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THE SARATOGA COUNTY BAR ASSOCIATION

SERVING THE INTEREST OF JUSTICE

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THE PRACTICE PAGE

NEW YORK'S NEW ELECTRONIC NOTARY LAW

HON. MARK C. DILLON *

New York now allows for the remote notarization of documents through the enactment of Executive Law 135-C, which became effective on February 1, 2023. It keeps notarization procedures current with developing technologies, as usable for commercial and other transactions and, as also relevant to us, litigation documents.

The statute provides that New York notaries may use audio-visual communication technology to interact with a principal at a remote location, subject to certain conditions. First, the notary must file a prescribed registration form with the Secretary of State confirming the ability to perform electronic notarizations. The form elicits the notary's name, address, e-mail address, the expiration date of the notary's commission, an exemplar of the notary's signature, and the type of electronic technology the notary intends to use. The exemplar signature on file shall only be used for notarial acts (Executive Law 135-C[5][a], [b], [c]). Any change that may occur in the notary's e-mail address must be reported to the Secretary of State within five days of the change (Executive Law 135-C[7]).

Second, at the electronic meeting, the notary shall confirm in the normal course the identity of the person who is to sign the written instrument, in the electronic view of the notary. The notary must also confirm that the instrument to be executed is the same as that which the signatory attests to signing (Executive law 135-C[4][a]).

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Third, the notary must attach his or her electronic signature to the instrument in such a manner that its alteration or removal would be technologically detectable and render evidence that would invalidate the notarial act. The notary's electronic certificate must disclose that the oath or acknowledgement was obtained through electronic communication technology (Executive Law 135-C[5][a], [d]).

Fourth, the notary must retain for at least ten years an electronic copy of any video or audio recording of the notary's confirmation of the document signer's identity (Executive Law 135-C[2][b]).

Fifth, the notary may perform notarial acts where the signer of the instrument is elsewhere in New York State or in another state. The requirement that the signer of the instrument "personally appear" before the notary is statutorily satisfied. If the signer of the instrument is outside of the United States, the electronic notarization is permitted only if the subject matter of the instrument is to be recorded in a U.S. jurisdiction or involves U.S. property (Executive Law 135-C[4][a], [b]).

Observationally, the enactment of Executive Law 135-C makes life easier for attorneys obtaining affidavits from out-of-state witnesses, as it bypasses the need to obtain a "certificate of conformity" attesting that an oath taken in a foreign state conforms with the laws of that jurisdiction or of New York, as otherwise required by CPLR 2309(c) (e.g. *Midfirst Bank v Agho*, 121 AD3d 343, 348-49). The wide use of remote technology for the New York notarization of instruments executed by out-of-state signers means that the bench and bar may be seeing less of CPLR 2309(c) in the future. Since the practicing bar has sometimes found the acquisition of certificates of conformity to be a cumbersome and sometimes-complicated nuisance, any parting from CPLR 2309(c) will not be with sweet sorrow.

Sixth, if an original document must exist for recording, a printed copy of the electronically-notarized document suffices so long as all of the foregoing requirements of the statute are satisfied (Executive Law 135-C[6][a]). A physical or electronic image of a stamp, impression, or seal need not accompany an electronic signature if the notary has attached an electronic notarial certificate meeting the requirements of the statute (Executive Law 135-C[6](c]).The notary must certify that the paper version of the document and its signatures accurately reflect the electronic version, and if so, the municipal recording officers must accept the paper version for filing. The statute provides notaries with a template of the certification language that is to be used on the paper copy for filing (Executive Law 135-C[6][d][i], [ii], [iii]).

Seventh, the statute reserves to the notary the right to decline in any instance the performance of notarial acts through electronic means, including but not limited to circumstances where the notary is not satisfied that the signatory is competent or has the capacity to execute the instrument, or where the signatory's signature may not be knowingly or voluntarily made (Executive Law 135-C[9]). This provision assures that notwithstanding the geographic distance between the signatory and the notary, the de jure propriety of the notarial procedure is still guarded. Conversely, no notary is permitted to provide notarial services exclusively through electronic means (Executive law 135-c[8]).

