168). Additionally, in my partial concurrence and dissent, joined by Chief Judge Lippman, I observed that "we rejected th[e] federal [totality of the circumstances] approach in *Johnson*, finding our state constitutional standards better protected individual rights" (*id.* at 1182). Then, as now, in my view, "[t]hat

assessment of the totality test is still applicable today and I see no reason to reconsider and resuscitate a standard buried long ago" (*id.*).

Thus, a majority of the *Argyris* Court, fully aware of the dangers of anonymous tips and the constitutional rights at risk if we lowered our guard against fabricated allegations of criminality, expressly rejected the federal totality of the circumstances test that the prosecution advocated for in that case, and which the majority now adopts. The legal landscape has not changed since the Court decided *Argyris*, and anonymous tips are no less unreliable and dangerous today. The only identifiable difference between *Argyris* and this appeal is the membership of the Court, but that has never been grounds to adopt a position contrary to precedent (*see People v Bing*, 76 NY2d 331, 338 [1990] [stare decisis "rests upon the principle that a court is an institution, not merely a collection of individuals, and that governing rules of law do not change merely because the personnel of the court changes"]; *see also Vasquez v Hillery*, 474 US 254, 265 [1986] ["(T)he important doctrine of *stare decisis* . . . [is] the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion. That doctrine permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government"]; *People v Garvin*, 30 NY3d 174, 187 [2017] [same]). At bottom, the majority does not, and cannot, justify its adoption of a test that a majority of the Court unequivocally rejected in *Argyris*.

III.

Applying the correct standard to the appeal before us, the officers here lacked reasonable suspicion to stop defendant's car. At the time of that intrusion, the police knew that an anonymous caller claimed that someone was shot at a particular intersection. An officer at that intersection contradicted the caller's statement by contemporaneously reporting that no shots were fired, calling into question the tipster's reliability. The tipster's general description of the shooters' race and gender, and of the model and color of the car they occupied, was information entirely unrelated to criminality and did not support a conclusion that the tipster's report was credible. Indeed, the information that the tipster provided was no more

suggestive of criminality than what one would notice from observing a car on the road for only a few seconds. While an officer's observations may corroborate a tipster's reliability, here, the officers' observations of defendant a few blocks from the intersection of the alleged shooting in a white Mercedes Benz failed to do so. Furthermore, in this case, the officers' observations that defendant was neither speeding nor attempting to elude the police did nothing to corroborate the tip. Additionally, there were no other telltale signs of a recent shooting, such as people running from the scene, looking for cover, flagging down the officers' car, screaming, or appearing injured.

Notably, although information obtained after the officers decided to stop defendant cannot supply reasonable suspicion of criminality (*see People v William II*, 98 NY2d 93, 98 [2002]), defendant's conduct upon being stopped does not provide any suggestion of criminal activity. When the officers activated their lights and siren, defendant immediately pulled over. Upon request, he provided the officers with his license and registration, and he explained that he was headed home from a baby shower. When the officers asked if there was anything in the car they should know about, defendant invited them to check the car.[4]

The majority's analysis fails on its own terms, because it hinges on mischaracterizations of the record. In its summary of the contents of the radio dispatches, the majority suggests that the officers knew more than they did at the time they detained defendant (*see* majority op at 269). For example, the majority states that the 911 caller provided the address of the shooters' residence and claimed to have "beef with" the shooters, and that the caller had been shot in the arm, without clarifying that the officers did not have this information when they stopped defendant's car (*see id.*). This muddied narrative is es-

4. As for the anonymous tip, the more that the police learned, the more the caller's reliability was called into question. The caller refused police assistance despite claiming that they had been shot. They also tried to stop the 911 dispatcher from calling an ambulance by stating that they were already headed to the hospital. However, a police canvas of nearby hospitals revealed that no one had appeared with a gunshot wound, and despite the police's best efforts, they could not locate the caller. Thus, there was no way to confirm the alleged shooting. If there even was a shooting, the police should have followed up on the tip by taking additional investigatory steps prior to stopping defendant's car based solely on an anonymous tip that provided nothing more than confirmation that two Black men in a white Mercedes Benz were driving down the street.

sential to the majority's conclusion because, otherwise, all it can point to is a description of the car that lacked the model and license plate number, and physical descriptions that lacked any unique characteristics and fit all adult Black males in New York City. Contrary to the majority's assertion (*see id.*), and to the extent that it is relevant to the majority's application of its erroneous standard to the facts, at the hearing, the officer did not testify that the 911 caller was the victim of the shooting when he seized defendant. Rather, the officer only testified that a "911 call came over that a male was just shot." Thus, at the relevant time, the officers' understanding of the situation and the description of the shooters was insufficient to provide them with reasonable suspicion to stop defendant, even under the more expansive and less protective totality of the circumstances test.

The majority appears to rest its application of a less strict test on the fact that investigatory stops requiring reasonable suspicion, rather than probable cause, are a "lesser intrusion" (majority op at 272). This distinction does not justify the majority's departure from precedent. As I have stated previously, "[w]hether the inquiry is to confirm the existence of probable cause for a search or an arrest, or the reasonable suspicion to stop and detain," the Court must "carefully scrutinize the anonymous informant and the tipster's information, and . . . require corroboration that provides a basis for an officer's supported belief of criminal conduct, taking into account that the source of the information is unknown and untested" (*Argyris*, 24 NY3d at 1177 [Rivera, J., concurring in part & dissenting in part]). Although the majority asserts that the totality of the circumstances test still "involves an analysis of the *Aguilar-Spinelli* reliability and basis of knowledge factors" (majority op at 274), it provides no guarantee that those factors will receive the weight that their significance requires, or that other factors will not outweigh them. The majority agrees that there are inherent risks in relying on an anonymous tip, and that there must be some minimum, reasonable showing that an anonymous tip is reliable (*id.* at 274 n 3), but it abandons the very safeguards that require an anonymous tip to bear sufficient indicia of reliability. They do so in exchange for a standard that by its very nature involves a discretionary balancing of factors.

Significantly, the majority fails to explain why adoption of a less protective standard benefits New Yorkers. Experience and

logic suggest the contrary, because investigatory stops regularly lead to searches and seizures of the occupants and the vehicle, as was the case here. If the police can rely on an anonymous tip to seize an individual without sufficient assurances of that tip's reliability and accuracy, and, in turn, use the information they acquire from the stop to make an arrest, then the majority has effectively eroded the standard for probable cause. Put another way, police conduct based on reasonable suspicion may escalate based on probable cause developed during the initial encounter, and accordingly, we should not apply a more protective standard to one but not the other.

IV.

The police stopped defendant's car based on an anonymous tip that provided no allegations of criminal behavior that the officers could corroborate. Moreover, the tip failed to provide a description of the shooters beyond that they were Black men in a white Mercedes Benz. This information, on its own, did not constitute reasonable suspicion. To be clear, the police did not have to ignore the tip, even if an officer at the scene reported that no shots had been fired, but they could have instead taken appropriate investigatory steps, such as following the car. Here, however, the police immediately stopped defendant's car as soon as they saw that it matched the tip's vague description of the car and its occupants, ignoring the red flags suggesting that the tip was unreliable. Notably, the majority admits that the "result here might be different" had the police known that the alleged shooting occurred in Mount Vernon prior to making the car stop (majority op at 274-275). Had the police conducted even a minimal investigation once they saw the Mercedes Benz, rather than immediately initiate a car stop, they would have received that information from a radio dispatch first, casting more doubt on the reliability of the anonymous tip. The police missed that critical information in their haste to initiate the car stop without investigation, based on their undue deference to the anonymous tip. Thus, the majority's endorsement of the police's conduct flies in the face of the Court's decades of warnings about the dangers of such a tip.

Our Constitution permits officers to follow leads, but if the police want to forcibly stop someone, they cannot solely rely on an anonymous tipster's unsubstantiated allegation of a crime. At a time when the police are increasingly soliciting tips to assist with investigations, and the phrase "if you see something,

say something" has become ubiquitous, it is all the more critical that law enforcement and the courts remain vigilant against malicious anonymous tipsters and those relying on mere rumor and suspicion.

I dissent.

Judges GARCIA, SINGAS, TROUTMAN and HALLIGAN concur. Judge RIVERA dissents in an opinion, in which Chief Judge WILSON concurs.

Order affirmed.

REPORTS OF CASES

DECIDED IN THE

APPELLATE DIVISION

OF THE

SUPREME COURT

OF THE

STATE OF NEW YORK

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CASES DECIDED

IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK

[243 NYS3d 348]

C.R., Respondent, v Episcopal Diocese of New York, Respondent-Appellant, and The Cathedral School of St. John the Divine, Appellant-Respondent.

First Department, September 25, 2025

PROCEDURAL SUMMARY

Appeal and Cross-Appeal from an order of the Supreme Court, New York County (Sabrina B. Kraus, J.), entered October 24, 2023. The order denied defendant The Cathedral School of St. John the Divine's motion to dismiss all causes of action against it and denied defendant Episcopal Diocese of New York's motion for summary judgment dismissing all causes of action as against it.

C.R. v Episcopal Diocese of N.Y., 2023 NY Slip Op 33851(U), modified.

HEADNOTES

Negligence — Negligent Supervision — Sexual Abuse of Student by Teacher — Schools — Students — Injury to Student — Scope of Duty — Notice of Criminal Propensity — Sexual Abuse of Student by Teacher off School Grounds

1. In an action for negligent hiring, retention and supervision against defendant parochial school, plaintiff former student's allegations that a lay teacher at the school had sexually abused her over the course of six months, including after the abuse was reported to the school by the parents of plaintiff's friends and a therapist, were sufficient to permit an inference that defendant school, had it exercised ordinary care, should have been aware of the teacher's propensity to engage in sexual abuse. Plaintiff's allegations indicated that the abuse "occurred regularly" over a six-month period; the

teacher "openly and notoriously" drove her to and from the school every day; plaintiff regularly wore the teacher's jacket throughout the school; the teacher "openly touched Plaintiff in sensual and inappropriate ways" at an after-school dance program; and the teacher "openly flirt[ed] with Plaintiff during school hours" and touched her in a flirtatious manner in the hallways of the school. While plaintiff denied the sexual abuse claims when the school questioned her about them, the standard of care is based on what was customary at the time of the conduct. At that time, defendant school should have known that a 13-year-old student may deny being sexually abused by a teacher in a single meeting with school administrators out of fear, and that the report made by the friend's parents required a more robust response than the school provided.

Schools — Students — Injury to Student — Scope of Duty — Sexual Abuse of Student by Teacher off School Grounds

2. Defendant parochial school was not entitled to dismissal of plaintiff former student's action for negligent hiring, retention and supervision, which arose from allegations that a lay teacher at the school had sexually abused her over the course of six months, based on defendant's claim that it did not owe a duty to plaintiff because all of the alleged sexual abuse occurred off the school's premises. While a school's custodial duty ceases once the student has passed out of its orbit of authority and a parent is free to reassume control over the child's protection, its duty continues and is breached if the student is released without further supervision into a foreseeably hazardous setting the school had a hand in creating. Plaintiff's allegations, including inappropriate physical touching during school hours and on school grounds, created the necessary nexus between defendant school and the off-campus abuse and permitted an inference that the off-campus abuse was foreseeable.

Damages — Punitive Damages — Negligent Hiring, Retention and Supervision — Conscious Disregard for Rights of Others

3. Supreme Court properly denied defendant parochial school's motion to dismiss plaintiff former student's demand for punitive damages in an action for negligent hiring, retention and supervision arising from allegations that a lay teacher at the school had sexually abused plaintiff over the course of six months. Punitive damages in negligent hiring, retention, or supervision actions generally require conduct evincing a high degree of moral culpability or which constitutes willful or wanton negligence or recklessness so as to evince a conscious disregard for the rights of others. A "conscious disregard" requires knowledge, or actual notice, of the potential of harm to others. The complaint alleged that defendant school was given actual notice that the teacher was sexually abusing plaintiff and then failed to adequately investigate the allegations to such an extent that suggested ulterior motives. Plaintiff's denial of the abuse during a meeting with school administrators did not negate the actual notice received by defendant. Accepting as true plaintiff's allegations that defendant school, in an effort to avoid scandal, continued to retain the teacher without any disclosure of his heinous acts to students and their parents, failed to act to prevent or limit his contacts with children, and concealed their knowledge that the teacher was unsafe, the punitive damages claim was sufficient at the prediscovery stage of the litigation.

Negligence — Negligent Supervision — Sexual Abuse of Student by Teacher at Religious School — Duty of Religious Diocese

4. Defendant religious diocese did not establish entitlement to summary judgment dismissing an action for negligent hiring, retention and supervision arising from allegations that plaintiff former student was sexually abused over the course of six months by a lay teacher at a parochial school within the diocese. Defendant's affidavit from its archivist briefly disputing

the allegations was neither conclusive nor supported by any corroborating evidence. That affidavit was refuted by one submitted by plaintiff from a former Catholic priest and theologian who, based on publicly available records, opined that there existed an affiliation and relationship between the school and its teachers and the diocese, and that the proof of the extent of that relationship was in the sole possession of defendants.

Damages — Punitive Damages — Negligent Hiring, Retention and Supervision — Actual Notice of Sexual Abuse of Student by Teacher

5. In an action for negligent hiring, retention and supervision arising from allegations that plaintiff former student was sexually abused by a lay teacher at a parochial school controlled by defendant religious diocese, plaintiff's claim for punitive damages against defendant diocese was dismissed. Plaintiff did not plead any actual notice to defendant, either of plaintiff's sexual abuse, the teacher's propensity for the sexual abuse of children, or even generally of its parochial school teachers sexually abusing students. While plaintiff alleged that the bishop of the diocese knew that "employees/agents of the Diocese under their supervision and control . . . were grooming and sexually molesting children with whom the priests/brothers would have contact in their ministry, educational, and pastoral functions" and that it "was a widespread, ubiquitous, and systemic problem in the Diocese involving many priests and numerous victims," the teacher alleged to have abused plaintiff was not a priest or an ecclesiastical teacher. Thus, plaintiff failed to plead any conduct on behalf of defendant diocese that evoked a conscious disregard for the rights of others so as to warrant punitive damages.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d Agency §§ 1, 197; AM JUR 2d Damages §§ 551, 563, 566, 570, 573, 578–580, 593, 598–599; AM JUR 2d Employment Relationship §§ 367, 370, 372–373; AM JUR 2d Negligence §§ 1, 5, 68, 78, 80, 118, 120–121, 123, 126–128, 234–235, 238–240, 246–248, 251–253, 258–260, 262–263; AM JUR 2d Religious Societies §§ 46, 48; AM JUR 2d Schools §§ 174, 450–451, 457; AM JUR 2d Summary Judgment § 8.

CARMODY-WAIT 2d Complaints in Particular Actions §§ 29:143–29:144; CARMODY-WAIT 2d Summary Judgment §§ 39:192, 39:203.

DOBBS LAW OF TORTS (2d ed) §§ 31–32, 140, 329, 333, 418, 423, 483.

MCKINNEY'S, Education Law art 23–b.

NY JUR 2d Agency and Independent Contractors §§ 1, 167, 211; NY JUR 2d Damages §§ 185, 190, 193–194, 198; NY JUR 2d Employment Relations §§ 391–392; NY JUR 2d Government Tort Liability §§ 229, 233, 250, 257–258; NY JUR 2d Negligence § 57; NY JUR 2d Religious Organizations §§ 18, 20; NY JUR 2d Schools, Universities, and Colleges §§ 246, 336; NY JUR 2d Summary Judgment § 9.

NEW YORK LAW OF TORTS §§ 1:2, 6:3–6:4, 6:6, 6:8, 6:15, 6:19–6:20, 21:108, 21:111.

NEW YORK PATTERN JURY INSTRUCTIONS—CIVIL, PJI 2:210, 2:240, 2:278.

ANNOTATION REFERENCES

Liability of churches or other religious societies for torts causing personal injury or death. 124 ALR 814.

Tort liability of private schools and institutions of higher learning. 160 ALR 250.

Liability of school authorities for hiring or retaining incompetent or otherwise unsuitable teacher. 60 ALR4th 260.

Liability, Under State Law Claims, of Public and Private Schools and Institutions of Higher Learning for Teacher's, Other Employee's, or Student's Sexual Relationship with, or Sexual Harassment or Abuse of, Student. 86 ALR5th 1.

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APPEARANCES OF COUNSEL

Epstein, Becker & Green, P.C., New York City (*Lori A. Medley* and *Melissa L. Jampol* of counsel), for appellant-respondent.

McGivney, Kluger, Clark & Intoccia, P.C., New York City (*Charles R. Cordova* and *Mindy Kallus* of counsel), for respondent-appellant.

Herman Law, New York City (*Kyle Schiedo*, *Stuart S. Mermelstein*, *Ameer Benno* and *Vanessa A. Neal* of counsel), for respondent.

OPINION OF THE COURT

KAPNICK, J.

In 2006, plaintiff was a 13-year-old student at The Cathedral School of Saint John the Divine, sued herein as The Cathedral School of St. John the Divine, an Episcopal parochial school located in Manhattan. At the same time, Jose Bravo was an adult employed at the School as a lay teacher (as opposed to an ecclesiastical one). According to plaintiff, Mr. Bravo repeatedly sexually abused and molested her over the course of six months during the 2006 school year, including after the abuse was

reported to the School by the parents of plaintiff's friends and a therapist.

In March of 2021, proceeding under a pseudonym for her privacy, plaintiff commenced this revival action pursuant to the Child Victims Act (CPLR 214-g) against the School and the Episcopal Diocese of New York, to recover damages for their negligence in failing to prevent her from being sexually abused by Mr. Bravo.[1] The complaint also includes a demand for punitive damages as against each defendant. The School moved for dismissal of plaintiff's complaint in its entirety pursuant to CPLR 3211 (a) (7) and the Episcopal Diocese moved for summary judgment in its favor pursuant to CPLR 3212.[2] Supreme Court consolidated defendants' prediscovery motions and denied both motions in their entirety in a single decision and order dated October 17, 2023 (2023 NY Slip Op 33851[U] [Sup Ct, NY County 2023]). For the reasons discussed below, we modify the order appealed from to grant the Episcopal Diocese's motion for summary judgment only to the extent of dismissing plaintiff's demand for punitive damages as against it, and otherwise affirm.

I.

According to the complaint, plaintiff was being bullied at the School for being Hispanic and she came to trust a teacher, Mr. Bravo, because he too was Hispanic. When he would overhear plaintiff being harassed he would intervene on her behalf. Plaintiff further alleges that Mr. Bravo then began "open and notoriously" driving her to and from the School every day and regularly sexually abusing her inside his home and vehicle over the course of six months. The abuse included fondling, touching, oral sex, and vaginal intercourse. According to plaintiff, during this period of time, she would frequently wear Mr. Bravo's jacket throughout the School. Mr. Bravo would also openly flirt with plaintiff on the School's premises throughout the school day, including touching her in sensual and inappropriate ways at an after-school dance program that Mr. Bravo had created. Plaintiff told her friends of the abuse and the parents of plaintiff's friends, together with a therapist, then reported Mr. Bravo's sexual abuse to the School.

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1. Plaintiff asserts only two causes of action in her complaint: one for general negligence against the School, and another for general negligence against the Episcopal Diocese.

2. The Episcopal Diocese's motion for summary judgment followed its answer denying the substantive allegations of plaintiff's complaint.

According to the complaint, plaintiff told Mr. Bravo that her friend's therapist had told the School about the abuse and Mr. Bravo threatened plaintiff that her financial aid would be taken away if she told the School anything. As relevant to this appeal, paragraphs 26 and 27 of plaintiff's complaint further allege as follows:

> "26. Plaintiff then had separate meetings with her parents, Bravo, and administrators from the School and two other students. Plaintiff did not report the sexual abuse at this time, as she was afraid of the consequences that Bravo threatened her with. The School administrators admonished [plaintiff] for making up such a story.
>
> "27. Despite this meeting, no further investigation or action was done regarding Bravo, and he continued to sexually assault and abuse Plaintiff."

Despite the dissent's conclusory characterization, the complaint does not allege any particular response, or lack thereof, by plaintiff's parents. In September 2021, the School moved for dismissal of plaintiff's complaint in its entirety pursuant to CPLR 3211 (a) (7), arguing that (1) plaintiff had not alleged facts to support her negligence cause of action, but rather made speculative conclusions that the School knew, or reasonably should have known, of Mr. Bravo's sexual abuse of the plaintiff or his alleged propensity to sexually abuse children generally; (2) the sexual abuse as alleged by plaintiff occurred off the School's premises, and thus the School no longer owed a duty to plaintiff once she was outside of its custody and control; and (3) the allegations in the complaint were insufficient to support a claim that the School acted so recklessly or wantonly as to warrant an award of punitive damages against it. Plaintiff opposed the School's motion, arguing that the factual allegations pleaded in the complaint are sufficient to warrant her obtaining discovery and support an award for punitive damages.

In February 2023, the Episcopal Diocese moved for summary judgment, echoing the arguments made by the School in its pre-answer motion to dismiss and additionally arguing that (1) the Episcopal Diocese had no relationship with the School; (2) because the Episcopal Diocese did not employ or supervise the School's employees it cannot be held vicariously liable for the actions of Mr. Bravo or the actions or inactions of the School;

and (3) punitive damages against the Episcopal Diocese are not warranted, as plaintiff fails to allege any conduct or misconduct by the Episcopal Diocese that rises to that level.

In support of its motion, the Episcopal Diocese submitted an affidavit from its archivist representing that (1) Mr. Bravo had never been employed by the Episcopal Diocese; (2) the Episcopal Diocese has no hiring, firing, or retention power over employees of the School; (3) the Episcopal Diocese did not own, manage, operate, or supervise the day-to-day operations at the School, which includes the activities and supervision of teachers; and (4) the Episcopal Diocese did not hire, train, or supervise any employees at the School. Plaintiff opposed the Episcopal Diocese's motion, arguing that summary judgment was premature and that the Episcopal Diocese had not submitted sufficient proof of the nature of its relationship with the School, or lack thereof. Plaintiff also submitted an affidavit reiterating the factual allegations in her complaint and an affidavit from a former Catholic Priest and theologian who, based on publicly available records, opined that there existed an affiliation and relationship between the School and its employees, including teachers, and the Episcopal Diocese, the precise nature of which would be discussed in specific documents that are not publicly available.

The motion court held that plaintiff had sufficiently alleged that the School had knowledge of Mr. Bravo's propensity to sexually abuse plaintiff, reasoning that plaintiff was not required to provide extensively detailed allegations at the current stage of the litigation, and that the School had not introduced any evidence conclusively establishing that plaintiff's allegations were false. The court further held that plaintiff sufficiently alleged that with Mr. Bravo's inappropriate behavior toward plaintiff occurring both on and off the School's premises, the School knew or should have known of that misconduct and failed to protect plaintiff. The court stated that the events need not only occur on school property in order to prevail on a negligent hiring and supervision cause of action. The court also held that it was unclear whether the School's conduct amounted to egregious and willful misdoing sufficient to justify an award of punitive damages and that the determination was best left for the trier of fact.

With respect to the Episcopal Diocese, the court held that the archivist's affidavit was not documentary evidence and thus was not appropriate proof warranting dismissal under

CPLR 3211 (a) (1). The court also held that the Episcopal Diocese's alternate request for relief pursuant to CPLR 3212 was withdrawn.[3] The court was silent as to the issue of punitive damages asserted against the Episcopal Diocese, but did definitively state that its motion for summary judgment was denied in its entirety.

II.

The motion court properly denied the School's motion to dismiss plaintiff's negligence claim and her demand for punitive damages. On a motion pursuant to CPLR 3211 (a) (7) to dismiss a complaint for failure to state a cause of action, a court must "accept the facts as alleged in the complaint as true, accord [the plaintiff] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, 403 [1st Dept 2013]), and "[w]hether [the] plaintiff can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; *see also Rubin v Poly Prep Country Day Sch.*, 227 AD3d 741 [2d Dept 2024]).

A plaintiff bringing a negligence action must allege "a duty owed to the plaintiff by the defendant, a breach of that duty, and injury proximately resulting therefrom" (*Moore Charitable Found. v PJT Partners, Inc.*, 40 NY3d 150, 157 [2023], citing *Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016]; *see also Akins v Glens Falls City School Dist.*, 53 NY2d 325, 333 [1981]). The School argues for dismissal of plaintiff's negligence claim on two grounds. First, the School argues that plaintiff did not sufficiently allege that it knew or should have known of Mr. Bravo's propensity to sexually abuse children, a prerequisite for a negligent hiring, retention, and supervision claim. "When an employer has notice of its employee's propensity to engage in tortious conduct, yet retains and fails to reasonably supervise such employee, the employer may become liable for injuries thereafter proximately caused by its negligent supervision and retention" (*Moore*, 40 NY3d at 157).

3. The Diocese only withdrew its request to dismiss the School's cross-claims.

Thus, to state her claim, plaintiff must allege, among other elements, that the School knew or should have known of Mr. Bravo's tendency to engage in the tortious conduct. Plaintiff alleged that (1) the abuse "occurred regularly" over a six-month period; (2) Mr. Bravo "openly and notoriously" drove her to and from the School every day; (3) plaintiff wore Mr. Bravo's jacket "throughout the School on a regular basis"; (4) Mr. Bravo "openly touched Plaintiff in sensual and inappropriate ways" at an after-school dance program; and (5) Mr. Bravo "openly flirt[ed] with Plaintiff during school hours" and touched her in a flirtatious manner in the hallways of the School. Moreover, plaintiff also alleged that the parents of her friends and a therapist reported her sexual abuse to the School, and that the abuse nonetheless continued thereafter.

[1] The School's reliance on the fact that plaintiff denied the sexual abuse claims when the School questioned her about them is misplaced. In contrast to many other revival cases brought under the Child Victims Act, where the alleged abuse took place many decades ago, the sexual abuse alleged by plaintiff in this case occurred during 2006, less than 20 years ago. The standard of care is based on what was customary at the time of the conduct (*see Nellenback v Madison County*, 44 NY3d 329, 338 n 7 [2025], citing *Bethel v New York City Tr. Auth.*, 92 NY2d 348, 353 [1998] ["The objective, reasonable person standard in basic traditional negligence theory . . . necessarily takes into account the circumstances with which the actor was actually confronted when the (incident) occurred"]). By 2006, the School should have known that a 13-year-old student may deny being sexually abused by a teacher in a single meeting with school administrators out of fear, and that the report of plaintiff's sexual abuse made to the School by the parents of her friends required a more robust response than the School provided. This was far more than just a claim for "running a sloppy investigation" as the dissent suggests (dissenting op at 17).[4] Plaintiff's allegations were therefore sufficient to permit an inference that the School, had it exercised ordinary care, should have been aware of Bravo's propensity to

4. The Safe Schools Against Violence in Education Act (Project SAVE) was enacted July 24, 2000, and, among other things, added article 23-B to the Education Law which required all certified or licensed school personnel to immediately report allegations of child abuse committed in an educational setting by school employees or volunteers to school authorities, who then must notify parents and law enforcement agencies. Educational setting includes "the building and grounds of a school . . . and any other location

(n. cont'd)

engage in sexual abuse (*see Fain v Berry*, 228 AD3d 626, 627-628 [2d Dept 2024]; *MCVAWCD-DOE v Columbus Ave. Elementary Sch.*, 225 AD3d 845, 847-848 [2d Dept 2024]; *Johansmeyer v New York City Dept. of Educ.*, 165 AD3d 634, 636 [2d Dept 2018]).

