New York State Law Digest

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No. 784 March 2026

Reporting on Significant Court of Appeals Opinions and Developments in New York Practice

NYSBA

CASE LAW DEVELOPMENTS

Majority of Court of Appeals Finds Critical Videos Showing Sexual Abuse of Child Not Properly Authenticated

Dissenting Opinions Warn of Dire Consequences of Majority Opinion

Matter of M.S. (M.H.), 2026 N.Y. Slip Op. 00825 (Feb. 17, 2026) was a particularly contentious narrowly split decision out of the Court of Appeals dealing with the authenticity and subsequent admissibility of certain videos. Because of its disturbing underlying facts, however, its ramifications can have unfortunate long-term consequences.

Relevant here is an appeal arising out of Family Court orders finding that a mother (M.H.) had abused her daughter (M.S.) and derivatively abused her son (G.H.). The adjudications stemmed from allegations that the mother's former live-in boyfriend (D.K.) had sexually abused the daughter multiple times and that the mother had failed to protect her children. The primary issue was the mother's claim that the court improperly admitted surveillance videos depicting the abuse because the petitioner had failed to establish the authenticity of those videos.

During an unrelated investigation into the trading of child pornography, the FBI had discovered the videos in January 2022. The suspect (B.W.) admitted to an FBI special agent that he had been hacking into security web cameras. Three years earlier, in 2019, he stated that he had hacked into a security camera and observed an adult male sexually abusing a teenage girl. Following an investigation, the FBI obtained from the suspect's computer three videos date-stamped from May, June, and July 2019 and, with the assistance of the New York State Police, determined that the videos came from a camera in the house in which M.H. lived with her children and boyfriend.

In the Family Court proceeding in which the children were removed from the mother's home, a hearing was conducted and the videos were admitted into evidence. Neither M.H. nor D.K. testified at the hearing, but M.H. joined D.K.'s objection to admitting the videos, the sole evidence of abuse offered. A split Fourth Department affirmed the Family Court order, finding that "the videos were sufficiently authenticated through testimony regarding their source and how they were discovered in conjunction with testimony supporting the conclusion that the videos depicted the area and individuals they purported to depict." 229 A.D.3d 1040, 1041 (4th Dep't 2024). A deeply divided Court of Appeals reversed.

The majority opinion, written by Chief Judge Wilson, compared the facts in this case to a prior one, *People v. Patterson*, 93 N.Y.2d 80 (1999), holding that the videos were improperly admitted here because an insufficient foundation was offered. The Court focused on what it characterized as the lack of proper authentication of the videos. It noted that neither D.K., who allegedly created the videos, nor B.W., the child pornographer, testified; the relevant FBI agent (Baranski) gave hearsay testimony about what B.W., the suspect, had told him; "there was no continuous video, only snippets excerpted from a longer, unrecovered feed of the camera by B.W., who told Agent Baranski he had watched many days of video but did not explain what or how he selected and what he omitted or deleted."; the agent did not testify that B.W. advised that the videos were unaltered; and there was a 2–1/2 year period between the time when the videos were stolen and B.W. created the tape, and when the FBI covered recovered them. "This long gap in the chain of custody of a key piece of evidence . . . raises further doubts about the authenticity of the videos."

The majority took issue with the Family Court's reliance

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on Agent Baranski's "expertise and testimony" in concluding that the videos were not altered. It stressed that the agent was never qualified as an expert in video authentication or as possessing the experience or training to detect evidence of tampering or fabrication. The Court similarly found an investigator's testimony "that the videos matched his personal observations of the layout of the living room and items he observed" insufficient and

> not meaningfully different from what we rejected in *Patterson*. There, an officer who had visited the store where the robbery occurred testified that the video was an accurate depiction of the store's "actual physical layout." The fact that much of the video apparently accurately depicted the home is not sufficient—as it was not in *Patterson*—to authenticate the video. If such testimony was insufficient then, the increasing prevalence of "deepfake" videos has only rendered the method of matching circumstantial details in a video to personal observations a more suspect form of authentication; most fabricated videos "leverage" real details from real photos and videos of real places and people, then alter the pieces the person wishes to alter to create a realistic, but manipulated, video (citations omitted).

