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THE SARATOGA COUNTY BAR ASSOCIATION

SERVING THE INTEREST OF JUSTICE

LAW NOTES

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THE PRACTICE PAGE

JUDICIAL NOTICE MIRACLES ON 34th STREET

HON. MARK C. DILLON *

The year-end holidays will be here before we know it. A classic holiday movie is Miracle on 34th Street starring Maureen O'Hara, John Payne, Natalie Wood, and Edmund Gwenn, made in 1947. It involved a man named Kris Kringle who was employed at the Macy's flagship store on 34th Street during holiday time. Kringle claimed to be the real Santa Claus and faced potential commitment to a psychiatric hospital as a result. We may assume that because Macy's was located in Manhattan, the case to commit Kringle was venued at the Supreme Court, New York County. The matter went to a trial where Kringle could avoid involuntary commitment only if able to prove that he was the one true Santa. Kringle lacked corroborative evidence. The trial was highly-publicized. Moments before a troubling oral decision was to be rendered from the bench by Justice Henry Harper, a mail sorter from the Post Office delivered to the court multiple bags of dead letters addressed to Santa Claus—proof in the official custody of the U.S. government that Santa existed. Justice Harper dismissed the case against Kringle to the enthusiastic applause of all present in the courtroom. In effect, the judge took judicial notice of the letters, though the movie never mentioned the statutory basis for him doing so, CPLR 4511 (known then as C.P.A. 344-a). Perhaps Kringle's attorney's motion for a directed verdict, with razor-sharp citation to the relevant practice statutes, was cut from the movie during editing.

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THE PRACTICE PAGE

JUDICIAL NOTICE MIRACLES ON 34th STREET

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Readers of CPLR 4511 should take care of the statute's constituent parts that distinguish between what "shall" and what "may" be judicially noticed. Judicial notice shall be taken by a court of the common law, public statutes, and constitutions of the United States and its individual states and territories, but not of the organization or management of the state or its agencies, or of local and county laws (CPLR 4511[a]). Judicial notice *may* be taken by a court at its own initiative of federal, state, and foreign statutes, resolutions, and regulations, but *shall* be taken of them if requested by a party, if properly documented and upon notice to all parties (CPLR 4511[b]). The foregoing regards matters of law. Beyond that, judicial notice *may* be taken of matters of fact for which there can be no reasonable dispute. A Westlaw search identifies examples as including dates and days of the week, official climatological data, the timing of sunrises and sunsets, scientific properties, weights and measures, undisputed court records, geographic locations, census statistics, travel distances, currency exchange rates, and known historical facts.

Judicial notice of a matter may be taken at any stage in a proceeding (*Caffrey v North Arrow Abstract & Settlement Services*, 160 AD3d 121, 127), which is why Justice Harper in *Miracle on 34th Street* could consider the dead letters from the Post Office at the last moments of Kringle's trial.

Assuming the trial determination was based on judicially-noticed letters, was that determination correct? May the government's mere possession of letters written to one recipient (Santa) addressed to the same place (the North Pole) qualify as indisputable evidence of the addressee's existence? Or alternatively, did the court commit reversible error by allowing the letters into evidence on Kringle's behalf? The answer is that judicial notice was inappropriate. The existence of the letters proved, at best, that children believed there was "*a*" Santa Claus and had acted upon that belief by mailing material at official postal depositories. The letters did not prove that the person to whom the letters were addressed existed in reality, or that Kringle was "*the*" Santa Claus to whom the children had written. The letters were of no probative value to the dispositive issue of the case (*People v Palencia*, 130 AD3d 1072, 1074-75), which was whether Kringle was *the* Santa Claus versus someone in need of psychiatric commitment. The dead letters made no difference to that narrow question.

The time for appealing Justice Harper's order to the First Department passed in 1948. If, however, there were a stay and the Kringle determination is still viable, appealed, and reversed, Hollywood can produce a post-appeal sequel to *Miracle on 34th Street,* with a better analysis of CPLR 4511 upon remittal.

Merry Christmas, Happy Chanukah.