"Causes of action alleging negligence based upon negligent hiring, retention, or supervision are not statutorily required to be pleaded with specificity" (*Novak v Sisters of the Heart of Mary*, 210 AD3d 1104, 1105 [2d Dept 2022]; *see also Spira v National Council of Young Israel*, 231 AD3d 987, 988 [2d Dept 2024]; *Davila v Orange County*, 215 AD3d 632, 635 [2d Dept 2023]). Plaintiff alleges that at all relevant times the School knew or in the exercise of reasonable care should have known that Mr. Bravo had a propensity to engage in the sexual abuse of children. Although plaintiff did not set forth specific facts alleging that the School had notice of Mr. Bravo's criminal proclivities at the time it hired him, at this prediscovery stage of the litigation, such information is in the sole possession and control of the movant (*see Ark 357 Doe v Jesuit Fathers & Bros.*, 221 AD3d 493, 493 [1st Dept 2023]; *G.T. v Roman Catholic Diocese of Brooklyn, N.Y.*, 211 AD3d 413, 413 [1st Dept 2022]). Therefore, dismissal was properly denied on this ground as "facts essential to justify opposition may exist but cannot then be stated" (CPLR 3211 [d]).

Second, the School argues that plaintiff's negligence claim should be dismissed because all of the sexual abuse alleged by plaintiff occurred off the School's premises—namely, in Mr. Bravo's car or home, when plaintiff was no longer in the School's custody—and therefore the School could not have owed a duty to plaintiff. Generally, "[a] school 'has a duty to exercise the same degree of care toward its students as would a reasonably prudent parent, and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision' " (*J.B. v Monroe-Woodbury Cent. Sch. Dist.*, 224 AD3d 722, 723 [2d Dept 2024], quoting *Destiny S. v John Quincy Adams Elementary Sch.*, 98 AD3d 1102, 1102 [2d Dept 2012]; *see also Mirand v City of New York*, 84 NY2d 44, 49 [1994]). The duty owed is "derive[d] from the simple fact that a school, in assuming physical custody and control over its students, effectively takes the place of parents and guardians" (*Mirand*, 84 NY2d at 49). Thus, "[a] school's custodial duty ceases once the

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where direct contact between an employee or volunteer and a child has allegedly occurred" (Education Law, art 23-b, § 1125 [5]).

student has passed out of its orbit of authority and the parent is perfectly free to reassume control over the child's protection" (*Davila*, 215 AD3d at 634, quoting *Vernali v Harrison Cent. School Dist.*, 51 AD3d 782, 783 [2d Dept 2008]).

[2] However, "the school's duty continues and is breached if the student is released 'without further supervision into a foreseeably hazardous setting [the school] had a hand in creating' " (*C.M. v West Babylon Union Free Sch. Dist.*, 231 AD3d 809, 812 [2d Dept 2024], *lv dismissed* 42 NY3d 1092 [2025], quoting *Boyle v Brewster Cent. Sch. Dist.*, 209 AD3d 619, 621 [2d Dept 2022]; *see also Davila*, 215 AD3d at 634). Plaintiff's allegations, including inappropriate physical touching during school hours and on school grounds, created the necessary nexus between the School and the off-campus abuse and permitted an inference that the off-campus abuse was foreseeable (*see C.M.*, 231 AD3d at 813; *Fain*, 228 AD3d at 628; *Johansmeyer*, 165 AD3d at 636; *cf. P.S. v Beck*, 233 AD3d 489 [1st Dept 2024] [the bare-bones complaint in that case contained no allegation that the teacher ever engaged in inappropriate behavior with the plaintiff while at the school]; *Doe v Hauppauge Union Free Sch. Dist.*, 213 AD3d 809, 810 [2d Dept 2023] [similar distinction]).

[3] Plaintiff's demand for punitive damages against the School was also properly sustained at this prediscovery stage of the litigation (*see Spira*, 231 AD3d at 989). Contrary to the dissent's position, this Court has found claims for punitive damages may be appropriate in certain negligence cases (*see e.g. Reid v St. Luke's-Roosevelt Hosp. Ctr.*, 191 AD3d 545, 547 [1st Dept 2021]; *see also B.F. v Reproductive Medicine Assoc. of N.Y., LLP*, 136 AD3d 73, 82 [1st Dept 2015], *affd* 30 NY3d 608 [2017]). Specifically, "[p]unitive damages in actions involving negligent hiring, retention, or supervision generally require conduct evincing a high degree of moral culpability, so flagrant as to transcend simple carelessness, or which constitutes willful or wanton negligence or recklessness so as to evince a *conscious disregard* for the rights of others" (*Pisula v Roman Catholic Archdiocese of N.Y.*, 201 AD3d 88, 102 [2d Dept 2021] [emphasis added]; *see also Home Ins. Co. v American Home Prods. Corp.*, 75 NY2d 196, 201 [1990]). A "conscious disregard" requires knowledge, or actual notice, of the potential of harm to others (*see Pisula*, 201 AD3d at 105). The complaint alleges that the School was given actual notice that Mr. Bravo was sexually abusing plaintiff and then failed to adequately

investigate the allegations to such an extent that suggests ulterior motives. Further, the dissent is mistaken in its belief that plaintiff's denial of the abuse during a meeting with school administrators negates the actual notice received by the School from the parents of her friends and a therapist, which, by itself, triggered a statutorily required response that the School did not fully implement (*see* Education Law art 23-b).

The dissent's reliance on the Court of Appeals' decision in *Ross v Louise Wise Servs., Inc.* (8 NY3d 478 [2007]) is misplaced. First and foremost, *Ross* is distinguishable from the case at bar in that the Court of Appeals was evaluating the plaintiffs' claim for punitive damages on summary judgment with a fully developed record. In *Ross*, the Court of Appeals determined that punitive damages could not be recovered from the adoption agency because evidence in the record showed that its failure to reveal the biological parents' mental illness to the plaintiffs was pursuant to a prevailing theory at that time (in 1961) that this information should not be revealed if professionals were unsure if the illnesses were hereditary. The Court noted that many in the adoption field in the 1960s, and even into the 1980s, thought that "mental illness could be avoided if a child were placed in a loving environment and that disclosure of birth parents' emotional disturbances would negatively affect the child's bonding with the adoptive parents" (*id.* at 490), and thus the moral turpitude required for punitive damages was wholly absent.

Additionally, the Court of Appeals in *Ross* focused on the purpose of punitive damages being to "deter this wrongdoer and others similarly situated from indulging in the same conduct in the future" (*id.* at 489). Because subsequent statutes required disclosure of such information, and the agency was no longer in the adoption business, the Court found that deterrence considerations did not warrant punitive damages in that case. Applying the same considerations to the instant matter, here the School acted in violation of the very statute intended to ensure its proper reaction to allegations of sexual abuse of one of its students. Further, the School still operates as a school educating children from as young as kindergarten through eighth grade.

Accepting all of the alleged facts as true and affording plaintiff every favorable inference, plaintiff pleads that "[u]pon information and belief, the Defendants continued to retain Bravo without any disclosure of his heinous acts to students

and their parents and without any action to prevent or limit his contacts with children in an effort to avoid scandal" and "[a]t all relevant times, Defendants concealed their knowledge that Bravo was unsafe." *Anonymous v Streitferdt* (172 AD2d 440 [1st Dept 1991]) is distinguishable in that there this Court dismissed the plaintiffs' demand for punitive damages because there was "no allegation that the appealing defendants [religious entities] acted with malicious intent toward the plaintiffs in supervising the activity of defendant Streitferdt" (*id.* at 441). While *Streitferdt* also involved allegations of sexual abuse of children, there were no allegations of actual notice of said abuse or Streitferdt's propensity for sexual misconduct to the religious corporation defendants. In the instant matter, the ultimate propriety of punitive damages will depend on the extent of the School's knowledge and the nature of its response, including its involvement in any cover-up, facts which will need to be further developed in discovery.

III.

The Episcopal Diocese argues that it did not owe a duty to plaintiff because it did not hire, employ, supervise, or control Mr. Bravo and did not own, operate, or control the School. In *Walker v Archdiocese of N.Y.*, this Court affirmed dismissal of a complaint as against defendant Archdiocese of New York on summary judgment "based upon the *unrefuted* affidavits of the Pastor of the Church of St. Peter's that the Church owns the premises on which defendant school is located, and of the Secretary of the Archdiocese that the Archdiocese does not own, operate or exercise control over the school" (270 AD2d 127, 128 [1st Dept 2000] [emphasis added]). In *Walker*, the plaintiff merely claimed that "disclosure may reveal some involvement by the Archdiocese" and this Court found that to be too "speculative and insufficient to raise an issue of fact bearing upon the Archdiocese's liability" (*id.*).

In the matter currently before us, plaintiff alleged, among other things, in the complaint that (1) the Episcopal Diocese "controls all Episcopal religious, pastoral, and educational functions in Manhattan, the Bronx, and Staten Island in New York City"; (2) the School "is an Episcopal School operating under the authority and control of the Diocese"; and (3) "the Diocese, as principal, and the School, as agent, were in an agency relationship, such that the School acted on the Diocese's behalf, in accordance with the Diocese's instructions and directions on all

matters, including those relating to the hiring of employees and agents." In support of its motion, the Episcopal Diocese submitted an affidavit from its archivist briefly disputing these allegations.[5] Such an affidavit is properly considered in support of a motion under CPLR 3211 (a) (7) or on a motion for summary judgment.

[4] However, we find that the subject affidavit was not conclusive, or at least that summary disposition based on the affidavit would be premature at this early stage of the litigation. The Episcopal Diocese did not submit any evidence corroborating the affidavit and plaintiff did submit an affidavit from a former Catholic Priest who has testified as an expert witness in cases involving sexual abuse, suggesting that the relationship between the Episcopal Diocese and the School was in fact closer than the Episcopal Diocese's affidavit indicated, and that the proof of the extent of that relationship was in the sole possession of the defendants. The evidence submitted by plaintiff refutes the affidavit submitted by the Episcopal Diocese, and amounts to more than mere speculation, thus raising an issue of fact requiring the denial of summary judgment dismissing the negligence claims at this time.

[5] Supreme Court's decision was silent as to its reasoning in denying the motion of the Episcopal Diocese to dismiss plaintiff's demand for punitive damages against it. Plaintiff has not pleaded any actual notice to the Episcopal Diocese, either of plaintiff's sexual abuse, Mr. Bravo's propensity for the sexual abuse of children, or even generally of its parochial school teachers sexually abusing students. Plaintiff instead includes a section in her complaint entitled "Concealment of Acts of Sexual Abuse by Priests" which pleads that the Bishop of the Episcopal Diocese knew that "employees/agents of the Diocese under their supervision and control, were grooming and sexually molesting children with whom the priests/brothers would have contact in their ministry, educational, and pastoral functions" and that "[a]t all relevant times, the Bishop knew that this was a widespread, ubiquitous, and systemic problem in the Diocese involving many priests and numerous

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5. The affidavit in relevant part states "Cathedral School of Saint John the Divine is an independent private institution"; "Bravo has never been employed by the Diocese, and the Diocese has no hiring, firing, or retention power over employees of Cathedral School of Saint John the Divine"; and "the Diocese did not own, manage, operate, or supervise the day-to-day operations at Cathedral School of Saint John the Divine, which included the activities and supervision of teachers."

victims." Mr. Bravo was not a priest or an ecclesiastical teacher; rather, he was a lay teacher. Thus, the complaint fails to allege that the Episcopal Diocese had any actual notice of either plaintiff's sexual abuse, Mr. Bravo's criminal proclivities, or of a systemic problem in the Episcopal Diocese involving the sexual abuse of students by teachers. It therefore cannot be said that plaintiff has pleaded any conduct on behalf of the Episcopal Diocese that evokes a "*conscious disregard* for the rights of others" so as to warrant punitive damages (*see Pisula*, 201 AD3d at 105).

Given that punitive damages are "awarded only in 'singularly rare cases,' " they are appropriately reserved for those cases which allege that the defendants, despite having actual knowledge of the perpetrator's propensity for the sexual abuse of children, concealed that knowledge or otherwise knowingly underresponded to that information so as to suggest that they dismissed all concern for the rights of others in favor of their own self-interest (*see Streitferdt*, 172 AD2d at 441, citing *Rand & Paseka Mfg. Co. v Holmes Protection*, 130 AD2d 429, 431 [1st Dept 1987], *lv denied* 70 NY2d 615, [1988]). As plaintiff here has not alleged the knowledge required to infer any improper state of mind on behalf of the Episcopal Diocese, her demand for punitive damages against the Episcopal Diocese should be dismissed (*id.* at 441).

Accordingly, the order of the Supreme Court, New York County (Sabrina B. Kraus, J.), entered October 24, 2023, which denied defendant The Cathedral School of St. John the Divine's motion to dismiss all causes of action against it and denied defendant Episcopal Diocese of New York's motion for summary judgment dismissing all causes of action as against it, should be modified, on the law, to grant defendant Episcopal Diocese of New York's motion to the extent of dismissing the request for punitive damages against it, and otherwise affirmed, without costs.

FRIEDMAN, J. (dissenting in part). I concur with the majority's affirmance of the denial of the respective motions by defendants the Episcopal Diocese of New York and the Cathedral School of St. John the Divine to dismiss the complaint insofar as plaintiff seeks compensatory damages. I also concur in the majority's dismissal of the punitive damages claim against the Diocese. However, in my view, the request for an award of punitive damages against the School should have been dismissed, as well. Assuming the truth of the allegations of the complaint,

this is not a case where the School's alleged conduct, even if negligent, was "activated by evil or reprehensible motives" (*Aronis v TLC Vision Ctrs., Inc.*, 49 AD3d 576, 577 [2d Dept 2008]), or was "intentional and deliberate, and ha[d] the character of outrage frequently associated with crime" (*Prozeralik v Capital Cities Communications*, 82 NY2d 466, 479 [1993] [internal quotation marks omitted]).

Plaintiff herself alleges that, after learning that plaintiff had told her friends about the abuse, the School started an investigation, in which plaintiff, when questioned, told the School that she had been lying to her friends. While the School may have been negligent in taking plaintiff's denial of the abuse at face value—although it appears from the complaint that plaintiff's parents did the same—that error of judgment cannot be described as "evinc[ing] a high degree of moral turpitude and demonstrat[ing] such wanton dishonesty as to imply a criminal indifference to civil obligations" (*Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 489 [2007]), or as "willful or wanton negligence, or recklessness, or . . . [as] a conscious disregard of the rights of others or conduct so reckless as to amount to such disregard" (*Chauca v Abraham*, 30 NY3d 325, 329 [2017] [internal quotation marks omitted], quoting *Home Ins. Co. v American Home Prods. Corp.*, 75 NY2d 196, 203-204 [1990]).[1] In sum, because plaintiff's allegations, if true, do not show "wrongful conduct that goes beyond mere negligence . . . [or] aggravating factors demonstrat[ing] an additional level of wrongful conduct" (*id.* at 331-332), plaintiff's demand for punitive damages against the School should be dismissed.

Instructive here is the Court of Appeals' decision in *Ross v Louise Wise Servs., Inc.* (8 NY3d 478 [2007]). The plaintiffs in *Ross* sued the defendant adoption agency for "wrongful adoption/fraud" (*id.* at 481) based on the agency's concealment, upon the plaintiffs' inquiry, of the history of mental illness in the biological family of the plaintiffs' adoptive child. Although it was established that the *Ross* plaintiffs "raised a cognizable claim under common-law fraud principles in the adoption setting" (*id.* at 488), the Court of Appeals held that the existence of a viable claim for fraud—an intentional tort—was not

1. While the majority asserts that "the complaint does not allege any particular response, or lack thereof, by plaintiff's parents" (majority op at 6), the inescapable inference from paragraph 26 of the complaint—which the majority itself quotes—is that plaintiff's parents, although made aware of what plaintiff had told her friends about the abuse, did nothing about it.

enough to support the plaintiffs' claim for punitive damages, which the Court of Appeals dismissed, because it could not be said that the concealment was "motivated by malice" (*id.* at 491).[2] Thus, the Court of Appeals in *Ross* held that even evidence showing that the agency had intentionally induced the plaintiffs to adopt the child through fraud did not suffice to demonstrate that the agency's conduct was so culpable as to warrant an award of punitive damages. A fortiori, in this case, where plaintiff sues the School not for an intentional tort, but essentially only for negligence in running a sloppy investigation, the claim for punitive damages should be dismissed, as well (*cf. Ernest L. v Charlton School*, 30 AD3d 649, 651-652 [3d Dept 2006] [in an action against an agency for its allegedly negligent hiring and supervision of an employee who had sex with a minor resident of the agency's facility, the agency was granted partial summary judgment where, upon learning of an allegation of the employee's misconduct, the agency conducted an investigation and concluded that the allegation was unfounded based upon, inter alia, the minor's denials of the allegation]).[3]

In concluding that the claim for punitive damages should be sustained as against the School, the majority relies on allegations that are entirely conclusory and unsubstantiated by any factual detail. Specifically, the complaint offers no basis either for the allegation that the School knew of the abuser's propensity to engage in this kind of misconduct or for the allegation that the School prematurely terminated its investigation out of a desire "to avoid scandal and accountability" (majority op at 13). While I agree that, at the pleading stage, unparticularized allegations as to matters outside the pleader's knowledge are sufficient to sustain a negligence cause of action, it does not follow that conclusory allegations should suffice to support a request for punitive damages. If reciting unsupported bare conclusions were all it took to inject the issue of punitive damages into a lawsuit, every tort action would become a punitive damages case.

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2. In so holding, the Court of Appeals disagreed with both the majority in this Court and the trial court, which had sustained the punitive damages claim (*see Ross v Louise Wise Servs., Inc.*, 4 Misc 3d 279, 285-286 [Sup Ct, NY County 2004], *affd* 28 AD3d 272 [1st Dept 2006], *mod* 8 NY3d 478 [2007]).

3. While the majority tries to distinguish *Ross*, it cannot get around the fact that the plaintiffs in that case were held to have a viable claim against the defendant adoption agency for fraud—an intentional tort—while in this case not even plaintiff claims that the School intentionally allowed the abuse to continue.

The majority highlights its error in sustaining the claim for punitive damages in stating, "Plaintiff's allegations [concerning the School's response to the hearsay reports that she had been abused] were . . . sufficient to permit an inference that the School, *had it exercised ordinary care*, should have been aware of Bravo's propensity to engage in sexual abuse" (majority op at 9 [emphasis added]). A claim that a plaintiff was injured by a defendant's failure to "exercise[ ] ordinary care" gives rise to a cause of action against that defendant for negligence (which we are all agreed that plaintiff has stated), not to grounds for seeking punitive damages. I fully agree that the School's alleged response to the reports of plaintiff's abuse by Bravo supports a cause of action for negligence. What I do not see is how, in light of *Ross* and the other authority I have cited, plaintiff's allegations go beyond ordinary negligence so as to warrant injecting the issue of punitive damages into the case. The implication of the majority's position is that punitive damages may be sought in every case in which the plaintiff has sufficiently alleged that he or she suffered a serious injury as a result of the defendant's failure to exercise "ordinary care."

I further note that the majority is inconsistent in sustaining the punitive damages claim against the School while dismissing the punitive damages claim as against the Diocese. While, to reiterate, I do not dispute that plaintiff has alleged the minimum necessary to state negligence claims against both defendants, her allegations against the School no more evoke "conscious disregard of the rights of others" (*Chauca*, 30 NY3d at 329 [internal quotation marks omitted]) than do her allegations against the Diocese.

For the reasons explained above, I would modify the order appealed from to dismiss the request for punitive damages against both defendants, and otherwise affirm.

To the extent the majority does otherwise, I respectfully dissent.

KERN, J.P., and RODRIGUEZ III, J., concur with KAPNICK, J.; FRIEDMAN, J., dissents in a separate opinion in which O'NEILL LEVY, J., concurs.

Order Supreme Court, New York County, entered October 24, 2023, modified, on the law, to grant defendant Episcopal Diocese of New York's motion to the extent of dismissing the request for punitive damages against it, and otherwise affirmed, without costs.

[242 NYS3d 594]

Christina Moore, Individually and as Administrator of the Estate of Kenneth Moore, Deceased, Respondent, v Charles Maley et al., Defendants, and Roger Wood et al., Appellants.

First Department, October 2, 2025

PROCEDURAL SUMMARY

Appeal from an order of the Supreme Court, Bronx County (Patsy Gouldborne, J.), entered March 11, 2024. The order, to the extent appealed from, denied defendants Roger Wood and K&B Transportation Inc.'s motion for summary judgment dismissing the complaint as against them on the ground that plaintiff's decedent did not sustain serious injuries within the meaning of Insurance Law § 5102 (d).

HEADNOTE

Insurance — No-Fault Automobile Insurance — Serious Injury — Causation

In an action arising from a motor vehicle accident, defendants, the operator and owner of the tractor-trailer that struck decedent's vehicle, were not entitled to summary judgment dismissing the complaint on the ground that decedent did not sustain serious injuries within the meaning of Insurance Law § 5102 (d), where plaintiff raised issues of fact as to whether the accident caused decedent to suffer new injuries and exacerbated his preexisting conditions. Plaintiff's evidence regarding decedent's cervical spine injuries, including conflicting expert reports; testimony as to decedent's increased pain and diminished physical capabilities; and medical records showing a new course of treatment, new diagnoses, and aggravated injuries, raised issues of fact as to whether decedent's worsened physical condition was causally related to the accident. Additionally, deposition testimony describing decedent's diminished physical capacities postaccident, records showing decedent's receipt of physical therapy and other treatment for months after the accident, and records documenting decedent's hospitalizations during the two years between the accident and his death raised issues of fact regarding plaintiff's 90/180 day claim.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

Am Jur 2d Automobile Insurance §§ 33, 343, 350.

Carmody-Wait 2d Summary Judgment §§ 39:193, 39:198–39:199.

Couch on Insurance (3d ed) §§ 125:68, 125:73–125:74.

McKinney's, Insurance Law § 5102 (d).

NY Jur 2d Insurance §§ 1973, 1975, 1979–1980; NY Jur 2d Summary Judgment and Pretrial Motions to Dismiss §§ 9–10, 12.

NEW YORK LAW OF TORTS § 12:76.

ANNOTATION REFERENCE

What constitutes sufficiently serious personal injury, disability, impairment, or the like to justify recovery of damages outside of no-fault automobile insurance coverage. 33 ALR4th 767.

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APPEARANCES OF COUNSEL

Lester Schwab Katz & Dwyer, LLP, New York City (*Thomas V. Backis* and *Paul M. Tarr* of counsel), for appellants.

Lisa M. Comeau, Garden City, for respondents.

OPINION OF THE COURT

MICHAEL, J.

Defendants Roger Wood and K&B Transportation Inc. moved for summary judgment to dismiss the complaint as against them on the ground that plaintiff's decedent, Kenneth Moore (Moore), did not sustain serious injuries within the meaning of Insurance Law § 5102 (d) as a result of the subject motor vehicle accident. In support of their motion, defendants established prima facie that Moore's injuries were not causally related to the subject accident by submitting evidence of Moore's myriad preexisting conditions. In opposition, however, plaintiff raised issues of fact as to causation through deposition testimony, medical records, and conflicting expert reports opining that the accident caused Moore to suffer new injuries and exacerbated his preexisting injuries. Supreme Court thus correctly denied summary judgment and we affirm.

I.

On April 24, 2017, Moore was driving in the middle lane on the Cross Bronx Expressway with his daughter and granddaughter when his vehicle was struck from the right side by a tractor-trailer operated by defendant Roger Wood and owned by defendant K&B Transportation Inc. (collectively, defendants). The impact from the right side pushed Moore's vehicle

into another tractor-trailer traveling in the left lane. The impacts caused Moore's head to strike the steering wheel and dashboard.

Moore commenced this action on February 19, 2018, alleging that defendants' negligence caused the motor vehicle accident from which he sustained serious injuries within the meaning of Insurance Law § 5102 (d). Moore's initial bill of particulars, dated June 12, 2018, alleged that due to the accident, Moore suffered injuries to his cervical spine, lumbar spine,[1] right shoulder, and both knees, including the exacerbation of preexisting conditions. Moore's preexisting conditions included sickle-cell anemia, osteomyelitis of his cervical spine, early spinal stenosis, and prior vertebral compression fractures at C5-C6.

Unfortunately, Moore died on May 25, 2019, from complications following surgery to his cervical spine. His daughter, Christina Moore, was substituted as plaintiff and filed an amended complaint and supplemental bill of particulars alleging that Moore's death was caused by the injuries resulting from the motor vehicle accident.

Defendants moved for summary judgment dismissing the complaint. They argued that Moore's alleged injures and death were not causally related to the accident but were instead caused by his multitude of preexisting conditions—namely, sickle cell anemia and osteomyelitis of his cervical spine. In support of their motion, defendants relied on their experts' reports, medical records, and Moore's deposition testimony.

Plaintiff opposed, arguing that the evidence demonstrated that the accident caused Moore to suffer new injuries, aggravated his preexisting injures, and severely diminished his ability to manage daily living. He complained that after the accident, he developed significant neck pain and headaches; was diagnosed with cervical spine, shoulder, and knee sprains and later with myelopathy (a spinal injury); and suffered significant progression of spinal stenosis at the C2-3 level. Plaintiff argued that Moore's injures led to his rapid decline, with him ultimately losing the ability to walk or care for himself. In support of these arguments, plaintiff relied on her expert's initial and supplemental reports, medical records, and Moore's and plaintiff's deposition testimony.

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1. Supreme Court dismissed plaintiff's claims relating to Moore's lumbar spine injuries, which are not at issue on this appeal.

Supreme Court granted defendants' motion in part. It found that defendants were entitled to summary judgment regarding the injuries to Moore's lumbar spine, which were not addressed by plaintiff's expert. However, the court denied defendants' motion as to the injuries relating to Moore's cervical spine, right shoulder, and knees, finding issues of fact as to causation.

II.

Under Insurance Law § 5104 (a), there is no right of recovery for noneconomic loss in any action between covered persons for personal injuries arising out of the negligent use or operation of a motor vehicle "except in the case of a serious injury." Insurance Law § 5102 (d) defines "[s]erious injury" as a personal injury which results in, among other things, death, a fracture, permanent consequential limitation of use of a body organ or member, significant limitation of use of a body function or system, or a

> "medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than [90] days during the [180] days immediately following the occurrence of the injury or impairment," also known as the 90/180 day rule.

