To be Argued by:
ANDREW D. LEFTT
(Time Requested: 30 Minutes)

APL-2023-00192
New York County Clerk's Index No. 805224/21
Appellate Division—First Department Case No. 2023-03239

Court of Appeals

of the

State of New York

JAMES KNIGHT, as Administrator of The Estate of PAMELA J. KNIGHT,

Plaintiff-Respondent,

– against –

AMSTERDAM NURSING HOME CORP. and THE NEW YORK AND PRESBYTERIAN HOSPITAL,

Defendants,

– and –

DEWITT REHABILITATION AND NURSING CENTER, INC. d/b/a Upper East Side Rehabilitation and Nursing Center,

Defendant-Appellant.

BRIEF FOR PLAINTIFF-RESPONDENT

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PRELIMINARY STATEMENT

This case arises from a venue selection clause contained in admission agreements allegedly signed and initialed by Pamela Knight, who was admitted to the Upper East Side Rehabilitation and Nursing Center, referred to in this case as Dewitt, the name of the company doing business as that nursing center. Ms. Knight, then 89 years old, was a resident there three times in 2019, the last year of her life.

The lawsuit underlying this appeal, brought by her estate, alleges nursing home negligence, medical malpractice, and wrongful death. Our claim before the Court (as before the lower courts) is that Dewitt must prove that Ms. Knight actually executed the two inadmissible admission agreements that it produced for her three admissions (no admission agreement has been produced for the third admission and no explanation has been offered for the missing document).

The reason that execution by Ms. Knight matters is because the admission agreements had buried within them venue-selection clauses providing that any legal claims arising out of Ms. Knight's interaction with Dewitt were to be brought and litigated in Nassau County, which has no connection to anything in this lawsuit, rather than in New York County

where Ms. Knight lived and the three defendants in this lawsuit were all located[1].

Although Ms. Knight's claimed execution of the agreements was allegedly witnessed by Dewitt employee Eliezer Morales, it has not produced any evidence from him that Ms. Knight signed or initialed anything. It has also not produced any explanation of why it has not produced any evidence from Mr. Morales.

We, on the other hand, produced an affirmation from Ms. Knight's son with exemplars of her handwriting and his own observation that he was familiar with her handwriting and that the purported signatures and initials on the agreements were not only unlike any of her signatures as he had seen them, but were mutually inconsistent. Mr. Knight, although a lay person, was competent to offer his opinion on the genuineness of what purported to be her signature and initials. His affidavit showed a sufficient foundation for

[1] Dewitt's suggestion that the burden of proof in a motion to change venue pursuant to a forum selection clause under CPLR 501 is somehow different from that of summary judgment in which CPLR 3212 which requires admissible evidence, Brief 12-3, is baffling. Dewitt has no authority to offer in support of that odd proposition (its analogy to the opposition to a motion to dismiss for lack of personal jurisdiction is inapt. Such a motion, under CPLR 3211, is one in which every possible inference is accorded to the plaintiff. *Leon v. Martinez,* 84 NY 3d 83,87 [1994]). This is hardly surprising: a motion is a request that a court do something or order that it be done. Such requests are not to be lightly made. Dewitt's apparent idea that it needs nothing more than its say-so to establish a foundation like the authenticated signature required for an enforceable contract is, as we show here, baseless. Its motion to enforce a contract – like all attempts to enforce contracts – must begin with a showing that the contract is enforceable – a showing that was never made here.

him to express his opinion that this was not his mother's handwriting. Jerome Prince, Richardson on Evidence § 7-318 [Farrell 11th Ed. 1995, 2008 Supp]. (Richardson)

Dewitt tries to downplay the impact of this evidence with invocations of Docusign and hand waving, but it has introduced no evidence showing that a genuine Docusign signature can be as different from an ordinary paper signature as Ms. Knight's purported signature was from what it calls her signature in this case, and importantly, no evidence that she Docusigned anything either.

