WARREN COUNTY BAR ASSOCIATION, INC.

# TIPSTAFF

FALL 2021

Volume III Issue 1

## IN THIS ISSUE





Greetings Friends and Colleagues:

I am happy to present to you the Fall 2021 edition of *Tipstaff.* This issue is filled with information and photos of the recent events and activities for our Bar Association.

Since the summer edition, a lot of things have been happening, and it has been great to see everyone in person. We kicked off the fall with a welcome back gathering at Springbrook Hollow Farm Distillery in Queensbury. Although a smaller gathering than usual, it was a beautiful warm fall night. Members were able to tour the distillery and sample the goods. The Bar had the first annual cocktail contest. The winner was the "Public Offender" cocktail, provided by yours truly. A big shout out to Dennis Tarantino, who was the winner of the door prize.

In October, Maria Nowotny and Kate organized a CLE for all members. The Bar hosted a box lunch and CLE at the Warren County Historical Society. The presentation was *Warren County Legal History and Its Impact on Environmental Law*. The program was skillfully presented by Jessica Hugabone Vinson, Esq., Honorable Glen T. Bruening, Thomas Lynch, Vice President of the Warren County Historical Society, and Claudia K. Braymer, Esq.

In November, the popular Mannix Dinner was held, carrying on the tradition of camaraderie among all members of the Bar Association. A delicious meal, prepared by and served by the judges, was enjoyed by all. The dessert contest was a success with a tie between Dan and Rachel Wade and, again, yours truly. Good luck next year, bakers.

Looking forward to an in person holiday gathering to be held at the Glens Falls Country Club on December 16, 2021. This will be a cocktail party with light fare. Remember to bring your mittens, gloves, hats and scarves for the annual donation to Warren County Head Start.

Many thanks to the Board and Kate Fowler for all the hard work and dedication to making this a successful year. We will continue to keep you informed through the *Weekly Digest, Tipstaff,* and website.

Best wishes for a happy and safe holiday season.

Karen Judd

# Lifting Our Spirits
# WCBA Welcome Back Party!
# September 2021



We spent a beautiful autumn evening at Springbrook Hollow Farm Distillery. We shared delicious pizza and wings from Bean's Country Store and lots of great spirits from the distillery! Karen Judd won the cocktail contest, and Dennis Tarantino took home a beautiful basket of goodies from our raffle! It is so good to be back together again!


EXIT


SPRINGBROOK


EXIT

# MARK TWAIN and the LAW

by James Cooper, Esq.

**James Cooper is a frequent contributor to the *Tipstaff.***

# MARK TWAIN and the LAW

Most of you have probably received advertising brochures tailored to decorate your offices with bric-a-brac associated with the profession, scales of justice, English courtroom prints and the like. I once viewed in such a publication an eighteenth century cartoon print available for framing . It portrayed a cow. At its head pulling on a halter was a man in breeches with a wig, and at its rear was another man similarly attired pulling on its tail. The caption of the man at the head of the cow was "plaintiff", at the tail, "defendant." Seated on a stool at the cow's udder was a man reaching underneath whose label was, "lawyer."

The profession has always been the subject of scorn and invective. Someone smart or wise must have figured out the reasons why. Probably you've had clients who've said, "I hate lawyers, but I like you." In my experience, most lawyers I knew told lawyer jokes to each other and were amused. Our own late Howard Krantz, however, resented lawyer jokes and was vocal about that.

Enter Mark Twain, universally disrespectful, cynical and funny. In his writings and performances, he counted on public antipathy toward lawyers to sustain his monologues. Some of his epigrams require placing them in context of his era, for example, agricultural commerce: "Some circumstantial evidence is very strong, as for instance when you find a trout in the milk." Below are some of his observations.

A good lawyer knows the law, a clever one takes the judge to lunch.

These people...early stricken of God, intellectually–the departmental interpreters of the laws of Washington...can always be depended onto take any reasonably good law and interpret the common sense all out of it.

It would not be possible for Noah to do in our day what he was permitted to do in his own. The inspector would come and examine the Ark, and make all sorts of objections.

