

CHIEF JUDGE KAYE: IMPROVING THE PACE AND INTEGRITY OF LITIGATION

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INTRODUCTION

Chief Judge Judith Kaye has been deservedly praised for her many contributions to the judicial system of New York State.¹ We focus here on her efforts to improve the pace of the litigation process and, relatedly, to strictly enforce procedural rules. In part because of her pre-court practice as a litigator,² she was well aware of unnecessary delay of litigation and had a sophisticated view about how to reduce it. As Chief Judge she used her administrative powers to reform problematic practices within the judiciary³ and as a judge she

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¹ See generally *Tributes: Chief Judge Judith S. Kaye*, 84 N.Y.U. L. REV. 647, 647–80 (2009).

² See JUDITH S. KAYE, *THE STATE OF THE JUDICIARY* 1993, at 1 (1993) [hereinafter *THE 1993 STATE OF THE JUDICIARY*] (“Having spent more than three decades as a trial lawyer and judge, I am convinced that an effective court system is essential to an orderly democratic society. Both the fact and the perception of an impartial forum where, promptly and peaceably, rights are protected, wrongs punished and disputes resolved, help to assure widespread respect for the law.”).

³ See, e.g., Stephen G. Breyer, *Chief Judge Kaye: A Creative Reformer*, 84 N.Y.U. L. REV. 648, 649 (2009) (“Chief Judge Kaye has spearheaded numerous administrative reforms, all of which have made the New York courts fairer and more effective. . . . Essentially, Judith Kaye’s tenure as Chief Judge has seen more than twenty-five years of human concern, imagination, and effective action, all harnessed in the interest of an improved state justice system.”).

took a no-nonsense position with lawyers who flouted the rules of procedure, especially when they slowed down the progress of litigation.⁴ “Deadlines matter, court-ordered deadlines and statutory deadlines. Don’t mess around!” Those were her words in her remarks at the New York University School of Law Symposium “The CPLR at Fifty: Its Past, Present and Future.”⁵ And she meant it.

Complaints about the delay of litigation are hardly new. They go back at least to the Roman Empire. In second century Rome, the poet Juvenal wrote:

Term after term I wait till months be past
And scarce obtain a hearing at the Last
Even when the hour is fixed, a thousand stays
Retard my suit a thousand vague delays:
 . . . wealth and patience worn away
By the slow drag-chain of the law’s delay.⁶

Shakespeare was also apparently miffed by “the law’s delay” and had Hamlet include it as one of the burdens of life that caused his musings of whether it is better “to be, or not to be.”⁷ Needless to say, the problem continues to nettle lawyers, the courts, and the public despite well-intended efforts to solve it. These include, in New York, the enactment of the Civil Practice Law and Rules (the “CPLR”),⁸ advances in judicial administration and, of course, judicial opinions. In a number of her opinions, Chief Judge Kaye made clear her impatience with lawyerly behavior that slowed down the progress of a case without justification.⁹ Sometimes, however, rigid application of procedural rules may lead to more delay of particular litigation. An example is the Court of Appeals’ approach in *Brill v. City of New York*,¹⁰ in which the Court held that a motion for summary judgment made after the time allowed by C.P.L.R. 3212(a) could not be heard

⁴ See discussion *infra* Part II.

⁵ Judith S. Kaye, *Remarks of Chief Judge Kaye*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 654, 657 (2013).

⁶ Simon Shetreet, *The Administration of Justice: Practical Problems, Value Conflict and Changing Concepts*, 13 BRIT. COLUM. L. REV. 52, 54 (1979) (quoting *Juvenal, Satire XVI*, lines 45–58).

⁷ WILLIAM SHAKESPEARE, *THE TRAGEDY OF HAMLET, PRINCE OF DENMARK*, act 3, sc. 1, line 1765 (G.R. Hibbard ed., Oxford Univ. Press 1987) (c. 1609).

⁸ The New York Civil Practice Law and Rules (CPLR) became effective on September 1, 1963. One of the goals of the new code was to make New York procedure more efficient and speedy. See N.Y. C.P.L.R. 104 (Consol. 2002) (“The civil practice law and rules shall be liberally construed to secure the just, speedy and inexpensive determination of every civil judicial proceeding.”); see also Oscar G. Chase, *The Paradox of Procedural Reform*, 62 ST. JOHN’S L. REV. 453, 471–73 (1988) (describing the history of efforts to improve the pace of litigation in New York from the Field Code to the enactment of the CPLR).

⁹ See *infra* Part II.

¹⁰ 814 N.E.2d 431 (N.Y. 2004); see discussion *infra* Part III.

by the trial court even if it was obvious that the motion had merit.¹¹ Writing for the Court's majority in *Brill*, Chief Judge Kaye quoted another of her own opinions:

In *Kihl v. Pfeffer*, . . . we affirmed the dismissal of a complaint for failure to respond to interrogatories within court-ordered time frames, observing that “[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity.” The present scenario, another example of sloppy practice threatening the integrity of our judicial system, rests instead on the violation of legislative mandate.¹²

As we discuss below, it is strongly arguable that giving more discretion to the trial judge in enforcing CPLR 3212(a) would lead to faster dispositions in some cases.¹³ Our broader point is that, while we applaud Chief Judge Kaye's many efforts to effect the goal of C.P.L.R. 104 “to secure the just, *speedy* and inexpensive determination of every civil judicial proceeding,”¹⁴ we argue that Courts should take into account unintended problematic results when the discretion of trial judges is overly limited.

Before addressing the *Brill* paradox, we will explore Chief Judge Kaye's efforts, both as a judge and as administrator,¹⁵ to enhance the pace of litigation while maintaining the quality of outcome. We conclude that available statistics of litigation efficiency in the Supreme Court of New York indicate that the pace of litigation improved during her leadership.

¹¹ See N.Y. C.P.L.R. 3212(a) (Consol. 1964) (“Any party may move for summary judgment . . . after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.”).

¹² *Brill*, 814 N.E.2d at 435 (quoting *Kihl v. Pfeffer*, 722 N.E.2d 55, 58 (N.Y. 1999)); see discussion *infra* Part III.

¹³ See *infra* Part II.

¹⁴ N.Y. CPLR 104 (McKinney 2003) (emphasis added).

¹⁵ The Chief Judge of the Court of Appeals is the “chief judicial officer of the united court system.” N.Y. CONST. art. VI, § 28(a). As such, she appoints “a chief administrator of the courts who shall serve at the pleasure of the chief judge.” *Id.* Additionally, she “shall establish standards and administrative policies for general application throughout the state, which . . . shall be promulgated after approval by the court of appeals.” *Id.* § 28(c) (amended 2001).