When Dewitt moved to change venue from New York County to Nassau County, we opposed the motion because the law in this state requires proof that a person against whom a purported contract was sought to be enforced had actually signed the alleged contract. The law establishing and reinforcing this principle in New York dated back to at least the early 1800s and was recited in caselaw as well as in treatises.

That law had been applied to a venue selection provision in a nursing home admission agreement in a then-recent Appellate Division case, *Andreyeva v. Haym Solomon Home for the Aged, LLC*, 190 AD 3d 801 (2nd Dept 2021). In that case, the nursing home offered an employee's affidavit to authenticate the resident's alleged signature, but the affidavit did not state

that the employee was present when the resident allegedly signed the agreement or that she had personal knowledge of whether the resident had signed it. The nursing home had no other proof to offer to show that the resident had signed the form. Accordingly, the signature could not be authenticated, and the purported contract was unenforceable.

We cited this case to the Supreme Court, which ignored it even though it was controlling authority under *Mountain View Coach Lines v. Storms*, 102 AD 2d 663 (2d Dept 1984), and to the Appellate Division in the motion practice and the appeal that followed.

On appeal, Dewitt argued that another Appellate Division case, *Caio v. Throgs Neck Rehabilitation and Nursing Center*, 197 AD 3d 1030 (1st Dept 2021), conflicted with *Andreyeva* and was the appropriate legal authority to govern the disposition of this case. Although *Caio* also involved an admission agreement with a venue selection clause, it addressed a very different issue. In our case, as in *Andreyeva*, there is no evidence of who "signed[2]" and "initialed" the agreement(s). In *Caio* there was no such issue. The identity of

[2] We have put the words "signed" and "initialed" into scare quotes because, as we will show later in this Brief, not only has Dewitt offered no evidence that Ms. Knight executed these documents, but we have offered evidence – an affidavit from her son and Executor – that she did not, since the signatures not only do not resemble hers, but are mutually inconsistent. Thus, we do not want to even appear to have accepted Dewitt's characterization of what these writings actually are. We use "initialed" to literally mean the letters of her first and last name, as opposed to initials that can be written in a unique form similar to a signature.

the signer (the son and designated representative of the resident) was not in issue and the Appellate Division agreed with the nursing home defendant that the son's signing of the agreement was appropriate in light of his representative status. In light of the proper execution of the agreement and the inability of the plaintiffs in that case to show that the new venue was inappropriate under the CPLR 510 criteria, the Appellate Division found the contract, including the change of venue, enforceable. The two cases plainly do not conflict and, as we will show below, *Caio* has no bearing on the issues raised in this case.

As matters stand now, Dewitt's claim is still full of holes. It cannot tell us who "executed[3]" the admission agreements, what role (if any) Morales had in their execution, why we have heard nothing from or about Morales in the course of this case, or why there are only two purported admission agreements although there are incontestably three admissions. Worse yet, it appears to have tied up three levels of courts in its Quixotic attempt either to change 200 years of New York law on private contracts or to somehow convince a court that this law does not apply to it.

[3] See Footnote 1 re scare quotes.

COUNTER-STATEMENT OF THE CASE

We agree in general with Dewitt's Statement of the Case. We write here to correct some misstatements in it.

Ms. Trimarchi's affidavit, while it says more or less what Dewitt reports it as saying, does not, as we show in this Brief, present any narrative consistent with custom and practice as it is understood and applied by the courts in this state.

We also take issue with Dewitt's characterization of the issues as raised in the motion practice and the appeal to the Appellate Division. Supreme Court, as the Appellate Division recognized, misapprehended the issue presented to it. The type of showing that both that court and the Appellate Division dissenters focused on: the standard CPLR 510 inquiry about whether enforcement of a contractual change of venue may be thwarted by considerations of fraud, overreaching, logistical problems or other hardships resulting from the transfer, etc. has no applicability without showing that the specific contract claimed to be involved can be enforced against the specific person (or the estate of the person) who is alleged to have entered into it. Our law has always been that a private document purported to be a contract entered into by an individual cannot be received into evidence unless it is

established that this individual signed or otherwise adopted it. These were the polarities in the motion practice.