In this topsy-turvy, crazy, illogical world, man has made laws for himself. He has fenced himself round with them, mainly with the idea of keeping communities together, and gain for the strongest. No woman was consulted in the making of laws. And nine-tenths of people who are daily obeying –or fighting against –Nature's laws, have no real opinion. Opinion means deduction after weighing the matter and deep thought upon it. They simply echo feeling, because for generations forbears have laid something down as an axiom. They do not investigate or weigh for themselves. The axiom of the forbears was, 'It is immoral to follow God's law, unless bound by man's law and a wedding ring.'

A reputable lawyer will advise you to keep out of the law, make the best of a foolish bargain, and not get caught again.

To succeed in the other trades , capacity must be shown; in the law, concealment of it will do.

The law is a system that protects everybody who can afford to hire a good lawyer.

They all laid their heads together like as many lawyers when they are gettin' ready to prove that a man's heirs ain't got any right to his property.

...trial juries are,"the most ingenious and infallible agency for defeating justice that the human wisdom could contrive."

Laws control the lesser man...Right conduct controls the greater one.

Twain had a contemporary of even sharper and more caustic wit, Ambrose Bierce. In *The Devil's Dictionary* he defines 'Lawyer': "n. One skilled in circumvention of the law," 'Lawful' as, "adj. Compatible with the will of a judge having jurisdiction."

He quotes a poem,

> *Once **Law** was sitting on the bench,*
> *And **Mercy** knelt a-weeping.*
> *"Clear out!", he cried "disordered wench!"*
> *Nor come before me creeping*
> *Upon your knees if you appear,*
> *'Tis plain you have not standing here."*
>
> *Then **Justice** came. His honor cried;*
> *"Your status?–devil seize you!"*
> *"Amicus Curiae," she replied–*
> *Friend of the court, so please you."*
> *"Begone!" he shouted –"there's the door–*
> *"I never saw your face before!"*

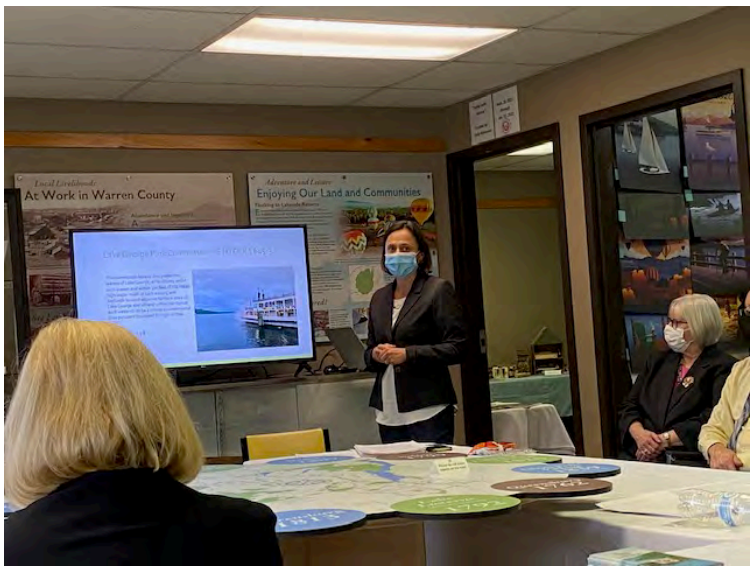
Robert Louis Stevenson:

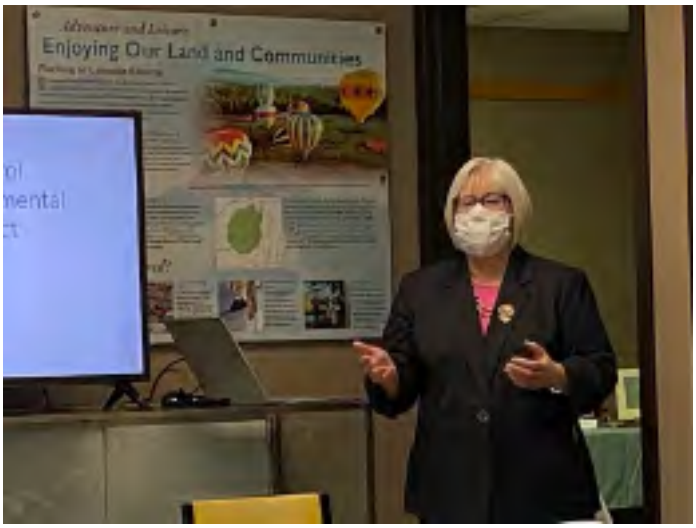
"Home is the sailor home from the sea,
And the hunter home from the hill."