And finally, notaries may charge up to $25 for their remote electronic notarial services (19 NYCRR 182.11[g]).

The Secretary of State is specifically authorized to promulgate rules that establish standards, practices, procedures and forms (Executive Law 135-C[5][e]). Therefore, notary publics, including attorney notaries, should stay abreast of communications from the Secretary of State.

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

TORTS AND CIVIL PRACTICE:

Selected Cases from the Appellate Division, 3rd Department

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

Defending liability claims with the "emergency" and "storm in progress" doctrines.

Marra v. Zaichenko (Pritzker, J., 3/16/23)

Relying on the "storm in progress" doctrine, the defendant auto upholstery shop won summary judgment from Supreme Court (Powers, J., Schenectady Co.) against the plaintiff, who claimed injuries in a parking lot fall. Plaintiff contended that although it was snowing when he fell, the cause of his fall was ice which he did not notice because of the fresh coat of snow. Both parties submitted expert reports from meteorologists, and the plaintiff also offered an affidavit from a former employee of the auto shop, who avowed personal knowledge that the accident location was prone to accumulation of moisture and precipitation. The Third Department (with two dissenters) reversed the trial court and reinstated the plaintiff's complaint, noting that the meteorologists consulted similar weather data and that "any disagreements between the experts would present a credibility determination appropriate for the finder of fact", making summary judgment improper.

Williams v. Ithaca Dispatch, Inc. (Ceresia, J., 12/22/22)

A defendant seeking summary judgment based upon the "emergency doctrine" must show, as a matter of law, (s)he was confronted with an emergency not of his/her own making and that his/her reaction to the emergency was reasonable under the circumstances. In this 3-car, chain-reaction auto accident, the moving defendants (vehicles 2 and 3) claimed a sudden snowfall and icy road conditions were the "emergency", and were granted summary judgment by Supreme Court (Baker, J, Chemung Co.). Plaintiff was a passenger in vehicle 2 (a taxicab), the driver of which testified he was confronted with a "wall of snow" but also agreed that the conditions were not consistent with a "whiteout". The Third Department reversed, citing to "clear issues of fact" relating to weather, road conditions, vehicle speeds and the actions of the drivers trying to avoid the collisions. The moving defendants also argued that plaintiff didn't sustain a "serious injury" as required by Insurance Law § 5102(d) but Supreme Court never reached that issue – instead, addressing it in what the Appellate Division said only "amounted to an academic exercise".

Bryant v. Gulnick (Egan, J., 12/22/22)

Northacker v. County of Ulster (Egan, J., 12/22/22)

The above actions arose from the same 2018 car-bus accident, in which injuries were sustained by the car operator, her passenger and the bus driver. The car operator, who later died, was judged to be at fault after losing control of her vehicle in wintry weather and skidding into the opposite lane of travel, colliding with the bus. The auto passenger was a senior citizen being driven to a medical appointment as part of a volunteer transportation program operated by Ulster County and Jewish Family Services ("JFS"). The bus, not affiliated with the JFS program, was owned by Ulster County. Motion practice ensued in Supreme Court, after which both cases ended up in the Appellate Division, where the Third Department found that the bus driver's (Bryant) claims against the car operator (Hyde), the County and JFS were barred because Bryant sought and received workers' compensation benefits. The AD also ruled that Supreme Court (Fisher, J.) properly found that Bryant and Hyde were co-employees, and that Bryant's action against JFS should be dismissed because the plaintiff alleged only vicarious liability against that defendant (for the actions of the volunteer driver). As for the claims of the injured auto passenger (Northacker), the Third Department found she was entitled to summary judgment against the County (it was vicariously

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

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liable for the negligence of Hyde), but that claims against the County, for the actions of Bryant, should be dismissed because the bus driver's actions were reasonable and prudent given that she was faced with an emergency situation not of her own making.

Trip and fall.