Summary judgment "is a drastic remedy, to be granted only where the moving party has tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks omitted]). Failure to meet this burden requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Moreover, the facts must be viewed in the light most favorable to the nonmoving party (*see Vega*, 18 NY3d at 503). In opposing a motion for summary judgment, the nonmoving party "must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact . . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

To prevail on a motion for summary judgment under Insurance Law § 5102 (d), the defendant must prove with competent evidence that the plaintiff's injuries are not "serious" within

the meaning of the statute or that the injuries were not caused by the accident (*Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590 [1st Dept 2011]). Thus, even where there is objective medical proof of a serious injury, "when additional contributory factors interrupt the chain of causation between the accident and claimed injury—such as a gap in treatment, an intervening medical problem or a preexisting condition—summary dismissal of the complaint may be appropriate" (*Pommells v Perez*, 4 NY3d 566, 572 [2005]).

However, a preexisting condition does not foreclose a finding that the plaintiff's injuries were causally related to the subject accident (*Matthews v Cupie Transp. Corp.*, 302 AD2d 566, 567-568 [2d Dept 2003]). Where a defendant meets its prima facie burden in establishing that the preexisting condition is the cause of the plaintiff's injuries, the burden shifts to the plaintiff to present evidence addressing causation (*Pommells*, 4 NY3d at 580; *Style v Joseph*, 32 AD3d 212, 214 [1st Dept 2006]).

To meet his burden, the plaintiff must address the evidence of preexisting conditions "and explain why [his] current reported symptoms [are] not related to the preexisting conditions" or how the accident aggravated his underlying degenerative conditions (*Giap v Hathi Son Pham*, 159 AD3d 484, 486 [1st Dept 2018] [citations omitted]). For example, in *McIntosh v Sisters Servants of Mary* (105 AD3d 672, 673 [1st Dept 2013]), this Court held:

> "The medical records [plaintiff] submitted not only showed that doctors had diagnosed her with degenerative osteoarthritic changes before the accident and that MRIs taken shortly after the accident noted disc desiccation and diffuse degenerative disc disease, but also that she was asymptomatic during the four years prior to the accident. Plaintiff also submitted the affidavit of her chiropractor who found significant limitations in range of motion of her cervical and lumbar spine immediately after and persisting after the accident. Plaintiff's neurologist made similar range of motion findings in an examination almost six years after the accident. Both doctors opined that plaintiff's injuries resulted from the accident. Moreover, her chiropractor opined that, given her 'pre-existing cervical and lumbar condition,' the injuries she sustained from the accident 'were superimposed upon her already

> delicate medical condition.' Thus, plaintiff's submissions and the opinions of her experts suffice to raise an issue of fact as to the significant limitations of her cervical and lumbar spine (*see Perl v Meher*, 18 NY3d 208, 219 [2011])."

Similarly, in *Giap* (159 AD3d at 486), this Court held:

> "To the extent plaintiff's physicians asserted that plaintiff . . . had degenerative joint disease which was common for her age, that she was previously asymptomatic, that the accident aggravated her underlying degenerative joint disease, and that trauma increases the rate of disc desiccation, rendering her now symptomatic, this was sufficient to raise an issue of fact as to causation" (internal quotation marks omitted).

Defendants met their prima facie burden as to Moore's cervical spine injuries by presenting evidence that those injuries existed prior to the accident (*see Gjoleka v Caban*, 188 AD3d 458, 458 [1st Dept 2020]; *Attilio v Torres*, 181 AD3d 460, 460 [1st Dept 2020]). It is undisputed that Moore was in his early 50s at the time of the accident, unemployed, and had been collecting social security disability for 30 years. Moore testified that his sickle cell disease prevented him from working and caused him to be hospitalized for "two or three weeks" at a time prior to the accident.

Pursuant to Moore's dialysis records, he was on kidney dialysis from January 2015 until his death on May 26, 2019. A consult note from April 28, 2017, four days after the accident, stated that Moore had, among other ailments, end stage renal disease with hemodialysis, a history of cocaine use, endocarditis, multiple admissions for pain crisis, osteomyelitis of the cervical spine, avascular necrosis of the bone of the left shoulder, and degenerative arthritis of the spine.

Moore testified that for years prior to the accident, he would have pain throughout his body and that he received shots for his pain. Moore's records from Montefiore Hospital, his primary treatment facility, indicate that he obtained monthly prescriptions for 30 mg tablets of oxycodone since at least September 20, 2016. Moore's daughter testified that prior to the accident, she would take Moore to the hospital regularly to get his pain medicine. Notably, defendants contend that none of the approximately 15,000 pages of records produced from Montefiore Hospital mention the motor vehicle accident, except for the emergency room records from the day of the accident.

The ER records show that Moore visited the ER at approximately 6:30 p.m. on the day of the accident. Moore's chief complaint was sickle cell pain crisis. He also complained of generalized body pain. No X-rays were performed of Moore's cervical spine and Moore testified that no one in the ER told him he had any broken bones or fractures of his cervical spine. In the months following the accident, medical records show that Moore was regularly admitted to the hospital due to his sickle cell disease and experienced symptoms "similar to past sickle cell pain."

Defendants submitted a report by their expert, spinal surgeon Yong Kim, M.D., who reviewed the Montefiore medical records, including but not limited to, CT scans of Moore's cervical spine dated June 2017, August 2018, and April 2019, and an MRI of the cervical spine in May 2019. Dr. Kim concluded that Moore's injuries to his cervical spine were consistent with preexisting conditions, including diffuse, multilevel degenerative changes, along with a history of osteomyelitis of his cervical spine. Dr. Kim also reviewed records relating to Moore's May 2019 surgeries performed shortly before his death and opined that the first surgery was performed to address the ongoing, progressive nature of Moore's myelopathy, "the presence of which existed prior to the subject motor vehicle accident," and that the second surgery was performed to address infection. In short, Dr. Kim concluded that neither surgery performed shortly before Moore's death was causally related to the accident. Defendants' other expert, nephrologist Jonathan Winston, M.D., concluded that Moore's death was an anticipated outcome in 2019 and that had he survived in 2019, "he would have succumbed to his disease within one year."

Simply put, defendants met their prima facie burden by establishing that the injuries to Moore's cervical spine were preexisting and not causally related to the accident (*see Ledesma v Rodriguez*, 217 AD3d 453, 453 [1st Dept 2023]; *Massillon v Regalado*, 176 AD3d 600, 600-601 [1st Dept 2019]). However, plaintiff sufficiently established questions of fact regarding whether the accident exacerbated and otherwise hastened Moore's physical decline (*see Ortiz v Boamah*, 169 AD3d 486, 488 [1st Dept 2019]; *Giap*, 159 AD3d at 486).

Specifically, Moore testified that the accident caused him to hit his head on the steering wheel and dashboard, and as a result, he experienced significant neck pain and headaches, in contrast to his usual general body aches and pain. He also

reported that he had increased difficulty walking and carrying objects. His daughter testified that she lived across the street from Moore and that prior to the accident, he was "very active" and had no issues performing daily activities, even with the pain associated with his sickle cell disease. However, after the accident, his physical capabilities noticeably declined, such that she had to care for him and bathe him. Further, medical records from Moore's final hospital admission discuss his transition in the two years post-accident from using a cane, to a walker, to a wheelchair, to being bedbound.

Records from Moore's visit to the ER on the day of the accident indicate that while his chief complaint related to his sickle cell disease, he was seen in connection with the accident. The following day, Moore began receiving physical therapy, chiropractic, and acupuncture treatment for orthopedic injuries at a multispecialty facility in the Bronx. An initial evaluation by Dr. Sotelo-Garza from Warren Street Orthopedic indicated that Moore was seen in connection with the motor vehicle accident and was diagnosed with cervical and lumbar sprain, bilateral knee sprain, and bilateral shoulder sprain. Dr. Sotelo-Garza advised Moore to have physical therapy and an MRI of both shoulders and knees.

An evaluation by Bronx Chiropractic Health Services on April 25, 2017, stated that Moore was hit from the left and had headaches and constant neck pain and stiffness. He was treated there for several months. In addition, Moore saw Hao Zhang, M.D. at Preferred Medical PC on June 1, 2017, and records from that provider indicated Moore was significantly disabled from engaging in daily activities after the accident. Although Moore ceased treatment at the Bronx facility in January 2018, Moore "sought continuous, albeit different modalities of treatment since the accident" via regular hospital visits to Montefiore Hospital (*Ortiz*, 169 AD3d at 489).

On August 26, 2019, Moore underwent a myelogram and was diagnosed with myelopathy.[2] A discharge summary from Montefiore Hospital dated May 25, 2019, noted that the April 26, 2019 cervical myelogram and MRI performed on May 6, 2019, revealed "severe impingement of the [spinal] cord at C2-C3"

2. According to Johns Hopkins Medicine, "Myelopathy is an injury to the spinal cord due to severe compression that may result from trauma, congenital stenosis, degenerative disease or disc herniation" (https://www.hopkinsmedicine.org/health/conditions-and-diseases/myelopathy [last accessed June 11, 2025]).

and "severe spinal stenosis at the level of C2[-]3 and C3[-]4." As discussed above, Moore had two surgeries shortly before his death on May 26, 2019. Operative notes dated May 29, 2019, indicate that his preoperative and postoperative diagnosis was severe cervical stenosis, myelopathy, and weakness at C2-3, C3-4, and C4-5. Plaintiff maintains that these records are significant because in addition to the previous absence of myelopathy, there was no evidence that Moore suffered from significant preexisting disease at the C2-3 level as opposed to the C5-6 level.

Most notably, plaintiff submitted two expert reports by Franco Cerabona, M.D. Dr. Cerabona reviewed Moore's medical records and opined that there was no indication that Moore had any signs of myelopathy either pre-accident or initially postaccident. In particular, "[n]o myelopathic gait, hyperreflexia, clonus, ataxia, Babinski or Hoffman signs [were] documented in the medical records reviewed," contrary to defendant's expert's (Dr. Kim) conclusory opinion that the "presence of [cervical myelopathy] existed prior to the subject motor vehicle accident" (*see McCree v Sam Trans Corp.*, 82 AD3d 601, 601 [1st Dept 2011]). Further, Dr. Cerabona compared the June 2017 CT scan with the August 2018 CT scan and opined that the latter scan showed significant progression at the C2-3 level, which "was the level with the most severe compression of the spinal cord as noted on Mr. Moore's preoperative myelogram." He noted that this assessment is consistent with defendant's expert's acknowledgment in his report that the August 2018 CT scan showed severe central stenosis at the C2-3 level.

Defendant's expert did not sufficiently contradict Dr. Cerabona's assessment that the deterioration at the upper level of Moore's cervical spine, as evidenced by the postaccident progression of stenosis at the C2-C3 level and the onset of myelopathy, was precipitated by trauma from the accident (*see McIntosh*, 105 AD3d at 673).

In sum, plaintiff's evidence, including conflicting expert reports; testimony as to Moore's increased pain and diminished physical capabilities; and medical records showing a new course of treatment, new diagnoses, and aggravated injuries, raised issues of fact as to whether Moore's worsened physical condition was causally related to the accident (*see e.g. Ortiz*, 169 AD3d at 488; *Garcia v Leon*, 70 AD3d 566, 566 [1st Dept 2010]; *Liburd v Mondal*, 215 AD3d 655, 655-656 [2d Dept 2023]; *see also McCahill v New York Transp. Co.*, 201 NY 221, 224 [1911]

["(O)ne who has negligently forwarded a diseased condition and thereby hastened and prematurely caused death cannot escape responsibility even though the disease probably would have resulted in death at a later time without his agency"]).

Additionally, plaintiff raised issues of fact as to causation with respect to injuries to Moore's right shoulder and knees. As discussed, plaintiff presented evidence that shortly after the accident, Moore complained of and sought treatment for injuries to his shoulder and knees and was diagnosed with bilateral shoulder and knee sprains and found to have decreased range of motion. As Supreme Court correctly held, defendants failed to address those allegations, warranting denial of summary judgment.

Finally, the court properly denied dismissal of the 90/180 day claim. In addition to deposition testimony describing Moore's diminished physical capabilities postaccident, plaintiff submitted records showing Moore received physical therapy and other treatment for months after the accident. Further, records show that Moore was admitted to Montefiore Hospital approximately 15 times during the six months following the accident and was confined to the hospital for no less than 163 days between the time of the accident in April 2017 until his death in May 2019. Accordingly, issues of fact exist regarding the extent to which Moore was prevented "from performing substantially all of the material acts which constitute [his] usual and customary daily activities for not less than [90] days during the [180] days immediately following the [accident]" (Insurance Law § 5102 [d]).

III.

In conclusion, the decedent was plagued by comorbidities that preexisted the motor vehicle accident giving rise to this litigation and defendants understandably point to those conditions as the source of the decedent's claimed injuries. Plaintiff, however, raised the triable issues of fact identified above, warranting Supreme Court's denial of defendants' summary judgment motion. Whether plaintiff suffered new or exacerbated injuries as a result defendants' alleged negligence must be evaluated by a jury.

Accordingly, the order of the Supreme Court, Bronx County (Patsy Gouldborne, J.), entered March 11, 2024, which, to the extent appealed from, denied defendants Roger Wood and K&B Transportation Inc.'s motion for summary judgment dismissing the complaint as against them on the ground that plaintiff's

decedent did not sustain serious injuries within the meaning of Insurance Law § 5102 (d), should be affirmed, without costs.

RENWICK, P.J., MANZANET-DANIELS, HIGGITT and ROSADO, JJ., concur.

Order Supreme Court, Bronx County, entered March 11, 2024, affirmed, without costs.

[244 NYS3d 534]

ELIE TAHARI, Respondent, v 860 FIFTH AVENUE CORPORATION et al., Appellants.

First Department, October 9, 2025

PROCEDURAL SUMMARY

APPEAL from an order of the Supreme Court, New York County (Arthur F. Engoron, J.), entered April 30, 2024. The order, to the extent appealed from as limited by the briefs, denied defendants' motion to dismiss the complaint as against defendant board of directors and granted the cross-motion of plaintiff to amend his pleadings to serve and file a third amended complaint naming an individual as a defendant, in his representative capacity as president of the board.

HEADNOTE

Condominiums and Cooperatives — Board of Directors — Amenability to Suit

The board of directors of a corporation is not amenable to suit, separate and apart from being sued in its representative capacity for the corporation. Accordingly, in an action in which plaintiff shareholder's breach of fiduciary duty causes of action against defendants residential cooperative corporation and 14 individual board members had been dismissed for failure to state a cause of action, Supreme Court erred in denying defendants' motion to dismiss plaintiff's newly asserted breach of fiduciary duty claim against defendant board of directors of the cooperative corporation. Significantly, the Business Corporation Law does not contain any provision authorizing a corporation's board of directors to sue or be sued in its own capacity. *Dau v 16 Sutton Place Apt. Corp.* (205 AD3d 533 [1st Dept 2022]) should not be read to hold that a claim for breach of fiduciary duty may be brought directly against a board of directors.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d Condominiums and Cooperative Apartments § 61; AM JUR 2d Corporations §§ 1848, 1852–1853, 2068.

CARMODY-WAIT 2d Actions and Proceedings by and Against Corporations, Their Officers, Directors, and Shareholders §§ 121:3, 121:207–121:208.

NY JUR 2d Business Relationships §§ 1056, 1209, 1212; NY JUR 2d Condominiums and Cooperative Apartments § 163.

ANNOTATION REFERENCE

See ALR Index under Condominiums and Cooperative

Apartments; Corporate Officers, Directors, and Agents; Corporations.

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APPEARANCES OF COUNSEL

Cozen O'Connor, New York City (*Menachem J. Kastner* and *Amanda L. Nelson* of counsel), for appellants.

Morrison Cohen LLP, New York City (*Amber R. Will* and *Yehuda D. Scharf* of counsel), and *Quinn McCabe LLP*, New York City (*Simon Block* and *Christopher P. McCabe* of counsel), for respondent.

OPINION OF THE COURT

SCARPULLA, J.

This action concerns a long-running dispute between a shareholder of a residential cooperative corporation and the cooperative corporation regarding the shareholder's combination and renovation of two penthouse apartments. Plaintiff commenced this action in 2018 and has asserted a variety of contract and tort causes of action against the cooperative corporation and individual board members in his complaint and amended complaint.

In *Tahari v 860 Fifth Ave. Corp.* (214 AD3d 491 [1st Dept 2023]), this Court, among other things, dismissed plaintiff's breach of fiduciary duty causes of action against the cooperative corporation and most of the individual board members for failure to state a cause of action. Plaintiff then interposed a second amended complaint in which he asserted a breach of fiduciary duty cause of action against the board of directors of the cooperative corporation, as distinct from the now-dismissed breach of fiduciary duty causes of action against the cooperative corporation and the individual board members. Defendants moved to dismiss the cause of action against the board of directors on the ground, among others, that the board was not amenable to suit. In response, plaintiff cross-moved to serve a third amended complaint, naming the current board president as a representative of the board.

The motion court denied defendants' motion to dismiss and granted plaintiff's cross-motion to amend the complaint to add

the board president as a representative of the board of directors. Specifically, the court held that this Court has determined that the board of directors of a cooperative corporation is directly amenable to suit, as opposed to the cooperative corporation and/or individual board members. That holding misinterprets our precedent and we now clarify that the board of directors of a corporation is not amenable to suit, separate and apart from being sued in its representative capacity for the corporation.

New York corporations are created and regulated pursuant to the New York Business Corporation Law, which provides that private corporations can "sue and be sued in all courts," and can "participate in actions and proceedings . . . as natural persons" (§ 202 [a] [2]). Further, the Business Corporation Law provides that the business of the corporation is to be conducted through its board of directors (§ 701). A board of directors is a group of individuals elected by the shareholders of a corporation to manage day-to-day operations and make decisions on behalf of the corporation (*Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 536 [1990]). Significantly, the Business Corporation Law does not contain a provision authorizing a corporation's board of directors to commence suit in its own capacity, separate from the corporation. Nor does the Business Corporation Law contain any provision permitting suit directly against a board of directors.

New York trial courts have explicitly held that a board of directors is not an entity that may be sued separately from the corporation (*see e.g. Stromberg v East Riv. Hous. Corp.*, 82 Misc 3d 871, 883-884 [Sup Ct, NY County 2023] [concluding that "no basis exists to treat the board of a cooperative corporation as a juridical entity distinct from the cooperative itself" following its review of statutory and decisional law]; *Biales v 10 E. End Ave. Owners, Inc.*, 85 Misc 3d 1202[A], 2025 NY Slip Op 50074[U] [Sup Ct, NY County 2025]). Federal courts have echoed this conclusion (*see e.g. Siegler v Sorrento Therapeutics, Inc.*, 2021 WL 3046590, *10, 2021 US App LEXIS 21391, *27-28 [Fed Cir, July 20, 2021, 2020-1435] [noting that "California's Corporation Code only identifies a corporation or association as entities that may be sued"]; *Heslep v Americans for African Adoption, Inc.*, 890 F Supp 2d 671, 678-679 [ND W Va 2012]; *Team Sys. Intl., LLC v Haozous*, 2015 WL 2131479, *2, 2015 US Dist LEXIS 59845, *4 [WD Okla, May 7, 2015, No. CIV-14-1018-D]; *Lopez-Rosario v Programa Seasonal Head Start/Early*

Head Start de la Diocesis de Mayaguez, 245 F Supp 3d 360, 370 [D PR 2017] [holding that "(a) board of directors is not a legal entity separate and apart from the corporation it directs . . . and, thus, lacks capacity to be sued" (internal quotation marks omitted)], *affd* 847 Fed Appx 9 [1st Cir 2021]).

The Ohio Appellate Court, in *Flarey v Youngstown Osteopathic Hosp.* (2002-Ohio-6899, ¶ 13, 151 Ohio App 3d 92, 96, 783 NE2d 582, 585 [7th Dist 2002]), aptly noted that

> "[a]s a practical matter, it would be nonsensical to hold a board of directors liable as a collective entity. A board of directors may not own property in its own name. Thus, any judgment against it could not be recovered from the collective group. Furthermore, a judgment against the collective entity cannot apply to the individual, as the individuals are liable only if they participated in the tortious conduct. Thus, such a suit would be, for all practical purposes, pointless."

Applying the Business Corporation Law and consistent with the foregoing cases, the residential cooperative board of defendant 860 Fifth Avenue Corporation is not an entity with the capacity to sue and be sued separate and apart from the corporation on whose behalf it acts. The motion court's reliance upon *Dau v 16 Sutton Place Apt. Corp.* (205 AD3d 533 [1st Dept 2022]) to find otherwise was misplaced. In *Dau*, an action was commenced against both a residential cooperative corporation and its board of directors (*id.* at 534). The issue in *Dau*, with respect to the breach of fiduciary duty claims against the board of directors, was whether those claims were sufficiently and timely pleaded (*id.* at 535-536). Whether the board of directors could be sued separately from the corporation itself was never raised. Thus, *Dau* should not be read to hold that a claim for breach of fiduciary duty may be brought directly against a board of directors.*

While a shareholder cannot assert allegations of breach of fiduciary duty against a board of directors, a shareholder may assert the claim against the individual directors (*see e.g. Weinreb v 37 Apts. Corp.*, 97 AD3d 54, 57 [1st Dept 2012]; *Peacock v*

* Similarly, *Fuisz v 6 E. 72nd St. Corp.* (222 AD3d 402 [1st Dept 2023]) does not hold that a board of directors is a proper defendant to a claim for breach of fiduciary duty because, like in *Dau*, neither the cooperative corporation nor the board of directors raised an issue as to whether a board of directors is a separate entity capable of being sued.

Herald Sq. Loft Corp., 67 AD3d 442, 442-443 [1st Dept 2009]). Here, plaintiff originally brought breach of fiduciary duty causes of action against 14 of the individual board members and the corporation (*see Tahari*, 214 AD3d at 492). Those causes of action were largely dismissed, and plaintiff may not simply replace those parties with "the board" to revive those now dismissed claims.

Lastly, plaintiff has not demonstrated proper grounds for leave to amend the complaint to add Mr. Hagglund as a defendant in his capacity as president of the board. As the board is not an "unincorporated association" (*see Board of Mgrs. of the 28 Cliff St. Condominium v Maguire*, 191 AD3d 25, 28 [1st Dept 2020]), General Associations Law § 13 does not apply.

The remaining arguments have been considered and are unavailing.

Accordingly, the order of the Supreme Court, New York County (Arthur F. Engoron, J.), entered April 30, 2024, which, to the extent appealed from as limited by the briefs, denied defendants' motion to dismiss the complaint as against defendant board of directors and granted the cross-motion of plaintiff to amend his pleadings to serve and file a third amended complaint naming Ryan Hagglund as a defendant, in his representative capacity as president of the board, should be reversed, on the law, without costs, defendants' motion granted, and plaintiff's cross-motion denied.

WEBBER, J.P., KAPNICK, GONZÁLEZ and MICHAEL, JJ., concur.

Order, Supreme Court, New York County, entered April 30, 2024, which, to the extent appealed from as limited by the briefs, denied defendants' motion to dismiss the complaint, reversed, on the law, without costs, defendants' motion granted, and plaintiff's cross-motion denied.

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2 Shergill v Pannikodu, 2026 NY Slip Op 50789(U). Courts—Small Claims—Substantial Justice—Property Damage. (App Term, 2d Dept, 9th & 10th Jud Dists, May 14, 2026)

3 Layode v Hamza-Ogagbor, 2026 NY Slip Op 50790(U). Appearances—Appearance by Corporation—Subsequent Retention of Counsel. (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, May 15, 2026)

4 Shamayim Chiropractic, P.C. v Permanent Gen. Assur. Corp., 2026 NY Slip Op 50791(U). Judgments—Default Judgment—Vacatur. (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, May 15, 2026)

5 Urology & Mesh Med. Consulting, PLLC v Rubenstein, 2026 NY Slip Op 50792(U). Contracts—Formation of Contract. (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, May 15, 2026)

6 Big Apple Delivery Supply Corp. v Permanent Gen. Assur. Corp., 2026 NY Slip Op 50793(U). Insurance—No-Fault Automobile Insurance—Cancellation of Out-of-State Policy. (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, May 15, 2026)

7 Big Apple Delivery Supply Corp. v Plymouth Rock Assur. Corp. of N.Y., 2026 NY Slip Op 50794(U). Insurance—No-Fault Automobile Insurance—Denial of Claim—Proper and Timely Mailing. (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, May 15, 2026)

8 Big Apple Delivery Supply Corp. v Plymouth Rock Assur. Corp. of N.Y., 2026 NY Slip Op 50795(U). Insurance—No-Fault Automobile Insurance—Denial of Claim—Timely and Proper Mailing. (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, May 15, 2026)

9 Prompt Med. Group, Inc. v Erie Ins. Co. of N.Y., 2026 NY Slip Op 50796(U). Insurance—No-Fault Automobile Insurance—Denial of Claim—Proper and Timely Mailing. (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, May 15, 2026)

10 Prompt Med. Group, Inc. v Erie Ins. Co. of N.Y., 2026 NY Slip Op 50797(U). Motions and Orders—Timeliness of Motion—Summary Judgment Motion. (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, May 15, 2026)

11 Rock v Plaza Motors, Inc., 2026 NY Slip Op 50798(U). Courts—Small Claims—Substantial Justice—Service of Vehicle. (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, May 15, 2026)

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17 People v Delgado (Caridad), 2026 NY Slip Op 50804(U). Crimes—Larceny—Grocery Store—Sufficiency of Evidence. Crimes—Right to be Present at Trial—Waiver. (App Term, 2d Dept, 9th & 10th Jud Dists, May 21, 2026)

18 People v Shealy (Taquan), 2026 NY Slip Op 50805(U). Crimes—Sexual Abuse—Sexual Gratification—Sufficiency of Accusatory Instrument. (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, May 22, 2026)

19 Wei Lin v Bin Zheng, 2026 NY Slip Op 50806(U). Landlord and Tenant—Warranty of Habitability. (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, May 22, 2026)

20 People v Zurrow (Bruce), 2026 NY Slip Op 50807(U). Crimes—Disclosure—Automatic Discovery—Due Diligence. (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, May 22, 2026)

21 Pacific Med. Servs., P.C. v Country-Wide Ins. Co., 2026 NY Slip Op 50808(U). Interest—Actions in Which Recoverable—No-Fault Automobile Insurance. (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, May 22, 2026)

22 Air Plus Surgical Supply, Inc. v Country Wide Ins. Co., 2026 NY Slip Op 50809(U). Interest—Computation—Statutory No-Fault Interest. (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, May 22, 2026)

23 Medtech Med. Supply, Inc. v Allstate Ins. Co., 2026 NY Slip Op 50810(U). (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, May 22, 2026)

24 Metropolitan Med. P.C. v Allstate Ins. Co., 2026 NY Slip Op 50811(U). (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, May 22, 2026)

25 Paramount Med. Group, P.C. v Allstate Ins. Co., 2026 NY Slip Op 50812(U). (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, May 22, 2026)

SELECTED CASES DECIDED

IN

OTHER COURTS

OF THE

STATE OF NEW YORK

[242 NYS3d 885]

STONY BROOK TECHNOLOGY CENTER ASSOCIATION, INC., et al., Plaintiffs, v SRM 23 LLC et al., Defendants.