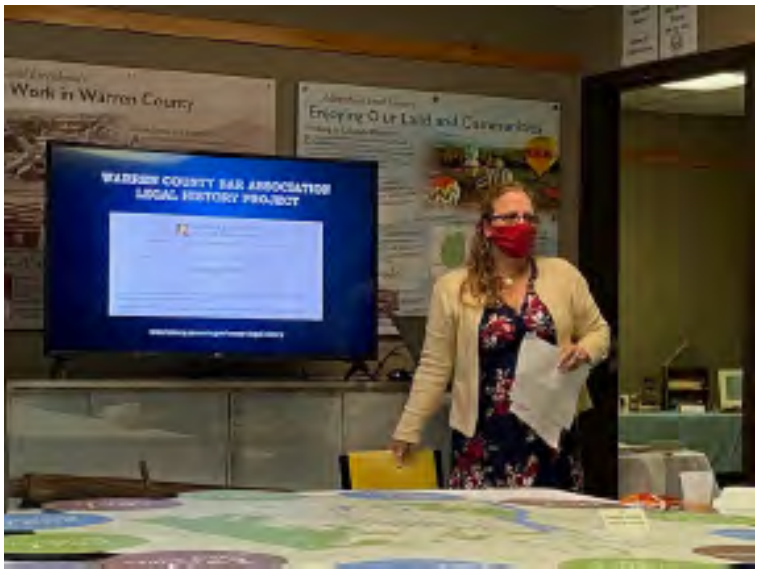
The future may say of us: homeward heads the lawyer with a bruised right knee, their battered briefcase slapping, the vessel of their trade, that held... a luncheon sandwich wrapping.

Jim Cooper

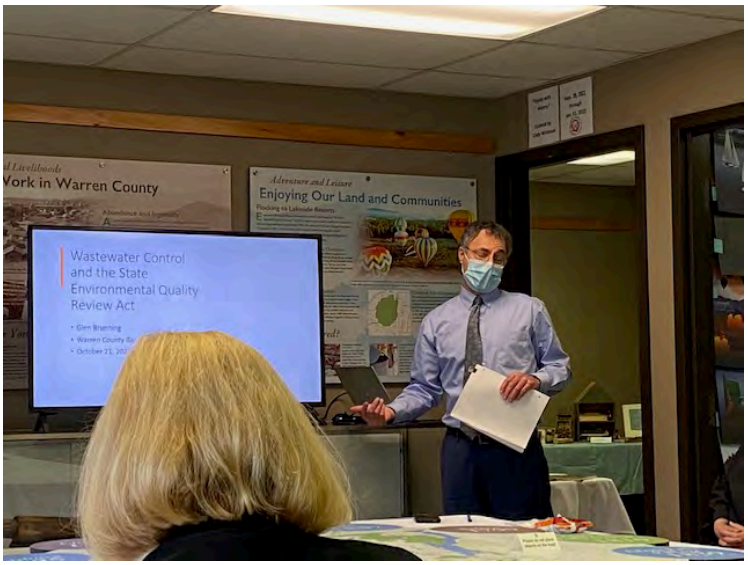
# *Warren County Legal History and Its Impact on Environmental Law* CLE
## October 21, 2021








**Many thanks to Hon. Glen Bruening, Jessica Vinson, Claudia Braymer, and Tom Lynch for sharing their vast knowledge of the history of Warren County with our attorneys!**


Changing Times


Inspired by the Land

# *From The Judge's Chambers*

**Robert J. Muller, JSC**
**Warren County Supreme Court**
**Chair, Bench Book for Trial Judges – New York**
**Warren County Municipal Center**
**1340 State Route 9, Lake George, NY 12845**

**METRO COLLECTION SERVICE, INC., Plaintiff,**
**v.**
**Matthew D. MERRIHEW, Defendant.**

**Index No. EF2020-68584**
**Decided on October 28, 2021**

Synopsis by the Court:

