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# Court of Appeals Ruling in Nellenback Provides CVA Clarity

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**Court of Appeals Ruling in *Nellenback* Provides CVA Clarity**

In 2019, New York enacted the Child Victims Act (CVA). The legislature ultimately opened a two-year window for survivors of childhood sexual abuse to file claims that were otherwise time-barred and allowed future claims to be brought until a plaintiff turned 55. Since the enactment of the CVA thousands of lawsuits have been filed across New York, alleging that employers were negligent in their hiring, retention, and supervision of alleged abusers. A recent ruling from the New York Court of Appeals in *Nellenback v. Madison County* offers significant guidance for defendants in CVA cases, particularly in terms of the standard for summary judgment and the requirements for proving negligent supervision claims.

***Nellenback* Facts**

In *Nellenback*, the plaintiff alleged that he had been sexually abused by his caseworker, Karl Hoch, at every visit while he was in the custody of Madison County's Department of Social Services (DSS), between 1993 and 1996. The abuse occurred in a County-owned vehicle and at various locations off County-owned premises. Plaintiff further alleged that Hoch threatened him and because of the threats, he did not tell anyone about the abuse. The plaintiff filed suit against the county in 2019, accusing it of negligent hiring, training, supervision, and direction of the caseworker. The county moved for summary judgment, arguing that the plaintiff had failed to present any proof that the county had actual or constructive notice of the caseworker's propensity for abuse.

During depositions, the county's DSS supervisor and commissioner testified that prior to 1996 there was no evidence to suggest that the caseworker had any abusive tendencies, and no complaints had been made regarding the caseworker's behavior. In fact, the caseworker had been recognized with the "Madison County Employer of the Year" award in 1990. However, the plaintiff argued that deficiencies in the caseworker's oversight and training raised issues of fact that warranted a trial. To support his argument, the plaintiff pointed to:

- the supervisor's admission that she did not review caseworker notes as regularly as she should have
- expert testimony that suggested lax recruitment and hiring practices led to the caseworker having "unfettered access" to children

- the department had no handbook for how caseworkers should perform their duties

**Trial and Appellate Decisions**

The trial court granted summary judgment to the county, finding that it had made a prima facie case that it lacked both actual knowledge and constructive notice of the caseworker's abuse, and that no further investigation or supervision would have led to the discovery of the abuse. The Appellate Division affirmed, with two justices dissenting, concluding that the failure to more regularly review caseworker notes did not create a triable issue of fact regarding the county's knowledge of the abuse. The plaintiff then appealed to the Court of Appeals.

**Court of Appeals Decision**

In a 6-1 decision, the Court of Appeals ruled in favor of the county, holding that the plaintiff failed to raise a triable issue of fact regarding constructive notice. The Court acknowledged that there was no dispute that the county had no actual knowledge of the abuse. It then focused on whether the county had constructive notice—i.e., whether it should have known about the alleged abuse. The Court concluded that the plaintiff's argument that increased review of caseworker notes would have revealed the abuse was speculative. There was no evidence suggesting that the county had any reason to be aware of the caseworker's misconduct or propensity to abuse. Without "evidence showing any prior conduct, warnings or signs of risks" related to an alleged abuser's propensities for sexual abuse, *Nellenback* found proof of notice was not satisfied.As the majority stated:

"[The Court of Appeals 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*."

**Key Takeaways Post-*Nellenback***

1. **Constructive Notice in CVA Cases**

The Court affirmed that the standard for proving constructive notice in CVA cases is the same as in any other cause of action. While the passage of time in many CVA cases creates evidentiary challenges unique to this context, those challenges do not lower the burden of proof. Constructive notice cannot be established without "evidence showing any prior conduct, warnings, or signs of risks" related to the alleged abuser's propensity for sexual abuse. Courts will not infer notice simply because records may have been lost or destroyed over time.

1. **Speculative Assertions Are Insufficient to Establish Notice**

The Court emphasized that broad, speculative allegations are not enough to establish constructive notice. In *Nellenback*, the plaintiff claimed that a more thorough review of the alleged abuser's case notes would have alerted the Defendant to the risk of abuse. The Court rejected this argument, holding that such assertions must be supported by specific facts. A plaintiff cannot rely on bare speculation; there must be concrete evidence in the record indicating an employee's propensity to commit sexual abuse.

- **The Standard of Care Relates to the Time that the Abuse was Considered**

The Court of Appeals found that it must evaluate the reasonableness of the defendant's supervision

and training by the then-prevailing standards, not today's standard.

**Post-Nellenback Open Questions**

In *Nellenback*, the Court held that without evidence in the record establishing a defendant's opportunity or reason to know of the abuse, it is speculative for a plaintiff to argue that heightened or extraordinary vigilance by the employer would have resulted in notice. This holding raises an important unresolved question: Does a plaintiff's assertion about the nature and frequency of alleged abuse, on its own, still constitute a factual basis for a triable issue of fact related to constructive notice?

Spcifically, in light of *Nellenback*'s requirement that genuine evidence of notice must exist in the record, can plaintiffs continue to rely solely on their own uncorroborated allegations regarding the frequency of abuse to survive summary judgement and create a triable issue of fact? If, as the Court concluded in *Nellenback,* allegations of lax supervision and infrequent review of caseworker notes do not suffice to establish notice, it remains uncertain whether courts will find that frequency of abuse alone can meet the threshold for constructive notice.

**Conclusion**

*Nellenback* is a key decision for entities defending CVA claims. By reiterating the high standard for proving constructive notice and making clear that speculative claims of negligence are not sufficient to defeat summary judgment, the Court has confirmed that plaintiffs should not survive summary judgment in these cases without more concrete evidence of prior misconduct or warning signs. That being said, the Court of Appeals did not address the line of Appellate Division Second Department cases holding that movants for summary judgment must eliminate all triable issues pertaining to notice for defendants to meet their initial burden on a motion for summary judgment. Watch this site for an update on this issue and a motion to renew we have currently pending in the Second Department based in large part upon *Nellenback*



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