Supreme Court, Suffolk County, September 10, 2025

HEADNOTES

Injunctions — Preliminary Injunction — Operation of Cannabis Dispensary in Violation of Restrictive Covenant

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RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d Covenants, Conditions, and Restrictions §§ 1, 148, 169, 175, 206; AM JUR 2d Injunctions §§ 1, 9, 49, 53–54, 58–59.

CARMODY-WAIT 2d Injunctions §§ 78:1, 78:4, 78:69, 78:73, 78:127.

NEW YORK CONTRACT LAW (2d ed) § 7:21.

NY JUR 2d Deeds §§ 118–119; NY JUR 2d Injunctions §§ 1, 33, 37, 66, 71, 75.

NEW YORK ZONING LAW AND PRACTICE (4th ed) § 1:5.

SIEGEL, NY PRAC (6th ed) § 327.

ANNOTATION REFERENCE

See ALR Index under Cannabis; Covenants; Injunctions; Preliminary Injunctions.

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Query: "restrictive covenant" /5 violat! & (preliminar! /3 enjoin! or injunction)

APPEARANCES OF COUNSEL

Egan & Golden, LLP, Patchogue, for plaintiffs.

Holland Schriever LLP, New York City, for defendants.

OPINION OF THE COURT

JAMES HUDSON, J.

The matter before us is a dispute concerning the operation of a cannabis dispensary. Plaintiffs' application obliges the court to decide the question of whether a restrictive covenant bars a use which has been sanctioned by both state and town government.

This is an action sounding, inter alia, in breach of contract and nuisance as well as a statutory claim under Real Property Law § 339-j. Plaintiffs seek a permanent injunction and monetary damages. The instant motion, brought by order to show cause, is an application for a preliminary injunction. On August 13, 2025, the court issued a temporary restraining order (TRO) which (pending the determination of this motion) enjoined defendants from operating a cannabis dispensary at the *locus in quo*.

Defendants oppose this application and brought a separate motion by order to show cause seeking to renew and reargue the issuance of the temporary restraining order on August 13th. Defense counsel also requested that their papers in support of their CPLR 2221 motion be considered as the opposition to plaintiffs' motion.

Initially, the court would be remiss if it did not compliment Messrs. Egan, Schriever and Holland for the thoughtful, zealous advocacy they brought forward on behalf of their respective clients. Such counsel honor the court.

As stated in *Merling v Ash Dev., LLC* (198 AD3d 743, 745 [2d Dept 2021]), "The party seeking a preliminary injunction must demonstrate (1) a likelihood of success on the merits, (2) danger of irreparable harm in the absence of an injunction, and (3) a balance of the equities in favor of the injunction" (citations omitted).

CPLR 6301 and 6313 (a) provide for the granting of a temporary restraining order pending the hearing for a preliminary injunction where it appears that immediate and irrepar-

able injury, loss or damage will result unless the defendant is restrained before the hearing can be had.

Although the standard of proof for the granting of a preliminary injunction is clear and convincing evidence, the case of *Yonkers Racing Corp. v Catskill Regional Off-Track Betting Corp.* (143 AD2d 345, 346 [2d Dept 1988] [internal quotation marks omitted]) acknowledges that a TRO may be based "on a demonstration [of] immediate and irreparable injury" in the absence of restraint (citing CPLR 6301).

As discussed below, plaintiffs have met the more stringent standard and shall be granted the relief requested.

The Stony Brook Technology Center (also known as the Complex, Tech Center) is a 103-acre technology park located in East Setauket. The defendant, SRM, is the owner of the Tech Center unit located within the Tech Center at 19 Technology Drive. The defendant Strong Strains is a tenant of SRM and is now operating a retail cannabis dispensary at the *locus in quo*. It is uncontroverted that Strong Strains has obtained the necessary license and permit from the State of New York and the Town of Brookhaven to operate a cannabis dispensary.

It is uncontroverted that the individual condominium units are burdened with restrictions on their use. They consist of (1) a declaration of restrictions filed with the County Clerk (restrictive covenant) and (2) the "Plan of Condominium Ownership: Declaration of Northgate Plaza at Stony Brook Pursuant to Article 9-B of the Real Property Law of the State of New York" (the plan) filed with the Suffolk County Clerk. Additionally, Northgate Plaza (the sub-association that manages Tech Center units 7 through 21) operates under its bylaws. All these documents prohibit uses in the units that contravene federal law. (Complaint, exhibits B, C, D.)

Section 1 of the restrictive covenant reads in pertinent part as follows:

> "In addition, no part of the Property or any improvements thereon shall be used or occupied for any purpose which in Declarant's opinion constitutes a nuisance or is noxious or offensive or results in the emission or creation outside of any building of fumes or noise; *or violates any federal, state, county or town laws*." (Emphasis added.)

Section 19 of the Tech Center's offering plan "Covenants and Restrictions" at paragraph (f) states, "No . . . unlawful use shall be made of the property nor any part thereof and *all*

valid laws, zoning ordinances and regulations of all governmental bodies having jurisdiction thereof shall be observed." (Emphasis added.)

Section 6 (3) of article IX ("Rules and Regulations") of the bylaws provides:

> "No Unit Owner shall permit anything to be done, or kept in his Unit, or in the common elements, which will result in an increase or the cancellation of insurance on the Building, or contents thereof, or which would be *in violation of any law or regulation*. No waste shall be committed on the common elements." (Emphasis added.)

It is uncontroverted that the manufacture, possession, and/or distribution of cannabis is illegal under federal law (*see e.g.* 21 USC § 841 [a]).

On December 12, 2024, Mr. Mike Smith, Alisa Tarsa, Seth Walker and Mallory Guerin, on behalf of the Board of Managers and managing agent of Northgate Plaza at Stony Brook Condominium, sent a letter which listed as its subject "Request for Unit Owner Vote on Special Permit and Variance Request for Cannabis Retail Sales at Unit #19 (19 Technology Drive)" to all unit owners.

The letter detailed that the defendant Dr. Sandhu proposed the operation of a cannabis retail establishment at 19 Technology Drive, within the Northgate Plaza at Stony Brook Condominium. The letter specified, "The proposal seeks approval for changes to the current L-1 zoning regulations, which require the consent of unit owners. As such, your vote is necessary to approve or reject the requested special permit and variance."

With the exception of the defendant Dr. Sandhu, all the unit owners voted against the proposal.

The defendants assert that this action by the other owners did not constitute a rejection of the proposed use. The court disagrees. Although the wording of the proposal did not state that it was a vote to disallow the cannabis dispensary, the disapprobation of the other unit owners was clearly manifest.

Despite this action of the plaintiffs and being charged with knowledge of the negative easements governing the use of the realty, the defendants continued their preparations to open the facility.

Before their opening and on or about June 9, 2025, plaintiffs sent defendants a cease-and-desist letter outlining the above

issues as well as defendants' violation of the Tech Center's sign regulations. (Exhibit F.)

According to Dr. Sandhu's affirmation, the business opened to the public on June 9, 2025.

Before we consider if the plaintiffs have met their burden and established the tri-partite prerequisite for a preliminary injunction, the court will first consider the defendants' argument that the plaintiffs waived their right to enforce the covenant and are estopped from seeking this relief.

Defendants bring to the court's attention certain actions of Mr. Smith, specifically that he approved of the defendants' business and actively assisted them.

> "This is not conduct evincing an unequivocal intention to enforce the 'unlawful use' restriction upon which plaintiffs' entire case rests—it shows the opposite of an intent to enforce that restriction. Defendants relied to their detriment on this conduct by moving forward after the December 2024 vote, with Smith's explicit encouragement." (NY St Cts Elec Filing [NYSCEF] Doc No. 38.)

In support of this contention, defense counsel cites to the holdings in *Board of Mgrs., Washington's Headquarters Townhouses Condominium v Gottlieb* (186 AD2d 525, 527 [2d Dept 1992]); *Airco Alloys Div. v Niagara Mohawk Power Corp.* (76 AD2d 68, 81 [4th Dept 1980]); and *Nassau Trust Co. v Montrose Concrete Prods. Corp.* (56 NY2d 175, 184 [1982]).

In *Nassau Trust Co.*, the Court opined,

> "an estoppel 'rests upon the word or deed of one party upon which another rightfully relies and so relying changes his position to his injury' (*Triple Cities Constr. Co. v Maryland Cas. Co.*, 4 NY2d 443, 448; *Lynn v Lynn*, 302 NY 193, 205; *Metropolitan Life Ins. Co. v Childs Co.*, 230 NY 285, 292). It is imposed by law in the interest of fairness to prevent the enforcement of rights which would work fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing party's words or conduct, has been misled into acting upon the belief that such enforcement would not be sought (*White v La Due & Fitch*, 303 NY 122, 128). While estoppel requires detriment to the party claiming to have been misled, waiver requires no more than the voluntary and intentional abandonment of a known right which,

> but for the waiver, would have been enforceable (*City of New York v State of New York*, 40 NY2d 659; *Davison v Klaess*, 280 NY 252)" (56 NY2d at 184).

A fair review of the proffered cases indicates that they actually favor the plaintiffs' cause. In *Board of Mgrs., Washington's Headquarters Townhouses Condominium v Gottlieb*, estoppel was found to be appropriate because the plaintiff condominium board never formally demanded the cessation of the offending conduct and "at other times explicitly acquiesced in [defendant's] conduct" (186 AD2d at 525).

By contrast, the plaintiffs in the matter sub judice have established that they opposed the defendants' proposed use of unit 19 and took a vote disapproving of such behavior. We acknowledge the defendants' proof of communications between Mr. Smith and Dr. Sandhu which indicate that the former had privately expressed support for the dispensary. When this is juxtaposed, however, against the fact that there was a clearly worded covenant forbidding the defendants' desired use, any reliance on Mr. Smith's utterances cannot be considered reasonable. Dr. Sandhu proceeded with foreknowledge of the risk and cannot now use his current financial distress (or the straitened circumstances of his unfortunate employees) as a shield to continue violating a restrictive covenant.

The fact patterns in *Airco* and *Nassau Trust Co.* (a breach of contract and a mortgage foreclosure case respectively) also limit their utility.

The Court in *Nassau*, however, made reference to an earlier decision, *Imperator Realty Co. v Tull* (228 NY 447 [1920]), in which the immortal Cardozo distilled waiver and estoppel to their essence: "The truth is that we are facing a principle more nearly ultimate than either waiver or estoppel, one with roots in the yet larger principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong" (228 NY at 457 [Cardozo, J., concurring], citing *Riggs v Palmer*, 115 NY 506 [1889]).

Who then is the wrongful actor? Mr. Smith, who publicly opposed the offending use yet purportedly feigned acquiescence in private communiques to Dr. Sandhu? Or the defendants who, facing unanimous disapprobation from their fellow unit owners and, most importantly, the stark prohibition of a restrictive covenant, conceived and brought to fruition a business which exists in violation of the laws of these United States?

This court finds that the defendants cannot assert estoppel in light of their own admitted behavior.

Ultimately, the actions of Mr. Smith are of no moment. The restrictive covenant did not require board action to govern the actions of the defendants. Given the clear, unambiguous language found in the negative easement, the relief which the defendants desire can only be provided by a successful plenary action "to obtain a declaration with respect to enforceability of the restriction" (RPAPL 1951 [2]) or by the federal government's repeal of those provisions of the Controlled Substances Act (CSA) of 1970 which trigger the restrictive covenant's prohibitions.

Moreover, in order for estoppel to apply, the court would be tacitly condoning (and enforcing) an agreement between Mr. Smith and Dr. Sandhu to violate a federal statute (*see Kelley v Levitt & Sons, Inc.*, 262 App Div 92 [2d Dept 1941]). It has been pointed out by more learned courts that the federal government has been refraining from prosecuting under the CSA of 1970. This is a course fraught with peril. I remind the parties that absent a change in federal law, let Lord Coke's venerable, yet viable maxim *Dormiunt aliquando leges, moriuntur nunquam*[*] serve to caution. Estoppel cannot lie under such circumstances.

The foregoing discussion constrained the court to consider the merits of the plaintiffs' claim for breach of contract. We find that, by clear and convincing evidence, the movants have proved a likelihood of success (*EdCia Corp. v McCormack*, 44 AD3d 991, 993 [2d Dept 2007]).

We next address the defense's argument that the granting of a preliminary injunction would impermissibly disturb the status quo. Relying on the holdings in *Zoller v HSBC Mtge. Corp. (USA)* (135 AD3d 932, 933 [2d Dept 2016]) and *MacIntyre v Metropolitan Life Ins. Co.* (221 AD2d 602, 602 [2d Dept 1995]), the defendants posit that the sought-after relief constitutes a mandatory injunction which would require a finding of "extraordinary circumstances" (*Zoller* at 933). This argument is problematic. Initially, the court finds that the status quo is the operation of a business in accord with the restrictive covenant. Additionally, as noted above, the defendants proceeded with their business plan even though they were forewarned by clear

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* 2 Edward Coke, Institutes of the Laws of England 161 (1797) (The law sometimes sleeps but never dies).

language from the restrictive covenant and the Board of Managers that this was unacceptable.

Defendants also argue that the plaintiffs seek the ultimate relief in the complaint and cite to *Board of Mgrs. of Wharfside Condominium v Nehrich* (73 AD3d 822, 824 [2d Dept 2010]); *St. Paul Fire & Mar. Ins. Co. v York Claims Serv.* (308 AD2d 347 [1st Dept 2003]); and *SHS Baisley, LLC v Res Land, Inc.* (18 AD3d 727, 728 [2d Dept 2005]).

In order to obtain a preliminary injunction which has the effect of granting the ultimate relief sought, the party seeking same must show "extraordinary circumstances" are present (*Nehrich* at 824).

The actions of the defendants, described above, demonstrate an obdurate desire to commence a business which a reading of *any* of these documents (the declaration of restrictions, the plan or the bylaws) would have shown to be forbidden. In this light, the interest in enforcing the restriction on use rises to the level of an extraordinary circumstance.

The case of *SHS Baisley, LLC v Res Land, Inc.* involved a *Yellowstone* injunction which brings us to defendants' argument that the court should apply, by analogy, the case law pertaining to same.

A *Yellowstone* injunction is an equitable device limited to commercial leases; it allows a commercial tenant to "protect its investment in the leasehold by obtaining a stay tolling the cure period so that upon an adverse determination on the merits the tenant may cure the default and avoid a forfeiture of the lease." (*146 Broadway Assoc., LLC v Bridgeview at Broadway, LLC*, 164 AD3d 1193, 1194-1195 [2d Dept 2018] [internal quotation marks omitted].)

In order to obtain a *Yellowstone* injunction, the tenant must demonstrate that

> "(1) it holds a commercial lease, (2) it received from the landlord either a notice of default, a notice to cure, or a threat of termination of the lease, (3) it requested injunctive relief prior to both the termination of the lease and the expiration of the cure period set forth in the lease and the landlord's notice to cure, and (4) it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises." (*JT Queens Carwash, Inc. v 88-16 N. Blvd., LLC*, 101 AD3d 1089, 1090 [2d Dept 2012], quoting *Barsyl Supermarkets,*

Inc. v Avenue P Assoc., LLC, 86 AD3d 545, 546 [2d Dept 2011].)

This argument, though eloquently made, has a fatal defect. In obtaining a *Yellowstone* injunction, the tenant must possess an ability to cure the defect which gives rise to the landlord's desire to end the tenancy. In this case, the "cure" is for the defendants to cease the operation of the cannabis dispensary, precisely the relief sought in the complaint.

The next factor for review is whether the plaintiffs have shown that they will suffer irreparable harm if they do not obtain a preliminary injunction.

Defendants contend that the plaintiffs have failed to show any "concrete harm" as a result of the continued operation of the cannabis dispensary.

Against the defendants' position, however, are the array of cases submitted by plaintiffs: *Moody v Filipowski* (146 AD2d 675 [2d Dept 1989]); *Board of Mgrs. of Bond Parc Condominium v Broxmeyer* (62 AD3d 925 [2d Dept 2009]); *North Haven Point Assn., Inc. v 27 on the Bluff LLC* (2023 NY Misc LEXIS 66505 [Sup Ct, Suffolk County, June 13, 2023, index No. 606082/2023]); *Board of Mgrs. of the S. Star v Grishanova* (2013 NY Slip Op 33560[U] [Sup Ct, NY County, Feb. 7, 2013]); *Board of Mgrs. of Clinton W. Condominium v Desmond* (2018 NY Slip Op 30907[U] [Sup Ct, NY County, May 11, 2018]); and *Beechwood Plainview Old Bethpage LLC v Grindell* (2019 NY Slip Op 35260[U] [Sup Ct, Nassau County, May 9, 2019]).

In *Moody v Filipowski*, the defendants were constructing a dwelling on property which was the subject of a negative easement limiting the realty's use to beach recreation and swimming. In granting the preliminary injunction, the Court noted that "continued construction would interfere with the plaintiffs' full use of the property." (146 AD2d at 679.)

The proof offered by the plaintiffs on the subject of irreparable harm is found in the affidavit of Mr. Michael Smith dated August 5th, 2025:

> "A substance abuse medical treatment center operates at 21 Technology Drive, just next door to defendants' dispensary. Defendants' operation has impeded and will continue to impede that business's ability to treat patients. A childcare center and a school for special needs children are located on Research Way, approximately 1,500 feet and 1,000 feet respectively from defendants' dispensary. The

> dispensary also operates next to my gym, Outlift Athletics, which occupies 13, 15, and 17 Technology Drive. My gym is a family-oriented operation with beginner classes and customers of all age groups, including children and the elderly. Since defendants' opening, customers and employees of my gym have complained of cannabis smoke and aroma emanating from the parking lot and the Unit. The dispensary use . . . is also incompatible with the Tech Center's purpose and general light-industrial uses. The Tech Center is not made to accommodate busy retail uses such as defendants' operation. It is already disruptive to the parking and traffic in and around Northgate Plaza. Customers are and will be less likely to frequent the above-referenced businesses as a result of defendants' operation."

The court finds this to be a sufficient demonstration, by the necessary quantum of proof, of irreparable harm.

With respect to the balancing of competing equities, the court must decide whether the irreparable harm that the plaintiffs would suffer in the absence of an injunction "substantially outweighs the injury that the injunctive relief would cause to the defendant[s]" (*Xiaokang Xu v Xiaoling Shirley He*, 147 AD3d 1223, 1225-1226 [3d Dept 2017], citing *Parry v Murphy*, 79 AD3d 713, 715 [2d Dept 2010]; *see Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 70 AD2d 1021, 1022 [3d Dept 1979], *appeal dismissed* 48 NY2d 654 [1979]).

The concepts of irreparable harm and balancing of the equities are slightly different. The former focuses on an individual litigant as well as the urgency of the moment. The latter is not so constrained by time and allows the court to look at the prospect of the ultimate consequences of granting or denying a preliminary injunction.

Defense counsel states that if the motion is granted, the "defendants will lose their business, fifteen employees will lose their livelihoods (with irreparable consequences like foreclosure), and defendants will be out $3 Million invested plus profits they would have made plus the opportunity to have a long-standing business indefinitely at this state-and-locally approved location" (Mr. Schriever's mem of law dated Aug. 26, 2025). In addition to their argument, the defense has proffered affidavits from 15 of the defendants' employees which detail their financial predicament in the event of the dispensary closing (NYSCEF Doc Nos. 22-37).

The court must point out to the defendants that they are not being dispossessed of their property. Their title is undisturbed. They may put it to productive commercial use, and employ those persons affected by this decision, within the bounds of the covenant.

The plaintiffs, if denied injunctive relief, will suffer from a continuous use of unit 19 in a manner which violates the covenant (*see* Real Property Law § 339-j) and results in the harm described by Mr. Smith. Additionally, given the manner in which the defendants proceeded to knowingly breach the condominium plan and open their business in the absence of authority shows that for the purpose of this application, it is they who have unclean hands (*Amarant v D'Antonio*, 197 AD2d 432, 434 [1st Dept 1993]; *Peconic Surgical Group, P.C. v Cervone*, 31 Misc 3d 1240[A], 2011 NY Slip Op 51059[U] [Sup Ct, Suffolk County 2011, Emerson, J.]). Additionally, the interests of the general public will not be affected whether the establishment remains open or closed (*De Pina v Educational Testing Serv.*, 31 AD2d 744, 745 [2d Dept 1969]). Accordingly, at this time the balancing of the equities favor the plaintiffs (*see Clarion Assoc. v Colby Co.*, 276 AD2d 461, 463 [2d Dept 2000]).

Under the circumstances presented, the court finds that the plaintiffs have established, by clear and convincing evidence, the elements necessary for a preliminary injunction (*Broadway-Flushing Homeowners' Assn., Inc. v Dilluvio*, 97 AD3d 614, 616 [2d Dept 2012]).

This holding in no way conflicts with the decisions found in *Matter of Buenos Hill Inc. v Saratoga Springs Planning Bd.* (83 Misc 3d 494 [Sup Ct, Saratoga County 2024, Richard A. Kupferman, J.], *affd* 240 AD3d 990 [3d Dept 2025]); *Cannabis Impact Prevention Coalition, LLC v Hochul* (85 Misc 3d 827 [Sup Ct, Albany County 2024, James H. Ferreira, J.]); and *Cannabis Impact Prevention Coalition, LLC v New York State Cannabis Control Bd.* (87 Misc 3d 205 [Sup Ct, Albany County 2025, Peter A. Lynch, J.]).

Those courts considered the question of whether the State Cannabis Law was preempted by the Federal Controlled Substances Act of 1970. All answered that question in the negative. None of those cases involved a determination of whether the State Cannabis Law overrides a restrictive covenant which forbids uses in violation of federal law.

We have considered the remaining contentions of defense counsel and although they have been argued with commendable zeal, they fail to persuade the court.

The court having granted plaintiffs' motion must next determine the proper amount to set as an undertaking. CPLR 6312 (b) states,

> "prior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court, that the plaintiff, if it is finally determined that he or she was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction" (*2339 Empire Mgt., LLC v 2329 Nostrand Realty, LLC*, 71 AD3d 998, 999 [2d Dept 2010]).

The parties are directed to submit affirmations and any documentary proof for the court's consideration on or before October 1, 2025. The court will set the undertaking on or before October 7, 2025. As stated in *Lelekakis v Kamamis* (303 AD2d 380, 380-381 [2d Dept 2003] [citations omitted]), the amount "must be rationally related to the amount of the defendant's potential liability if the preliminary injunction later proves to be unwarranted . . . and not based upon speculation."

Accordingly, it is ordered that the motion (seq No. 001) for a preliminary injunction is granted. The temporary restraining order issued by the court in connection with this matter shall continue until October 7, 2025, to permit the setting of an undertaking. It is further ordered that the defendants' motion (seq No. 002) seeking an order vacating the temporary restraining order issued on August 13, 2025, is denied.

[— NYS3d —]

In the Matter of Principal Hans-Gaston, Petitioner, v Nancy T. Sunshine, in Her Official Capacity as Clerk of the Supreme Court, Kings County, Respondent.

Supreme Court, Kings County, November 7, 2025

HEADNOTES

Courts — Transfer or Removal to Other Court — Application in Supreme Court to Remove Lower Court Action — County Clerk's Protocol

RESEARCH REFERENCES

By the Publisher's Editorial Staff

Am Jur 2d Mandamus §§ 1, 17, 33–35, 37, 202, 248, 251, 253, 255–256, 259–261, 268, 280.

Carmody-Wait 2d Courts and Their Jurisdiction §§ 2:226, 2:229–2:231, 2:243, 2:247–2:248, 2:252; Carmody-Wait 2d Proceeding Against a Body or Officer §§ 145:64, 145:67, 145:856.

McKinney's, CPLR 325 (b).

NY Jur 2d Article 78 and Related Proceedings §§ 4, 8, 80–82, 114, 118–121, 129–131; NY Jur 2d Courts and Judges §§ 893–899, 903–904, 923.

Siegel, NY Prac (6th ed) §§ 13, 19, 25, 558.

ANNOTATION REFERENCE

See ALR Index under Jurisdiction; Mandamus; Motions; Removal of Actions.

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Query: ((transfer OR remov!) /3 court) & "CPLR 325 (b)"

APPEARANCES OF COUNSEL

Principal Hans-Gaston, petitioner pro se.

New York State Unified Court System, Office of Court Administration (*Niaa C. Daniels* of counsel), New York City, for respondent.

OPINION OF THE COURT

Aaron D. Maslow, J.

Having heard oral argument, and due deliberation having been had, the within CPLR article 78 special proceeding is determined as hereinafter set forth.

Issue Presented

Petitioner challenges the procedure adopted by respondent Kings County Clerk with respect to accepting for filing applications pursuant to CPLR 325 (b) which seek a removal of an action from a court of lesser jurisdiction, in particular the Civil Court, to the Supreme Court.

Specifically, the issue presented is whether a county clerk, in the performance of the duties of the clerk of the Supreme Court, may impose a requirement that when an application, referred to as a "motion" in CPLR 325 (b), is made by a party to remove an action from a lower court to the Supreme Court, it be made by petition commencing a special proceeding (or by summons and complaint or summons with notice commencing an action), instead of by a motion existing outside the contours of a special proceeding or an action. This court has not located any Court of Appeals or Appellate Division decisions directly on point. Neither was it able to locate any Supreme Court decisions on this issue.

The particular statutory provision involved states as follows:

> "From court of limited jurisdiction. Where it appears that the court in which an action is pending does not have jurisdiction to grant the relief to which the parties are entitled, a court having such jurisdiction may remove the action to itself upon motion. A waiver of jury trial in the first court is inoperative after the removal." (CPLR 325 [b].)

Background

On or about August 16, 2024, petitioner Principal Hans-Gaston commenced an action in the New York City Civil Court, Kings County (Kings County Civil Court), seeking $50,000 in damages for personal injuries from nonparty Comunilife, Inc. (Comunilife), allegedly due to a failure on the part of the latter to provide service in the course of assisting vulnerable communities with housing and culturally sensitive support services. The action was assigned Kings County Civil Court index No. CV-018171-24/KI.

In March 2025, by which time petitioner had added nonparty Rebecca Canty, alleged to be Comunilife's program director, as

a defendant in the Civil Court action, petitioner moved in Civil Court for leave to amend and/or transfer the action to the Supreme Court. Petitioner now sought $250,000 for his alleged personal injuries. Kings County Civil Court (Hon. Monique J. Holaman, J.C.C.) denied petitioner's motion.

In or about June 2025, petitioner attempted to file a notice of motion and supporting papers with the office of respondent Kings County Clerk. By now, petitioner sought $1,000,000. He applied to remove his Kings County Civil Court action to Supreme Court, Kings County (Kings County Supreme Court). In doing so, he was rebuffed by respondent Kings County Clerk's staff, who informed him that a mere notice of motion and supporting papers would not suffice. The record contains correspondence back and forth between petitioner and staff at various units within Kings County Supreme Court, as well as allegations of statements made by them to petitioner. Suffice it to say, respondent Kings County Clerk's staff maintained that a special proceeding or an action had to be commenced in order for the Supreme Court to consider petitioner's application to remove his action to said court. Respondent County Clerk reiterates this position in its papers filed in opposition herein.