QUESTIONS PRESENTED

1.) When there is no proof, direct or indirect, that a person has signed or adopted a private contract, should a court treat the purported signature of the person against whom the contract is being sought to be enforced as self-authenticating?

No. Such treatment is contrary to New York law going back to the early 1800s and this case provides no reason to change it now.

2.) In deciding whether a venue-setting provision in a nursing home admission agreement is enforceable, is it permissible to place the burden of proof as to authenticity of the claimed signature on the resident or her representatives instead of on the nursing home seeking to enforce the claimed contract?

No. The proponent of the claimed contract has the initial burden of showing that it was entered into by the person against whom enforcement is sought.

3.) Can a purported signature on a private document that does not even meet the foundational requirements of a business record correctly be deemed to be self-authenticating?

No. The courts are justifiably reluctant to create or recognize enforceable legal obligations based on unauthenticated signatures on private documents. The potential opportunities for harm arising from this kind of enforcement are too many. Even more so when the private documents have not been authenticated.

I. DEWITT HAS NOT PROVED THAT ITS AGREEMENTS WERE SIGNED/INITIALED BY MS. KNIGHT OR THAT IT CAN ENFORCE ITS CLAIMED CONTRACT IN THE ABSENCE OF THAT PROOF.

a.) Under our law, the authenticity of a signature on a private document intended to memorialize a legal obligation is not self-authenticating. It must be proved.

There is no dispute that the purported forum-selection clause in the Agreement is a private document, a contract, and subject to New York law, as it recites in ¶ XII. (a) [72, 101].

Our law provides that "'a contract is not enforceable against an individual unless sufficient evidence has been introduced to sustain a finding that the [individual] was in fact the signer.' Richardson § 9-101; *see* 2

McCormick on Evidence § 221[4] [8th ed])." *Andreyeva* at 802. The legal principle set forth in *Andreyeva* was nothing new in our legal history. The need to prove the authenticity of signatures on private documents has generated cases older than this Court.

Almost 200 years before *Andreyeva* the courts recognized that signatures on private legal documents could not be regarded as self-authenticating and that enforcement of contracts or other legal obligations required proof that the signatures were genuine. In *Cunningham v. The Hudson River Bank*, 21 Wend. 557 (1839), a trial was held in Superior Court and an appeal taken to the Supreme Court of Judicature of New York[5] on the issue of whether a check "purporting to be drawn by S.A. Cunningham" the defendant below was actually signed by him. Neither court regarded the

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[4] The relevant language in the McCormick section cited by the *Andreyeva* Court appears to be on page 83 of the treatise. It reads as follows:
"In the everyday affairs of business and social life, it is customary simply to look at the writing itself for evidence as to its source. If the writing bears a signature purporting to be that of X, or recites that it was made by X, we assume, nothing to the contrary appearing, that it is exactly what it purports to be, the work of X. At this point, however, the law of evidence has long differed from the commonsense assumption upon which we conduct our own affairs. Instead it adopts the position that the purported signature or recital of authorship on the face of a writing is not sufficient proof of authenticity to secure the admission of the writing into evidence."

[5] Under the New York court system as it existed at that time, this court was the predecessor of the modern Supreme Court and Appellate Division. It had statewide jurisdiction and the power – exercised in this case – to review decisions of the various inferior courts. Botler et al. *The Appellate Division of the Supreme Court of New York: An Empirical Study* 47 Fordham L. Rev. 929, 932-3 (1979).

"signature" as self-authenticating and "proof" of its genuineness did not survive appellate review[6].