I

ADMINISTRATIVE EFFORTS TO IMPROVE LITIGATION PACE

Then an Associate Judge of the Court of Appeals, Judith Kaye became Chief Judge in March of 1993 under extremely difficult circumstances. Chief Judge Sol Wachtler, her predecessor, had resigned in November of 1992 when he had been arrested for the stalking and extortion of a former lover,¹⁶ “an event . . . that changed the course of Judith Kaye’s life, as well as the lives of many others.”¹⁷ Judith Kaye was appointed by Governor Mario Cuomo to succeed Chief Judge Wachtler and was sworn in as Chief Judge on March 23, 1993.¹⁸ As Chief Judge Wachtler had been Chief since 1985, his arrest and sudden resignation created problems for the Court.¹⁹ Moreover, the courts of the state had been confronted in 1991 by a budget crisis that left the judiciary so short of needed funds that hundreds of court staffers were laid off, leading to a reduction of dispositions and consequential delay.²⁰ Chief Judge Wachtler had sued the Governor and the Legislature in 1991, alleging that they had failed a constitutional duty to adequately finance the courts.²¹ The case was settled in 1992, and some funding was restored in the 1992–1993 budget.²² While there was some respite, the built-up backlog remained a problem.²³ “In short order, Kaye was able to pick up on Chief Judge Wachtler’s unfinished projects. She showed surprising political acumen for a

¹⁶ See Catherine S. Manegold, *Judge and Heiress: The Rise and Fall of a Private Affair*, N.Y. TIMES (Nov. 15, 1992), <http://www.nytimes.com/1992/11/15/nyregion/judge-and-heiress-the-rise-and-fall-of-a-private-affair.html?pagewanted=all>. Mr. Wachtler later pleaded “guilty [to] a single count of ‘transmitting in interstate commerce threats to kidnap.’” JOHN M. CAHER, KING OF THE MOUNTAIN: THE RISE, FALL, AND REDEMPTION OF CHIEF JUDGE SOL WACHTLER 310 (1998); see also Steven C. Krane, *Judith Smith Kaye*, in THE JUDGES OF THE NEW YORK COURT OF APPEALS: THE BIOGRAPHICAL HISTORY 811–12 (Albert M. Rosenblatt ed., 2007), <http://www.nycourts.gov/history/legal-history-new-york/history-legal-bench-court-appeals.html?http://www.nycourts.gov/history/legal-history-new-york/luminaries-court-appeals/kaye-judith.html> (explaining that Judge Wachtler’s arrest and subsequent resignation left a vacancy on the Court that Judge Kaye ultimately would fill).

¹⁷ Krane, *supra* note 16, at 811.

¹⁸ *Id.* at 812.

¹⁹ *Id.* at 811.

²⁰ See SOL WACHTLER, THE STATE OF THE JUDICIARY 1992, at 3–4 (1992) [hereinafter THE 1992 STATE OF THE JUDICIARY]. The 1992 State of the Judiciary, an annual report of the Chief Judge, was written by Chief Judge Wachtler prior to his arrest. Its publication was authorized by Acting Chief Judge Simons. *Id.* at ii.

²¹ See SOL WACHTLER, THE STATE OF THE JUDICIARY 1991, at 8–9 (1991) [hereinafter THE 1991 STATE OF THE JUDICIARY].

²² THE 1992 STATE OF THE JUDICIARY, *supra* note 20, at 5.

²³ *Id.* at 5–6.

woman who had never been involved in politics, and grasped the opportunities for reform that Wachtler had let slip by.”²⁴

One of the projects that Chief Judge Kaye took on in 1993 was improving the operation of the Individual Assignment System (IAS).²⁵ Civil litigation in New York had been markedly changed in 1986 by the replacement of the prior Master Calendar System with the Individual Assignment System.²⁶ Under the former, an action was not assigned to a judge for all purposes; rather, judges rotated among motion “parts” within their jurisdiction and motions were brought before that judge.²⁷ Thus, the next motion arising in the same case would probably be brought before and decided by a different judge who had had no experience with the case. “This system . . . was thought in many quarters to be duplicative and wasteful.”²⁸ Under the IAS a specific judge is assigned to handle all of the pretrial activities in the case and, under some circumstances, preside over the trial.²⁹ It was intended to avoid the problems of the Master Calendar System and generally improve the efficiency and pace of litigation.³⁰ According to statistics cited by Chief Judge Wachtler, the IAS program had by 1990 produced a substantial impact on delay.³¹

Because of the burdens on the civil courts (due in large part to the budget problems described above) Chief Judge Wachtler had appointed a committee to review the IAS and recommend changes that would make it even more effective.³² In 1993, when Judith Kaye

²⁴ CAHER, *supra* note 16, at 147.

²⁵ See THE 1993 STATE OF THE JUDICIARY, *supra* note 2, at 27–28.

²⁶ See N.Y. COMP. CODES R. & REGS. tit. 22, § 202.3 (2017) (describing the structure of the Individual Assignment System); N.Y. STATE UNIFIED COURT SYS., 8TH ANNUAL REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS §§ 1.4, 3 (1986); DAVID D. SIEGEL & PATRICK M. CONNORS, NEW YORK CIVIL PRACTICE 132–33 (5th ed., 2011) [hereinafter SIEGEL]; 7 JACK B. WEINSTEIN ET AL., NEW YORK CIVIL PRACTICE ¶ 3401.04[1] (David L. Ferstendig ed., 2d ed. 2017) [hereinafter 7 NEW YORK CIVIL PRACTICE] (“Under IAS, a single judge supervises all aspects of a case through trial, including conferences and motions.”).

²⁷ SIEGEL, *supra* note 26, at 132.

²⁸ *Id.*

²⁹ See N.Y. COMP. CODES R. & REGS. tit. 22, § 202.3 (2017) (explaining that the Individual Assignment System “provides for the continuous supervision of each action and proceeding by a single judge”); 1 FERSTENDIG, WEINSTEIN, KORN & MILLER CPLR MANUAL § 15.02 (David L. Ferstendig ed., 3d ed. 2016) (explaining that the Uniform Civil Rules for the Supreme Court and County Court now permit a “dual track” system, whereby the case can be reassigned to a different judge for trial); SIEGEL, *supra* note 26, at 132–33.

³⁰ See N.Y. STATE UNIFIED COURT SYS., *supra* note 26, §§ 1.4, 3 (listing the goals of the IAS).

³¹ THE 1991 STATE OF THE JUDICIARY, *supra* note 21, at 37 (citing increase of dispositions and decrease of delayed cases on the Supreme Court calendars since 1985).