2026 N.Y. Slip Op. 00825 at *5.

The three dissenting judges produced two scathing opinions by Judge Troutman and Judge Singas. Judge Troutman criticized the majority for injecting the "deepfake" video issue into the case, based on "suppositions and inferences" never presented to the Family Court. "In addressing a concern that was never raised below, the majority creates new and perhaps insurmountable hurdles for future authentication of video evidence. As a result, children will be harmed and abusers will escape accountability." *Id.*

The dissent took issue with the majority's statement "that during a search of the family's home, 'police officers took several pictures of the living room which appeared to match details shown in the videos' (majority op at 3). That description belies the level of detail regarding the home that was confirmed by police to match what was depicted in the videos." *Id.* Judge Trotman insisted that circumstantial evidence can be used to authenticate and that there was sufficient circumstantial evidence to authenticate the videos here and permit the Family Court to admit them into evidence:

> First, the mother affirmatively identified her boyfriend and her daughter from screenshots taken from the videos. Second, video cameras that the police found in the living room were in position to capture the sexual abuse as depicted in the videos. Third, the living room's appearance and furnishings were as they appeared in the video upon a search of the home. And finally, items indistinguishable from those shown in the videos during the instances of sexual abuse were found in the home.

Id. at *6.

The dissent lamented that

> [i]t seems that in the future, a party opposing the introduction of video evidence need only posit, with no evidentiary support whatsoever, that the video might be a deepfake. The party introducing the video then must disprove that unfounded accusation. How is the party seeking admission to do so, if circumstantial evidence is not a permissible method of authentication?

Id. at *7.

Judge Singas "fully agreed" with Judge Troutman's dissent but added her separate opinion "to emphasize that the majority's superficial and simplistic analysis of 'deepfake' technology raises serious legal questions to which the majority supplies no answer, and defies the critical approach taken by the federal courts and other jurisdictions. More importantly here, it will harm abused and neglected children." *Id.* at *8. Judge Singas maintained that "the level of fakery" required here allegedly occurring in 2019 and 2022 was not possible. Thus, based on the majority's conclusion, "it is hard to imagine what circumstantial evidence could ever suffice to authenticate a video." *Id.* at *10.

Judge Singas concluded that the ramifications of the majority's decision will be grave:

> In practicality, in child-protective proceedings, the majority places the onus on child victims to authenticate videos that their abusers and pornographers create. Above all, the majority returns a child victim to an abuser's care by holding for the first time—in a case predating the possibility of wholesale deepfake video forgery—that sheer speculation of such forgery renders sex-abuse videos inadmissible absent testimony by an observer, a participant, or an expert. In the wake of the majority's reckless holding, Family Court, criminal, and civil litigants alike will surely raise a deepfake defense, however baseless, when faced with unfavorable evidentiary exhibits of all kinds, and the most vulnerable among us will suffer the consequences.

Id. at *11–12.

Court of Appeals Holds That Names and Addresses of Town Residents Subscribing to E-News Are Exempt from FOIL Disclosure

Subscribers Have Strong Privacy Interest in Keeping Their Names and Email Addresses Confidential and Disclosure Would Serve No Public Interest

The Town of Mount Pleasant has a notification system referred to as "E-news" to send subscribers email alerts with respect to news, updates, or announcements relating to the Town. The petitioner submitted a Freedom of Information Law (FOIL) request to the Town seeking disclosure of the names and email addresses of all Town residents who subscribe to E-news. The Town clerk and Town supervisor refused to produce the records.

The petitioner commenced this CPLR article 78 proceeding against the Town to compel the production of the rele-

vant documents and an award of litigation costs. The Town claimed that disclosure of the records would constitute an unwarranted invasion of personal privacy and thus exempt under FOIL. The relevant exemption from disclosure here provides that an "agency may deny access to records or portions thereof that . . . if disclosed would constitute an unwarranted invasion of personal privacy under [Public Officers Law § 89(2)] (Public Officers Law § 87[2][b])." In *Matter of Russell v. Town of Mount Pleasant, N.Y.,* 2026 N.Y. Slip Op. 00966 (Feb. 19, 2026), the Court of Appeals pointed out that while Public Officers Law § 89(2)(b) provides a non-exhaustive list of specific types of exempt information, it does not expressly cover the situation here. As a result, the Court is required to balance the privacy interests against the public interest posed by the disclosure of the information.

