**Agenda**

**NYSBA Committee on Civil Practice Law and Rules**

Friday, June 4, 2021, 12:00 p.m. – 2:00 p.m.

**Via Zoom Conference**

Dial-In Number: 888 475 4499
Meeting ID: 574 909 5451

Passcode: 042089

**Please see the link below to view meeting materials:**

<http://www.nysba.org/CPLRJune2021>

Welcome by the co-chairs, Souren A. Israelyan and Domenick Napoletano

1. Approval of Minutes for the Committee Meeting of February 26, 2021 **(Exhibit 1)**
2. Discussion of the current state of legislative activity Adriel F. Colón-Casiano
	1. S523 & S523-A (Hoyman) /A4580 & 4580-A (Lavine) **(Exhibits 2-3)**

Article 53 of CPLR – Recognition of Foreign Country Money Judgments

1. Report on NYSBA’s Executive Committee actions on CPLR Committee’s affirmative legislative proposals – CPLR 3113 (d) and 3107; CPLR 312-b; CPLR 2016
2. CPLR Committee’s affirmative proposals
	1. CPLR 3025 (b) – Motion to amend pleadings
		1. Proposal **(Exhibit** **4)**
		2. Supporting materials **(Exhibit 5)**
			1. *Kamara v 767 Fifth Partners, LLC*, 188 AD3d 602 (1st Dept 2020)
			2. *Frangidakis v 51 W. 81st St. Corp.*, 161 AD3d 478 (1st Dept 2018)
			3. *NYAHSA Servs., Inc., Self-Insurance Trust v People Care Inc.*, 156 AD3d 99 (3d Dept 2017)
			4. *Matter of Bynam v Camp Bisco, LLC*, 155 AD3d 1503 (3d Dept 2017)
			5. *Lucid v Mancuso*, 49 AD3d 220 (2d Dept 2008)
			6. *Seeley v Shen*, Sup Ct, Montgomery County, Dec. 23, 2020, Slezak, J., index No. 986/14
	2. CPLR 3001 – Declaratory judgment **(Exhibits 6-9)**
		1. *159 MP Corp. v Redbridge Bedford, LLC*, 33 NY3d 353 (2019, Wilson, J., dissenting) – whether a contractual provision barring a declaratory judgment is against the public policy – *Yellowstone* injunctions

**(Exhibit 6)**

* + 1. S5614 (2019) – Prohibiting commercial leases from including a waiver of the right to a declaratory judgment action and states that inclusion of such waiver in a commercial lease shall be null and voice as against public policy **(Exhibit 7)**
		2. Real Property Law § 235-h (L 2019, ch 689, § 1) **(Exhibit 8)**
		3. *Redbridge Bedford, LLC v 240 Bedford Ave. Realty Holding Corp.*, 2021 NY Slip Op 21065 (2d, 11th & 13th Jud Dists, March 19, 2021) (“We rely on the legislature's expression of the public policy of New York, as explicitly set forth in Real Property Law § 235-h and reflected in the legislative history thereof, and hold that the clause permitting the termination of the lease based upon tenant's commencement of a declaratory judgment action is unenforceable as against public policy”).

**(Exhibit 9)**

* 1. CPLR 3211(e) – Motion to dismiss based on a lack of personal jurisdiction
		1. Proposal **(Exhibit 10)**
		2. Supporting materials
			1. Report to the 1965 Legislature in Relations to the Civil Practice Law and Rules and Proposed Amendment Adopted Pursuant to Section 229 of the Judiciary Law **(Exhibit 11)**
			2. N.J. Court Rule 4:6-3 **(Exhibit** **12)**
			3. Connecticut Rules for the Superior Court § 10-30 **(Exhibit** **13)**
1. Discussions for possible proposals
	1. Should an individual employee of a municipality be identified in a Notice of Claim served under General Municipal Law § 50-e?