³² THE 1992 STATE OF THE JUDICIARY, *supra* note 20, at 6–7.

became Chief Judge, the recommendations of the Committee on the Individual Assignment System were implemented. In her first State of the Judiciary Chief Judge Kaye reported that “improved case management procedures and technological innovations” had led to a still greater increase in dispositions and reduction of pending delayed cases.³³

Another of Chief Judge Kaye’s administrative innovations was the 1995 creation of the Commercial Division of the Supreme Court³⁴ that followed a pilot program started in 1993.³⁵ A Commercial Division is virtually a separate court within the Supreme Court in the county in which it is established. It may hear only specifically authorized types of cases, including breach of contract, cases arising under the Uniform Commercial Code and the Business Corporation Law, among others,³⁶ provided that a monetary minimum is met.³⁷ The Rules of the Commercial Division vary from the rules that are applicable to other types of cases litigated in the Supreme Court.³⁸

Among these, a preliminary conference is mandatory within 45 days of the assignment of a case to the Commercial Division or as soon thereafter as practicable.³⁹ Counsel is expected to meet prior to the conference and discuss settlement, discovery, and other matters. Further, discovery in the Commercial Division is subject to limitations not found in the C.P.L.R., i.e., interrogatories may not exceed twenty-five and are limited to specific areas of the case.⁴⁰ On the other hand, expert disclosure is more expansive than is otherwise available under the C.P.L.R.⁴¹ Generally, practice in the Commercial Division now more closely resembles federal practice than does New York practice

³³ THE 1993 STATE OF THE JUDICIARY, *supra* note 2, at 27–28.

³⁴ N.Y. COMP. CODES R. & REGS. tit. 22, § 202.70 (2017); *see* 7 NEW YORK CIVIL PRACTICE, *supra* note 26, ¶ 3401[2].

³⁵ *See Commercial Division—New York Supreme Court: History*, N.Y. ST. UNIFIED CT. SYS., <http://www.nycourts.gov/courts/comdiv/history.shtml> (last visited Mar. 15, 2017) (discussing Chief Judge Kaye’s creation of the Commercial Courts Task Force and subsequent establishment of the Commercial Division); *see also* 7 NEW YORK CIVIL PRACTICE, *supra* note 26, ¶ 3401[2].

³⁶ N.Y. COMP. CODES R. & REGS. tit. 22, § 202.70(b); *see* 7 NEW YORK CIVIL PRACTICE, *supra* note 26 ¶ 3401[2].

³⁷ N.Y. COMP. CODES R. & REGS. tit. 22, § 202.70(a). The amount varies by the county in which the Commercial Division is sitting. It ranges from \$50,000 in Albany County to \$500,000 in New York County.

³⁸ *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 202.70(g). For a thorough description of the background and current operation of the Commercial Division, *see Commercial Division—New York Supreme Court: History*, *supra* note 35.

³⁹ N.Y. COMP. CODES R. & REGS. tit. 22, § 202.70(g) Rule 7.

⁴⁰ N.Y. COMP. CODES R. & REGS. tit. 22, § 202.70(g) Rule 11-a.

⁴¹ *Compare* N.Y. C.P.L.R. 3101 (d)(1)(i) (McKinney 2014), *with* N.Y. COMP. CODES R. & REGS. tit. 22, § 202.70(g) Rule 13(c).

governing other civil litigation.⁴² Perhaps most important, the Commercial Division Justices preside over the cases assigned to them through the trial, if one is required. Currently, a Commercial Division has been established in a number of Supreme Court venues throughout the State, including New York County.⁴³

According to one respected treatise, “[t]he Commercial Division has resulted in increased efficiency and less delay in the disposition of commercial cases.”⁴⁴ Further, The Task Force on Commercial Litigation in the 21st Century created by Chief Judge Jonathan Lippman (the successor to Chief Judge Kaye) reported: “In the course of our efforts, we found that the Bar and the business community are immensely proud of the Commercial Division.”⁴⁵ Although that Report did not claim that the Commercial Division was disposing of cases more efficiently or more quickly than it had in the past or more quickly than other divisions of the Supreme Court, there is some statistical evidence that it does so.⁴⁶

A possible reason for this is that since the judges assigned to the Division have familiarity with this type of cases they can bring them to disposition more quickly and efficiently than judges who do not share these qualities. Further, by removing these cases from the other, non-Division judges, it allows those judges to handle their other cases without being bogged down by the more commercial complex cases.

II

ENFORCING RULES OF PROCEDURE AND REDUCING NEEDLESS DELAY

Judge Kaye’s dissent in *Northway Engineering, Inc. v. Felix Industries, Inc.*⁴⁷ exemplifies her dual concerns—respect for rules of procedure and concern for the pace of litigation.⁴⁸ The issue before the Court was, colloquially speaking, the appropriate sanction to impose on the defendant-counterclaimant for failing to serve a bill of

⁴² See David L. Ferstendig, *Commercial Division Continues to Emulate Federal Practice*, N.Y. ST. L. DIG. (N.Y. State Bar Ass’n, Albany, N.Y.) June 2015, at 1–2.

⁴³ See N.Y. COMP. CODES R. & REGS. tit. 22, § 202.70(a) (2016).

⁴⁴ 7 NEW YORK CIVIL PRACTICE, *supra* note 26, ¶ 3401.04.

⁴⁵ THE CHIEF JUDGES’ TASK FORCE ON COMMERCIAL LITIGATION IN THE 21ST CENTURY, REPORT AND RECOMMENDATIONS TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 3 (2012).

⁴⁶ See *infra* note 116 and accompanying text.

⁴⁷ 569 N.E.2d 437 (N.Y. 1991).

⁴⁸ See *id.* at 441–42 (Kaye, J., dissenting).

particulars. As we shall see, Judge Kaye played the proverbial “tough cop,” though in dissent.⁴⁹

Felix, the general contractor for the construction of a sewage filtration plant, had contracted with Northway as a subcontractor. Claiming that Felix had not paid the full amount owed for the work done, Northway commenced this action. In its answer, Felix pleaded a general denial and asserted two counterclaims (also labeled as defenses), one for breach of contract and another for negligent performance. Northway served a demand for a bill of particulars “with respect to the counterclaims.”⁵⁰ When Felix failed to respond, Northway successfully moved for an order of preclusion. The trial court granted the motion conditionally, giving Felix another thirty days to comply. When it failed to do so, the order took effect and “effectively removed the counterclaims from the case.”⁵¹ Northway then moved for summary judgment for part of the sum it had sought in the complaint. Defendant Felix sought to present defenses in opposition but the trial court granted summary judgment for the amount claimed, holding that the preclusion order “barred the defendants ‘from offering any defense.’” The Appellate Division affirmed.⁵²

Reversing, a majority of the Court of Appeals held that the preclusion order could bar only the claims asserted in Felix’s counterclaims. Writing for the Court, Chief Judge Wachtler distinguished a demand for a bill of particulars from a discovery demand in that the former was limited to matters on which the party has the burden of proof, “whether alleged in that party’s pleading, whether it be a complaint, an answer, or any other type of pleading However, a party need not particularize general denials because these are matters on which the party making the allegations, and not the party denying them, has the burden of proof.”⁵³ Consequently, Northway had no right to demand a bill of particulars directed at Felix’s general denials. To preclude Felix from presenting evidence in support of the denials would, the Court concluded, deprive it of the right to “their day in court”⁵⁴ and would blur “the distinction between the demand for a bill of particulars and a demand for disclosure.”⁵⁵

⁴⁹ *Id.* Judge Kaye asserted that the order entered by the trial judge precluded the defendant from presenting defenses to the claims as well as the facts underlying the counterclaims.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 439 (citations omitted).