Petitioner acquiesced and filed a notice of petition and petition to commence a special proceeding in which removal of the Civil Court action to Kings County Supreme Court was sought.[1] Said special proceeding was assigned Kings County Supreme Court index No. 622/2025. On October 27, 2025, the court (Hon. Gina Abadi, J.S.C.) denied and dismissed the petition. In part, the court held, "[I]t is improper for this court to remove this case from lower court based upon a proposed amended complaint."

In the within article 78 special proceeding commenced on July 21, 2025, against respondent Kings County Clerk, petitioner seeks, inter alia, an order declaring respondent's protocol for processing his CPLR 325 (b) motion arbitrary, unlawful and in violation of governing law and directing respondent to properly accept and process CPLR 325 (b) filings.[2]

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1. "[C]ourts may take judicial notice of a record in the same court of either the pending matter or of some other action" (*Caffrey v North Arrow Abstract & Settlement Servs., Inc.*, 160 AD3d 121, 126-127 [2d Dept 2018]).

2. At oral argument respondent County Clerk argued that the issue is moot since petitioner had his application to remove the Civil Court action heard and denied. The court rejects this position inasmuch as lack of stand-

(n. cont'd)

Discussion

This article 78 special proceeding is in the nature of mandamus. Concerning mandamus, the Court of Appeals has said:

> "A writ of mandamus 'is an "extraordinary remedy" that is "available only in limited circumstances" ' (*Matter of County of Chemung v Shah*, 28 NY3d 244, 266 [2016], quoting *Klostermann v Cuomo*, 61 NY2d 525, 537 [1984]). Such remedy will lie 'only to enforce a clear legal right where the public official has failed to perform a duty enjoined by law' (*New York Civ. Liberties Union v State of New York*, 4 NY3d 175, 184 [2005]; *see also* CPLR 7803 [1]). While mandamus to compel ' "is an appropriate remedy to enforce the performance of a ministerial duty, it is well settled that it will not be awarded to compel an act in respect to which [a public] officer may exercise judgment or discretion" ' (*Klostermann*, 61 NY2d at 539, quoting *Matter of Gimprich v Board of Educ. of City of N.Y.*, 306 NY 401, 406 [1954]). Discretionary acts ' "involve[ ] the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result" ' (*New York Civ. Liberties Union*, 4 NY3d at 184, quoting *Tango v Tulevech*, 61 NY2d 34, 41 [1983]). Further, mandamus may only issue to compel a public officer to execute a legal duty; it may not ' "direct how [the officer] shall perform that duty" ' (*Klostermann*, 61 NY2d at 540, quoting *People ex rel. Schau v McWilliams*, 185 NY 92, 100 [1906])." (*Alliance to End Chickens as Kaporos v New York City Police Dept.*, 32 NY3d 1091, 1093 [2018].)

It is within these parameters that the court determines the within petition.

A review of the issue posed in this case—whether the protocol of respondent County Clerk, as clerk of the Supreme Court, for processing applications seeking removal of Civil Court actions to the Supreme Court is proper—entails a bit of discus-

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ing was not pleaded as an affirmative defense. In any event, petitioner desires to preserve his right in the future to make CPLR 325 (b) motions and have them processed properly (*see Matter of Santman v Satterthwaite*, 238 AD3d 1156, 1158 [2d Dept 2025] [mandamus properly sought as exception to mootness doctrine where there is likelihood of repetition either between the parties or among other members of the public]).

sion of the types of lawsuits filed and applications for relief within lawsuits.

In New York, "[t]here is only one form of civil action" (CPLR 103 [a]). "All civil judicial proceedings shall be prosecuted in the form of an action, except where prosecution in the form of a special proceeding is *authorized*" (*id.* § 103 [b] [emphasis added]). A special proceeding "is initiated and prosecuted in much the same manner and with the same speed as a motion . . . , and is usually determined in a manner similar to summary judgment" (Vincent C. Alexander, Prac Commentaries, McKinney's Cons Laws of NY, CPLR C103:2). "Special proceedings are reserved for limited types of dispute resolution in which speed is desirable" (*id.*).

> "A special proceeding is a civil judicial proceeding in which a right can be established or an obligation enforced in summary fashion. Like an action, it ends in a judgment (CPLR 411), but the procedure is similar to that on a motion (CPLR 403, 409). Speed, economy and efficiency are the hallmarks of this procedure." (Vincent C. Alexander, Prac Commentaries, McKinney's Cons Laws of NY, CPLR C401:1.)

"Statutory authorization must exist for the use of a special proceeding to enforce a particular right" (*id.*). The Commentary continues:

> "Set forth below is an illustrative listing of provisions of the CPLR that authorize special proceedings for the resolution of certain types of matters:
>
> "• Proceeding against a body or officer (CPLR Article 78).
>
> "• First application arising out of an arbitrable controversy which is not made by motion in a pending action (CPLR 7502(a)).
>
> "• Proceeding against attachment garnishee to compel payment (CPLR 6214(d)).
>
> "• Determination of adverse claim to attached property (CPLR 6221).
>
> "• Order for payment of money out of court (CPLR 2606(2)).
>
> "• Proceeding relating to express trust (CPLR Article 77).

"• Habeas corpus (CPLR Article 70).

"• Settlement of claim of infant or person for whom guardian has been appointed for personal needs or property management (CPLR 1207).

"• Miscellaneous procedures for enforcement of judgments (e.g., sale of homestead exceeding $50,000 in value (CPLR 5206(e)); to compel payment by person in possession of judgment debtor's property (CPLR 5225(b)); to compel payment of debts owed to judgment debtor (CPLR 5227); to determine adverse claims to property levied on under an execution (CPLR 5239))." (Vincent C. Alexander, Prac Commentaries, McKinney's Cons Laws of NY, CPLR C401:1.)

The Commentary further states:

"The following list provides examples of statutes authorizing special proceedings in miscellaneous other provisions of the Consolidated Laws of New York:

"• Proceeding for appointment of a guardian for personal needs or property management (Mental Hygiene Law, Article 81).

"• Summary proceeding to recover possession of real property (Real Property Actions and Proceedings Law, Article 7).

"• Tax certiorari proceedings (Real Property Tax Law, Article 7).

"• Election law disputes (Election Law, Article 16).

"• Disposition of real property of infant or incompetent (Real Property Actions and Proceedings Law, Article 17).

"• Judicial dissolution of corporations (Business Corporation Law, Article 11).

"• Change of name proceeding (Civil Rights Law, Article 6).

"• Custody and visitation of children (Domestic Relations Law § 240(1))." (Vincent C. Alexander, Prac Commentaries, McKinney's Cons Laws of NY, CPLR C401:1.)

Another special proceeding which comes to mind is one commenced pursuant to Real Property Actions and Proceedings Law § 881 to encroach on an adjacent property to make repairs on one's own.

In an action, the parties are denoted as plaintiff and defendant. In a special proceeding, the parties are denoted as petitioner and respondent (*see* CPLR 401). An action is commenced by way of a summons and complaint or a summons with notice or, in some instances, a summons with notice of motion for summary judgment in lieu of complaint can commence an action (*see id.* §§ 304, 3213). A special proceeding is commenced by filing of a petition (*see* CPLR 304; *Wesco Ins. Co. v Vinson*, 137 AD3d 1114, 1115 [2d Dept 2016]). The petition would be accompanied by a notice of petition or a proposed order to show cause (*see* CPLR 403 [a], [d]). However, as noted above, a special proceeding "must be based on specific statutory authorization" (*Matter of Town of Johnstown v City of Gloversville*, 36 AD2d 143, 144 [3d Dept 1971]).

> "The following thought may thus occur to the practitioner unfamiliar with the rules of practice: why, with all the advantages a special proceeding affords, should a plaintiff ever bother bringing a regular action? The answer is that a special proceeding may be used only when it is specifically authorized by law. CPLR 103(b) ('All civil judicial proceedings shall be prosecuted in the form of an action, except where prosecution in the form of a special proceeding is authorized.'); *see* Siegel & Connors, New York Practice §§ 4, 547 (6th ed. 2018)." (Patrick M. Connors, Prac Commentaries, McKinney's Cons Laws of NY, CPLR C2211:3.)

"A motion is an application for an order. A motion on notice is made when a notice of the motion or an order to show cause is served." (CPLR 2211.)

> "The resemblance that the special proceeding has to a motion is in its procedure. The special proceeding, while usually seeking a substantive right, is brought on with the same steps that bring on a motion. *Compare* CPLR 2214(b) (outlining notice requirements for motions) *with* CPLR 403(b) (outlining similar, but not identical, notice requirements for special proceedings). We may say, in fact, that the special proceeding is as plenary as an action, but is brought on with the facility and speed of a motion." (Patrick M. Connors, Prac Commentaries, McKinney's Cons Laws of NY, CPLR C2211:3.)

"A special proceeding and a motion have sometimes been confused" (*Matter of Callahan*, 262 App Div 398, 399 [3d Dept 1941]). Ordinarily,

> "[t]he difference between them is that the one is an application in a proceeding already pending or about to be commenced, on which it depends for jurisdiction, while the other is an independent prosecution of a remedy, in which jurisdiction is obtained by original process. A motion is not a remedy but is based upon some remedy and is always connected with and dependent upon the principal remedy." (*Id.*)[3]

"Since a motion is an application for an order, and an order is a piece of incidental relief within the framework of an action or special proceeding" (Patrick M. Connors, Prac Commentaries, McKinney's Cons Laws of NY, CPLR C2211:8), one might ask whether

> "all motions authorized by the CPLR would be housed within an action or special proceeding. *That is not the case.* The Advisory Committee intended to avoid giving the name of 'motion' or 'order' to applications that have no such context, *see* 2d Rep. Leg. Doc. (1958) No. 13, p. 180, but some appear to have slipped into the CPLR anyway. Among them are the application for disclosure from a person within the state for use in foreign litigation, CPLR 3102(e), the related procedure authorizing judicial aid for the service of papers upon local persons to aid foreign cases, CPLR 328(a), and the application for pre-action disclosure, CPLR 3102(c). *See* Siegel & Connors, New York Practice § 352 (6th ed. 2018). While an application for assistance under CPLR 328 can apparently be sought ex-parte, as a court order is not even required to serve papers in connection with a proceeding in a tribunal outside the state, CPLR 328(b), it has been held that an application for an order under CPLR 3102(e) must be on notice to the person or entity requested to provide the disclosure. *Matter of Deloitte, Haskins and Sells*, 146 Misc.2d 884, 552 N.Y.S.2d 1003 (Sup.

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3. An example of how a motion and a special proceeding are grouped together is the fact that special proceedings appear on motion calendars and are assigned motion sequence numbers. They are not identical. Having a separate calendar for special proceedings would be appropriate in order to maintain the distinction.

> Ct., New York County 1990); *see* Practice Commentary, CPLR 3102, C3102:9 ('Disclosure to Aid Foreign Proceedings')." (*Id*. [emphasis added].)

Case law exists holding that a motion exists only incidental to an action or a special proceeding properly commenced through a summons and complaint or summons with notice, or a petition, respectively (*e.g. Wesco Ins. Co. v Vinson*, 137 AD3d 1114 [motion brought on by order to show cause to fix amount of workers' compensation lien]; *O'Brien v Contreras*, 126 AD3d 958 [2d Dept 2015]).

However, such a broad statement does not take into account that there are provisions in the CPLR for stand-alone applications, as noted in the above quoted CPLR Commentary. This was recognized in *Town of Johnstown v City of Gloversville* (36 AD2d at 145 [emphasis added]), where the Court stated, "Absent a *specific statute permitting a motion to be made in the absence of an action or special proceeding* (e.g., CPLR 3102, subd. [c]) there is no authority for a motion in the absence of a civil judicial proceeding which has not already been commenced," i.e., if a specific statute permits a motion to be made in the absence of an action or special proceeding, such motion can exist on a stand-alone basis (emphasis added).

It is noted that CPLR 325 (b) specifically refers to a *motion* as the vehicle by which one may apply to a court possessing jurisdiction to remove an action to it from a court not possessing jurisdiction. Although they are similar, a motion is not a special proceeding. A motion culminates in an order (*see* CPLR 2211), whereas a special proceeding culminates in a judgment (*see* CPLR 411). "A judgment is the determination of the rights of the parties in an action or special proceeding and may be either interlocutory or final. A judgment shall refer to, and state the result of, the verdict or decision, or recite the default upon which it is based." (CPLR 5011.)

An application to have a case removed to a court with greater jurisdiction will not culminate in determining the rights between the parties. Therefore, it would be inappropriate for such an application to culminate in a judgment, as would be required in a special proceeding (*see* CPLR 411).

Understandably, respondent County Clerk feels the need to ensconce an application to remove a lower court action to the Supreme Court within a lawsuit: an action or a special proceeding. That would facilitate recordkeeping, assigning an index

number, and collecting a fee.[4] At oral argument, respondent mentioned that an index number needs to be issued, and argued that CPLR 325 (b) is silent as to the context for its motion. But a motion to remove an action already lies within the ambit of an action, albeit one pending in the court of lower jurisdiction. To compel the movant (applicant) to file a petition commencing a special proceeding is in effect forcing the party to place a square peg in a round hole. It does not fit. Even more compelling is the existence of CPLR 103 (b)'s mandate that a special proceeding may not be prosecuted as a special proceeding unless it is *authorized*. The CPLR does not authorize a special proceeding to remove an action from a court of lower jurisdiction to a court of higher jurisdiction. Therefore, it is improper to maintain a protocol compelling such a special proceeding to be initiated or permitting the motion to remove after an action has been commenced in Supreme Court. There cannot be a lawsuit when the pending one has not yet been removed.

This court was unable to locate Court of Appeals or Appellate Division precedent on the issue posed herein: whether an applicant to remove an action to a higher court must commence a special proceeding through the filing of a petition. However, this court notes that in discussing applications to remove an action to a court of higher jurisdiction, the word "motion" was used. For example, in a lengthy discussion concerning CPLR 325, in *Huston v Rao* (74 AD2d 127 [2d Dept 1980]), the Appellate Division held that if an action was previously removed from the Supreme Court to the Civil Court, and the plaintiff seeks to retransfer the action to the Supreme Court, "[o]rderly procedure requires that, in such circumstances, a formal motion for retransfer be included in the moving papers," not just a motion for permission to serve an amended complaint seeking a higher sum of damages (74 AD2d at 131-132 ["there was no motion for a retransfer"; "such motion must be coupled with a motion for retransfer"]).

In sustaining Kings County Supreme Court's denial of removal to the Supreme Court of a Civil Court action, the Second Department held:

"To demonstrate their entitlement to such relief the

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4. For a separate example of papers being accepted for filing by a county clerk, acting as the clerk of a court, without the existence of an action or special proceeding, note the procedure detailed in CPLR 3218 for entering a judgment by confession.

> plaintiffs were required to adduce evidence showing the merits of their case, the reasons for their delay in asserting their present claims, and that their increase in damages resulted from facts that only recently came to their attention (*see, Gambino v Swan,* 152 AD2d 620; *Dolan v Garden City Union Free School Dist.,* 113 AD2d 781). The medical evidence supporting such a motion must establish 'a "causal connection between the injury and a consistent course of treatment for the accident-caused injuries" ' (*Martin v Maimonides Med. Ctr.,* 125 AD2d 455, 456, quoting *Dolan v Garden City Union Free School Dist., supra,* at 785).
>
> "The plaintiffs have failed to make the requisite showings insofar as they have not proven that their allegedly recently-discovered injuries were incapable of earlier detection or why those injuries only belatedly came to their attention (*see, Harrison v Saltzman,* 233 AD2d 296; *Martin v Maimonides Med. Ctr., supra*). Moreover, we agree with the Supreme Court that the defendant would suffer genuine prejudice in defending the plaintiffs' increased claims at this juncture (*see, Dolan v Garden City Union Free School Dist., supra*)." (*Barsoum v Wilson*, 255 AD2d 537, 537-538 [2d Dept 1998].)

Notably, the Court referred to "the plaintiffs' *motion* to remove their action from the Civil Court of the City of New York to Supreme Court (CPLR 325 [b]) and to serve an amended complaint increasing their ad damnum clause" (*id.* at 537 [emphasis added]).

In other decisions affirming Kings County Supreme Court orders denying applications for removal of Civil Court actions to it due to deficiencies, the Appellate Division, Second Department consistently referred to the applications as *motions* (*see Lopez v Alexander*, 251 AD2d 297 [2d Dept 1998] [failure to demonstrate merits of case]; *Francilion v Epstein*, 144 AD2d 633 [2d Dept 1988] [absence of request for leave to amend ad damnum clause]; *Gambino v Swan*, 152 AD2d 620 [2d Dept 1989] [insufficient showing of case's merits, reasons for delay, and that increase was warranted by facts which recently came to plaintiff's attention]; *Coleman v New York City Tr. Auth.*, 193 AD2d 712 [2d Dept 1993] [plaintiff failed to show increase in damages to $500,000 warranted by facts only recently coming to her attention]). "Motion" was also used in *Martin v Wald-*

baum's Supermarket (172 AD2d 804 [2d Dept 1991]), a decision on appeal from Queens County Supreme Court, and in *R & T Holding Corp. v Commack Realty, Inc.* (30 AD3d 574 [2d Dept 2006]), a decision on appeal from Suffolk County Supreme Court.

The word "petition" was used in *Matter of Sealy v Morris* (99 AD3d 1008 [2d Dept 2012]), which presumably is indicative of a special proceeding having been commenced in Supreme Court for the purpose of seeking removal. Commencing a special proceeding for this purpose would not be fatal, but this court deems it inappropriate because such a special proceeding is not authorized (*see* CPLR 103 [b]).

That applications for removal to the Supreme Court have been styled as motions and referred to as such by the Appellate Division bolsters this court's view that the motion referred to in CPLR 325 (b) is a motion without an extant Supreme Court action or special proceeding.

It may appear trivial that the issue presented here involves the terminology of the application for removal but more than nomenclature is involved. The legislature having determined that the application be presented in the form of a motion, a county clerk, as a governmental officer, is required to adhere to the prescribed form of application for relief. When an applicant for removal of an action to the Supreme Court files a motion pursuant to CPLR 325 (b), it must be treated as such. This is similar to a county clerk delegated the statutory ministerial duty of recording instruments affecting real property having to accept mortgages and assignments without looking beyond an instrument that otherwise satisfies the recording statute's requirements (*see Matter of MERSCORP, Inc. v Romaine*, 8 NY3d 90 [2006]).

CPLR 325 (b) being facially clear that a motion is to be used to apply for removal, a county clerk lacks jurisdiction to reject it on the basis that there is no lawsuit pending in the Supreme Court. One should not be compelled to file a petition, thereby commencing a special proceeding. While mandamus is an extraordinary remedy available only in limited circumstances, it will lie to enforce a clear legal right provided for in the CPLR concerning which there is no discretion (*see Matter of Capital Equity Mgt., LLC v Sunshine*, 222 AD3d 640 [2d Dept 2023]; *cf. Alliance to End Chickens as Kaporos v New York City Police Dept.*, 32 NY3d 1091). Acceptance of a CPLR 325 (b) motion is not a matter of discretion. It involves the performance of a ministerial duty.

To the extent that petitioner seeks relief other than compelling respondent to accept and file motions seeking removal of actions from a lower court to the Supreme Court, the court finds it is not warranted. This includes requests to remove notations on filed documents (a county clerk is entitled to make any markings on documents in order to facilitate processing), to find that respondent engaged in administrative misconduct (there is no pattern of misconduct), and to declare service of opposing counsel proper (this implicates an issue in the matter decided by Justice Abadi). Also, service of the papers herein is not being contested.

Conclusion

Accordingly, it is hereby ordered and adjudged that the within petition is granted solely to the extent of the following:

(1) Respondent's protocol of requiring that a petition commencing a special proceeding, or alternatively a summons and complaint or summons with notice commencing an action, be filed when a party in an action pending in a court of limited jurisdiction applies to the Supreme Court for an order removing the said action to the Supreme Court is declared improper and contrary to law;

(2) Respondent shall accept for filing a notice of motion and supporting papers or a proposed order to show cause and supporting papers submitted by a party in an action pending in a court of limited jurisdiction when the party applies to the Supreme Court for an order, pursuant to CPLR 325 (b), removing the said action to the Supreme Court which are otherwise in proper form and accompanied by the respective filing fee, notwithstanding that such party has not filed a petition commencing a special proceeding or alternatively a summons and complaint or summons with notice commencing an action.

[— NYS3d —]

loanDepot.com, LLC, Plaintiff, v Rivka Ortner et al., Defendants.

Supreme Court, Kings County, October 31, 2025

HEADNOTES

Dismissal and Nonsuit — Failure to Enter Default Judgment within One Year — Taking of Proceedings — Request for Judicial Intervention for Foreclosure Settlement Conference

RESEARCH REFERENCES

By the Publisher's Editorial Staff

Am Jur 2d Dismissal, Discontinuance, and Nonsuit §§ 1, 70; Am Jur 2d Judgments §§ 222, 226, 233.

Carmody-Wait 2d Judgments §§ 63:188, 63:193–63:194, 63:197.

NY Jur 2d Actions §§ 167–168; NY Jur 2d Judgments §§ 119, 121, 141, 144.

Siegel, NY Prac (6th ed) §§ 293–294.

ANNOTATION REFERENCE

See ALR Index under Default Judgments; Dismissal, Discontinuance, and Nonsuit; Judgments, Orders, and Decrees.

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APPEARANCES OF COUNSEL

Frenkel Lambert Weisman & Gordon, LLP, Bay Shore, for plaintiff.

New York Litigation Group, PLLC, Rochester, for defendants.

OPINION OF THE COURT

Menachem M. Mirocznik, J.

The motion and cross-motion are determined in accordance with this decision and order as follows:

Introduction

This case presents a question of statutory construction with significant consequences for foreclosure litigation in New York:

whether the filing of a request for judicial intervention for purposes of convening a mandatory settlement conference—an act required *before* a defendant is in default—constitutes the taking of proceedings for the entry of judgment *after* the default within the meaning of CPLR 3215 (c). It does not. The chronology built into the foreclosure-settlement-conference regime itself forecloses that proposition. Under 22 NYCRR 202.12-a (b) (1), the request for judicial intervention (RJI) for a settlement conference must be filed at the same time as proof of service; and under CPLR 3408 (a) (1), proof of service must be filed within 20 days of service. In every foreclosure action subject to CPLR 3408 settlement conferences, therefore, the RJI must be filed *before* the defendant's time to answer has expired—before a default can occur as a matter of law. A procedural filing that the Legislature requires to necessarily precede the existence of default cannot, by definition, constitute a "proceeding" in furtherance of a post-default judgment within the meaning of a separate act of the Legislature. Moreover, the notion that the filing of an RJI constitutes the taking of proceedings cannot be reconciled with the Legislature's explicit command in CPLR 3215 (d) that in cases concerning multiple defendants an "application to the court" is required.

CPLR 3215 (c) demands diligent prosecution *after* default, not ministerial compliance with administrative prerequisites arising *before* it. The Legislature used mandatory language—"the court . . . shall dismiss the complaint as abandoned"—and required courts to enforce that mandate even "upon [their] own initiative," thereby underscoring that the statute is a discipline, not a suggestion. (CPLR 3215 [c].) A court rule adopted decades later to facilitate mortgage-settlement conferences cannot satisfy nor displace a statutory condition precedent enacted by the Legislature in 1962, nor can it transform a scheduling device into a judicial application for judgment.

The Second Department decision in *Citimortgage, Inc. v Zaibak* (188 AD3d 982 [2d Dept 2020]) and its progeny (*see U.S. Bank N.A. v Newson*, 240 AD3d 821, 822 [2d Dept 2025]; *U.S. Bank Trust N.A. v Nieves*, 239 AD3d 1020, 1022 [2d Dept 2025]; *U.S. Bank N.A. v 63 Holiday Dr. Realty Corp.*, 230 AD3d 713, 714 [2d Dept 2024]; *U.S. Bank N.A. v Jerriho-Cadogan*, 224 AD3d 788, 790 [2d Dept 2024]) neither considered nor determined the specific arguments raised by defendant here why the filing of an RJI does not, as a matter of law, constitute "tak[ing] proceedings for the entry of judgment" within the

meaning of CPLR 3215 (c). Hence, the court is not bound under stare decisis to apply *Zaibak*. Precedent is created only by express determinations made by an appellate court, not supposition by a party based on appellate court silence concerning arguments not raised.

Because plaintiff did not move for default judgment or otherwise apply for judicial relief in furtherance of the entry of judgment, within one year of the default, dismissal under CPLR 3215 (c) is mandatory. The filing of an RJI does not satisfy CPLR 3215 (c) as a matter of law. Accordingly, for the reasons that follow, defendant's cross-motion is granted, and the complaint is dismissed pursuant to CPLR 3215 (c). This conclusion follows not from judicial discretion, but from the Legislature's command.

Factual and Procedural History

Plaintiff commenced the instant action to foreclose a mortgage on June 26, 2023. (NY St Cts Elec Filing [NYSCEF] Doc No. 1.) Defendant Ortego Realty 40, LLC (defendant), owned by the borrower Ortner, was served with process pursuant to Limited Liability Company Law § 303 by delivery to the Secretary of State on September 7, 2023. (NYSCEF Doc No. 78.)

The defendant did not serve an answer. Plaintiff filed an RJI to request a settlement conference on September 22, 2023. (NYSCEF Doc Nos. 80-81.) Plaintiff moved for, inter alia, a default judgment against the defendant on December 9, 2024. (NYSCEF Doc No. 86.) The defendant cross-moved to dismiss under CPLR 3215 (c), arguing that plaintiff failed to take proceedings to enter judgment against the defendant within one year of the defendant's default. (NYSCEF Doc No. 114.) Oral argument was heard on the motion and cross-motion on September 3, 2025.

Discussion

CPLR 3215 (c) provides that "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after [a defendant's] default, the court shall not enter judgment but shall dismiss the complaint as abandoned . . . unless sufficient cause is shown why the complaint should not be dismissed." Plaintiff concedes that it did not move for a default judgment or order of reference within one year of the defendant's default. Plaintiff instead contends that under *Citimortgage, Inc. v*

Zaibak (188 AD3d 982 [2d Dept 2020]) and its progeny plaintiff's filing of an RJI in September 2023 constituted "tak-[ing] proceedings for the entry of judgment" within the meaning of CPLR 3215 (c). For several distinct reasons as argued by defendant, each of which alone is per se sufficient, the court disagrees.