Interesting Debtor/Creditor Decision

On September 27, 2016, the Combined Court, Jefferson County in the State of Colorado issued a Judgment in favor of plaintiff and against defendant in the amount of $5,618.79 plus interest at the rate of 18% per annum, compounded annually. Plaintiff commenced this action to obtain a what is now an unsatisfied $10,163.08 judgment in New York based upon the Colorado judgment. The Court found that the defendant's failure to appear entitled plaintiffs to a default judgment in the amount of $10,163.08 (see CPLR 3215 [a]). With respect to the request to continue the judgment at 18% interest the Court found reliance upon 2d Dept. authority permitting the rate of interest applicable in the State in which it was originally rendered was misplaced. Under the doctrine of stare decisis, where the Court of Appeals has previously pronounced a rule this Court is bound to follow it. Accordingly, the Court ordered interest on the judgment at the statutory rate of 9% per annum, as provided in CPLR 5004.

73 Misc.3d 1212(A)
Unreported Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN THE REPORTER.
This opinion is uncorrected and will not be published in the printed Official Reports.
Supreme Court, New York, Warren County.

METRO COLLECTION SERVICE, INC., Plaintiff,
v.
Matthew D. MERRIHEW, Defendant.

Index No. EF2020-68584
|
Decided on October 28, 2021

**Attorneys and Law Firms**

Law Offices of Steven Cohen, LLC, Bronx (Adam Nichols, of counsel), for plaintiff.

Matthew D. Merrihew, Glens Falls, pro se.

**Opinion**

Robert J. Muller, J.

***1** On September 27, 2016, the Combined Court, Jefferson County in the State of Colorado issued a Judgment in favor of plaintiff and against defendant in the amount of $5,618.79 plus interest at the rate of 18% per annum, compounded annually. To date, the Judgment has not been paid. Defendant now resides in the City of Glens Falls, Warren County and, on December 30, 2020, plaintiff commenced this action to obtain a Judgment in New York based upon the unsatisfied Judgment in Colorado. Specifically, plaintiff seeks a Judgment in the amount of $10,163.08 with interest continuing at the rate of 18% per annum. Defendant was personally served on January 1, 2021 and thereafter failed to appear. Presently before the Court is plaintiff's motion for a default judgment.

Plaintiff is entitled to a default judgment in the amount of $10,163.08 (*see* CPLR 3215 [a]). Interest on the amount, however, shall not continue at the rate of 18% per annum.

Plaintiff relies upon *Hospital Serv. Plan of N.J. v Warehouse Prod. & Sales Empls. Union* (76 AD2d 882 [1980]) in support of its request that interest should continue at the Colorado rate. There, the Appellate Division, Second Department found that "[a] judgment rendered in a sister State ... is entitled, under the principles of full faith and credit, to enforcement together with the rate of interest applicable in the State in which it was originally rendered" (*id.*). That being said, in *Wells Fargo & Co. v Davis* (105 NY 670 [1887]), the Court of Appeals expressly found that "that the interest to be allowed ... should be governed by the law in force in this State" (*id.* at 673) — and this finding has since been adopted by other Courts (*see e.g. Cahn v Cahn* [119 Misc 2d 150, 151-152 [Civ Ct, Bronx County 1983]).

Under the doctrine of *stare decisis*, where the Court of Appeals has pronounced a rule this Court is bound to follow it (*see Mountain View Coach Lines v. Storms*, 102 AD2d 663, 664 [1984]). Accordingly interest on the

judgment amount shall be at the statutory rate of 9% per annum, as provided in CPLR 5004.

Therefore, having considered NYSCEF documents 1 through 11 and 14 through 16, it is hereby

**ORDERED** that plaintiff's motion for a default judgment is granted in its entirety; and it is further

**ORDERED** and **ADJUDGED** that interest on the judgment amount shall be at the statutory rate of 9% per annum, as provided in CPLR 5004; and it is further

**ORDERED** that any relief not specifically addressed herein has nonetheless been considered and is expressly denied.

The original of this Decision, Order and Judgment has been e-filed by the Court. Counsel for plaintiff is hereby directed to promptly obtain a copy of the e-filed Decision, Order and Judgment for service with notice of entry upon defendant in accordance with CPLR 5513.