⁵⁴ *Id.*

⁵⁵ *Id.*

Judge Kaye dissented. She would have enforced the preclusion of facts supporting the general denials and affirmed the grant of summary judgment against Felix. Her disagreement with the majority was based in part on her different reading of Northway's demand for the bill of particulars. The majority was mistaken, she wrote, in characterizing the demand as addressed only to the counterclaims. Instead the demand "was directed to specific paragraphs of the answer which defendant itself had denominated '*counterclaim and defense.*'"⁵⁶ Felix could have challenged the demand if it thought it was improper. Having failed to do so, and further having failed to respond to the demand, the preclusion of facts underlying the denials as well as the counterclaims was proper.⁵⁷ Judge Kaye did not rest her dissent on an analysis of the role of the bill of particulars. The non-compliance led to a reprimand:

[D]efendants' calculated indifference to the CPLR—involving plaintiff and the court in costly, time-consuming motion practice—should not be rewarded by now reversing summary judgment. That is an improper result in this case, and a very poor example for other cases. Plaintiff should have the balance due on its contract rather than defendants' renewed foot-dragging, discovery runarounds, and litigation in the trial court—as well as a bill of costs from us.⁵⁸

Judge Kaye's strong words must be understood in the context that the majority had left out but that she emphasized. First, a year had passed between the time that Northway had requested the bill and the trial court had issued its conditional order, and second, five months had passed after the order was made and Felix had not responded.⁵⁹ Northway then moved for summary judgment which led Felix to argue for the first time that the demand for a bill of particulars was not authorized.⁶⁰

Chief Judge Kaye had another opportunity to express her displeasure of time-wasting violations of judicial directives in *Kihl v. Pfeffer*.⁶¹ This time she was in the majority and wrote the opinion of the Court. It held that the trial court had not abused its discretion in dismissing the complaint of a plaintiff who had failed to respond timely to the defendant's interrogatories.

⁵⁶ *Id.* at 441.

⁵⁷ *Id.* at 441–42.

⁵⁸ *Id.* at 442.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Kihl v. Pfeffer (Kihl II)*, 722 N.E.2d 55, 58 (N.Y. 1999) (stating that "a litigant cannot ignore court orders with impunity").

On July 26, 1995, Merryl Kihl sued Honda for injuries she sustained as a passenger in a one-car accident,⁶² alleging “negligence, breach of express and implied warranties, strict products liability and failure to warn in connection with the automobile and its component parts, including the seat belts.”⁶³ Honda responded with a general denial and a “host of discovery requests.”⁶⁴ A conference on March 18, 1996 resulted in a Preliminary Conference Order consented to by the parties and signed by the judge. Among other matters, the Order required the plaintiff to respond to Honda’s interrogatories within 30 days of receiving them.⁶⁵ On the day the order was issued, Honda served plaintiffs with a set of interrogatories—ninety-two questions spanning thirty-four pages⁶⁶—which, for five months, went unanswered.⁶⁷ Thus, on September 13, 1996, Honda moved to strike the complaint and dismiss Kihl’s claims.⁶⁸ On December 10, 1996, plaintiff submitted an affidavit opposing the motion and also responded to the interrogatories.⁶⁹ Honda sought dismissal of the complaint, describing plaintiff’s interrogatory responses as “woefully inadequate.”⁷⁰

On March 31, 1997, the Trial Judge held Kihl’s responses to be insufficient and issued a conditional order granting Honda’s motion to dismiss unless plaintiff properly answered certain interrogatories within twenty days of service of a copy of this order.⁷¹ Honda served it on June 6, 1997.⁷² Ultimately, on February 9, 1998, the Trial Judge ruled in Honda’s favor, granting its motion to strike the complaint.⁷³ The Appellate Division affirmed.⁷⁴ The Court affirmed the Appellate Division,⁷⁵ stating “when a party fails to comply with a court order and frustrates the disclosure scheme set forth in the C.P.L.R., it is well

⁶² *Id.* at 56.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 57.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* Many of Kihl’s responses contained boilerplate language that merely alleged a defective design generally, and attempted to reserve the right to provide more detailed responses prior to trial. *Id.*

⁷¹ *Id.* at 57.

⁷² *Id.*

⁷³ *Id.* at 58. Importantly, plaintiff did not respond to the interrogatories within the twenty-day deadline. *Id.* at 57.

⁷⁴ *Kihl v. Pfeffer (Kihl I)*, 682 N.Y.S.2d 462, 463 (App. Div. 1998) (holding that Honda’s Affidavit of Service was properly executed and therefore presumed to have been properly mailed, and that the presumption of delivery was not rebutted by the mere assertion from plaintiff’s counsel that it was not received).

⁷⁵ *Kihl II*, 722 N.E.2d at 56.

within the Trial Judge's discretion to dismiss the complaint."⁷⁶ Chief Judge Kaye also lamented the frequency with which parties fail to meet the timely requirements of disclosure,⁷⁷ citing *Tewari v. Tsoutsouras*⁷⁸ and *Reynolds Securities, Inc. v. Underwriters Bank and Trust Co.*⁷⁹ Highlighting the importance of a court's ability to enforce its disclosure directives, Chief Judge Kaye remarked:

Regrettably, it is not only the law but also the scenario that is all too familiar. If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity. Indeed, the Legislature, recognizing the need for courts to be able to command compliance with their disclosure directives, has specifically provided that a "court may make such orders . . . as are just," including dismissal of an action (CPLR 3126).⁸⁰

A later case in which Chief Judge Kaye authored an opinion in which the court imposed a penalty on a party who had flouted a statutory time limit was *Brill v. City of New York*.⁸¹ As we explain in the next section, *Brill* illustrates how rigid enforcement of a time limit

⁷⁶ *Id.* at 58.

⁷⁷ *Id.* (discussing the importance of compliance with court orders).