The Court reasoned that "[o]n one side of the scales, the subscribers have a strong privacy interest in keeping their names and email addresses confidential to avoid unwanted and unwelcome communications, and to minimize the risk of cybersecurity threats resulting from disclosure of such information. An email address, and the corresponding holder's name, are commonly treated as personally identifying information (PII)." *Id.* at *3. In fact, email accounts tend to contain a significant amount of personal data. The Town's concerns as to the potential risks to subscribers if disclosure was permitted were not "speculative." The ubiquitous nature of email, coupled with the possibility for identity theft and account hacking, makes "email addresses highly sought after for nefarious purposes."

On the other hand, the Court found that the public interest would not be served by disclosing the documents sought here. Contrary to the petitioner's argument, disclosure would not increase public engagement on issues of community concern. People would likely be reticent to sign up because of privacy and security concerns. As a result, "it is more likely that disclosure will have either no or a negative effect on public engagement." Moreover, the Town's E-news service involves one-way communications, "and its existing subscribers may have no interest in political discourse." Finally, the petitioner acknowledges that he could use social media to reach the residents. Thus, the Court concluded that "[t]he balance tips in only one direction: in favor of the privacy interest."

Second Department Provides Clarity as to the Trigger for Six-Month Period Under CPLR 205 and 205-a When No Appeal Is Taken

Rules It Begins to Run 30 Days After the Dismissal Order is Served with Notice of Entry

In *HSBC Bank USA, N.A. v. Hillaire*, 2026 N.Y. Slip Op. 00353 (2d Dep't Jan. 28, 2026), the Second Department addressed an important issue relevant to CPLR 205 and 205-a. This gives us an opportunity to look at the competing statutes. As we have covered in the past, CPLR 205 provides that if an action is timely and properly commenced and is terminated in a manner other than those set forth in the statute, the plaintiff can bring a second (otherwise untimely) action based upon the same transaction or occurrence, or series of transactions or occurrences, within six months of the termination of the first action.

As part of a larger amendment signed into law on December 30, 2022, the Foreclosure Abuse Prevention Act (FAPA), CPLR 205-a was added. CPLR 205-a concerns an action upon a CPLR 213(4) instrument (bond, note, or mortgage), applicable in mortgage foreclosure actions. Much like CPLR 205, it provides that a second action can be commenced within six months of the termination of a prior action (including service within that time period, but see distinction below), even if the statute of limitations has run in the interim. Both sections require that the new action would have been timely when the first action was commenced.

However, while the language in CPLR 205-a is similar to CPLR 205 with respect to the exclusions generally (that is, voluntary discontinuance, failure to obtain personal jurisdiction over the defendant, neglect to prosecute, and a judgment on the merits), it differs in a few significant ways. For example, CPLR 205-a expands the neglect exclusion dramatically and enumerates a series of non-exhaustive examples. In addition, the requirement in CPLR 205 that the specific conduct constituting the neglect (which conduct demonstrates a general pattern of delay) be set forth in the record is omitted from CPLR 205-a.

Moreover, a successor in interest or an assignee of the original plaintiff cannot commence a new action unless it pleads and proves that it is acting on behalf of the original plaintiff; the original plaintiff is only entitled to one six-month extension; and CPLR 205 provides that service be *effected* within the six-month period, while CPLR 205-a states that service must be *completed* within six months, placing increased time pressure on a plaintiff to serve the defendant in the second action in a timely fashion. *See Deutsche Bank Nat'l Trust Co. v. Heitner*, 226 A.D.3d 967 (2d Dep't 2024) and its treatment in the June 2024 *Law Digest.*

Hillaire addressed the meaning of the word "termination," the kickoff for the six-month period, where no appeal is taken from the dismissal order. The court set forth the options—that is, whether the termination of the prior action runs from the date the order is signed, is entered by the clerk, is served, or from 30 days after service of the order with notice of entry (to take into account the potential filing of a notice of appeal or a motion for leave to reargue). Ultimately, in an effort to provide "judicial clarity," the court concluded that the termination occurs 30 days after service of the order of dismissal with notice of entry, when no appeal is taken. As usual, in the process, Justice Dillon provides an invaluable discussion of the nuts and bolts of CPLR 205 and 205-a.

The court noted that neither the statutory language nor legislative history provide guidance on what was intended by the use of the word "termination;" the dismissal and termination of an action may not be the same thing; an order of dismissal can be followed by subsequent events, such as a timely reargument motion, a renewal motion or an appeal which

further defers the termination of the action; and while the Court of Appeals has ruled that an action is not terminated until appeals as of right have been exhausted, the Appellate Division, including the Second Department, has not been clear in establishing the date of termination, where appeals are not perfected, coming to differing conclusions.