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*Mark C. Dillon is a Justice of the Appellate Division, 2nd Dept., an Adjunct Professor of New York Practice at Fordham Law School, and a contributing author of CPLR Practice Commentaries in McKinney's.

TORTS AND CIVIL PRACTICE:
Selected Cases from the Appellate Division, 3rd Department

TIM J. HIGGINS, ESQ. of LEMIRE & HIGGINS, LLC

Non-party discovery compelled in priest abuse claims.

Melfe v. Roman Catholic Diocese of Albany (Pritzker, J., 7/1/21)

Plaintiffs are siblings who filed suit pursuant to the Child Victims Act, alleging sexual, physical and emotional abuse by the defendant Francis Melfe when he was employed as a priest by the defendant Diocese (from 1969-1979 when Melfe worked at parishes in Albany and Schenectady). Supreme Court (Mackey, J., Albany Co.) granted plaintiffs' motion to compel discovery of the Diocese's files on six non-party priests who were removed in 2002 after the U.S. Conference of Bishops mandated a zero-tolerance policy for pedophilia, ruling that such discovery could lead to admissible evidence, including that the Diocese and Defendant Bishop Howard Hubbard "had a custom or practice of retaining priests who had credibly been accused of child sexual abuse". Emphasizing that the party *opposing* the discovery request bears the burden of showing the materials sought are exempt or immune from disclosure – a burden that cannot be satisfied "with wholly conclusory allegations", the Third Department affirmed, and further directed the trial court to do an in camera review of the non-party priests files to redact any information that could identify the victims of the sexual abuse.

Assumption of risk sinks sports injury claimant.

Secky v. New Paltz Cent. School Dist. (Aarons, J., 6/24/21)

Under New York law, a person who voluntarily participates in a sport or recreational activity is presumed to assume those risks which are inherent in and arise out of the sport/activity. Here, the plaintiff's 14-year old son was injured during a school basketball drill when he collided with the retracted bleachers after being bumped from behind by another student. The drill was designed to continue play even when a basketball went out of bounds; as was the case when the infant plaintiff chased the rebound of a missed shot. The plaintiff (and her school safety expert) claimed the inherent risks of the drill were increased by the elimination of the out-of-bounds lines and Supreme Court (Cahill, J., Ulster Co.) agreed, denying the defendant's motion for summary judgment. The Appellate Division (with one dissenter) reversed and dismissed the action, noting that the "primary assumption of risk doctrine… encompasses risks involving less than optimal conditions", and finding no evidence that the boundary lines of the basketball court "acted as, or were intended to be, a safety mechanism to prevent a player's collision with the bleachers".

Dismissal affirmed due to lack of long-arm jurisdiction.

State of New York v. Vayu, Inc. (Garry, P.J., 6/24/21)

Plaintiff brought this breach of contract action after purchase of two allegedly defective unmanned aerial vehicles ("UAVs") from the defendant corporation (based in Michigan) which were delivered to and scheduled for use in the delivery of medical supplies to remote areas of the island nation of Madagascar. Purchased for the SUNY Stony Brook Global Health Institute in Madagascar after its director was contacted by the defendant's CEO, the non-performing UAVs were returned to the company but not replaced, nor was the purchase price refunded. Supreme Court (Walsh, J., Albany Co.) granted the defendant's motion to dismiss for lack of personal jurisdiction and the Third Department (with two dissenters) affirmed. While long-arm jurisdiction (CPLR § 302) allows a court to exercise jurisdiction over a non-domiciliary who transacts any business within New York, the majority agreed that the defendant's activities "did not result in more sales in New York or seek to advance" the company's business contacts, and found that the CEO's post-purchase visit to New York was to discuss issues with the *completed* purchase agreement rather than to seek new business from Stony Brook or other customers in the state.

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TORTS AND CIVIL PRACTICE:
Selected Cases from the Appellate Division, 3rd Department

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Fall from unsecured ladder leads to § 240(1) summary judgment.