⁷⁸ In *Tewari v. Tsoutsouras*, 549 N.E.2d 1143 (N.Y. 1989), plaintiff's medical malpractice suit faced dismissal for failure to file a notice of medical malpractice action as required by C.P.L.R. 3406(a). *Id.* at 1144. In addition to this tardy behavior, plaintiff's counsel had failed to respond to repeated disclosure requests made by the defendant. *Id.* The Supreme Court denied the defendant's motion to dismiss, but the Appellate Division reversed and dismissed the complaint. *Id.* The New York Court of Appeals reversed, finding no statutory support for dismissal as a sanction for violation of C.P.L.R. 3406(a). *Id.* at 1143. In so doing, however, the Court expressed concern about the delay: "We stress, however, that we do not condone the use of dilatory tactics by the plaintiffs' bar in failing to timely file these notices . . ." *Id.* at 1147. In a concurring opinion, Judge Kaye noted that "dismissal of the action for failure to file a timely notice penalizes not the attorney but the plaintiff." *Id.* at 1149. Judge Kaye argued that such attorney failures can instead be addressed by fining the lawyers, or by individual judges "fixing serious return dates, insisting upon adherence to the schedules, and entering orders enforceable on pain of dismissal [which] would address habitual 'law office failures' and systemic delays without unnecessarily penalizing the litigants." *Id.*

⁷⁹ In *Reynolds Sec., Inc. v. Underwriters Bank and Tr. Co.*, 378 N.E.2d 106 (N.Y. 1978), the defendant repeatedly disregarded discovery notices and failed to appear for four court-ordered depositions. *Id.* at 108. As a result, the trial court entered a default judgment against the defendant for the full amount sought by plaintiff without considering evidence as to the plaintiff's actual loss. *Id.* The New York Court of Appeals held that entry of the default judgment was proper, but that existing law required proceedings to determine the amount of damages. *Id.* at 109. In so doing, the court made clear that the trial court could "rely on lesser and more informal proofs" if the defendant's disruptive behavior continued and thus interfered with efforts to determine the precise amount of damages incurred by plaintiff. *Id.* at 110.

⁸⁰ *Kihl II*, 722 N.E.2d at 58.

⁸¹ 814 N.E.2d 431 (N.Y. 2004); see *infra* notes 87–107 and accompanying text.

may create more problems of delay than can the judicious application of discretion.

III BRILL AND THE UNINTENDED CONSEQUENCES OF RIGIDITY

While *Brill v. City of New York*⁸² was a watershed moment in the area of summary judgment motion deadlines, Chief Judge Kaye's impassioned intolerance for the disregard of deadlines was similar to that manifested in her dissent in *Northway Engineering*,⁸³ and her Opinion for the Court in *Kihl v. Pfeiffer*.⁸⁴

Punishing discovery violations by striking a pleading (as was done in *Kihl*⁸⁵) is in line with the stated desire to maintain the court's credibility and integrity. By the time a court sanctions a party for a discovery violation, in most cases that party has repeatedly ignored discovery requests and court orders. The cases assessing more serious sanctions usually take into account the "willful and contumacious" behavior of the offending party.⁸⁶ Indeed, there can be tactical rea-

⁸² 814 N.E.2d 431 (N.Y. 2004).

⁸³ *Northway Eng'g, Inc. v. Felix Indus., Inc.*, 569 N.E.2d 437 (N.Y. 1991).

⁸⁴ *Kihl II*, 722 N.E.2d at 58.

⁸⁵ *Id.*

⁸⁶ See e.g., *Field v. Bao*, 35 N.Y.S.3d 150, 152 (App. Div. 2016) ("Here, the plaintiff's willful and contumacious conduct can be inferred from her repeated failure, over a period of more than two years, to respond to any of the defendants' discovery demands, even after being directed to do so by court order, as well as her failure to respond to the defendants' separate motions to dismiss the complaint and, consequently, the absence of any reasonable excuse for her noncompliance. Accordingly, the Supreme Court should have granted the defendants' separate motions pursuant to CPLR 3126 to dismiss the complaint insofar as asserted against them." (citations omitted)); *Richards v. RP Stellar Riverton, LLC*, 25 N.Y.S.3d 346, 348 (App. Div. 2016) ("Here, the Supreme Court providently exercised its discretion in granting the plaintiff's motion, in effect, pursuant to CPLR 3126 to strike the appellants' answer to the extent of precluding them from offering any evidence on the issue of liability at the trial of this matter unless they provided certain discovery by a specified date. The willful, deliberate, and contumacious character of the appellants' conduct may be inferred from their repeated failures, without an adequate excuse, over a period of more than four years, to comply with the plaintiff's discovery demands and five discovery orders."); *Ozeri v. Ozeri*, 23 N.Y.S.3d 363 (App. Div. 2016) (stating repeated failure to appear for a continued deposition without a reasonable excuse results in grant of motion to strike answer); *Parker Waichman, LLP v. Laraia*, 16 N.Y.S.3d 774, 775 (App. Div. 2015) ("Here, the Supreme Court providently exercised its discretion in granting that branch of the plaintiff's motion which was pursuant to CPLR 3126(3) to strike the defendant's answer upon his repeated and willful failure to provide substantive responses to the discovery demands of the plaintiff, even after the court issued orders directing him to do so, including a conditional preclusion order dated July 25, 2014. The defendant's failure to comply with the disclosure requests of the plaintiff, despite court conferences and hearings about such discovery, as well as court orders directing such disclosure, together with his contradictory excuses for his failure to comply, constitute willful and contumacious conduct.").

sons why a party might delay in providing discovery as part of an overall strategy of dragging out the case. Discouraging such behavior is important.

The facts and implications of the *Brill* decision, however, are more nuanced and complicated by actual practice in the courts. *Brill* concerned the summary judgment deadline under C.P.L.R. 3212(a), commonly referred to as the 120-Day Rule.⁸⁷ The amendment to C.P.L.R. 3212(a), enacted in 1996,⁸⁸ sought to deal with the common practice of parties moving for summary judgment on the eve of trial, which resulted in trial delays, inconvenience, and disruption of the courts' calendars.⁸⁹ As amended, C.P.L.R. 3212(a) provides:

Any party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.⁹⁰

The amendment added the words beginning "provided however . . ." and continuing to the end of subdivision (a).⁹¹ Prior to the amendment, the only statutory deadline imposed on making summary judgment motions related to the *earliest* it could be made; C.P.L.R. 3212(a) had prohibited a motion prior to the joinder of issue, as is still the case.⁹²

The bill's sponsors' memorandum explained the motivation behind the law:

Under current practice, a motion for summary judgment may be delayed until the eve of trial and made when there is no adequate time for an adversary to reply or for the court to consider the motion, thereby occasioning either a determination on the merits of the motion without adequate consideration or the delay of the trial, especially when the motion papers are voluminous. The latter course disrupts court calendars, especially under the individual

⁸⁷ *Brill v. City of New York*, 814 N.E.2d 431 (N.Y. 2004).

⁸⁸ 1996 N.Y. Sess. Laws Ch. 492 (S. 3863-B) (McKinney).

⁸⁹ See *Brill*, 814 N.E.2d, at 433 ("Eleventh-hour summary judgment motions, sometimes used as a dilatory tactic, left inadequate time for reply or proper court consideration, and prejudiced litigants who had already devoted substantial resources to readying themselves for trial.").

⁹⁰ N.Y. C.P.L.R. 3212(a) (McKinney 2003).

⁹¹ 1996 N.Y. Sess. Laws Ch. 492 (S. 3863-B) (McKinney).