The court here dispensed with the notion that the mere entry of the dismissal order should trigger the six-month period. It referred to CPLR 2220(b) which provides that "[s]ervice of an order shall be made by serving a copy of the order." The mandatory nature of the language ("shall") has prompted the Second Department to rule previously that "when the rights of a party may be affected by an order, the successful party, in order to give validity to the order, is required to serve it upon the adverse party. Certainly, the rights of plaintiffs are affected by orders directing dismissal of their actions, including the right for qualifying plaintiffs to timely recommence actions under CPLR 205(a) and 205-a (citations omitted)." *Id.* at *4.

The court stressed that serving an order with notice of entry is "uncomplicated and universal." Significantly, it assures notice to affected parties and obviates compliance with the order, if appropriate; provides "a fixed date from which to specifically measure compliance with the order or to trigger conditional remedies for its noncompliance;" and it "fixes the date for time-sensitive remedies," such as motions for leave to reargue or to vacate a default or filing a notice of appeal.

Thus, the court concluded that service of notice of entry "should be required for triggering the rights and time computations that flow from the order itself," including when computing the six-month period here. Conversely, not requiring the service of the notice of entry with the order would incentivize non-compliance in the hope that the six-month period would pass before the impacted party would be on notice of the order. In addition, the court concluded that, an additional period of 30 days should be added after the date of service of the notice of entry with the order, to acknowledge an aggrieved party's right to appeal or to move for leave to reargue during that period.

> The term "termination," as used in CPLR 205(a) and 205-a, is a word of finality . . . An action with an order of dismissal, even with notice of entry and without the entry of a judgment, still enjoys statutory oxygen. If 30 days elapse from the service of an order of dismissal with notice of entry without further activity by the aggrieved party, such as the filing of a motion for leave to reargue or a notice of appeal, then at 12:01 a.m. on the 31st day, the action is out of oxygen and has reached, by statutory construction, its full and final termination.

Id. at *5.

COVID Toll Does Not Apply to Contractual Limitation Periods

It Applies to Rules, Statutes, and the Like

The *Law Digest* has spent some time discussing the relevant Executive Orders and COVID toll of statutes of limitations. The toll applies to limitation periods contained in New York's procedural rules, statutes, local laws, ordinances, orders, rules, or regulations.

In *244 Howard Ave., LLC v. MT Group, LLC,* 2026 N.Y. Slip Op. 00338 (2d Dep't Jan. 28, 2026), the plaintiff was renovating an existing structure on real property it owned. It retained the defendant-subcontractor (MT) to inspect the work. After the front wall of the renovated structure collapsed in 2019, the plaintiff brought this action in 2022, alleging that the collapse was a result of defendant's negligence.

The defendant moved to dismiss on the ground that the action was time-barred by the two-year limitation period contained in the contract between the plaintiff and the defendant. The trial court granted the motion, concluding that the action was untimely, even if the COVID toll applied. The Second Department affirmed, but went out of its way to point out that the toll does not apply to a contractual limitation period.

> "Inasmuch as the two-year period in which plaintiffs could commence actions . . . was contractually agreed upon, rather than 'prescribed by the procedural laws of the state . . . or any other statute, local law, ordinance, order, rule, or regulation' (9 NYCRR 8.202.8), the Executive Order and subsequent orders extending that order do not apply to toll the limitation period" (citations omitted).

Id.

Status Conference Orders Generally Not Appealable as of Right

Unless They Resolve a Motion on Notice

Generally, a status conference order is not appealable as of right because it is not an order which determined a motion made upon notice. *See Armstrong v B.R. Fries & Assoc., Inc.*, 95 A.D.3d 697 (1st Dept 2012); CPLR 5701(a)(2) (a supreme court order is appealable "where the motion it decided was made upon notice . . ."). However, where the order was not made sua sponte but was the result of a motion, it is appealable. Thus, in *Perrotte v. Bloomberg, L.P.,* 2026 N.Y. Slip Op. 00632 (1st Dep't Feb. 10, 2026) the order "resolved plaintiff's letter application, which defendants opposed through their own letter submissions. Under these circumstances, the process afforded the parties the opportunity to be heard and created a proper record for appellate review" (citation omitted). *Id.*

ISSN 0028-7636 (print) ISSN 2379-1225 (online)