I. *Zaibak* conflicts with the legislative and regulatory scheme.

First, *Zaibak*'s logic collapses under the weight of the governing statutes and rules if read together as required, and combined require plaintiffs to file the RJI prior to the default. Under 22 NYCRR 202.12-a (b) (1), *the RJI in a foreclosure action must be filed at the same time as proof of service of the summons and complaint*. And CPLR 3408 (a) (1) mandates that proof of service in a foreclosure action *must be filed "within twenty days of such service*" (emphasis added). Thus, where service is made under CPLR 308 (2) ("leave and mail") or 308 (4) ("nail and mail"), service is not even complete *until 10 days after* proof of service is filed (CPLR 308 [2], [4]). Only after service is complete does the defendant's time to answer begin running (CPLR 320 [a]).

Accordingly, in the overwhelming majority of foreclosure actions, the RJI must be filed before the defendant's time to answer has even begun to run—i.e., *before a default can legally occur at all.* And even in cases of personal delivery, CPLR 320 (a) provides that an appearance is due "within twenty days after service," whereas the RJI must be filed within that same window. Therefore, under all circumstances where CPLR 3408 conferencing applies,[1] the RJI must precede the default. An act that the Legislature requires to take place *before* a defendant is in default cannot simultaneously satisfy a separate statutory condition that applies *after* default. Thus, as a matter of statutory chronology, an RJI must be filed *before the defendant is even in default* and cannot constitute a "proceeding" taken "after default" within the meaning of CPLR 3215 (c).

This timing reality is fatal to *Zaibak*'s construction. CPLR 3215 (c) measures compliance *from the moment of default forward*, not from commencement. Each Department of the Ap-

1. Otherwise, such an *RJI* is not required and its filing cannot prevent dismissal for abandonment (*see US Bank N.A. v Pane*, 237 AD3d 1237, 1239 [2d Dept 2025] ["Here, however, since the action was not subject to mandatory foreclosure settlement conferences . . . the plaintiff's filing of the RJI did not constitute the taking of proceedings for the entry of judgment within the meaning of CPLR 3215 (c)"]).

pellate Division has applied this rule uniformly: "[P]laintiffs' time in which to move for entry of judgment is measured from [the] default" (*NYCTL 2017-A Trust v Heirs-at-Law of John Ghiselli*, 215 AD3d 427, 429 [1st Dept 2023]; *U.S. Bank N.A. v DiGiovanni*, 231 AD3d 1077, 1078 [2d Dept 2024] ["The one-year statutory time frame is not one year from the commencement of the action, but one year from when the defendant's answer or responsive motion was due, which itself is measured from when service is deemed complete"]; *U.S. Bank, N.A. v Reamer*, 187 AD3d 1650, 1651 [4th Dept 2020]; *PHH Mtge. Corp. v Davis*, 111 AD3d 1110, 1113 [3d Dept 2013]).

Zaibak inverts CPLR 3215 (c) by treating a *pre-default* filing as compliance with a *post-default* statutory mandate. That is the opposite of harmonization. The Court of Appeals has explained the governing canons: "[I]t is not the function of the court to declare one statute the victor over another if the statutes may be read together, without misdirecting the one, or breaking the spirit of the other" (*Matter of Goodman [Barnard Coll.—Commissioner of Labor]*, 95 NY2d 15, 21 [2000] [ellipsis omitted]). And courts must "construe [related provisions] in a way that renders them internally compatible" (*Yatauro v Mangano*, 17 NY3d 420, 427 [2011]).

The court rules themselves adopt this reconciliation principle: "The provisions of this Part shall be construed consistent with the Civil Practice Law and Rules (CPLR)" (22 NYCRR 202.1 [d]).

Rather than "harmonize" CPLR 3215 (c) and 3408 *Zaibak* and its progeny displace one with the other. It allows a filing required *before* default to satisfy a statute that governs only *after* default, and in doing so *Zaibak* "misdirects" CPLR 3408 while it "breaks the spirit" of CPLR 3215 (c) (*Goodman*, 95 NY2d at 21). *Zaibak*'s construction is therefore unsustainable. The logic of *Zaibak* results in the incongruous outcome that a plaintiff who *deliberately violates* CPLR 3408 and 22 NYCRR 202.12-a (b) (1) (by failing to timely file the RJI with the proofs of service) would occupy a better position with respect to CPLR 3215 (c) than one who complied with the legal requirements. As such, this ministerial form—which, whenever applicable, is legally required to be filed prior to the accrual of any default—cannot constitute taking proceedings for the entry of judgment within a year after the default. The filing of an RJI cannot possibly constitute the "taking of proceedings" to enter judgment within one year after default. By operation of statute and rule,

a foreclosure plaintiff is *already obligated* to file the RJI *before* the defendant's default occurs. If the plaintiff obeys the law and files when required, the filing precedes the default and is therefore legally irrelevant to any section 3215 (c)-abandonment analysis. And if the plaintiff withholds the RJI until after default, it has *violated binding procedural requirements*, and the court cannot reward such calculated noncompliance by allowing the delinquent filing itself to supply the missing "proceedings" the statute demands. A party cannot convert its own breach of a mandatory filing obligation into a tolling device. Thus, because controlling authority required the RJI to be filed *before* default, its filing *after* default is not only untimely—it is legally incapable of constituting "proceedings for the entry of judgment" within the meaning of CPLR 3215 (c). Any other construction would invert the statute, excuse violation of mandatory procedure, and incentivize the very defiance of law that section 3215 (c) was enacted to deter.

This statutory tension disappears once CPLR 3215 (c) is construed the way every Department of the Appellate Division (including the Second Department, save for the aberrant *Zaibak* line of cases) has already construed it: the phrase "take proceedings" means a motion for judicial relief directed toward the entry of a default judgment, not the ministerial filing of an RJI. The First, Third, and Fourth Departments are uniform on this point—it is the filing of *a motion for default judgment* (or its foreclosure equivalent, a motion for an order of reference) within one year of default that constitutes the taking of proceedings within the meaning of CPLR 3215 (c). (*See e.g. Deutsche Bank Natl. Trust Co. v Bakarey*, 198 AD3d 718, 721 [2d Dept 2021] ["In a mortgage foreclosure action, a plaintiff satisfies the requirements of CPLR 3215 (c) when, within one year of a defendant's default, the plaintiff takes the preliminary step toward obtaining a default judgment of foreclosure and sale by moving . . . for an order of reference pursuant to RPAPL 1321"]; *U.S. Bank N.A. v Nunez*, 190 AD3d 660, 661 [1st Dept 2021] ["where a plaintiff fails to move for a default judgment within a year of the defendant's default . . . dismissal of the action is required"]; *see also U.S. Bank, N.A. v Reamer*, 187 AD3d 1650, 1651 [4th Dept 2020] ["Here, plaintiff failed to initiate proceedings for the entry of a default judgment within one year of the default, and indeed had not taken the preliminary step toward obtaining a default judgment of foreclosure and sale by moving for an order of reference within

one year of the defendant's default" (internal quotation marks and citations omitted)]; *Bank of N.Y. v Richards*, 192 AD3d 1228 [3d Dept 2021].)

This construction not only fits the statutory text of CPLR 3215 (c) but is the only construction that harmonizes CPLR 3215 (c) with CPLR 3408 and 22 NYCRR 202.12-a (b) (1) without "misdirecting the one, or breaking the spirit of the other" (*Matter of Goodman [Barnard Coll.—Commissioner of Labor]*, 95 NY2d 15, 21 [2000]). It preserves the Legislature's command that CPLR 3215 (c) be triggered *after* default, rather than displaced by a filing required *before* default, and it conforms to the principle that "[c]ourts must harmonize the various provisions of related statutes and . . . construe them in a way that renders them internally compatible" (*Yatauro*, 17 NY3d at 427). Treating an RJI as "taking proceedings" would do the opposite—it would require courts to read CPLR 3408 and 22 NYCRR 202.12-a in a manner that destroys the operative command of CPLR 3215 (c). There is only one reading that harmonizes all three provisions. The RJI is the *administrative trigger* for settlement conferences (filed before default). A motion for default judgment is the act of prosecution required *after* default. CPLR 3215 (c) is satisfied only by the latter, not the former.

II. Accepting an RJI as sufficient belies the plain language of CPLR 3215 (d).

Second, *Zaibak*'s rule is irreconcilable with the Legislature's express command in CPLR 3215 (d). That subdivision governs multi-defendant actions and provides that where one defendant answers and another defaults, the plaintiff must make an "application to the court within one year after the default" before a default can be taken against the non-appearing party (CPLR 3215 [d]). The statutory text leaves no doubt that the Legislature required a judicial application—not a ministerial filing such as an RJI—to qualify as the "tak[ing] of proceedings." By requiring an "application to the court," the Legislature plainly intended proceedings *beyond the mere filing of a request for judicial intervention* to satisfy the statutory requirement of the timely taking of proceedings for the entry of a default judgment.

If the mere filing of an RJI were sufficient to satisfy CPLR 3215 (c), then the Legislature's explicit requirement in subdivision (d) of an "application to the court" would be rendered entirely superfluous. The law does not tolerate such reading.

The Court of Appeals has made clear that where the Legislature prescribes a procedural step, courts may not treat that directive as optional: "Having prescribed the . . . method, the Legislature has ordained the required procedure, for otherwise the statute would serve no purpose and we may not ascribe to the Legislature a vain act." (*Matter of Petrella v Siegel*, 73 NY2d 846, 849 [1988].)

Zaibak's interpretation does exactly what *Petrella* forbids—it drains CPLR 3215 (d) of all operative meaning by treating a pre-default, administrative filing as the equivalent of the "application to the court" the Legislature expressly required. Put differently, if an RJI were enough, subdivision (d) would not exist.

The Legislature knew how to authorize satisfaction of CPLR 3215 (c) and (d) by administrative filing if it had wished to do so; it did not. (*See Matter of Orens v Novello*, 99 NY2d 180, 189 [2002].) Instead, it chose an application to the court in furtherance of the entry of judgment. *Zaibak* and its progeny rewrite the statute by eliminating the Legislature's chosen noun—"application"—and replacing it with "paperwork." That is not construction; it is amendment. Under CPLR 3215 (d), the Legislature itself resolves the issue: "application to the court" means an actual submission for judicial relief, not the mechanical filing of a request for calendaring of a settlement conference. A court must harmonize subdivisions (c) and (d), not collapse them. (*See Matter of Goodman [Barnard Coll.—Commissioner of Labor]*, 95 NY2d 15, 21 [2000].)

III. In drafting CPLR 3215 (c) the Legislature could not have intended compliance with ministerial calendaring requirements imposed decades later to constitute taking proceedings for the entry of judgment.

Third, the judicial settlement conference regime was created after CPLR 3215 (c) and cannot be read back into it. CPLR 3215 (c) dates to 1962 (L 1962, ch 308). The foreclosure-RJI regime (22 NYCRR 202.12-a) was created decades later, after the 2008 foreclosure crisis, and serves a wholly different statutory objective: loss-mitigation, not the entry of judgment. Hence, a settlement-conference RJI cannot constitute "tak[ing] proceedings for the entry of judgment" within the meaning of CPLR 3215 (c) for a fundamental threshold reason: when CPLR 3215 (c) was enacted in 1962 (L 1962, ch 308), the Legislature had not yet created—nor even contemplated—the mandatory settlement-conference procedure codified decades later in 22

NYCRR 202.12-a. A later-adopted court rule cannot possibly retroactively redefine a statutory term (and the intent of the legislature in enacting it) that predates it. The Legislature designed CPLR 3215 (c) to require post-default prosecutorial action for the entry of a judgment, not a ministerial administrative filing created years later for a wholly different purpose.

Additionally, as the Court of Appeals has repeatedly instructed, a court rule cannot abridge or expand a statutory deadline. (*See People v Ramos*, 85 NY2d 678, 687-688 [1995] ["no court rule can enlarge or abridge rights conferred by statute, and this bars the imposition of additional procedural hurdles that impair statutory remedies"].) Treating the RJI as a "proceeding for the entry of judgment" would do exactly that—functionally tolling the one-year abandonment statute by court rule—something no court has authority to do. (*See Deutsche Bank Trust Co. Ams. v Gonzales*, 215 AD3d 636 [2d Dept 2023].) The Appellate Division has made this explicit: "to engraft exceptions where none exist is a trespass by a court upon the legislative domain" (*Stegemann v Rensselaer County Sheriff's Off.*, 153 AD3d 1053, 1054 [3d Dept 2017] [brackets and ellipsis omitted]). A procedural filing created by court administrators cannot override a legislative deadline enacted by statute. (*See Gonzales*.) The displacement of a statutory condition precedent by a judicially promulgated or administratively required rule is not interpretation—it is legislation by judicial fiat, which courts have no power to undertake.

IV. CPLR 3215 (c) calls for proceedings for the entry of judgment, not merely any activity.

Fourth, ministerial steps, clerical filings, or activities that do not seek adjudication are not "proceedings" for judgment. They do not result in the entry of judgment and do not call upon the court to determine anything. A request for judicial intervention to trigger a settlement conference is a case-management mechanism. It compels no finding, requests no judicial ruling, and seeks no judgment. It does not ask the court to grant relief; it asks only that the court convene a conference to explore settlement prospects. It is a predicate to negotiation—not adjudication.[2] The statute does not call simply for "activity"; it calls for

2. *Zaibak*'s holding conflicts with multiple other rules in the CPLR 3215 (c) jurisprudence. First, the suggestion that the filing of an RJI constitutes the "taking of proceedings" under CPLR 3215 (c) is irreconcilable with long-standing appellate precedent holding that *proceedings directed at one party*

(n. cont'd)

proceedings for the entry of judgment. A "proceeding" within the meaning of CPLR 3215 (c) is an adjudicatory act—one that

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do not excuse the plaintiff from timely pursuing default relief against another in accordance with CPLR 3215 (d). (*See e.g. HSBC Bank USA, N.A. v Cross*, 205 AD3d 779 [2d Dept 2022]; *Private Capital Group, LLC v Hosseinipour*, 170 AD3d 909 [2d Dept 2019]; *US Bank, N.A. v Onuoha*, 162 AD3d 1094, 1096 [2d Dept 2018]; *Deutsche Bank National Trust Co. v Cruz*, 173 AD3d 610 [1st Dept 2019].)

Second, the notion that the mere filing of a request for judicial intervention constitutes "taking proceedings" within the meaning of CPLR 3215 (c) cannot be squared with the Second Department's own rule in some cases that the mandatory foreclosure settlement conference process *tolls—rather* than satisfies—the obligation to timely move for a default judgment. If the RJI itself were deemed a CPLR 3215 (c) proceeding, there would be nothing to toll: the filing of the RJI is precisely what *triggers* the statutorily required CPLR 3408 conference in the first place. Yet the Second Department has repeatedly held that the time within which to move for the entry of a default judgment is tolled during the period when the matter is pending before the foreclosure settlement part (*see e.g. Bank of N.Y., N.A. v Scarso*, 233 AD3d 739, 743 [2d Dept 2024]; *Bank of Am., N.A. v Bhola*, 219 AD3d 430, 432 [2d Dept 2023]), which creates tension with another line of cases. (*See e.g Aurora Loan Servs., LLC v Hiyo*, 2014 NY Slip Op 34079[U] [Sup Ct, Suffolk County 2014], *affd as mod* 130 AD3d 763 [2d Dept 2015]; *HSBC Bank USA, N.A. v Slone*, 174 AD3d 866, 867 [2d Dept 2019]; *U.S. Bank N.A. v Ahmed*, 137 AD3d 1106, 1109 [2d Dept 2016]; *Procco v Kennedy*, 88 AD2d 761, 761-762 [4th Dept 1982], *affd* 58 NY2d 804 [1983].)

Because no party has raised or briefed the "tolling" contention, principles of due process and adversarial presentation preclude the court from reaching it sua sponte (*see Misicki v Caradonna*, 12 NY3d 511, 519 [2009]; *Rosenblatt v St. George Health & Racquetball Assoc., LLC*, 119 AD3d 45, 54 [2d Dept 2014]). Especially when multiple reasonable arguments can be asserted on either side. Including that (i) settlement conferences were not required in this case, as the subject property was not subject to CPLR 3408 conferences (*see US Bank N.A. v Pane*, 237 AD3d 1237 [2d Dept 2025]; *Wilmington Sav. Fund Socy., FSB v Nifenecker*, 236 AD3d 971 [2d Dept 2025]); (ii) CPLR 3408 does not prohibit the making of a motion but merely provides that the same "shall be held in abeyance." (*See* CPLR 3408 [n].) Neither CPLR 3408 (n) nor 22 NYCRR 202.12-a (c) (7) use the word "toll" or state that the time to move for a default judgment shall be tolled; (iii) the legislative history of CPLR 3408 indicates it was expressly designed to provide protections for homeowners and not the lenders (*see generally Marcon Affiliates, Inc. v Ventra*, 112 AD3d 1095, 1096 [3d Dept 2013] [CPLR 3408 and 22 NYCRR 202.12-a were enacted as "protections accorded to homeowners in residential foreclosures"—not to foreclosing plaintiffs]; (iv) given that CPLR 3408 (m) provides for a "presumed" reasonable excuse and only for 30 days after the initial conference, well established canons of statutory construction, such as *expressio unius est exclusio alterius* and others would prohibit the reading of a toll in favor of the lenders for 30 days after the conference, let alone a blanket toll during the entire settlement conference process; (v) evenhanded application of the law and principles of fairness would require that if a defendant is in default pursuant to CPLR 3215 (a), then necessarily, plaintiff has an obligation to take proceedings under CPLR 3215 (c), or alternatively, if a defendant

(n. cont'd)

invokes the court's authority to determine rights or grant judicial relief. Examples include a motion for default judgment, a motion for an order of reference, or any application placing before the court a request to exercise judicial power toward the "entry of judgment."

V. Dismissal under CPLR 3215 (c) is mandatory, and its salutary purpose of forcing diligent prosecution cannot be judicially diluted.

CPLR 3215 (c) provides that where a plaintiff "fails to take proceedings for the entry of judgment within one year after the default," the court "shall dismiss the complaint as abandoned," absent a showing of sufficient cause. This language is mandatory, not permissive. The statute reflects a legislative judgment that dormant claims should not be kept alive indefinitely and that plaintiffs bear the responsibility to prosecute their actions diligently.

In enacting CPLR 3215 (c), the Legislature chose mandatory language—"shall dismiss"—and did not authorize judicial drifts to excuse or overlook noncompliance. Statutory time limits reflect legislative constraint, not judicial flexibility. As the

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is not in default and there is a "toll" for a defendant to file an answer until the completion of conferences, then plaintiff need not take proceedings for entry of judgment (*see Haslett v Haslett*, 25 AD2d 256, 261 [3d Dept 1966] ["What is sauce for the goose is sauce for the gander"]; *but compare e.g. Bank of Am., N.A. v Viener*, 172 AD3d 795 [2d Dept 2019], *with e.g. Bank of N.Y., N.A. v Scarso*, 233 AD3d 739 [2d Dept 2024]; *see also Matter of Alvarez v Annucci*, 38 NY3d 974, 977 [2022] ["courts may not 'legislate under the guise of interpretation' "]; *Diamond v Chakrabarty*, 447 US 303, 317 [1980] ["The choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives. Whatever their validity, the contentions now pressed on us should be addressed to the political branches of the Government, the Congress and the Executive, and not to the courts"]); (vi) whether the legislative amendment to CPLR 3215 (c) in 1962 changing the discretionary nature of the provision to a mandatory requirement stripping away the power of the court to enter judgment contemplated a separate and distinct "equitable" vehicle to exercise discretion to avoid dismissal other than a showing of "sufficient cause." See discussion in *FVX LLC v Robertson* (2025 NY Slip Op 34250[U] [Sup Ct, Kings County 2025]) for the general proposition that "equity follows the law" (*see e.g. Seif v City of Long Beach*, 286 NY 382, 388 [1941] ["equitable powers of the courts may not be invoked to sanction disregard of statutory safeguards and restrictions"]); and (vii) other potential arguments not considered herein including whether any such arguments were expressly considered by the Appellate Division for stare decisis to bind this court. This court looks forward to discussing such contentions in an appropriate case.

Court of Appeals has repeatedly held, "statutory time frames . . . are not options, they are requirements" (*Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 726-727 [2004]).

CPLR 3215 (c) is not discretionary. By its plain text, the Legislature used the mandatory verb "shall." "[T]he court shall not enter judgment but shall dismiss the complaint as abandoned" unless the plaintiff takes proceedings for the entry of judgment within one year of the default or shows sufficient cause. Mandatory language forecloses equitable or implied exceptions. As the Court of Appeals has made clear, where the Legislature has employed the word "shall," (let alone where, as here, the term "shall" is used twice), the duty is absolute. (*See People v Ricken*, 29 AD2d 192, 193 [3d Dept 1968], *affd* 27 NY2d 923 [1970].)

> "Where, as here, a party moving for a default judgment beyond one year from the date of default fails to address any reasonable excuse for its untimeliness, courts may not excuse the lateness and 'shall' dismiss the claim pursuant to CPLR 3215 (c) (see *County of Nassau v Chmela*, 45 AD3d at 722; *Keyes v McLaughlin*, 49 AD2d 974 [1975]; *Di Carlo v Bravo Tours*, 129 AD2d 552 [1987]; *Perricone v City of New York*, 96 AD2d 531, 532 [1983], *affd* 62 NY2d 661 [1984]; *Shepard v St. Agnes Hosp.*, 86 AD2d 628, 630 [1982])." (*Giglio v NTIMP, Inc.*, 86 AD3d 301, 308-309 [2d Dept 2011, Dillon, J.P.].)

CPLR 3215 (c) serves a deliberate *disciplining* function: it furthers the general policy of this State that litigation be diligently prosecuted. (*See* Thirteenth Ann Rep of Jud Council of State of NY [1947] at 221 ["Public policy demands not only that actions be instituted seasonably but also that they be prosecuted with diligence and brought to a close within a reasonable time and in an orderly manner"].) The Legislature crafted this rule precisely to prevent plaintiffs from sitting idle after a defendant has defaulted, allowing stale claims to linger in perpetuity without entry of judgment. (*See* Thirteenth Ann Rep of Jud Council of State of NY at 216 ["The policy of repose underlying the statute of limitations would be defeated if a plaintiff were permitted to postpone action in a default case and thus create an indefinite hiatus in proceedings"].) It is a statute about *movement toward entry of judgment*, not mere maintenance of the action in suspended animation. (*See* 1957 Rep of Temp Commn on Courts to Governor & Legislature of State of NY [1956-1957] at 97 [noting section was "intended to

prevent plaintiffs from unreasonably delaying the termination of an action"].)

Because the statute's purpose is to compel diligence in prosecuting actions to judgment, with the attendant benefit of clearing court backlogs, its effect necessarily evaporates if courts begin carving out judicial exceptions based on sympathetic facts, administrative filings, or post-default settlement procedures. A statute cannot accomplish its design if courts undermine the very condition the Legislature chose to enforce timely pursuit of default judgment. Once courts begin accepting *anything less than the taking of proceedings to obtain a judgment*, they are not "construing" the statute—they are *rewriting* it.

The Legislature selected a bright-line rule because bright lines deter delay. Allowing plaintiffs to satisfy CPLR 3215 (c) through collateral acts—whether administrative filings, RJIs, or generic docket activity—would "fritter away" the statute's force and transform a mandatory discipline into a paper tiger. The Legislature could have written a permissive standard; it did not. It enacted a mandatory dismissal rule keyed to plaintiff's diligence in seeking the entry of judgment.

The judicial system is overrun by foreclosures laying fallow on its dockets, "with the strain on judicial resources ultimately being subsidized by New York taxpayers." (Senate Introducer's Mem in Support of 2022 NY Senate Bill S5473D, enacted as L 2022, ch 821.) Most of these pending cases are on default and a significant amount were abandoned long ago via the plaintiff's inaction. To prevent backlog, the Legislature enacted the abandonment rule of CPLR 3215 (c) to direct dismissals, sua sponte and by default (*Nevling v Chrysler Corp.*, 206 AD2d 221, 225 [2d Dept 1994]). The interdiction of stale cases is a legitimate legislative objective. (*See Sun Oil Co. v Wortman*, 486 US 717, 730 [1988] ["A State's interest in regulating the workload of its courts and determining when a claim is too stale to be adjudicated certainly suffices to give it legislative jurisdiction to control the remedies available in its courts by imposing statutes of limitations"].) Yet foreclosure decisions reveal a stubborn reluctance to enforce the rule as intended.

In short: the statute is deliberately sharp-edged. It exists *because* some litigants would otherwise allow defaulted claims to drift indefinitely, clogging court dockets. To judicially soften or dilute this requirement is to defeat the Legislature's chosen means of enforcing expeditious prosecution. CPLR 3215 (c) is not a technicality—it is a command.

VI. *Zaibak* is not stare decisis as it never considered—let alone rejected—the arguments raised here.

Zaibak and its progeny are not precedentially dispositive under stare decisis because *Zaibak* neither raised nor considered the specific questions presented here. *Zaibak* did not address (1) the statutory chronology under CPLR 3408 and 22 NYCRR 202.12-a and whether a step legally required to occur prior to the default can constitute a "proceeding" taken thereafter; (2) whether its holding reconciles with CPLR 3215 (d); (3) whether the Legislature designed the abandonment law to be obviated by a ministerial calendaring tool created decades later by court rule; or (4) whether an administrative or clerical filing that seeks no adjudication of any issue related to the merits of the case constitutes taking proceedings for the entry of judgment. These express questions were never litigated, briefed, or analyzed in that decision. Stare decisis governs only those issues actually considered and decided, not unstated assumptions. (*See Matter of Hoffmann v New York State Ind. Redistricting Commn.*, 41 NY3d 341, 368 [2023] [prior decision was not stare decisis where it was "silent as to" the specific argument raised in later action, "does not discuss any interpretation of (statute raised in later action), and no party advanced any argument about (later raised statute's) meaning"].) A decision cannot bind later courts on a point it never confronted.

The Court of Appeals has consistently rejected the notion that a court's unexamined inference transforms into rule of law. As *Hoffmann* explains, "a court is [not] 'derelict' for failing to address an argument no one advanced," and silence on a point cannot supply a holding where none was made. (*Id.* at 368.) That is precisely the posture of *Zaibak* and its progeny as it relates to the arguments raised by defendant here.

This is not a novel proposition; rather it is confirmed by the Second Department's own recent jurisprudence including *Zaibak* itself. In *U.S. Bank N.A. v DiGiovanni* (231 AD3d 1077, 1078 [2d Dept 2024]), the Court held that the filing of an RJI requesting settlement conferences did not defeat dismissal for abandonment because it was filed *before* the defendant's default. It was precisely because the party made the argument that under the unambiguous language of CPLR 3215 (c) the proceedings must take place *after* the default. Notwithstanding the same facts being present in *Zaibak*, as the RJI in *Zaibak* was filed on February 3, 2015, *six days before* the defendant's February 9, 2015 default. Nevertheless, the Second Depart-

ment correctly declined to treat *Zaibak* as controlling in *DiGiovanni* because the parties in *Zaibak never addressed the legal significance of an RJI filed before the default.* The same analytic structure appears again in *Federal Natl. Mtge. Assn. v Bandhu* (239 AD3d 708, 710 [2d Dept 2025]), confirming that an RJI filed prior to default cannot cure abandonment and does not constitute "proceedings" under CPLR 3215 (c). Rather than undermining this conclusion, *Zaibak* reinforces it: that the parties' arguments in a case control the disposition of the case.