First Department found that an individual employee must be identified in a Notice of Claim and if he or she is not identified therein, a lawsuit against that employee should be dismissed (*see Alvarez v City of New* York, 134 AD3d 599, 606 [1st Dept 2015]; *Cleghorne v City of New* York, 99 AD3d 443, 446 [1st Dept 2012]; *Tenenbaum v City of New York*, 30 AD3d 357, 358 [1st Dept 2006], *abrogated on other grounds by Kapon v Koch*, 23 NY3d 32 [2014]). Note that municipalities are not required to indemnify employees for their intentional acts. By contrast, the other three judicial departments have held that there is no such requirement as long as the Notice of Claim enables the municipal authority to locate the place, fix the time, and understand the nature of the occurrence (*see Goodwin v Pretorius*, 105 AD3d 207, 216 [4th Dept 2013]; *Pierce v Hickey*, 129 AD3d 1287, 1289 [3d Dept 2015]; *Blake v City of New York*, 148 AD3d 1101, 1106 [2d Dept 2017]; *Williams v City of New York*, 153 AD3d 1301, 1304-1305 [2d Dept 2017]). **(Exhibit 14)**

* 1. Is an attorney work product privilege waived by a deponent’s review of such document prior to testimony? The issue could arise when a client, an expert, or any other deponent reviews an attorney work product prior to deposition, hearing or trial testimony. CPLR 3101 (c) provides: “Attorney’s work product. The work product of an attorney shall not be obtainable.”

The Second Department held that “[a]ny privilege under CPLR 3101 was waived when Vincent Grieco used his written statement prior to his deposition to refresh his recollection as to the events of the incident, and when the plaintiffs’ witness reread her statement prior to the trial for the same purpose” (*Grieco v Cunningham*, 128 AD2d 502, 502 [2d Dept 1987] [holding that attorney work product and attorney client relationship privileges were waived and the written statements made by the attorney’s client and a witness must be turned over to the adversary]). The First Department, essentially followed the Second Department in *Beach v Touradji Mgt., LP* (99 AD3d 167 [1st Dept 2012, Abdus-Salaam, J.]), by ordering an in-camera review to determine as to which portion of plaintiff’s forensic analyst’s report, which was used to refresh the expert’s recollection prior to his testimony, is discoverable, noting that “[t]he only portion the analysist’s reports that could be attorney work product would be impressions, directions, etc., of counsel” (*id.* at 171).

The Third and Fourth Departments, in the other hand, have held that an attorney work product privilege is not waived by a deponent’s review of the materials in preparation for testimony (*see Geffers v Canisteo Cent. School*, 105 AD2d 1062, 1062 [4th Dept 1984] [“Special Term was correct in denying discovery of a memorandum prepared by an attorney as part of his work product. The fact that the memorandum was reviewed by his client in preparation for an examination before trial does not constitute a waiver of the privilege under CPLR 3101, subd. [c].”]; *Fernekes v Catskill Regional Med. Cent.*, 75 AD3d 959, 961 [3d Dept 2010] [“While an unqualified privilege, such as applies to attorney work product, can be waived by a party, it is not waived merely through the client’s review of an attorney’s memorandum in preparation for a deposition”]). **(Exhibit 15)**