The recognition that, absent agreement between the parties, signatures had to be proved genuine persisted in our jurisprudence. The cases holding this are legion. *Young v. Crescent Coffee*, 222 AD 3d 704, 705 (2nd Dept 2023); *Sherrod v. Mt. Sinai St. Luke's*; 204 AD 3d 1053 (2nd Dept) 2022); *Andreyeva, supra*; *O'Donnell v. A.R. Fuels, Inc.*, 155 AD 3d 644, 645-6; *Fairlane Financial Corporation v. Greater Metro Agency, Inc.*, 109 AD 3d 868, 870 (2nd Dept 2013); *NYCTL 1998-2 Trust v. Santiago*, 30 AD 3d 572, 573 (2nd Dept 2006); *Wunsch v. AMF Bowling Center, Inc.*, 236 AD 2d 467, 468 (2nd Dept 1997); *Sloninski v. Weston*, 232 AD 2d 913, 913-4 (3rd Dept 1996). We know of no case holding to the contrary. Dewitt has apparently not been able to come up with any such case, or it would have cited it. The rule in this state, at least with private documents, is that "the requirement of

[6] More insight into the deep historical roots of a verification requirement for signatures on private documents comes from *Brown v. Kimball*, 25 Wend. 259, 269-70 (1840). This was a sealed-document case. A seal was a common-law device that, among other things, conferred a presumption (first conclusive, later modified to rebuttable) of adequate consideration for a contract. It was legislatively abolished in 1936. "The Legal Effect of the Seal on an Instrument" 11 St. John's Law Review 1 p. 146 (1936). *Brown* described the elaborate process of proving that a signature on a sealed document was genuine. Proof that it had been executed by the purported executing party had to come from witnesses to the document's execution. If these were dead/ unavailable, proof of the genuineness of their signatures was necessary. Failing this, proof of the handwriting of the executing party was sufficient. Again, nobody's signature – even the witnesses' – was self-authenticating.

authentication requires that the proponent, who is offering into evidence a writing .. produce evidence sufficient to support a finding that the writing .. is what the proponent claims it is." McCormick, *supra*, § 221.

b.) Recognized ways to authenticate a signature on a document.

There are four generally-recognized methods of proving of authenticity where – as here – the writing is not admissible without preliminary evidence that a particular person made or signed it. They are set forth in Richardson § 9-103 as:

a. the testimony of a witness who was present at the time and who saw the person make or sign the instrument;
b. an admission of authenticity made by an adversary to a witness or in a writing proved or admitted to be that of the adversary, or while testifying on another trial or hearing;
c. circumstantial evidence; or
d. proof of handwriting through a qualified lay or expert witness.

Ms. Knight is, as the Wrongful Death action advises, not available to confirm or contest the validity of the claim that her signatures and initials on the agreements were genuine. This means that to authenticate her signature, Dewitt must resort to one of the alternatives above. But, as the Appellate Division found, it hasn't.

c.) Dewitt's claim that circumstantial evidence shows that the signature/initials at issue belong to Ms. Knight is baseless and should not be reviewed by this Court.

Dewitt claims for the first time in its submission to this Court, that her signature is authenticated by circumstantial evidence. Appellant's Brief (Brief) 21-21. This claim was not raised by Dewitt in the Supreme Court. *See* Ind. No. 805224/2021 (NY County) NYSCEF DOC. NO. 15. Nor was it raised on appeal to the Appellate Division. *See* Case No. 2022-03239 (First Department) NYSCEF DOC. NO. 9. It was not even raised in Dewitt's Appellate Division Motion to Reargue. NYSCEF DOC. NO. 15. Therefore it should not be considered by this Court. *Henry v. New Jersey Transit Corporation*, 39 NY 3d 361, 364-5 (2023); *U.S. Bank National Association v. DLJ Mortgage Capital, Inc.,* 33 NY 3d 84, 89 (2019). Neither the Supreme Court nor the Appellate Division had an opportunity to conduct the analysis necessary to adjudicate this claim. In any event, the emptiness of this claim will be obvious should the Court choose to entertain it.