A court is bound by stare decisis only to the extent the prior appellate decision actually considered and decided the precise legal question later raised. If a proposition was not analyzed, there is no binding holding with respect to that question. (*Compare Colonial City Traction Co. v Kingston City R.R. Co.*, 154 NY 493, 495 [1897] ["It was not our intention to decide any case but the one before us . . . and our opinion should be read in the light of that purpose"], *with Misicki v Caradonna*, 12 NY3d 511, 519 [2009] ["We are not in the business of blindsiding litigants, who expect us to decide their appeals on rationales advanced by the parties, not arguments their adversaries never made"].)

Stare decisis does not extend by speculation to points a prior court might hypothetically have reached had the question been presented. New York jurisprudence has never recognized *sub silentio precedent*. More than a century ago, the Court of Appeals held that "[a] judicial opinion . . . must be read as applicable only to the facts involved and is an authority only for what is actually decided." (*Rolfe v Hewitt*, 227 NY 486, 494 [1920].) That principle has been repeatedly reaffirmed. In *Matter of Empire Ctr. for N.Y. State Policy v New York State Teachers' Retirement Sys.*, the Court of Appeals reiterated that its prior rulings are not "to be read as deciding questions that were not before us and that we did not consider" (23 NY3d 438, 446 [2014]).

Thus, because *Zaibak* never addressed these questions, it cannot control here. Where, as here, an opinion is silent on the interpretive question subsequently presented, it is not binding authority at all. (*See Hoffmann*, 41 NY3d at 368 ["issues that have never been addressed nor squarely decided certainly cannot bind future courts"].) A proposition not actually decided cannot constrain subsequent courts (*see id.* [stare decisis inapplicable to argument which "no party in (prior action) raised and as to which (*prior decision*) is silent"]).

Accordingly, *Zaibak* and its progeny are not stare decisis and cannot preempt the court's obligation to determine the dispositive arguments raised by defendant herein, given that such issues were neither raised nor examined in *Zaibak*. For the reasons set forth above, the court finds plaintiff's reliance on *Zaibak* misplaced.

Any contentions not raised by the parties are not being considered herein.[3]

Conclusion

Because plaintiff did not move for default judgment within one year of the default, and because the filing of an RJI does not satisfy CPLR 3215 (c), dismissal is mandatory. And because *Zaibak* did not consider, much less reject, the arguments presented here—arguments arising from the interplay of CPLR 3215 (c), (d) and 3408 and the proper province of court rules as they relate to statutes—this court is not bound to follow it.

The judiciary does not possess the authority to dilute or recast statutory text in the name of practicality or convenience. The Legislature imposed a bright-line rule: a plaintiff must move toward judgment. The courts may not substitute case-management filings for actual proceedings simply because they occur near the one-year deadline.

Respect for the separation of powers requires adherence to the rule as written. So too does the legitimacy of judicial precedent: stare decisis protects law actually rendered, not assumptions imputed to silence. The cross-motion is granted; the complaint is dismissed pursuant to CPLR 3215 (c); and the notice of pendency (NYSCEF Doc No. 4) is cancelled (*see* CPLR 6514 [a]; *Bayview Loan Servicing, LLC v Starr-Klein*, 193 AD3d 807 [2d Dept 2021]).

Accordingly, it is hereby ordered, that plaintiff's motion is denied; and it is further ordered, that the complaint is dismissed pursuant to CPLR 3215 (c); and it is further ordered,

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3. For the same reason noted in footnote 2, this court will not reach the argument that based on the record before the court, plaintiff served defendant, the sole owner of the subject premises, via the Secretary of State on September 7, 2023, meaning defendant's time to answer expired on October 7, 2023 (NYSCEF Doc No. 120 at 4, para 7), such that the RJI's filing on September 22, 2023 (NYSCEF Doc No. 120 at 4, para 8) occurred prior to defendant's default. Therefore, the RJI's filing cannot, as a matter of law, constitute "tak[ing] proceedings for the entry of judgment within one year after the default" (CPLR 3215 [c]; *see e.g. DiGiovanni*).

that the clerk is directed to cancel notice of pendency filed on June 26, 2023. Ordered, that the cross-motion is granted.

[245 NYS3d 870]

Larry Smith et al., Plaintiffs, v A.O. Smith Water Products Co. et al., Defendants.

Supreme Court, New York County, November 12, 2025

HEADNOTES

Trial — Evidence — Plaintiff's Remote Criminal Convictions and Past Drug Use — Motion in Limine

RESEARCH REFERENCES

By the Publisher's Editorial Staff

Am Jur 2d Witnesses §§ 773, 775, 784, 812, 816, 819–821, 823–826.

Carmody-Wait 2d Presentation of the Case §§ 56:283, 56:285–56:286; Carmody-Wait 2d Testimony of Witnesses §§ 195:103–195:105, 195:116–195:121, 195:126.

NY Jur 2d Evidence §§ 947–948, 951–952.

ANNOTATION REFERENCE

Conviction or acquittal as evidence of the facts on which it was based in civil action. 18 ALR2d 1287.

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APPEARANCES OF COUNSEL

Weitz & Luxenberg PC (*Jason P. Weinstein* of counsel) for plaintiffs.

Clyde & Co US LLP (*Kenneth C. Cooper* of counsel) for Jenkins Bros., defendant.

OPINION OF THE COURT

Hasa A. Kingo, J.

Plaintiffs Larry Smith and Phyllis Smith move in limine for an order precluding the defendants—and in particular trial defendant Jenkins Bros.—from introducing any evidence at trial regarding: (1) Larry Smith's past drug use or substance abuse; and (2) his prior arrests, convictions, or incarceration (including any underlying facts of those crimes). Plaintiffs contend

that Mr. Smith's history of illicit drug use, as well as criminal convictions dating back three decades or more, are irrelevant to any issue in this asbestos personal injury trial and that any minimal probative value is far outweighed by the danger of unfair prejudice. Jenkins Bros. opposes the motion, arguing that this evidence is relevant to Mr. Smith's health, life expectancy, and credibility, and that preclusion would unfairly impede its ability to challenge his testimony.

Background and Procedural History

This action is part of the New York City Asbestos Litigation (NYCAL). Plaintiff Larry Smith alleges he developed lung cancer as a result of exposure to asbestos-containing products for which the defendants, including Jenkins Bros., are responsible. The case is scheduled for trial. In August 2023, Mr. Smith was deposed. During his deposition, he acknowledged that he had been incarcerated on multiple occasions in the early 1990s. He testified that he was convicted "five or six" times in Nassau County during that period, for offenses including criminal possession of stolen property and sale/possession of a controlled substance, serving a total of about six to seven years in prison. These convictions all occurred approximately 30 or more years ago (primarily in the 1990s). Mr. Smith further admitted to past illicit drug use, explaining that his criminal troubles were related to addiction issues, and stated, "Not something I'm proud of, but it happened."

Notably, Mr. Smith did not testify to any conviction for a violent crime. However, Jenkins Bros. asserts in its opposition that public records show Mr. Smith (under a former alias) pleaded guilty to attempted robbery in the second degree in 1981—a conviction predating even the ones he disclosed by roughly a decade. Jenkins maintains that Mr. Smith omitted this 1981 violent felony from his deposition testimony, and it seeks to use that fact to impeach his credibility. Plaintiffs respond that no certified record of any such conviction has been produced, and in any event all of Mr. Smith's convictions (whether in 1981 or the 1990s) are too remote in time to have legitimate bearing on this trial. It is undisputed that after the early 1990s, Mr. Smith has had no further contacts with the criminal justice system.

Following Mr. Smith's deposition, none of the defendants pursued any discovery to obtain documentation of his criminal record. Defendants never demanded authorizations or other-

wise sought to independently verify the details of his convictions or any past drug treatment. Indeed, Jenkins Bros.' counsel has confirmed that the only evidence of Mr. Smith's criminal history in their possession is the plaintiff's own deposition testimony and certain decades-old newspaper clippings referencing the 1981 incident. Defendants likewise did not identify any expert witness to opine on Mr. Smith's history of drug use or its potential effect on his health. Jenkins Bros.' CPLR 3101 (d) expert disclosure lists no expert testimony whatsoever regarding drug or substance abuse. The sole medical expert disclosed (Dr. Stanley Fiel) is expected to testify about asbestos-related diseases and their impact on life expectancy—with no reference to drug use. In sum, there is no expert or medical proof tying Mr. Smith's remote drug history to any issue in this case.

Plaintiffs filed the instant motion in limine on November 10, 2025, seeking to preclude any evidence or reference to Mr. Smith's prior drug use or criminal record. Jenkins Bros. submitted written opposition on November 11, 2025, and the motion is now being addressed by the court prior to jury selection. No other defendant has submitted opposition papers or arguments; however, the relief sought is directed against all defendants.

Arguments

Plaintiffs argue that Mr. Smith's decades-old criminal record and past substance abuse have no legitimate relevance to the issues to be tried—namely, whether defendants' asbestos products caused his illness, the extent of his damages, and the credibility of competing expert evidence. They note that the convictions at issue date back approximately 30 to 40 years and are "too remote to be relevant in this trial." Any probative value they might hold on the issue of Mr. Smith's credibility, plaintiffs contend, is negligible given the extraordinary remoteness and the nature of the offenses, which largely stemmed from youthful drug addiction rather than fraudulent or deceitful conduct. On the other hand, the prejudicial impact of such evidence would be severe: its "sole purpose" would be to embarrass, harass, and smear Mr. Smith before the jury. Plaintiffs emphasize that evidence of illegal drug use or ancient convictions would invite the jury to view Mr. Smith as a bad or irresponsible person, thereby distracting from the merits of the case and depriving him of a fair trial.

Plaintiffs further maintain that Mr. Smith's past drug use is wholly irrelevant to any material fact in dispute. There is no claim in this case concerning Mr. Smith's mental health or substance abuse, nor any expert proof linking his remote drug use to his cancer or life expectancy. Absent such a nexus, evidence of drug use does not "tend to prove the existence or nonexistence of a material fact directly at issue." In plaintiffs' view, Jenkins Bros.' suggestion that prior drug use might have affected Mr. Smith's health or memory is rank speculation unsupported by any disclosed evidence. They note that Jenkins did not comply with CPLR 3101 (d) to obtain a medical expert opinion on the effects of drug use, and no doctor will testify that Mr. Smith's life expectancy or condition was impacted by drug abuse. Lacking any foundation, any reference to drug use serves only to prejudice the jury and should be excluded.

With respect to the criminal convictions, plaintiffs acknowledge that CPLR 4513 permits a witness's prior convictions to be used for impeachment, but stress that this is a discretionary, not absolute, rule. They argue that New York courts routinely preclude remote convictions when they have little bearing on credibility and carry a risk of unfair prejudice. Plaintiffs cite numerous authorities—from the Court of Appeals, the Appellate Division, First Department, and even prior NYCAL trial courts—holding that convictions older than a decade (and certainly those as old as 20-30 years) are generally too stale to be probative of a witness's present credibility. In particular, they highlight *People v Sandoval* (34 NY2d 371, 376 [1974]), where the Court of Appeals recognized that a "[l]apse of time" will diminish the materiality of prior conduct. They also point to Appellate Division, First Department, precedent like *People v Contreras* (108 AD2d 627, 628 [1st Dept 1985]), which reversed a conviction after the trial court indicated it would allow impeachment of a defendant with four convictions 18-20 years old, the appellate court holding those crimes "too remote in time to be truly probative on credibility." Likewise, in *People v Ellis*, the Appellate Division, First Department, noted that the "essence" of *Sandoval*'s rule is the lack of materiality and relevance of old conduct (94 AD2d 652, 652 [1st Dept 1983]). Plaintiffs argue Mr. Smith's situation is directly analogous: convictions three to four decades in the past, arising from addiction-driven behavior, have minimal probative value but a tremendous potential to "unfairly mar his credibility" in the eyes of the jury.

Plaintiffs further rely on civil cases underscoring the prejudicial effect of injecting a party's drug use or criminal history into trial when those matters are not truly at issue. For example, in *Arroyo v City of New York* (171 AD2d 541, 543 [1st Dept 1991]), the Appellate Division, First Department, held that the introduction of portions of a plaintiff's hospital records revealing prior drug abuse "served to deprive plaintiff of a fair trial and clearly had a prejudicial effect on the jury." Plaintiffs also cite *Cronin v Gramercy Five Assoc.* (233 AD2d 263 [1st Dept 1996]), where the Appellate Division, First Department, prevented disclosure of a plaintiff's past drug/alcohol abuse in discovery because no link had been shown between that history and the injuries claimed. In *Alford v City of New York* (116 AD3d 483, 484 [1st Dept 2014]), the same Court refused to compel disclosure of substance-abuse treatment records once the plaintiff withdrew any mental health claims, since the defendants failed to demonstrate that the information was genuinely relevant or necessary to the case (the "interests of justice" did not outweigh the plaintiff's confidentiality rights). By analogy, plaintiffs argue, Mr. Smith's past drug use has not been shown to bear on any claim or defense here—especially as he asserts no psychological injury or ongoing addiction issue—and thus any foray into that topic would be improper and prejudicial. In sum, plaintiffs urge the court to follow the weight of authority precluding remote and collateral matters that offer little beyond character assassination, and to grant the motion so that the trial may focus on the relevant evidence.

Jenkins Bros. opposes the motion, asserting that it has a good-faith basis and legal right to inquire into Mr. Smith's prior drug use and convictions as part of its defense. Jenkins argues first that Mr. Smith's history of drug use is relevant to his health and damages. It analogizes this to a smoking history: just as evidence of decades of cigarette smoking is routinely considered in an asbestos case (as it may affect causation, life expectancy, and damages), Jenkins contends that past illicit drug use "undoubtedly impacts his health" and *could* have contributed to his "past and present" condition, life expectancy, or pain and suffering. Jenkins further suggests that drug use *might* impair memory or cognitive function, positing that Mr. Smith's ability to recall events accurately could be diminished by a history of substance abuse. In its view, the jury is entitled to know about these aspects of Mr. Smith's

health and lifestyle to fully evaluate the causes of his illness, his prior suffering, and the credibility of his testimony.

Jenkins distinguishes the plaintiffs' cited cases as inapposite. For instance, Jenkins points to *Green v City of New York* (281 AD2d 193 [1st Dept 2001]), where prior drug use was deemed relevant in a medical context, and to cases from other departments allowing discovery of substance abuse history when pertinent to physical conditions (*L.T. v Teva Pharms. USA, Inc*., 71 AD3d 1400 [4th Dept 2010] [denying a protective order on alcohol history]; *Akel v Gerardi*, 193 AD3d 476 [1st Dept 2021] [compelling disclosure of psychological history in a medical malpractice case]). According to Jenkins, these cases show that evidence of substance use is not categorically off-limits, but rather can be relevant and admissible when linked to issues in the lawsuit. Jenkins argues that plaintiffs' reading of *Alford v City of New York* is overbroad; it contends that *Alford* merely turned on a failure to outweigh confidentiality concerns after mental health claims were withdrawn, not a blanket rule excluding substance history whenever mental condition is not at issue. Under Jenkins' reasoning, Mr. Smith's drug use history remains a relevant aspect of his overall health profile for the jury's consideration, and no comparable confidentiality or privilege concern exists here (since Mr. Smith's drug use is known and self-admitted).

Regarding Mr. Smith's criminal convictions, Jenkins Bros. argues that these go directly to his credibility as a witness. Jenkins emphasizes the well-established principle that "the credibility of a witness is always in issue," and a witness—including a civil plaintiff—may be confronted with prior criminal or immoral acts that bear on credibility. CPLR 4513 expressly permits proof of a witness's prior conviction "for the purpose of affecting the weight of his testimony," whether by cross-examination or by record of conviction. Jenkins cites *People v Sandoval*, which held that "evidence of prior specific criminal, vicious or immoral conduct should be admitted if the nature of such conduct . . . bear[s] logically and reasonably on the issue of credibility" (34 NY2d at 376). Here, Jenkins contends, Mr. Smith's past crimes—including attempted robbery and possession of stolen property—plainly meet that test, as they reflect a willingness to put his own interests above those of society or his victims. Such conduct, Jenkins argues, is highly probative of a witness's veracity, since it suggests a character that may disregard the oath and truth to serve self-interest (*see Sandoval*, 34 NY2d at 377).

Jenkins strongly disputes the notion that Mr. Smith's convictions are too old to matter. Citing *People v Walker* (83 NY2d 455 [1994]), and other authority, Jenkins notes that there are "no per se rules" requiring exclusion of an older conviction due solely to its age. Courts have frequently permitted impeachment with convictions from 10, 15, or even 20 years before trial. Indeed, Jenkins points out, in numerous cases appellate courts allowed cross-examination on criminal convictions more than a decade old, recognizing that temporal remoteness is only one factor for the trial court's discretion. For example, Jenkins cites *Tripp v Williams* (39 Misc 3d 318 [Sup Ct, Kings County 2013]), which collected cases upholding the use of convictions as old as 15-20 years. Jenkins thus contends that plaintiffs' emphasis on the 30-year span since Mr. Smith's convictions is misplaced; while unusual, such a time gap does not automatically bar the evidence, especially where the crimes are directly relevant to credibility. Jenkins argues that it is ultimately for the jury to decide how Mr. Smith's past affects his believability. It quotes decisions reiterating that credibility determinations are the province of the jury, not the court. To deprive the jury of knowledge of Mr. Smith's prior crimes, Jenkins insists, would be to present a misleadingly sanitized version of his character and deny the defense a fair trial.

In support, Jenkins cites *Sansevere v United Parcel Serv.* (181 AD2d 521 [1st Dept 1992]), where the Appellate Division, First Department, held that a trial court reversibly erred by refusing to let the defense impeach a key eyewitness with his criminal record. There, the trial judge had deemed it "grossly unfair" to question the witness about convictions unrelated to the accident, but the appellate court disagreed, ruling that the defense was entitled to expose that witness's background so the jury would not be left believing "no reason whatsoever to doubt [his] veracity" (*id.* at 522). Analogizing to *Sansevere*, Jenkins contends that if it is barred from probing Mr. Smith's criminal past, the jury will be improperly led to believe he has a clean record, thereby granting him unearned credibility. Jenkins also notes that Mr. Smith is "the most crucial witness" in this trial—as the plaintiff, his testimony about his asbestos exposure, work history, and health is central—and preventing full impeachment would severely prejudice the defense. In Jenkins' view, the probative value of hearing about Mr. Smith's convictions (to accurately gauge his truthfulness) far outweighs any unfair prejudice, particularly since the jury in a civil trial

will be instructed to consider such evidence only as to credibility. Jenkins emphasizes that at least one of Mr. Smith's crimes (attempted robbery) was of a violent and "immoral" nature, and that Mr. Smith failed to disclose it initially. That omission, Jenkins argues, makes it all the more legitimate to question him at trial—both to reveal the full extent of his past wrongdoing and to highlight the incomplete candor of his deposition testimony. According to Jenkins, so long as there is a good-faith factual basis for the inquiry (here, the newspaper records and Mr. Smith's own admissions), New York law permits cross-examination on any prior vicious or criminal act relevant to credibility (*Murphy v Estate of Vece*, 173 AD2d 445 [2d Dept 1991]). For all these reasons, Jenkins Bros. urges that plaintiffs' motion be denied in its entirety.

Discussion

After careful consideration, the court grants plaintiffs' motion in limine. The court concludes that evidence of Mr. Smith's long-past drug use and criminal convictions is inadmissible in this trial. Such evidence fails the twin tests of relevance and fairness that govern admissibility. The governing legal standards in New York—as reflected in the CPLR, Court of Appeals precedent, and Appellate Division, First Department, case law—all counsel in favor of preclusion under the circumstances at bar. The court addresses in turn the two categories of evidence at issue: (1) Mr. Smith's history of drug or substance abuse, and (2) his prior criminal convictions.

I. Evidence of Past Drug Use

It is fundamental that to be admissible, evidence must be relevant, meaning it tends to prove or disprove a fact material to the case (*People v Robinson*, 143 AD3d 744, 746 [2d Dept 2016]). Here, Mr. Smith's prior drug use (dating back to the 1980s-1990s) does not bear on any material fact in this asbestos products liability action. The core issues for trial involve whether exposure to defendants' asbestos-containing products caused Mr. Smith's illness, whether defendants were negligent or otherwise liable, and the extent of his injuries and damages. Mr. Smith's personal history of drug use or addiction decades ago does not make any fact on liability or damages more or less probable. It has no logical connection to his occupational exposure to asbestos, the medical causation of his lung cancer, or the extent of his asbestos-related injuries. Jenkins Bros.' speculative assertions notwithstanding, there is no evidence

that Mr. Smith's remote drug use contributed in any way to his developing cancer or impacts his prognosis. Indeed, Jenkins disclosed no expert testimony linking drug abuse to Mr. Smith's condition or life expectancy. Absent competent medical proof of such a link, the etiology of Mr. Smith's cancer will be determined by evidence of asbestos exposure and perhaps other recognized factors (such as smoking history, if any)—not unsupported conjecture about drug use. Simply put, evidence that Mr. Smith used illegal drugs many years ago does not "tend to prove the existence or nonexistence of a material fact" in dispute.

Nor is there any demonstrated relevance of past drug use to Mr. Smith's credibility or memory. Jenkins argues that drug use "undoubtedly" impacts memory and the ability to recall. But Jenkins proffers no scientific basis or factual showing that Mr. Smith has any cognitive impairments related to drug use. Mr. Smith is not alleged to be under the influence of any substance while testifying, nor to suffer any lingering mental effects of addiction. A decades-ago history of substance abuse, without more, does not reasonably indicate that a witness is unable to recollect events or will testify inaccurately. To allow impeachment on this ground would effectively invite the jury to engage in rank speculation that because Mr. Smith once used drugs, his perception or memory must be unreliable. That is not a valid inference absent evidence tying past drug abuse to some lasting mental incapacity. New York courts have recognized that not every bad act in a witness's past is relevant to credibility; the conduct must have a reasonable bearing on veracity or accuracy (*see e.g. Badr v Hogan*, 75 NY2d 629, 634 [1990] [cross-examination on prior misconduct "must have some tendency to show moral turpitude to be relevant on the credibility issue"]). Here, Mr. Smith's past drug use does not inherently demonstrate moral turpitude or dishonesty—it reflects a personal vice or addiction, not a propensity to lie. In fact, the Court of Appeals in *Sandoval* explicitly observed that crimes or conduct stemming from addiction (such as drug or alcohol abuse) "may have lesser probative value as to lack of in-court veracity" (34 NY2d at 377). Mr. Smith's admitted history falls squarely in that category: acts "occasioned by addiction or uncontrollable habit" are not strong indicators of a witness's truthfulness. (*Id.*) Thus, the probative value of Mr. Smith's prior drug use on the issue of credibility is minimal at best.

Even assuming arguendo that Mr. Smith's drug use had some marginal relevance, relevance is not always enough to render evidence admissible (*People v Cortez*, 22 NY3d 1061 [2014]). Trial courts have broad discretion to exclude evidence when its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or undue delay (*id*.; *see also People v Scarola*, 71 NY2d 769, 777 [1988]). Here, any slight probative worth of decades-old drug use is dwarfed by its capacity to inflame the jury and divert attention from the issues that matter. Evidence that a party used illegal drugs can trigger visceral negative reactions. A juror learning that Mr. Smith abused drugs in his past might unjustly regard him as irresponsible, immoral, or the "author of his own misfortune," even though his drug use has no causal relationship to his asbestos disease. There is a substantial risk that such evidence would "smear" Mr. Smith's character in the eyes of the jury, inviting them to judge him for past misdeeds rather than the facts of the case. This is precisely the sort of unfair prejudice that CPLR 4011 and our evidentiary rules guard against. The Appellate Division, First Department, has long recognized the danger; in *Arroyo v City of New York*, for example, the defendant had introduced hospital-record entries about the plaintiff's prior drug abuse, which the Appellate Court condemned as having a clear prejudicial effect that deprived the plaintiff of a fair trial. The prejudicial impact in *Arroyo* stemmed from painting the plaintiff as a drug user in front of the jury—a tactic that is equally prejudicial here and equally irrelevant to the issues at bar.

Jenkins Bros.' purported justifications for using the drug history are unavailing. Its analogy to smoking history fails because, unlike smoking (a known cause of lung disease), past use of illicit drugs has not been shown to bear on the causation or progression of Mr. Smith's cancer. If anything, Jenkins' argument underscores why an expert was required: the effect of drug use on health or life expectancy is a technical matter for medical testimony, not lay conjecture. Since no expert support was disclosed or offered, Jenkins cannot bootstrap a medical argument into a jury prejudice one. The attempt to liken drug use to smoking is thus not only scientifically unsupported in this case, but also a distraction from the real evidence on causation.

Jenkins' suggestion that the jury needs to consider drug use as part of Mr. Smith's "health prior to diagnosis" or "past pain

and suffering" is similarly speculative and unfair. There is no evidence that Mr. Smith's past drug use caused him any specific health impairment relevant to his damages claim. His damages relate to cancer and asbestos-related illnesses, not to any drug dependency or its consequences. Introducing evidence about a wholly unrelated form of past "self-harm" (if drug abuse can be so characterized) would likely confuse the issues—implying, without basis, that jurors should discount Mr. Smith's suffering or life expectancy because he may have engaged in unhealthy behavior long ago. In *Cronin v Gramercy Five Assoc.*, the Appellate Division, First Department, barred discovery of the plaintiff's substance abuse history precisely because no link was established between that history and the injuries claimed (emotional distress after an accident); allowing such evidence would have been a fishing expedition and a source of prejudice rather than enlightenment (233 AD2d at 263). The same logic applies: absent a demonstrated nexus, inquiry into substance abuse serves only to prejudice and confuse the main issue and mislead the jury.

Finally, it bears noting that plaintiffs are not claiming any damages related to drug addiction (such as costs of rehabilitation, lost employment due to drug use, etc.), nor placing Mr. Smith's mental health in controversy. Thus, the concerns present in some cases cited by Jenkins—where a plaintiff's substance abuse or mental health records were sought because of a specific claim (*see Alford*, 116 AD3d at 484; *Akel*, 193 AD3d at 476)—are not present here. To the contrary, as in *Alford*, Mr. Smith's substance abuse history is collateral to this litigation. The court finds that Jenkins has failed to demonstrate any concrete relevance of that history. Without such a showing, the only consequence of introducing drug use evidence would be unfair prejudice. Because any probative value is remote and conjectural, and the danger of prejudice is clear and significant, the court exercises its discretion to exclude evidence of Mr. Smith's prior drug or substance use. This ruling is consistent with the Court of Appeals' admonition that trial courts should be guided by "common sense and fairness" in evaluating such matters and avoid undue excursions into collateral issues (*People v Walker*, 83 NY2d 455, 463 [1994]; *People v Duncan*, 46 NY2d 74, 80 [1978]). The probative/prejudicial balance tips decidedly in favor of preclusion in this instance.