Begeal v. Jackson (Pritzker, J., 9/16/21)

Plaintiff, employed in the construction of a ventilation stack on the defendants' commercial property, was given an extension ladder which he positioned with its base in snow and top part at the eaves of the building. When he reached to remove a screw from his pocket, plaintiff felt the ladder shift to the right - he fell to the ground and was injured. Supreme Court (Burns, J., Chenango Co.) denied defendants' motion for summary judgment, as well as the plaintiff's motion for partial summary judgment under Labor Law § 240(1). Reversing in part, the Third Department granted plaintiff a liability judgment, finding that while defendants established the ladder was not defective, "the adequacy of the ladder is not a question of fact when it slips or otherwise fails to perform its function of supporting the worker". Plaintiff's failure to ask for help or clear the snow in which the ladder was placed was, at worst, comparative negligence which does not overcome the defendants' § 240(1) violation.

Claimant wins with res ipsa loquitor in collapsed chair injury.

Draper v. State of New York (Pritzker, J., 7/1/21)

Claimant, sitting in a plastic chair in the recreation room of the correctional facility where he is incarcerated, alleged that both rear legs of the chair broke off at the same time, causing him to fall to the concrete floor and sustain injuries. The Court of Claims (Mignano, J.) dismissed the action at the close of claimant's proof at trial, after finding the doctrine of res ipsa loquitor was not available to permit an inference of negligence. The Appellate Division reversed, ruling that the claimant made a sufficient showing that the chair was in the defendant's exclusive control and that the claimant's "temporary possession of the chair does not negate the inference that its sudden collapse, under normal usage, was most likely caused by defendant's negligence". The Third Department further determined that the trial record was sufficient to grant a judgment on liability to the claimant, and sent the action back to the Court of Claims for a trial on damages.

Dismissal of medical malpractice action reversed.

Marshall v. Rosenberg (Garry, P. J., 7/1/21)

Plaintiff came to the hospital with eye problems and after further examination at an ophthalmology office was admitted to the hospital for testing and discharged the next day. At an exam 7 days later, the ophthalmologist raised the possibility of several diagnoses including bilateral acute retinal necrosis ("BARN") - a rare condition that carries a high risk of retinal detachment and vision loss – and recommended plaintiff be assessed by a retinal specialist within 1-2 days. The ophthalmology staff, allegedly with the consent of the retinal specialist, scheduled the appointment for 13 days later. Shortly thereafter, while vacationing out of state, plaintiff was hospitalized with vision problems, diagnosed with and treated for BARN and, alleging severe vision loss in both eyes, eventually filed suit against the ophthalmologists and retinal specialist (by whom she was never examined). Supreme Court (Baker, J., Chemung Co.) granted summary judgment to all defendants which the Appellate Division found improper, reversed and reinstated the action. Among other things, plaintiff denied being told by the ophthalmologists that she was at risk for blindness or that the specialist's consult should be done within 48 hours. While the retinal specialist never examined the plaintiff, the Third Department noted that even in the absence of an assessment by a doctor, an "implied physician-patient relationship can arise with a specialist if the patient's treating physician reasonably and foreseeably relied upon the specialist's advice to the patient's detriment".

Afghanistan

DAVID W. MEYERS, ESQ. | MEYERS & MEYERS, LLP

This article is not meant to be political. Indeed it's actually meant to be a call for help.

The situation in Afghanistan is awful, and obviously the manner in which the United States left Afghanistan left a lot to be desired. The Biden Administration's sudden departure from Afghanistan left thousands of Afghans who partnered with the United States over the last twenty years, including doing work with our military forces, non-governmental organizations, and news outlets, facing imminent risk of violence and even death. There are women and young girls who are indeed more at risk than almost anyone else.

In the wake of this disastrous debacle, on August 29, 2021, President Biden directed the Department of Homeland Security ("DHS") to lead the federal government's implementation of Operation Allies Welcome, an effort to help vulnerable Afghans, including those who worked alongside Americans in Afghanistan for all those years, to safely resettle in the United States.