## All Citations

Slip Copy, 73 Misc.3d 1212(A), 2021 WL 4999671 (Table), 2021 N.Y. Slip Op. 51009(U)

New York Official Reports

Unreported Disposition
Slip Copy, 73 Misc.3d 1210(A),
2021 WL 4945976 (Table),
2021 N.Y. Slip Op. 50994(U)



***1** Bradley F. Payne, Plaintiff,
v.
King Neptunes NY, LLC, KING NEPTUNES NY, LLC d/b/a KING NEPTUNE'S and "JOHN DOE No. 1" and "JOHN DOE No. 2" the names of the last two defendants being fictitious and unknown to Plaintiff, it being intended to designate employees, agents and/or servants of KING NEPTUNES NY, LLC and/or KING NEPTUNES NY, LLC d/b/a KING NEPTUNE'S, Defendants.

Supreme Court, Warren County
Index No. EF2021-68701
Decided on October 7, 2021

CITE TITLE AS: Payne v King Neptunes NY, LLC

## ABSTRACT

Limitation of Actions
Tolling
COVID-19 Pandemic Executive Orders—Action to Recover for Injuries Sustained by Patron of Nightclub Timely.

*Payne v King Neptunes NY, LLC*, 2021 NY Slip Op 50994(U). Limitation of Actions—Tolling—COVID-19 Pandemic Executive Orders—Action to Recover for Injuries Sustained by Patron of Nightclub Timely. (Sup Ct, Warren County, Oct. 7, 2021, Muller, J.)

## APPEARANCES OF COUNSEL

O'Connell and Aronowitz, Albany (Pamela A. Nichols, of counsel), for plaintiff.
Smith Mazure, P.C., New York (Stacia J. Ury, of counsel), for defendants.

## OPINION OF THE COURT

Robert J. Muller, J.

Defendant King Neptunes NY, LLC (hereinafter defendant) owns and operates a nightclub located at 1 Kurosaka Lane in the Village of Lake George, Warren County. On August 13, 2017, defendant's employee allegedly ejected a patron from the nightclub "in such a manner that he was caused to strike the plaintiff thereby causing the plaintiff to sustain personal injuries." Plaintiff thereafter commenced this action on February 3, 2021 to recover for these injuries. Presently before the Court is defendants' pre-answer motion to dismiss on the grounds that the action is barred by the statute of limitations (*see* CPLR 3211 [a] [5]).

Defendants contend that the statute of limitations in this action -- which would have expired on August 13, 2020 -- was suspended until November 3, 2020 under a series of executive orders issued by former Governor



Andrew Cuomo as a result of the COVID-19 pandemic,[1] and ***2** that the action must be dismissed because it was not commenced until February 3, 2021. In this regard, defendants further contend that Executive Law § 29-a (1) -- which provides that the Governor "may by executive order temporarily suspend specific provisions of any statute, local law, ordinance, or orders, rules or regulations, or parts thereof, of any agency during a state disaster emergency" -- authorizes *only* the suspension of statutes of limitations.

Plaintiff, on the other hand, contends that the series of executive orders tolled the statute of limitations and, as such, the statute of limitations in this case did not expire until March 29, 2021 -- after the action was commenced.[2] Plaintiff further contends that the Governor was authorized to toll the statute of limitations under Executive Law § 29-a (2) (d), which provides that an executive order "may provide for the alteration or modification of the requirements of such statute, local law, ordinance, order, rule or regulation suspended, and may include other terms and conditions."

Following the return date of the motion, the Appellate Division, Second Department issued its decision in *Brash v Richards* (195 AD3d 582 [2021]) (hereinafter *Brash*) finding that "the subject executive orders tolled the time limitation[s]" contained in the CPLR (*id.* at 585), and that the Governor was authorized under Executive Law § 29-a (2) (d) to toll these time limitations (*see id.* at 584-585). To the extent that no other Appellate Division has issued a decision on the issue, the Court is bound by the findings in *Brash* (*see Mountain View Coach Lines v. Storms*, 102 AD2d 663, 664 [1984]). With the statute of limitations tolled for 228 days from March 20, 2020 -- when the first executive order was issued -- to November 3, 2020, this action had to be commenced on or before March 29, 2021. Commencement of the action on February 3, 2021 is therefore timely.