1. CPLR proposals by others
	1. S565 (Hoylman)/A2503 (Weinstein) – Vacating an arbitration award on the basis of arbitrator’s disregard of the law **(Exhibit** **16)**
	2. S6439 (Brisport) – Repeal of CPLR 3218 Judgment by confession **(Exhibit** **17)**
	3. S6656 (Sanders)/A4474-A (Hunter) – Creating a new cause of action for exposure to toxic burn pits while serving as a member of the armed forces **(Exhibits 18 & 19)**
2. Matters of Interest
	1. *Green v Esplanade Venture Partnership*, \_\_ NY3d \_\_\_, 2021 NY Slip Op 01092 (Feb. 18, 2021) – plaintiff grandmother’s grandchild is “immediate family” for the purpose of applying the zone of danger rule. Justice Rivera concurred in the result but argued that arbitrary lines as to who is included and who is excluded should be discarded, and the determination shall be made based on the fundamentals of tort law – foreseeability, causation, and discernible harm.  **(Exhibit 20)**
	2. *Ferreira v City of Binghamton*, US Dist Ct, ND NY, 13-Civ-107 (McAvoy, J. 2017), on appeal 975 F3d 255 (2d Cir 2020, Leval, J.), *cert. accepted* 35 NY3d 1105 (Oct. 20, 2020) – Unarmed plaintiff, a guest in the apartment and not the subject of a warrant, was shot in the stomach by a police officer in the course of botched no-knock warrant within a second or two the police knocked the door down and the first officer rushed into the apartment. The Second Circuit certified the following question to the New York Court of Appeals: “Does the ‘special duty’ requirement—that, to sustain liability in negligence against a municipality, the plaintiff must show that the duty breached is greater than that owed to the public generally—apply to claims of injury inflicted through municipal negligence, or does it apply only when the municipality’s negligence lies in its failure to protect the plaintiff from an injury inflicted other than by a municipal employee?” In other words, does a claim for municipal negligence must thread through the “special duty” needle. **(Exhibits 21 & 22)**
	3. *Reames v State*, 191 AD3d 1304 (4th Dept, Feb. 5, 2021, NeMoyer, Curran, J.J., *dissenting*) – “but for” vs. “proximate cause” and the effect of each. “In our view, applying a ‘but for’ causation ‘would relieve from liability a negligent actor if the same harm might have been sustained had the actor not been negligent, yet the law is clear that that fact may be considered in fixing damages but does not relieve from liability’ (1A NY PJI3d 2:70 at 435 [2020], citing *Dunham v Village of Canisteo*, 303 NY 498, 505-506 [1952]).”[[1]](#footnote-1) **(Exhibits 23)**
	4. Since we are on the subject of causation, *see N.W. v Sanofi Pasteur MSD*, Case C-621/15, Ct of Justice of European Union (2017) – “Where there is lack of scientific consensus, the proof of the defect of the vaccine and of a causal link between the defect and the damage suffered may be made out by serious, specific and consistent evidence.”[[2]](#footnote-2) **(Exhibits 24, 25 & 26)**
	5. Article 53 of CPLR
		1. *Akhmedova v Akhmedov*, 2020 NY Slip Op 30092(U) (Sup Ct, New York County 2020, Debra A. James, J.) **(Exhibit 27)**
		2. *Akhmedova v Akhmedov*, 189 AD3d 602 (1st Dept, Dec. 22, 2020)

**(Exhibit 28)**

* + 1. *Akhmedova v Akhmedov*, 2021 EWHC 545 (Decision High Court of Justice (Family Division) of England and Wales, April 21, 2021, Knowles, J.) [Akhmedova v Akhmedov & Ors [2021] EWHC 545 (Fam) (21 April 2021) (bailii.org)](http://www.bailii.org/ew/cases/EWHC/Fam/2021/545.html#para209)
1. New Business
2. Next Committee Meeting
1. *See also* Oliver W. Holmes, Jr., The Common Law at 113 (Little, Brown, & Co. 1881, republished by Barnes & Noble Books 2004) (“Unnecessary though it is for the defendant to have intended or foreseen the evil which he has caused, it is necessary that he should have chosen the conduct which led to it.”) [↑](#footnote-ref-1)
2. In the United States, vaccine manufacturers are immune from liability under 42 USC300aa-22, and a person who suffers injury due to a vaccine may only pursue a claim under the National Vaccine Injury Compensation Program, administered by U.S. Health Resources & Services Administration, an Agency of the U.S. Department of Health and Human Resources. According to the data available on the program’s website, since 1988, 1,348 death claims and 22,554 injury claims were filed. Pain and suffering is limited to $250,000 (42 USC 300aa-15 [a] [4]), and attorney’s fee may be awarded by a special master or the court and it is limited to “reasonable attorneys’ fees, and other costs” (42 USC 300aa-15 [e]). The COVID-19 vaccines are being distributed and administered under FDA’s Emergency Use Authorization (EUA), which in the words of FDA, “[t]he issuance of an EUA is different than an FDA approved (licensure) of a vaccine, in that a vaccine available under an EUA is not approved” (FDA Press Release, FDA Issues Emergency Use Authorization for Third COVID-19 Vaccine, Feb. 27, 2021 [Janssen COVID-19 Vaccine manufactured by Janssen Pharm. Co. of Johnson & Johnson]). [↑](#footnote-ref-2)