One of the ways which Afghani's who are outside the United States may come to the United States is through what is called "humanitarian parole". Humanitarian Parole is available to individuals who are outside of the United States and who seek to come to the United States (technically, to be "paroled" into the United States) based on urgent humanitarian or significant public benefit reasons for a temporary period of time. While parole allows for someone to come to the United States lawfully, parole does not give someone a permanent immigration status and indeed does not even provide a path to permanent residency (i.e., a Green Card) or even the ability to obtain lawful immigration status. However, someone in the United States in a parole status may be able to obtain lawful status in the United States (whether permanent or temporary) through other means.

The greater capital region has a surprisingly large Afghani community, seemingly all of whom have been personally impacted by this crisis. Apart from a few well-publicized success stories that we've been fortunate to read about in the local news media,[1] many local Afghan families are struggling right now to get hundreds and perhaps even thousands of their relatives out of Afghanistan so that they may hopefully come to the United States. Our phone lines are ringing off the hook. We are working extensively right now with local Afghan families to assist them in getting their relatives out of Afghanistan, safely, and ultimately to the United States.

So what can you do? Once these families get to the United States, there's still so much more to do. The U.S. Department of State has set up a web page that provides information for individuals and companies in the private sector (including non-profits) on how to "mobilize" a response "to support at-risk and vulnerable individuals from Afghanistan who have arrived in the United States". There are also dozens of other ways to get involved (e.g., Pangea, Centro Legal de la Raza, and the Afghan Diaspora for Equality & Progress, among many others). Contact your local diocese, church, synagogue or mosque. No doubt someone will be coordinating a local assistance effort.

My two cents. The Afghani people did not deserve to end up where they are today; that is, seemingly and suddenly abandoned by the United States after twenty years, even if the political reason for pulling out of the war in Afghanistan had merit. Clearly the Biden Administration did not anticipate that the Taliban would overrun the country so quickly. Just as clearly, the United States did not have a plan in place to support those who supported our troops, NGO's and news media once it was clear the Taliban was taking over. Our job now, as a nation and a community, is to change that narrative.

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[1] See, e.g., https://www.timesunion.com/news/article/Four-children-escape-Afghanistan-for-reunion-with-16422291.php.

Eight Albany Bond Attorneys Named 2022 *Best Lawyers in America®*

(Albany, NY): Bond, Schoeneck & King is pleased to announce that eight attorneys from the firm's Albany office have been named the 2022 Best Lawyers in America. Bond attorneys receiving this recognition in their respective fields are:

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- Jennifer M. Boll: Business Organizations (Including LCCs and Partnerships), Tax Law and Trusts and Estates
- Nicholas J. D'Ambrosio, Jr.: Employment Law – Management, Labor Law – Management and Litigation – Labor and Employment
- Sanjeeve K. DeSoyza: Employment Law – Management
- Hermes Fernandez: Administrative / Regulatory Law and Health Care Law
- Ryan P. Keleher: Commercial Litigation
- Robert F. Manfredo: Employment Law – Management, Labor Law – Management and Litigation – Labor and Employment
- Thomas W. Simcoe: Trusts and Estates

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- Mara D. Afzali – Civil Litigation: Defense
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- Ryan P. Keleher – Business Litigation
- Robert F. Manfredo – Employment & Labor

Bond Announces Saratoga Attorney Michael D. Billok Named in 2021 *New York Super Lawyers Upstate Edition*

(Saratoga, NY): Bond, Schoeneck & King is pleased to announce that Michael D. Billok of the firm's Saratoga Springs office has been recognized in the 2021 New York Super Lawyers Upstate Edition in Employment and Labor.

Bond Announces Saratoga Attorney Michael D. Billok Named in 2022 *Best Lawyers in America*®

(Saratoga, NY): Bond, Schoeneck & King is pleased to announce that Michael D. Billok of the firm's Saratoga Springs office has been named in the 2022 *Best Lawyers in America* in the fields of Employment Law – Management, Labor Law – Management and Litigation – Labor and Employment.

Mike regularly represents employers in state and federal court, defending against actions alleging violations of employment laws such as the Americans with Disabilities Act (ADA), Age Discrimination in Employment Act (ADEA), Title VII of the Civil Rights Act, including class actions, as well as collective and class actions under the Fair Labor Standards Act (FLSA) and New York Labor Law (NYLL).

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