Osterhoudt v. Acme Markets, Inc. (McShan, J., 3/16/23)

Plaintiff, making a delivery to the receiving area of the defendant's market, was injured in a fall when he tripped over the forks of a pallet jack that protruded into the delivery area. Supreme Court (Gilpatric, J., Ulster Co.) denied the defendant's motion for summary judgment, rejecting the argument that the plaintiff's decision to walk backwards with the loaded cart was the sole proximate cause of his accident, and that the pallet jack was both an "open and obvious" hazard, but not inherently dangerous. Affirming, the Third Department noted that the plaintiff's familiarity with the presence of pallet jacks in the market, and his decision to enter the receiving area walking backwards, are factors to be considered on the issue of comparative negligence but "do not establish that defendant was free from fault as a matter of law".

Herling v. Callicoon Resort Lodges, Inc. (Egan, J., 3/16/23)

Plaintiff was a guest at the defendant resort, which he left to walk to dinner at a restaurant near the resort's golf course. To reach the restaurant, plaintiff walked up the shoulder of a two-lane highway maintained by the defendant Town of Delaware, stepped from the shoulder onto an adjoining grassy area, and was hurt in a fall on a grated catch basin about four feet off the road shoulder. Supreme Court (Meddaugh, J., Sullivan Co.) granted the defendants' motions for summary judgement and the Appellate Division affirmed, noting an absence of evidence suggesting that "pedestrians regularly walked over the grated catch basin…or that either the Town or the resort defendants had reason to believe that they would do so".

Bonus: Court of Appeals on CPLR § 302(a)(1) "long-arm" jurisdiction.

State of New York v. Vayu, Inc. (Garcia, J., 2/14/23)

CPLR § 302(a)(1) allows a New York court to exercise personal jurisdiction over any non-domiciliary who "transacts any business within the state". Here, the Court of Appeals, reversing the trial court and the Third Department (which had two dissenters), denied the defendant's motion to dismiss and reinstated the plaintiff's breach of contract action against the Michigan corporation from which it bought two allegedly defective unmanned aerial vehicles ("UAVs"). The UAVs (drones) were purchased on behalf of SUNY Stony Brook and were scheduled for use in the delivery of medical supplies to remote areas of the island nation of Madagascar. Noting that courts should analyze a defendant's actions in New York to determine if such activities "were purposeful", the Court of Appeals found those requirements (and due process) satisfied, given that the defendant "sought, negotiated, and then entered a contractual relationship with a New York State entity", and furthered that relationship with phone calls, emails and a personal visit to New York by Vayu's CEO for the purpose of negotiating terms of the deal.

President Biden, What Have You Done for Me Lately?

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

It's April 2023. We're a little over two years into the Biden Administration, and for two of those years, the Democrats "controlled" two branches of the federal government. I put quotes around "controlled" because it feels like a misnomer to say that given that Democratic "control" of the Senate was not all that it was cracked up to be.

So, what has the Administration done on the immigration front? Well, according to Migration Policy Institute, from the President's inauguration to mid-January 2023, the Biden Administration took 403 immigration-related actions, which, if true, would mean that it would soon do more than the Trump Administration did in all four of its years.[1]

Notwithstanding, I think the results have been mixed, at best. I mean we're talking about a system that is entirely broken and has been for decades now.

For example, although the Biden Administration "suggests" it would like to end Title 42, in reality the Administration has continued it. As a reminder, Title 42 is a policy implemented in March 2020 under then President Trump (by order of the U.S. Centers for Disease Control and Prevention ("CDC")), purportedly to protect public health during the COVID-19 pandemic. According to U.S. Customs and Border Protection, more than one million migrants seeking to enter the United States to apply for asylum were expelled to their home countries or Mexico in Fiscal Year 2022. Although then President Trump enforced Title 42 as a blanket policy, to its credit, the Biden Administration modified it to allow unaccompanied minors and families with young children to enter the U.S.

In terms of enforcement priorities, the Biden Administration took a very big (positive) step when Department of Homeland Security ("DHS") Secretary Alejandro Mayorkas announced the Administration's new enforcement priorities, "Guidelines for the Enforcement of Civil Immigration Laws". But, perhaps predictably, several Republican states sued the Administration, and a federal judge has since blocked some key elements of the guidelines.