⁹² *Brill*, 814 N.E.2d at 651 ("CPLR 3212(a) (as added by L 1962, ch. 308) originally required only joinder of issue before a summary judgment motion could be made. In practice, however, the absence of an outside time limit for filing such motions became problematic, particularly when they were made on the eve of trial.").

assignment system, and is inequitable to the party served with a belated notice of motion for summary judgment, who may already have spent time and money preparing for trial. At times, such belated motions may be filed in an attempt to delay a case or to secure transfer of the case to a different judge for trial.⁹³

Brill was a slip and fall case filed against the City of New York. After discovery was complete, plaintiffs filed a note of issue and certificate of readiness. Almost a year thereafter, the City moved for summary judgment on the ground that it did not have prior written notice of the alleged defect where the accident occurred. The City offered no reason or excuse for waiting well beyond the 120-day limit under C.P.L.R. 3212 to move for summary judgment. The lower court granted the City's motion on the merits. It declined to preclude the motion as untimely, determining that in the interests of judicial economy and in the absence of prejudice, it could decide the motion. The Appellate Division affirmed.

The Court of Appeals was faced with two lines of conflicting cases. The dispute concerned the meaning of the term "good cause." This was critical because C.P.L.R. 3212(a) allows a summary judgment motion to be made after the 120-day limit only if "good cause" was shown. Some courts held that the "good cause" standard required a satisfactory explanation for the *delay* in bringing the motion before it would consider the merits of the motions.⁹⁴ However, other courts would entertain the motion if it had merit and there was no indication of prejudice to the adversary.⁹⁵

The Court of Appeals reversed in a majority opinion written by Chief Judge Kaye, finding that the lower court should not have considered the merits of the City's motion. In doing so, the majority adopted the former approach:

We conclude that "good cause" in CPLR 3212(a) requires a showing of good cause for the delay in making the motion—a satisfactory explanation for the untimeliness—rather than simply permitting meritorious, nonprejudicial filings, however tardy. That

⁹³ Mem. of Senate in Support, 1996 McKinney's Session Laws of N.Y., at 2432, 2433.

⁹⁴ See *Brill*, 814 N.E.2d at 434 (citing *Carvajal v. M. Madison LLC*, 747 N.Y.S.2d 93, 95 (App. Div. 2002); *Hilton v. City of New Rochelle*, 751 N.Y.S.2d 392, 393 (App. Div. 2002); *Ripepe v. Crown Equip. Corp.*, 752 N.Y.S.2d 890 (App. Div. 2002); *Falcone v. Khurana*, 742 N.Y.S.2d 871, 872 (App. Div. 2002); *Borelli v. Gegaj*, 670 N.Y.S.2d 90 (App. Div. 1998); *DiFusco v. Wal-Mart Discount Cities*, 680 N.Y.S.2d 377, 378 (App. Div. 1998); *John v. Bastien*, 681 N.Y.S.2d 456, 458–59 (Civ. Ct. 1998)).

⁹⁵ See *Brill*, 814 N.E.2d at 434 (citing *Burns v. Gonzalez*, 763 N.Y.S.2d 603, 604–05 (App. Div. 2003); *Lee v. City of New York*, 762 N.Y.S.2d 269, 269–70 (App. Div. 2003); *Simmonds v. Long Island R.R. Co.*, 745 N.Y.S.2d 555, 556 (App. Div. 2002); *Garrison v. City of New York*, 751 N.Y.S.2d 436, 438 (App. Div. 2002), *denied leave to appeal*, 790 N.E.2d 276 (N.Y. 2003); *Medina v. Barbaro*, 720 N.Y.S.2d 165, 166 (App. Div. 2001)).

reading is supported by the language of the statute—only the movant can show good cause—as well as by the purpose of the amendment, to end the practice of eleventh-hour summary judgment motions. No excuse at all, or a perfunctory excuse, cannot be “good cause.”⁹⁶

Since it was undisputed that the City’s motion was late and it did not proffer a reason or excuse for the delay, the Court concluded that the lower court should not have considered the merits of the motion, and should have instead denied it as untimely. Interestingly, however, the Opinion did not stop there. In her Opinion for the Court Chief Judge Kaye addressed a question posed by the late Professor David Siegel in one of his comments on C.P.L.R. 3212(a):

As Professor David Siegel—who has tracked this “controversial topic”—has promised, “we’d think better of judicial decisions that absolutely refuse to extend the time for meritorious summary judgment motions if they would tell us what is to happen in the case.”⁹⁷

The Court’s response again reflected Chief Judge Kaye’s concern with deadlines and her hope that the decision would encourage “a habit of compliance”⁹⁸:

What is to happen in this case is that summary judgment will be reversed and the case returned to the trial calendar, where a motion to dismiss after plaintiff rests or a request for a directed verdict may dispose of the case during trial. Hopefully, as a result of the courts’ refusal to countenance the statutory violation, there will be fewer, if any, such situations in the future, both because it is now clear that “good cause” means good cause for the delay, and because movants will develop a habit of compliance with the statutory deadlines for summary judgment motions rather than delay until trial looms.⁹⁹

While the *Brill* Court’s intentions were undoubtedly good, the circumstances of this particular case may have caused the Court to overlook “the facts on the ground.”¹⁰⁰ In *Brill*, the City was almost

⁹⁶ *Id.* at 434.

⁹⁷ *Id.* at 435 (citing DAVID D. SIEGEL, *NEW YORK PRACTICE* § 279, at 440 (3d ed. 1999)); *Court Holds That Mere Demonstration That Summary Judgment Motion Has Merit Does Not Excuse Delay and Allow Late Motion*, SIEGEL’S PRACTICE REVIEW, Jan. 1999, at 2, 2; *Strict Time Limit Placed on Motion for Summary Judgment*, SIEGEL’S PRACTICE REVIEW, Nov. 1996, at 1, 1).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ On the effects of *Brill*, see also Patrick M. Connors, *CPLR 3212(a)’s Timing Requirement for Summary Judgment Motions: On a Brill’s Stroll Through Brooklyn and the Dramatic Effect It Has Had on New York State’s Civil Practice*, 71 BROOK. L. REV. 1529 (2006). The article prompted a post-script written by Chief Judge Kaye, which was published with the article. *Id.* at 1586. While commending the “comprehensive treatment” it provided, *id.*, she took issue with Professor Connors’s observation that some lawyers had made various attempts to avoid the time requirement, which evidenced “the

eight months late in filing its summary judgment motion, some one year after the note of issue was filed. The effect of the *Brill* decision, however, has been to have courts deny motions made only a few days late as untimely without considering the merits.¹⁰¹ As stressed by Judge Smith's dissent in *Brill*, the already overtaxed trial courts are burdened by matters that should have been disposed by motion.¹⁰² Perhaps as troubling, the Court of Appeals overturned the discretion of the trial judge, the person who is presumably in the best position to assess his or her schedule and the impact of delay, and, in part, for whose benefit C.P.L.R. 3212(a) was amended.