The "circumstantial evidence" relied on by Dewitt consists of the agreements themselves and the affidavit of Trimarchi. Neither of these is sufficient to authenticate the signatures and initialings alleged to be Ms. Knight's.

If all that were needed to authenticate Ms. Knight's signatures and initials were the signatures or initials themselves, centuries of law would vanish, and we would be in a new legal world where signatures on private documents would be self-authenticating. Surely such a dramatic (and potentially mischievous[7]) change in the law would have to be accomplished by some mechanism: a statute, or a leading case.

Dewitt offers no such thing. This portion of its argument is nothing more than classic circular reasoning: we should believe that Ms. Knight signed and initialed these documents because her name and initials appear there. Her name and initials on these documents are there because she put them there. But this is simply a tautological statement that proves nothing. It asserts, instead of proving, a conclusion. The conclusion is far from the only one that can be drawn from these circumstances.

That Dewitt itself didn't believe that Ms. Knight's signature would be self-authenticating and sufficient to enable it to enforce the venue selection clause it had inserted into its agreements was shown by its having had Morales sign (and sometimes initial) the agreements as a witness. *E.g.*

[7] The legal world would be quite different if every "signature" on every document were presumed to be genuine. It is not by accident that signatures on documents transferring property, as in wills or conveyances of real property are required to be witnessed and formally acknowledged. And it is not lost on counsel for the plaintiff here that, should this case be settled for the sum of one dollar, the defense would not accept the plaintiff's signature on a General Release without proper notarization.

Record pages 86, 88, 118[8]. The only obvious purpose for Morales's signature to be there is so that he could be the witness who allegedly was present to attest that Ms. Knight signed the document[9]. Yet, Dewitt has not – as we noted above – produced either him or a reason why it has failed to do so. We urged the Appellate Division to draw an adverse inference from that failure in footnotes 4 and 5 in our opening brief to that Court, NYSCEF DOC. NO. 6., and now invite this Court to draw the same conclusion.

d.) The Trimarchi affidavit does not support Dewitt's claims.

Dewitt's other "circumstantial evidence" is the Trimarchi Affidavit. Brief 25 – 28. That affidavit is useless as proof of anything meaningful to the issues in this appeal.

Dewitt presents it as showing Trimarchi's "knowledge of the customs and practices in the performance of [her] duties as Director of Admissions of Dewitt." Brief 25. In the context of this case that is no more useful than the

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[8] Yet another mystery about the admission agreements why there are initials – presumably purporting to be Morales's – on some (but not all) pages that the "PK" initials appear on and sometimes twice on "PK"pages, *e.g.* 89, 117.

[9] If Dewitt had been seriously concerned with how it would prove that its residents actually executed admission agreements, it would have had a more formal process, with acknowledgement of the signatures before a notary, so that everyone involved would have proof of their genuineness. Of course, the disadvantage to such a process is that it requires real compliance with a real resident before a real notary and, if a slip in the compliance is discovered with an inconvenient event such as a lawsuit or an internal or external audit imminent, it is impossible to paper over with a quick signature and some scrawled initials "witnessed" by someone who doesn't exist or is conveniently unavailable.

affidavit of a bus driver about his or her customs and practices in driving a bus would be to the issue of whether a particular person was a passenger on a different bus at a particular time. Trimarchi knows nothing about whether Ms. Knight signed any of these documents. Her affidavit makes that clear. Her "direct oversight" (whatever that is supposed to mean) of the admissions process tells us nothing about what happened at any specific time with any specific resident.

