

## Court of Appeals Requires Some Evidence of Constructive Notice in Child Victims Act Cases



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In 2019, New York passed the Child Victims Act (CVA), which opened a two-year lookback window for survivors of childhood sexual abuse to file claims otherwise barred by the statute of limitations. During that two-year window, plaintiffs filed thousands of lawsuits across New York State alleging, among other allegations, that employers were negligent in their hiring, retention, and supervision of alleged abusers. But just last week, the Court of Appeals issued a significant ruling in *Nellenback v. Madison County* that will benefit employer-defendants in their CVA cases moving forward.

In *Nellenback*, the plaintiff alleged that a county employee sexually abused the plaintiff while he was in the care of Madison County's Department of Social Services (DSS). During depositions, witnesses testified that prior to the alleged abuse, the County had no information to suggest that the alleged abuser had any propensity to commit sexual abuse, including "a good work record" prior to being employed by DSS. Meanwhile, the plaintiff argued that there was evidence of deficiencies in both the alleged abuser's oversight and training, which raised issues of fact, thereby requiring a trial. Specifically, the plaintiff argued that a supervisor's statement that she did not review the

alleged abuser's notes "as regularly as [she] should have," combined with an expert's opinion that "slack recruitment and hiring standards" along with "lax [supervision]" gave the alleged abuser "unfettered access to" children. The trial court granted the County's motion and dismissed the complaint, holding that the County made a prima facie showing that it lacked actual or constructive knowledge of the alleged abuser's propensity to abuse children. Thereafter, the Appellate Division affirmed, albeit with two justices dissenting, reasoning that the possibility of a more thorough and regular review of the alleged abuser's notes did not create a triable issue of fact as to whether the County knew or should have known of the alleged abuse or propensity to abuse. The sole issue on appeal in *Nellenback* was whether the plaintiff raised a triable issue of fact on his negligent supervision claim.

In a 6-1 decision, the Court of Appeals held that the plaintiff failed to raise a triable issue on notice, ruling in favor of the County. After acknowledging that there was no dispute that the County did not have *actual* notice, the Court analyzed whether the County had *constructive notice*, i.e., whether the County *should have known* of the alleged abuser's misconduct or propensity to abuse. Ultimately, the Court determined that the plaintiff's assertion that increased review of the alleged abuser's notes would have put the County on notice of his propensity to abuse was simply too speculative, and ruled "there was neither evidence that the County had any knowledge of [the alleged abuser's] abuse ... nor any evidence the County was aware of any conduct that could have alerted them to the potential harm." Critically here, the Court of Appeals noted that it has "never held that a party can prove negligent supervision by stating the employer 'should have known' an employee was likely to engage in dangerous conduct without evidence showing any prior conduct, warnings, or signs of risk to that effect." In so doing, the Court also noted that even if evidence of lax review practices were sufficient to prove notice, the plaintiff here failed to demonstrate that the County deviated from a reasonable standard of care.

The *Nellenback* decision is a favorable one for employer-defendants named in CVA lawsuits and will serve as significant precedent in summary judgment motions moving forward. For questions related to this topic or similar ones, contact Dennis C. Vacco, former New York State Attorney General, former United States Attorney, Lippes Mathias partner, and co-leader of the firm's Government & Corporate Investigations practice team at [dvacco@lippes.com](mailto:dvacco@lippes.com), Scott Allen, partner with the firm's Government & Corporate Investigations practice team at [sallen@lippes.com](mailto:sallen@lippes.com), or Carmen Alexander Vacco, senior associate within the firm's Government & Corporate Investigations practice team at [cvacco@lippes.com](mailto:cvacco@lippes.com).

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