Based upon the foregoing, defendants' motion to dismiss is denied in its entirety.

Defendants are hereby directed to serve an answer on plaintiff within thirty (30) days of service of a copy of this Decision and Order with notice of entry thereon.

Therefore, having considered NYSCEF documents 1 through 9, 11, 13 and 14, it is hereby

ORDERED that defendants' pre-answer motion to dismiss is denied in its entirety; and it is further

ORDERED that defendants shall serve an answer on plaintiff within thirty (30) days of service of a copy of this Decision and Order with notice of entry thereon; and it is further

ORDERED that any relief not specifically addressed herein has nonetheless been considered and is expressly denied.

The original of this Decision and Order has been e-filed by the Court. Counsel for plaintiff is hereby directed to promptly obtain a copy of the e-filed Decision and Order for service with notice of entry upon defendant in accordance with CPLR 5513.

Dated:October 7, 2021

Lake George, New York

ROBERT J. MULLER, J.S.C.

**FOOTNOTES**



## Footnotes

1 Specifically, defendants reference Executive Order No. 202.8 (*see* 9 NYCRR 8.202.8), as extended by Executive Orders Nos. 202.14, 202.28, 202.38, 202.48, 202.55, 202.55.1, 202.60, 202.67, 202.72 (*see* 9 NYCRR 8.202.14, 8.202.28, 8.202.38, 8.202.48, 8.202.55, 8.202.55.1, 8.202.60, 8.202.67, 8.202.72).

2 A toll suspends the running of the applicable statute of limitations for a finite time period, and "the period of the toll is excluded from the calculation of the time in which the plaintiff can commence an action" (*Chavez v Occidental Chem. Corp.*, 35 NY3d 492, 505 n 8 [2020]; *see Foy v State of New York*, 71 Misc 3d 605, 608 [Ct Cl 2021]). "Unlike a toll, a suspension does not exclude its effective duration from the calculation of the relevant time period. Rather, it simply delays expiration of the time period until the end date of the suspension" (*Foy v State of New York*, 71 Misc 3d at 608).

# ANNUAL MANNIX DINNER
## November 2021

**Eleven judges and one, Charlie Hoertkorn, spent two evenings cooking and washing dishes in preparation for the annual Mannix Dinner. A special thank you also goes to Bill Nealon for his tremendous help with set up and clean up!**


**Dinner was, as always, a delicious offering of homemade Chicken Parmesan, served with spaghetti, tossed salad, and Villa bread!**

**Many thanks to the judges for also providing wine and beer, and to Dan Mannix for procuring it! Also, thank you to Judge Krogmann for plenty of Villa bread and butter, and to Judge Hogan for lovely tablescapes!**

**A big shout out goes to Matt and Michele Ludemann, Jason Carusone, Rachel and Dan Wade, and Karen Judd for our amazing desserts!**

**The Dessert Contest votes were *so* close! The winners were Karen Judd (2020) for her cheesecake parfait and to Rachel Wade (2021) for her peanut butter balls! Congratulations!**

**It's a sure bet that no one went away hungry!**


# The Practice Page

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

## THE PRACTICE PAGE

# JUDICIAL NOTICE MIRACLES ON 34TH STREET

**Hon. Mark C. Dillon ***

The year-end holidays are coming. 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 the many persons 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.

And we will for now put aside Justice Harper's improper *ex parte* conversations outside the courthouse with his grandchildren, who lobbied him hard to rule in favor of Kringle.

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 at the Appellate Division, 2nd Dept., an adjunct professor of New York Practice at Fordham Law School, and an author of CPLR Practice Commentaries in McKinney's.

# Torts and Civil Practice: Selected Cases from the Appellate Division, 3rd Department

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# Torts and Civil Practice: Selected Cases from the Appellate Division, 3rd Department

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**Coach Bill Parcells scores on appeal.**

**Vickers v. Parcells (Lynch, J., 10/21/21)**

Plaintiff claimed he was hurt in a fall off a stepladder while trimming a tree on the defendant's (former Giants/Jets/Patriots head coach) residence in Saratoga Springs - alleging in a negligence cause of action that the ladder was unsafe and unstable because it had been positioned in an area covered with mulch. Supreme Court (Walsh, J., Saratoga Co.) denied Parcells' motion for summary judgment; in which he argued lack of notice of any dangerous condition and that he did not supervise the plaintiff's work. The Third Department reversed and dismissed the complaint, noting that the plaintiff supplied his own ladder and trimmer, chose where to position to ladder before he used it, and (prior to the day of accident) "had purchased mulch and spread it around defendant's property, including around the tree where the subject accident later occurred".