Dewitt's second point about the affidavit is no more valid. It argues that the affidavit shows that the Appellate Division was wrong when it held that the admissions agreements had not been shown to be business records. Brief 25-6. That Court, relying on its 2003 decision in *DeLeon v. Port Authority*, 306 AD 2d 146 (1st Dept 2003), held that the business records foundation was not properly established for the agreements because the affidavit did not recite that the agreements had been created in the regular course of business. Dewitt suggests that this Court read the affidavit as implying that the agreements actually were created in the regular course of business. *Id.*

This type of incomplete business record foundation issue got the attention of this Court in *People v. Kennedy*, 68 NY 2d 569, 579-80 (1986), where records of a criminal usury business were offered as "business records" with a foundation that they were kept in the regular course of

business, but no showing that they were made pursuant to an established procedure for the routine, habitual, systemic making of records that would qualify them as trustworthy accounts or were regularly relied on in the business. This Court found that the proof presented was not adequate to show that the records were business records under CPLR 4518. The Trimarchi affidavit recites simply that the agreements were "kept and maintained in the ordinary course of business and maintained by it as a business record of Dewitt."

These records cannot be considered reliable, admissible business records for two reasons.

First is that Dewitt never established that Ms. Knight was under any "business duty" to say anything to anyone, which destroys the business records foundation under the oft-cited case of *Johnson v. Lutz*, 253 NY 124 (1930).

Second is that – even assuming that the agreements were transformed into admissible business records – all they would tell us is that something purporting to be Ms. Knight's name and initials appear on them, which – in this context – is proof of nothing. What matters in this case is who put them there and there is no evidence of that at all. So, unless we go back to the tautological loop that Ms. Knight's name and alleged initials are there

because she put them there, which we know because those are her name and alleged initials, the agreements are not direct or circumstantial proof of any issue that matters here.

Another way in which Trimarchi's affidavit is less than what Dewitt claims is Dewitt's bold statement that Trimarchi's affidavit included "important 'customs and practice'" evidence concerning the protocols utilized by Dewitt employees during the admission process." This Court (like others) has a different understanding of what "custom and practice" entails from Dewitt's.

The root case for our law on custom and practice is *Halloran v. Virginia Chemicals Inc.*, 41 NY 2d 386 (1977). In that case, the Court wrote that "[p]roof of a deliberate repetitive practice by one in complete control of the circumstances ... should therefore be admitted because it is highly probative." 41 NY 2d 392.

As later caselaw demonstrated, the phrases "deliberate repetitive practice" and "complete control" are indispensable elements of custom and practice, but there is more. "[T]o justify introduction of habit or regular usage, a party must be able to show on voir dire, to the satisfaction of the Trial Judge, that [s]he expects to prove a sufficient number of instances of the conduct in question." 41 NY 2d 392-3.

Thus, the elements, as the Second Department held in *Martin v. Timmins*, 178 AD 3d 107, 110-111 (2nd Dept 2019), are that the witness seeking to introduce evidence of admissible custom and practice must show that the practice in issue was one of "unvarying uniformity" and a sufficient number of instances of the conduct in question to satisfy the court. In addition, (s)he must show that the circumstances under which the practice took place were completely under his or her control. *Flores v. New York City Transit Authority*, 198 AD 3d 412, 412 (1st Dept 2021).

Since the missing Morales has not produced any evidence at all in this case, we don't know what he would have to say on the subject, but we cannot imagine that he could meet the *Halloran* test:

> "On no view, under traditional analysis, can conduct involving not only oneself, but particularly other persons or independently controlled instrumentalities produce a regular usage because of the likely variation of the circumstances in which such conduct will be indulged." 41 NY 2d 392.

Encounters involving people seeking to become residents of a nursing home/rehabilitation facility involve the conduct of both the facility's employees and the would-be residents (not to mention family members, friends, or other helpers). These interactions can present an array of varying circumstances depending upon the potential residents' needs, concerns, and degree of ability to understand what is going on. Additional complexity is

added by the actions and words of those accompanying the would-be residents and the personalities and institutional constraints of the facility workers. Thus, there are almost infinite variations of what could happen and how it could happen without it being under the "complete control" of anyone at all[10].