II. Impeachment by Remote Criminal Convictions

The second branch of the motion seeks to preclude Jenkins (and the other defendants) from introducing or referencing Mr.

Smith's prior criminal convictions, all of which date from approximately 30 or more years ago. The legal framework for this issue is CPLR 4513 and the case law governing use of convictions to impeach credibility. CPLR 4513 provides that a person who has been convicted of a crime "is a competent witness; but the conviction may be proved, for the purpose of affecting the weight of his testimony, either by cross-examination . . . or by the record." By its terms, the rule permits impeachment with convictions, but it does not mandate that all convictions must be admitted; the trial court retains discretion to exclude such evidence in appropriate circumstances. Evidence of a conviction may be excluded if it has no relevance to the truthfulness of the witness's planned testimony or is being presented primarily to turn the jury against that witness (*see Lopez v City of New York*, 192 AD3d 634, 639 [1st Dept 2021]). In other words, if a conviction is irrelevant or only marginally relevant to a witness's credibility, and seems proffered chiefly to smear the witness's character, the court acts within its discretion to preclude it (*see Acunto v Conklin*, 260 AD2d 787, 790 [3d Dept 1999] [upholding trial court's preclusion of plaintiff's prior conviction where it was not relevant to any issue in the trial]).

There is no doubt that credibility is always at issue when a party testifies, and New York courts generally allow broad cross-examination on matters bearing on credibility. This includes, as a general rule, the fact of criminal convictions or specific immoral acts that suggest the witness's lack of veracity or dishonesty (*see e.g. Badr v Hogan*, 75 NY2d at 634 [a witness may be questioned about prior vicious or criminal acts that indicate the witness to be unworthy of belief, provided there is a good-faith basis]; *1515 Summer St. Corp. v Parikh*, 13 AD3d 305, 307 [1st Dept 2004] [same, citing *Sansevere* and *Badr*]). In criminal cases, the procedure of a *Sandoval* hearing exists to balance the probative value of a defendant's prior crimes against the risk of undue prejudice if the defendant testifies. Although this is a civil case (and Mr. Smith is a plaintiff, not a criminal defendant), the court finds the *Sandoval* principles instructive because they articulate the same balancing that a civil trial court should undertake under common-law evidentiary discretion. *People v Sandoval* teaches that the court must weigh the relevance of prior crimes to credibility against the possibility of undue prejudice disproportionate to the probative value of the evidence of prior crimes (34 NY2d at 375). Among the key considerations identified in

Sandoval are the nature of the crimes, their bearing on honesty, and their remoteness in time (*id.* at 376-377). The Court of Appeals in *Sandoval* notably cautioned that "[l]apse of time" will "affect the materiality if not the relevance of previous conduct" (*id.* at 376). The Court also warned against evidence which has no purpose other than to show a defendant's "criminal bent or character," as that would be improper propensity evidence that could sway a jury to disbelieve or punish the witness for past crimes rather than judge the testimony on its merits (*id.* at 376-377).

Applying these standards here, the court concludes that Mr. Smith's prior convictions—all of which are roughly 30 years old or older—must be excluded because (a) their probative value on the issue of credibility is extremely low due to their remoteness and the circumstances of the offenses, and (b) whatever slight probative worth they might hold is far outweighed by the danger of unfair prejudice to the plaintiffs' right to a fair trial.

The sheer antiquity of Mr. Smith's convictions greatly diminishes their relevance to his credibility today. It appears that Mr. Smith's most recent conviction was in the mid-1990s, approximately 30 years ago. One conviction (the 1981 attempted robbery) is over 40 years old. Mr. Smith was in his early adulthood at the time of these offenses; he is now in his late 60s. Since the 1990s, by all indications, he has led a law-abiding life. When a person has lived an entire generation without further transgressions, the inference that an old conviction reflects on their current propensity to tell the truth becomes tenuous. As the Appellate Division, First Department, has observed, when past convictions are "sufficiently remote in time," it may be concluded that they "should have had no substantive effect upon [the witness's] credibility" (*People v Ellis*, 94 AD2d 652, 652 [1st Dept 1983]). This court reaches that conclusion here. A conviction from 30 or 40 years ago is simply too far removed from the present to shed reliable light on Mr. Smith's character for truthfulness in 2025. People can and do change over decades; the law recognizes that the probative linkage between past misdeeds and present credibility attenuates with time (*Sandoval*, 34 NY2d at 376).

To be sure, there is no absolute "time bar"—New York does not impose a strict cutoff beyond which a conviction is automatically inadmissible. Courts have discretion, and some cases have allowed impeachment with older convictions in par-

ticular circumstances. Jenkins correctly notes that, for example, a 15-year-old conviction might be deemed usable if highly relevant and if the witness's credibility is critical. However, we are far beyond those bounds here. As plaintiffs aptly cite, no New York appellate court has approved the use of a conviction as old as Mr. Smith's for impeachment. The decision in *Tripp v Williams*, a well-reasoned trial court opinion, confirmed that exhaustive research found no "appellate decision that has permitted the use of a criminal conviction . . . where the conviction was 25 years old" (39 Misc 3d 318, 328 [Sup Ct, Kings County 2013]). Mr. Smith's convictions exceed that 25-year threshold. In *Tripp*, Justice Battaglia noted that when a conviction becomes so stale, "[t]he probative value as to credibility under such circumstances is substantially diminished" and cannot justify the potential prejudice. (*Id.*) This view is echoed by many other courts. For example, in *People v Contreras*, the Appellate Division, First Department, held it was error to allow impeachment with convictions 18-20 years old, deeming them too remote to be "truly probative on credibility" (108 AD2d at 628). In *People v Young*, the Appellate Division, Third Department, similarly noted that convictions 15 years or older were generally found too prejudicial and not allowed (249 AD2d 576, 581 [3d Dept 1998]). And our own Appellate Division, First Department, in *People v Pippin* approved the exclusion of a 12-year-old conviction as too remote (67 AD2d 413, 418 [1st Dept 1979]). The pattern in the case law is clear: while not an absolute rule, the more distant the conviction, the more skeptical courts are of its probative value. Mr. Smith's convictions, being three to four decades old, lie well beyond the range that courts have typically found acceptable, especially in the absence of intervening misconduct.

It is also significant that Mr. Smith's prior crimes, by their nature, do not directly implicate truth-telling in the way that, for instance, perjury, fraud, or forgery would. His convictions (as disclosed) were for possession of stolen property and drug offenses; the one additional offense Jenkins identifies is attempted robbery. These are indeed crimes reflecting "immoral or vicious" acts to an extent—notably the theft-related crimes could indicate dishonesty or placing self-interest above the law. Under *Sandoval*, crimes involving theft or larceny may bear on credibility because they suggest a willingness to deliberately flout societal norms for personal gain, which might translate into a willingness to lie under oath. However, even that infer-

ence has limits. *Sandoval* itself drew a distinction between crimes of calculated dishonesty and crimes stemming from addiction or violence unaccompanied by deception (34 NY2d at 376-377). Mr. Smith's crimes appear to fall in a gray area: the stolen property offense suggests a form of theft (hence dishonesty), while the drug possession/sale offenses are more reflective of addiction-related conduct, which *Sandoval* indicated carry "lesser probative value as to . . . veracity." (*Id.* at 377.) Attempted robbery is a serious crime and involves larcenous intent coupled with potential violence, but here it is so old (from 1981) that its probative value is extremely attenuated. Moreover, it resulted in a plea to a lesser charge; we have scant details beyond the fact of the conviction. The court is not persuaded that these particular convictions, given their nature and vintage, provide meaningful insight into whether Mr. Smith is likely to testify truthfully. In contrast, the potential of this evidence to prejudice the jury is profound—a point the court turns to now.

Impeachment with prior convictions always carries some risk of prejudice, insofar as a juror might misuse the information (e.g., to conclude the witness is a generally bad person or has a propensity to commit wrongdoing). In a civil trial, the concern is that jurors might discredit a plaintiff's claim or character not based on the facts of the case, but due to unrelated past crimes. This is especially true when the crimes are dramatic or inflammatory—for instance, a violent felony like robbery. Here, allowing Jenkins Bros. to expose that Mr. Smith was convicted of attempted robbery in the early 1980s could very well cause jurors to view him with suspicion or distaste unrelated to the merits of his asbestos claim. They might improperly infer, "If he tried to rob someone, he might be capable of lying to us," or even punish him in their verdict for being a felon. The law strives to prevent such propensity-based reasoning. As the Court of Appeals admonished, evidence should not be admitted for the sole purpose of showing a witness's "criminal bent or character" (*Sandoval*, 34 NY2d at 376-377). Yet that is essentially what Jenkins seeks to do: highlight Mr. Smith's old criminal past to suggest he is not worthy of belief. At bottom, Jenkins' argument is that once a person has committed crimes, they are forever tainted as less credible and the jury should know it. But that is an overbroad and prejudicial proposition, especially after so much time has elapsed. The prejudice is amplified by the remoteness: the jury may wonder

why such ancient history is being brought up and infer that "where there's smoke, there's fire"—i.e., Mr. Smith must have a long track record of bad behavior that the court is allowing them to hear, so he must be untrustworthy. This inference would be far out of proportion to the actual probative worth of the evidence.

Furthermore, introducing these convictions would necessitate a detour into collateral matters that could confuse the jury and waste time. Mr. Smith's testimony would have to explain the circumstances of convictions from the 1980s/1990s, potentially leading to minitrials about events from a lifetime ago. This would not only prolong the proceedings but also risk shifting the focus from defendants' conduct (allegedly exposing Mr. Smith to asbestos) to Mr. Smith's own past conduct. The Court of Appeals has explicitly held that even relevant impeachment evidence may be excluded to avoid undue exploration of collateral matters (*People v Duncan*, 46 NY2d at 80). Allowing Jenkins to delve into each of Mr. Smith's convictions (dates, nature, his alias, etc.) would undoubtedly sidetrack the trial with collateral issues and possibly confuse jurors about what they are supposed to decide. This is another facet of undue prejudice and trial inefficiency that weighs against admission.

The court acknowledges Jenkins Bros.' reliance on *Sansevere* and similar cases emphasizing a defendant's right to impeach a witness for credibility. However, those cases are distinguishable. In *Sansevere*, the witness whose criminal record was at issue was an eyewitness to the accident central to that case, and the trial court had completely barred any mention of his multiple convictions, thereby misleading the jury into thinking he had a clean background. The Appellate Division, First Department, found that to be an abuse of discretion in that scenario—effectively, the jury was deprived of highly relevant information bearing on the reliability of a key third-party witness's account. *Sansevere* does not stand for the proposition that all convictions, no matter how old or tangential, must be admitted. It stands for the proposition that a trial court should not foreclose legitimate lines of impeachment that could materially affect a jury's view of a critical witness's credibility. Here, unlike in *Sansevere*, we are dealing with extremely remote convictions and a party-witness whose credibility can be adequately assessed through other means. Mr. Smith will be subject to cross-examination on many fronts (inconsistencies

in his statements, the specifics of his work history, potential bias due to his interest in the case's outcome, etc.). The jury will not be under the illusion that he is saintly or beyond reproach; they will judge his credibility by observing his demeanor and comparing his testimony against other evidence. The absence of his 30-year-old criminal record will not "mislead" the jury—indeed, given its remoteness and irrelevance to the facts, the jury would likely give it little weight even if allowed. But the far greater danger is that including it would inject an improper basis for discrediting Mr. Smith (his past character rather than his present testimony), or for diminishing his claim (jurors might subconsciously devalue the compensation for someone with a checkered past). The trial court's duty is to ensure a fair trial, and that includes protecting against evidence whose primary effect would be to "deprive [a] plaintiff of a fair trial" (*Gorman v Goldman*, 36 AD2d 767, 767 [2d Dept 1971]). In this court's assessment, admitting Mr. Smith's ancient convictions would do just that—deprive him of a trial based on the merits of his case, by unfairly prejudicing the jury.

It is also noteworthy that one of the convictions Jenkins is most eager to introduce—the 1981 attempted robbery—was not disclosed by Mr. Smith at deposition. Jenkins argues that this omission itself demonstrates why the jury must hear about it, implying that Mr. Smith may have intentionally concealed a particularly unsavory part of his past. The court is not persuaded by this bootstrap argument. First, it appears Mr. Smith answered all questions asked of him at deposition; he admitted multiple convictions and incarceration. He was not directly asked about 1981 or any alias (the question of how the topic was framed is unclear in the record before the court). There is no evidence that he deliberately lied—he may well have misunderstood or forgotten that very old conviction, especially if it occurred under a different name over 40 years ago. In any event, even if the omission were intentional, using it at trial would create a sideshow about whether Mr. Smith tried to hide a conviction, which then invites explanation or rebuttal. This distracts from the main issues. Moreover, the omission argument is somewhat circular: it posits that because he didn't mention a remote conviction, that makes the remote conviction relevant to his credibility. But if the conviction itself is irrelevant or too prejudicial (which is this court's finding), then his failure to recall or mention it is likewise of minimal probative

value and cannot independently justify its admission. The better course is to avoid litigating a collateral question (did plaintiff fully disclose his priors?) and keep the focus on the substantive evidence.

Finally, the court must consider the balance between the right of a civil defendant to impeach a witness and the right of the plaintiff to a fair trial on the merits. New York law certainly affords a civil litigant "broad authority to use the criminal convictions of a witness to impeach . . . credibility," but it simultaneously holds that "the nature and extent of cross-examination, including with respect to criminal convictions, remains firmly within the discretion of the trial court" (*Ubiles v Halliwell-Kemp*, 167 AD3d 1511, 1512 [4th Dept 2018]).

Here, the court has exercised its sound discretion to limit cross-examination in a manner that serves the interests of justice. The ordinary principles of common sense and fairness (*Walker*, 83 NY2d at 463) dictate that dragging a plaintiff's 30- to 40-year-old convictions into an asbestos trial will do far more harm than good to the truth-seeking process. The court is mindful that the jury's role is to assess credibility, but it is the court's role to ensure the jury receives evidence that will genuinely help that assessment rather than distort it. The jury will have "reason to doubt" a witness's veracity, in the *Sansevere* phrase, whenever there is legitimate impeachment evidence. In this case, there will be ample opportunity for Jenkins Bros. to challenge Mr. Smith's credibility through legitimate means—inconsistent statements, the implausibility of certain assertions if any, bias, interest in the outcome, etc. Excluding these ancient convictions does not render Mr. Smith immune from challenge; it simply removes an unfair and only marginally probative line of attack. The Appellate Division, First Department's decision in *People v Contreras* is instructive: the trial court there sought to allow 18- to 20-year-old convictions but was reversed, the Appellate Court noting that the convictions' age made them not truly probative of credibility (108 AD2d at 628). If convictions two decades old were found to add so little to a jury's evaluation of a witness's honesty that their admission was deemed error, then certainly convictions three to four decades old should be viewed with even greater skepticism.

In sum, considering all the factors—the extreme remoteness of the convictions, their limited bearing on veracity (especially those related to addiction), the high risk of prejudice, the likeli-

hood of confusing or distracting the jury, and the availability of other means to assess credibility—the court concludes that evidence of Mr. Smith's prior criminal convictions must be excluded. This ruling is consistent not only with the *Sandoval* balancing test applied by analogy, but also with numerous New York precedents. The Court of Appeals and the Appellate Division, First Department, have repeatedly upheld trial courts in excluding or limiting impeachment with prior crimes where the circumstances warranted it, emphasizing fairness and the avoidance of undue prejudice over a rigid adherence to the admissibility of anything labeled "credibility" evidence (*see People v Walker*, 83 NY2d at 463 [trial courts must exercise discretion guided by fairness]; *People v Duffy*, 36 NY2d 258, 262 [1975] [even where prior conviction is technically admissible, the trial court may exclude it if probative value is outweighed by danger of prejudice or confusion]; *People v Duncan*, 46 NY2d at 79-81 [court may exclude impeachment evidence to prevent diversion into collateral matters]). The court's ruling today falls well within the ambit of those principles. It bears emphasis that no party has an absolute right to impeach with every prior conviction; the right is a qualified one, tempered by the demands of justice. Here, justice demands that Mr. Smith's trial be decided on relevant, material facts—not on jurors' potential bias against him as a former addict or ex-felon.

For all the foregoing reasons, the court finds that the evidence which Jenkins Bros. seeks to introduce—Mr. Smith's decades-old drug use and criminal convictions—is inadmissible due to its minimal probative value and substantial risk of unfair prejudice. The governing standards in the Appellate Division, First Department, and New York law generally support the exclusion of such remote and collateral matters in order to ensure a fair trial on the merits. The court is not persuaded by Jenkins Bros.' arguments to the contrary; indeed, even the cases relied upon by Jenkins recognize the trial court's discretion and the need for a logical nexus between the evidence and the issues in the case—a nexus absent here. Mr. Smith's credibility can be effectively tested without reference to his life choices over a generation ago, and the jurors can fairly judge his claims without the shadow of unrelated criminal stigma.

Accordingly, it is hereby ordered that plaintiffs' motion in limine is granted in its entirety; and it is further ordered that

defendants (including Jenkins Bros.) are hereby precluded from offering any evidence, testimony, or reference at trial to: (1) plaintiff Larry Smith's past drug or substance use, abuse, or addiction; and (2) any arrest, criminal conviction, or period of incarceration of Mr. Smith, or any underlying facts relating thereto; and it is further ordered that this preclusion encompasses the attempted robbery conviction of 1981 and all convictions from the 1990s, as well as any uncharged misconduct related to drug use or other criminal acts; and it is further ordered that should defendants believe that plaintiffs "open the door" to such evidence through some unforeseen testimony, they must first seek permission from the court outside the presence of the jury before making any reference to these matters; and it is further ordered that the parties shall confine their proof to the truly relevant issues in dispute. By doing so, the court ensures that the jury's verdict will rest on the evidence of asbestos exposure, causation, and damages—not on improper character judgments.

Abstracts of Other Court Cases Selected for Online Publication

1 People v I.Y., 2026 NY Slip Op 50769(U). Crimes—Right to Speedy Trial—Determination of Offense Charged in Accusatory Instrument. (Crim Ct, NY County, May 21, 2026, Coleman, J.)

2 People v Ray (Joseph), 2026 NY Slip Op 50770(U). Crimes—Bill of Particulars. (Crim Ct, NY County, May 20, 2026, Coleman, J.)

3 Xie v 25 Fayette LLC, 2026 NY Slip Op 50771(U). Landlord and Tenant—Warranty of Habitability—Unsafe Condition Caused by Act of Third Party. (Civ Ct, Kings County, Apr. 27, 2026, Berman, J.)

4 Collins v Pfizer, Inc., 2026 NY Slip Op 50772(U). Courts—Jurisdiction—Long-Arm Jurisdiction—Transaction of Business within State—Discovery. Courts—Forum Non Conveniens. (Sup Ct, NY County, May 21, 2026, Schumacher, J.)

5 People v Martinez (Marcos), 2026 NY Slip Op 50773(U). Motions and Orders—Reargument or Renewal—Timeliness. Motor Vehicles—Chemical Tests—Consent—Blood Seizure Application. (Putnam County Ct, May 15, 2026, Molé, J.)

6 Sertesen v JDS Dev. Group LLC, 2026 NY Slip Op 50774(U). Indemnity—Contractual Indemnification—Intended Third-Party Beneficiary. (Sup Ct, NY County, May 18, 2026, Chin, J.)

7 Oliva v Mohommed, 2026 NY Slip Op 50775(U). Landlord and Tenant—Summary Proceedings—Sufficiency of Rent Demand. Landlord and Tenant—Summary Proceedings—Nonpayment Proceeding—Effective Date of Lease. (Civ Ct, Kings County, May 19, 2026, Haskin, J.)

8 KB v CP, 2026 NY Slip Op 50776(U). Attorney and Client—Fiduciary Duty—Diversion of Estate Assets. Negligence—Duty—Diversion of Estate Assets. (Sup Ct, Richmond County, Apr. 16, 2026, Castorina, Jr., J.)

9 Channel Partners Capital, LLC v Cookie Factory, LLC, 2026 NY Slip Op 50777(U). Contracts—Breach or Performance of Contract. Suretyship and Guarantee—Scope of Guarantee. (Sup Ct, Rensselaer County, May 22, 2026, Mendez, J.)

10 LaBarca, Matter of, 2026 NY Slip Op 50778(U). Costs—Counsel Fees—Reduction. (Sur Ct, Nassau County, May 18, 2026, Sullivan, J.)

11 145 Rosedale Ave. LLC v Bank of Am., N.A., 2026 NY Slip Op 50779(U). Vendor and Purchaser—Bona Fide Purchaser—Summary Judgment. (Sup Ct, Richmond County, Apr. 22, 2026, Castorina, Jr., J.)

12 Bender v Jewelry Designer Showcase Inc., 2026 NY Slip Op 50780(U). Disclosure—Discovery and Inspection—Motion to Compel Deposition. (Sup Ct, Richmond County, Apr. 24, 2026, Castorina, Jr., J.)

13 DeSouza-Schachner v Stoykov, 2026 NY Slip Op 50781(U). Motions and Orders—Reargument or Renewal—Liability. (Sup Ct, Richmond County, Apr. 29, 2026, Castorina, Jr., J.)

14 Nosrat LLC v Banaro, 2026 NY Slip Op 50782(U). Landlord and Tenant—Summary Proceedings—Restoration to Calendar upon Completion of Repairs. (Civ Ct, Kings County, May 22, 2026, Weisberg, J.)

15 DeMorato v Maggid Ventures, LLC, 2026 NY Slip Op 50783(U). Trusts—Constructive Trust—Mortgage Rescue Scheme. Pleading—Sufficiency of Pleading—Fraud. (Sup Ct, Richmond County, May 19, 2026, Marrone, Jr., J.)

16 Ferraras v Chowdhury, 2026 NY Slip Op 50784(U). Attorney and Client—Frivolous Conduct—False Statement in Attorney Affirmation—Sanctions. (Sup Ct, Kings County, May 24, 2026, Maslow, J.)

17 McKenzie v Dario, 2026 NY Slip Op 50785(U). Motions and Orders—Notice of Motion—Service by Mail. (Sup Ct, Bronx County, May 26, 2026, Hummel, J.)

18 Ost v Convissar, 2026 NY Slip Op 50786(U). Courts—Small Claims—Jurisdiction—Replevin. Replevin—Recovery of Chattel—Temporary Plastic Partial Denture. (Civ Ct, NY County, Apr. 9, 2026, Li, J.)

19 Redacted, Matter of, v Redacted, 2026 NY Slip Op 50787(U). Property—Lost Property—Recording Device. (Sup Ct, Kings County, May 26, 2026, Maslow, J.)

20 J.L. v R.L., 2026 NY Slip Op 50813(U). Parent, Child and Family—Support—Emancipation. (Sup Ct, Nassau County, May 1, 2026, Goodstein, J.)

21 S.C. v P.C., 2026 NY Slip Op 50814(U). Marriage—Annulment—Mental Illness—Standing of Decedent's Children. (Sup Ct, Nassau County, Apr. 30, 2026, Goodstein, J.)

22 Northfield Bank v Credenza Kitchens Inc., 2026 NY Slip Op 50815(U). Judgments—Summary Judgment—Motion for Summary Judgment in Lieu of Complaint. (Sup Ct, Richmond County, May 4, 2026, Castorina, Jr., J.)

23 Thomas v Mohammad Ali, LLC, 2026 NY Slip Op 50816(U). Negligence—Sidewalks—Location of Plaintiff's Fall. (Sup Ct, Bronx County, May 27, 2026, Hummel, J.)

24 Wilmington Sav. Fund Socy., FSB v Ramos, 2026 NY Slip Op 50817(U). Mortgages—Foreclosure—RPAPL 1304 Defense—Waiver. (Sup Ct, Suffolk County, May 27, 2026, Hackeling, J.)

25 State Farm Fire & Cas. Co. v M. Marin Restoration Inc., 2026 NY Slip Op 50818(U). Trial—Note of Issue and Statement of Readiness—Motion to Vacate. Judgments—Summary Judgment—Extension of Time. (Sup Ct, Richmond County, May 6, 2026, Castorina, Jr., J.)

26 Morataya v 183 Lincoln Ave. LLC, 2026 NY Slip Op 50819(U). Trusts—Constructive Trust—Fiduciary Relationship. Frauds, Statute of—Conveyances and Contracts Concerning Real Property. (Sup Ct, Westchester County, May 27, 2026, Ondrovic, J.)

27 B.E. v S.E., 2025 NY Slip Op 52233(U). Actions—Consolidation and Severance—Intertwined Issues—Confidentiality. (Sup Ct, NY County, Aug. 13, 2025, Chesler, J.)

28 J.G. Wentworth Originations, LLC, Matter of, v Prudential Ins. Co. of Am., 2026 NY Slip Op 50820(U). Assignments—Validity—Structured Settlement. (Sup Ct, Rensselaer County, May 27, 2026, Mendez, J.)

29 Melrose Fintech Ventures, LLC v MarineMax Northeast, LLC, 2026 NY Slip Op 50821(U). Sales—Warranties—Breach—Expiration of Warranty Period. Limitation of Actions—Four-Year Statute of Limitations—Uniform Commercial Code—Contracts for Sales. (Sup Ct, Erie County, May 27, 2026, Weinmann, J.)

30 Fasanella, Matter of (Stine), 2026 NY Slip Op 50822(U). Liens—Mechanic's Lien—Validity. (Sup Ct, Schoharie County, May 6, 2026, McAllister, J.)

31 Cornacchia Architects & Planners P.C. v Manhattan Schoolhouse LLC, 2026 NY Slip Op 50823(U). Contracts—Breach or Performance of Contract—Architectural and Construction Services. (Sup Ct, NY County, Apr. 24, 2026, Chesler, J.)

32 People v Francisco (Noel), 2026 NY Slip Op 50824(U). Crimes—Identification of Defendant—Non-Eyewitness—Suggestiveness. Crimes—Confession—Voluntariness. (Sup Ct, Bronx County, Apr. 27, 2026, Powell, J.)

33 Anonymous A, Matter of (Anonymous B), 2026 NY Slip Op 50825(U). Contempt—Civil Contempt—Mandate of Court. (Sup Ct, Nassau County, May 26, 2026, Knobel, J.)

34 Anonymous A, Matter of (Anonymous B), 2026 NY Slip Op 50826(U). Guardian and Ward—Appointment of Guardian—Determination of Capacity—Experts. (Sup Ct, Nassau County, May 21, 2026, Knobel, J.)

35 People v S.A., 2026 NY Slip Op 50827(U). Crimes—Disclosure—Automatic Discovery—Good Faith and Due Diligence. (Crim Ct, Bronx County, May 8, 2026, Moore, J.)

36 People v Emmanuel (Eric), 2026 NY Slip Op 50828(U). Crimes—Indictment—Dismissal in Interest of Justice—Compelling Factors. (Sup Ct, Bronx County, Apr. 27, 2026, Powell, J.)

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