What about refugees? Well, President Trump had lowered the refugee admissions ceiling to 15,000, and although last year the Biden Administration raised the cap to 125,000, as of mid-July last year, only a small fraction of that number were admitted to the U.S. Part of the issue is that the program is in a rebuilding mode after years of reduced admissions, the pandemic, and the failure to allocate sufficient resources to it.

Akin to refugees, but for those already here in the United States (and some not), the Biden Administration took meaningful steps on some humanitarian fronts, although certainly not perfect.

For example, the Administration set up (less than perfect) humanitarian parole programs to assist displaced Afghanis and Ukrainians. For nationals of Somalia, Yemen, Haiti, Ethiopia, Burma (Myanmar), Syria and Venezuela, the Biden Administration either designated or extended the designations of those countries for nationals to apply for Temporary Protected Status ("TPS") in the United States, which allows individuals from those countries who are in the United States to temporarily live and work here and defers them from removal / deportation.[2]

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[1] According to the Migration Policy Institute, the Trump Administration had 472 immigration-related executive actions during its entire four years.

[2] TPS designations are made for 6, 12 or 18 months at a time.

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President Biden, What Have You Done for Me Lately

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Also in the news was Deferred Action for Childhood Arrivals ("DACA"), a policy created a little more than ten years ago by the Obama Administration, which allows individuals brought to the U.S. as minors (generally through no fault or decision of their own) to attend school and work legally in the U.S. Unfortunately, and as I've written repeatedly in this space before, these individuals continue to live in limbo as DACA has been the focus of numerous court cases (and indeed as I type this, DACA recipients are waiting on a ruling from the 5th Circuit Court of Appeals in a case challenging the legality of the program).

There have been other changes as well (e.g., to the Public Charge rule, which I've written about before as well).

But what there has not been, and what we continue to desperately need, is change to the legal immigration process. On his very first day in office President Biden sent to the Hill the U.S. Citizenship Act of 2021, which, among other things, would have provided an eight-year path to citizenship for the estimated 11 – 13 million undocumented immigrants in the U.S. Of course, it was dead on arrival because Democratic "control" of the Senate was illusory at best (and certainly would get nowhere today).

So despite Democratic "control" in both houses of Congress during President Biden's first two years, Congress was unable to advance the President's agenda (and indeed Republican state officials have been very adept at using the federal courts, and Trump-appointed judges, to halt many of the Biden Administration's efforts on immigration-related actions). I'm not optimistic that the status quo will change (for the better) any time soon.

VERDICTS AND SETTLEMENTS

MOTOR VEHICLE

Schenectady County Supreme Court, Justice Thomas D. Buchanan

Debbie L. Roberts v. Allen V. Pashley

Plaintiff Attorney: Michael White - Harding Mazzotti LLP

Defense Attorney: Joseph Giannetti – Horigan, Horigan & Lombardo, P.C.

Facts and allegations:

Plaintiff, a 57-year-old woman, sued for injuries arising out of a motor vehicle accident on September 29, 2018, wherein the defendant failed to yield the right of way.Defendant conceded liability prior to trial. Plaintiff claimed injuries, including surgery in the form of an anterior cervical discectomy and decompression at C5-C6 and C6-C7; as well as anterior fusions at C5-C7 with allograft and local autograft, and anterior instrumentation at C5-C7.Plaintiff claimed that the two-level cervical fusion has permanently caused a significant reduction in her range of motion. Defendant claimed that plaintiff's surgery as well as associated pain was due to an ongoing degenerative condition. At deposition plaintiff denied having ever had an issue with respect to her neck.However, on the date of trial a medical record appeared indicating that plaintiff treated for neck pain arising out of an accident on a cruise ship several years prior to the accident. This record had not been produced at any time in the litigation to either counsel. Accordingly, the defense further contended at trial that plaintiff did have an ongoing issue with her neck despite that she only had two visits and no subsequent treatment between 2011 and the accident in 2018. At closing plaintiff asked the jury for $600,000. On the day of trial, plaintiff reduced her demand from the policy limits of $250,000 to $190,000. Defendant increased its offer from $75,000 to $100,000. The carrier was State Farm.

Result: Verdict $75,000

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