The Court's answer to Professor Siegel's question, suggesting that a directed verdict "may" dispose of the case during trial gives little comfort. First, that result still does not address the burden to the courts and requires in many instances the unnecessary use of jurors, perhaps needed in other matters. Second, the procedural differences between a summary judgment motion decided on papers well before trial and a directed verdict during a jury trial cast doubt on the Court's suggestion. While it may follow logically that a plaintiff faced with the denial of a defendant's meritorious summary judgment motion as untimely would avoid a trial, those procedural differences may not cause a plaintiff to walk away or accept a nominal settlement. Instead, the plaintiff may choose to take his or her chances at trial.

Finally, while 120 days sounds like a long period of time, in fact many courts throughout the state have adopted shorter time periods, for example, 60 days.¹⁰³ These shorter deadlines can be particularly problematic in view of the *practice* in several courts downstate, to permit (and in some instances to encourage) discovery to continue well after the filing of the note of issue. Some of these practices may be motivated or compelled by the pressure of the "standards and

adventuresome nature of a healthy segment of the bar," *id.* at 1563, 1568. She wrote, "I can't avoid offering some guidance of my own: just honor the deadlines, whether statutory or court-ordered." *Id.* at 1586.

¹⁰¹ See, e.g., *Milano v. George*, 792 N.Y.S.2d 906 (App. Div. 2005) (denying motion for summary judgment submitted one day late).

¹⁰² *Brill*, 814 N.E.2d at 436–37 (Smith, J., dissenting) ("What is clear from the legislative history is that the Legislature sought to give the trial court wide discretion in entertaining a motion for summary judgment. The Legislature could not have intended to grant a futile hope to a litigant or to waste the time of a number of people when the state courts are as burdened as they are."). Judge Smith argued that the 1996 amendment did not limit good cause to an excuse for an untimely motion, but even if it did, "the appropriate remedy is to progressively promote higher penalties by way of costs and sanctions, and even, in an appropriate case, preclusion." *Id.* at 437.

¹⁰³ See, e.g., *Cullity v. Posner*, No. 112494/11 (N.Y. Ct. App. Oct. 13, 2016) (reversing lower court grant of summary judgment, finding defendant's motion filed nine days after the 60-day period untimely, absent good cause for delay).

goals” deadlines for filing the note of issue and disposing of the case.¹⁰⁴ In any event, it should be clear that outstanding discovery requests not complied with by the end of the time permitted by C.P.L.R. 3212(a) or local rules would be a basis for extending that period even under *Brill*.¹⁰⁵ However, the case law has read in a requirement that that discovery be relevant or essential to the summary judgment motion, in order to merit an extension.¹⁰⁶

In these circumstances, it is difficult, at times, to comply with the summary judgment motion deadline when discovery is ongoing. This can place well-meaning diligent attorneys in the unfortunate position of having to decide whether to move prematurely for summary judgment or risk waiting. In the latter instance, the court could deny the motion as untimely, finding that the post note of issue discovery was not relevant or essential to the summary judgment motion¹⁰⁷ (a conclusion perhaps not readily ascertainable in advance of the discovery).

¹⁰⁴ Three standard and goal periods measure the length of time from filing a civil action to disposition. The first or “pre-note” standard measures the time from filing a request for judicial intervention (RJI)—when parties first seek some form of judicial relief—to filing the trial note of issue, indicating readiness for trial. N.Y. STATE UNIFIED COURT Sys., 38TH ANNUAL REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS 25 (2015) http://nycourts.gov/reports/annual/pdfs/15_UCS-Annual_Report.pdf. The second or “note” standard measures the time from filing the note of issue to disposition. *Id.* The third standard covers the entire period from filing the RJI to disposition. *Id.* The respective time frames are 8–15–23 months for expedited cases; 12–15–27 months for standard cases; and 15–15–30 months for complex cases. *Id.* In matrimonial cases, the standards are 6–6–12 months; and in tax certiorari cases, 48–15–63 months. *Id.*

¹⁰⁵ *Gonzalez v. 98 Mag Leasing Corp.*, 733 N.E.2d 203, 206 (N.Y. 2000) (affirming a trial court’s grant of a late motion for summary judgment by defendant when the plaintiff had prematurely filed a note of issue while important discovery was outstanding and the trial court had made an order permitting the discovery).

¹⁰⁶ See *infra* note 107 (collecting cases).

¹⁰⁷ See, e.g., *Courtview Owners Corp. v. Courtview Holding B.V.*, 978 N.Y.S.2d 859, 860 (Ct. App. 2014) (“Further, the Supreme Court properly denied, as untimely, those branches of the plaintiff’s motion which were for summary judgment, and the defendants’ cross motion for summary judgment, as the parties failed to demonstrate good cause for making their respective motion and cross motion more than 60 days after the filing of the note of issue, as required by a preliminary conference order. While significant outstanding discovery may, in certain circumstances, constitute good cause for a delay in making a motion for summary judgment (citations omitted), contrary to the defendants’ contention, the discovery outstanding at the time the note of issue was filed was not essential to their cross motion.” (citations omitted)); *Maschi v. City of New York*, 973 N.Y.S.2d 51, 52 (Ct. App. 2013) (“Defendant’s excuse for filing a tardy motion—that counsel was on trial in another case—does not satisfy the ‘good cause’ requirement (C.P.L.R. 3212(a)) inasmuch as it is essentially an excuse of law office failure. Also unavailing is defendant’s contention that plaintiff’s failure to furnish it with the estate’s tax return excuses its tardiness since the outstanding discovery is neither relevant nor necessary to the motion for summary judgment.” (citations omitted)); *Avezbakiyev v. City of New York*, 960 N.Y.S.2d 910, 911 (Ct. App. 2013) (“The Supreme Court properly denied, as untimely, the motion of the defendants Horizon at Forest Hills, LLC, and Britt Realty Development Corp. . . . for summary judgment dismissing the complaint and all cross claims insofar as asserted against

In sum, while the *Brill* decision would seem to have encouraged “a habit of compliance” among the less diligent counsel, practice in some of our courts can place diligent counsel in an uncertain and unfair position that Chief Judge Kaye may not have envisioned. In addition, the jury is still out as to whether the benefits of compelling strict adherence to the summary judgment deadline, even to deny motions only a few days late or to overturn a trial court’s discretion, outweighs the burden on the litigants, lawyers, and the courts. From the *Brill* experience we take the view that the Court should generally avoid limiting the discretionary authority of the trial judge in applying time limits, whether imposed by statute or rule, unless expressly required by the text of the statute or rule to do so.