**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.

**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.

**Claimant wins with res ipsa loguitor 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".

## Bonus: Court of Appeals

### Aybar v. Aybar (Singas, J., 10/7/21)

Examining the sole issue of whether Defendants Ford and Goodyear consented to general jurisdiction in New York by registering to do business in the state and designating a local agent for service of process (required of foreign corporations by the Business Corporation Law), the Court of Appeals concludes "no".

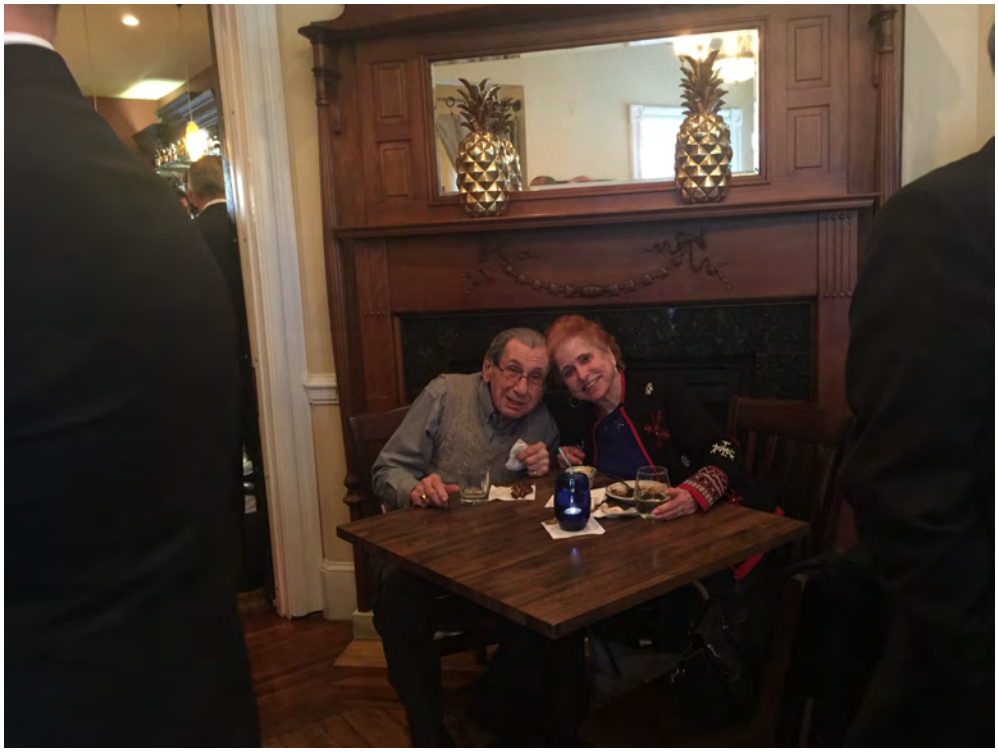
### Lividini v. Goldstein (10/14/21)

In a 4-3 decision, the Court of Appeals found Bronx County was an improper venue for the plaintiffs pediatric malpractice action. While the defendant doctor supervised resident physicians and saw his own patients at two locations in the Bronx, his "principal office" (CPLR 503(d)) was in Westchester County; the same county in which the plaintiff resides and in which she received the medical treatment at issue.

### Matter of Miller v. Annucci (9/9/21)

Plaintiff, a pro se inmate, opposed defendant's motion to dismiss his appeal as untimely by arguing that he timely delivered *to a prison employee* his notice of appeal addressed to the clerk's office and a service copy addressed to the defendant. Rejecting the request to establish a 'mailbox rule' for filing, the Court of Appeals noted that CPLR 5515(1) and 2102(a) expressly indicate "that filing occurs when the clerk's office receives the notice of appeal".

# IN MEMORIAM
# Paul Edward Pontiff
# June 6, 1930-October 5, 2021

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