IV

THE PACE OF LITIGATION DURING CHIEF JUDGE KAYE’S TENURE

After recognizing Chief Judge Kaye’s efforts to reduce delay in civil litigation in the Supreme Court and her related demand that lawyers follow the rules governing time limits, the obvious question arises: Did these efforts yield fruit? What impact did they have on the actual time from commencement to disposition of cases in the Supreme Court of New York? The best sources of relevant statistics available to the public are the annual reports of the Chief Administrator of the Courts. They do not, however, include the length of time of the cases commenced in the Supreme Courts from filing to disposition. Each year the Chief Administrator of the Courts publishes a Report that is made public by posting on the State Courts website.¹⁰⁸ The 2015 Report (the most recent) sets forth “standards and goal periods [that] measure the time from filing a civil action to disposi-

them, since they failed to demonstrate good cause for the delay in making their motion for summary judgment. Significant outstanding discovery may, in certain circumstances, constitute good cause for a delay in making a motion for summary judgment. Here, however, the discovery outstanding at the time the note of issue was filed was not essential to the appellants’ motion.” (citations omitted); *Greenpoint Props., Inc. v. Carter*, 919 N.Y.S.2d 370, 371 (Ct. App. 2011) (reversing lower court grant of summary judgment because defendant failed to demonstrate good cause, finding that “discovery at time the note of issue was filed was not essential to his motion”). *But see Gonzalez*, 733 N.E.2d at 206 (affirming a trial court’s grant of a late motion for summary judgment by defendant when the plaintiff had prematurely filed a note of issue while important discovery was outstanding and the trial court had made an order permitting the discovery).

¹⁰⁸ The Annual Reports from 1997 through 2015 are available online. See *Annual Reports of the Chief Administrator*, N.Y. ST. UNIFIED CTS. SYS., <http://www.courts.state.ny.us/reports/annual/index.Shtml> (last visited Mar. 15, 2017). Earlier Reports are available only in hard copy.

tion.”¹⁰⁹ However, the Report does not reveal how many cases meet the standards and goals and how many do not.¹¹⁰ Moreover, the Report does not report the number of dispositions of civil cases in the Supreme Court. It does report the number of new cases filed and the number of “matters” that reach disposition, but it does not report how many cases reached disposition.¹¹¹ The first full year in which Judith Kaye served as Chief Judge was 1994; she retired at the end of 2008. Table 1, based on the Annual Reports of the Chief Administrative Judge, shows the total number of active Supreme Court Justices (including Certificated Retired Justices¹¹²); the total number of matters disposed in the Supreme Court and the average number of matters disposed of by each judge; the total number of cases disposed; and the average number of case dispositions per judge. Some, but not all Reports include the number of case dispositions.¹¹³ The Reports for 2007 and 2008 do not report the number of active Supreme Court Justices.¹¹⁴

Table 1 reveals a substantial rise in all indicators during Chief Judge Kaye’s tenure. For example, 342,335 matters were disposed of in 1994 compared with 442,428 in 2008 (the highest number reached). Matters disposed of per judge also reached the highest number. A large jump was made in 1997 when matters rose to 405,050 and matters per judge rose to 1,209, compared with 357,933 and 1072 the prior year. After a slight drop of matters per judge in 1998, the matters per judge continued to rise to its height at 2006 of 1,348. The highest number of dispositions of cases was 214,481 in 2001.¹¹⁵ Total dispositions of the Supreme Court between 2001 and 2006 were all close to 200,000 with 193,461 reaching dispositions in 2006, the last year

¹⁰⁹ See *supra* note 104.

¹¹⁰ According to Mr. Chip Mount, “[o]ur automated systems calculate times for individual cases for management purposes but we do not compile reports for the public.” Email from Chip Mount, Dir. of Court Research, N.Y. State Unified Court Sys., to Oscar G. Chase (Oct. 15, 2016) (on file with Oscar G. Chase).

¹¹¹ For the purpose of measuring the number of “matters,” RJIs, *ex parte* applications, and uncontested matrimonial cases. *E.g.*, N.Y. STATE UNIFIED COURT SYS., 20TH ANNUAL REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS 10 (1997). The disposition of an RJI is the disposition of a case that was assigned to a Supreme Court Justice.

¹¹² A Supreme Court Justice who has retired because she reached the age of 70 may apply to be certified by the administrative board of the judiciary to continue to serve as a Supreme Court Justice for a two-year term, renewable until the end of the year in which she reaches the age of 76. N.Y. JUD. LAW § 115 (McKinney 2015).

¹¹³ No explanation was given in the Reports for years pre-1997 and post-2006.

¹¹⁴ No explanation is included.

¹¹⁵ N.Y. STATE UNIFIED COURT SYS., 24TH ANNUAL REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS 11, tbl.6 (2001), <http://nycourts.gov/reports/annual/pdfs/2001annualreport.pdf>.

reported.¹¹⁶ The dispositions per judge varied during the same period, with a high of 619 in 2001, a low of 558 in 1997, and then somewhat over 600 in 2005 and 2006. With the statistics publicly available, it is not possible to explain all of the differences. On the whole, the numbers show that while dispositions per judge were basically the same between 1997 and 2006, the disposition of matters was handled at a substantially speedier rate.

The overall improvement in civil litigation pace in the Supreme Court from the mid-1990s to the mid-2000s can reasonably be attributed to four factors: (1) the restoration of funds to the judiciary from 1992 to 1993; (2) the adoption of the IAS system in 1986 and its improvements made by Chief Judge Kaye in 1993 soon after she became Chief Judge; (3) the development of the Commercial Division that began with a trial program in 1993 in New York County and was expanded to additional counties over time; and (4) the ongoing and effective leadership of Chief Judge Kaye.

TABLE 1. CIVIL LITIGATION DISPOSITIONS IN THE SUPREME COURT OF NEW YORK

<i>Report Year</i>	<i>Total S. Ct. Judges</i>	<i>Matters Disposed</i>	<i>Cases Disposed</i>	<i>Matters per Judge</i>	<i>Disposition by Judge</i>
1990	318	302,939	N/A	953	N/A
1994	331	342,335	N/A	1034	N/A
1995	N/A	341,081	N/A	N/A	N/A
1996	334	357,933	N/A	1072	N/A
1997	335	405,050	201,304	1209	601
1998	369	409,710	205,889	1110	558
1999	346	428,516	209,172	1238	606
2001	346	439,309	214,481	1270	619
2002	352	432,136	199,116	1228	566
2003	356	439,010	197,992	1233	556
2004	332	434,675	197,926	1309	596
2005	330	429,558	199,626	1302	605
2006	321	432,632	193,464	1348	603
2007	N/A	428,402	N/A	N/A	N/A
2008	N/A	442,428	N/A	N/A	N/A

¹¹⁶ N.Y. STATE UNIFIED COURT SYS., 29TH ANNUAL REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS 8 (2006). We assume that RJs refer to cases.

CONCLUSION

Our reservations about the *Brill* case notwithstanding, we applaud Chief Judge Kaye's long expressed and deeply held concern for "the credibility of court orders and the integrity of our judicial system."¹¹⁷ What goals could be more important for the leader of any court? She pursued them through her decisions, her skillful administrative accomplishments, and her public statements. The "judicial system" that she loved and served is and will be all the better for her work.

¹¹⁷ *Kihl II*, 722 N.E.2d 55, 58 (1999).