In addition to making the origin of the unwitnessed name and alleged initials that appear on this document suspect, this kind of situation is inconsistent with the legal definition of custom and practice, one that the *Martin* court described as *not* admissible: "conduct however frequent yet likely to vary from time to time depending upon the surrounding circumstances." 178 AD 3d 110.

Trimarchi does not, and – in fairness to her – could not, describe the admission process in terms that would satisfy the requirements for custom and practice. But, more than that, she apparently cannot tell us anything about

[10] This Court gave us an example of what admissible custom and practice is in *Rivera v. Anilesh*, 8 NY 3d 627 (2007), a dental malpractice case arising from an injection of anesthesia. The procedure was one that the defendant dentist had administered thousands of times. It was completely under the dentist's control and never varied, regardless of particular medical circumstances or the patient's condition. The dentist herself was in complete control of the process. The process was an interaction among the dentist, the needle, and the patient's gum, only one of which was sentient and able to exercise any control over anything. In other words, a situation completely different from the admission process involving a prospective resident (with whatever cognitive or health issues [s]he had), a Dewitt worker, who might be at the beginning or the end of a workday, and family members, friends, or even bystanders. All of these people would bring their own input to the interaction and could be cooperative, uncooperative, angry, frightened, unable to communicate, unable to understand, and so on. Nobody is in control – much less complete control – of such a situation. "Custom and practice" is an aspiration – and an overambitious one – in such a situation, not a description of a real-world event.

Morales's interactions with prospective residents or whether he even attempted to follow the template she presented of some idealized admission practice. She doesn't even tell us if the reason that we have not heard from Morales is that he was fired for failure to make sure that the prospective residents understood and signed the admission agreements, or lost them completely, leaving problems for future internal or external audits of the Dewitt records.

Finally, Dewitt tells the Court that Trimarchi "believed that the Decedent 'executed the two Agreements after they were received and explained.'" Brief 28.

We know that there were three, not two, admissions in this case. Trimarchi may or may not have known this when she signed her affidavit. If she did not know this, it is just more proof of how far she is removed from the process she describes in her affidavit. If she knew this, then her failure to explain how there could be only two admission agreements for three admissions shows that she was less than forthcoming in that affidavit.

Of course, Trimarchi has made it clear that she had and has no idea of whether Ms. Knight executed the agreements, so her statement about her belief has no evidentiary value. Her statement is emblematic of Dewitt's position in this litigation: it does not distinguish between assertion and proof.

According to Dewitt, this combination of nothing plus nothing adds up to enough proof to throw the burden onto Ms. Knight's Estate to engage in the challenges awaiting all those who seek to evade CPLR 501's reach.

e.) The cases Dewitt cites as supporting its circumstantial evidence claim do not support it.

The circumstantial evidence cases that Dewitt cites on pages 21-2 of its Brief are not helpful to its claim.

People v. Dunbar Contracting Co., 215 NY 416 (1915), was a criminal prosecution of a charge of conspiracy to defraud the state in roadway repair work. Bart Dunn was the president and, by far, the major stockholder of Dunbar and an old friend and professional sponsor of Joseph Fogarty, a foreman of state laborers. A few days after Dunn's company had been awarded the roadwork contract, someone called Lynch, the state superintendent of repairs in the district where the work was to be done. The call originated in New York City, where Dunbar had its office and was a request that Fogarty be assigned to supervise Dunbar's project. On the same day, a dictated letter with the Dunbar letterhead signed on behalf of, but not by, Dunn was sent to Lynch[11]. The letter referred to the telephone conversation on that day,

[11] The opinion doesn't explicitly say that the letter was sent to Lynch, but it is clear from the context that it was.

repeated the request to assign Fogarty to "my road" and assured Lynch that any courtesy would be appreciated.

There were two intertwined authentication issues here: the identity of Lynch's caller and whether the letter had come from Dunn. Notably, there was no issue about authenticating a signature.

Obviously, given the linked content of the letter and the phone call, proof of the caller's identity would establish the authorship of the letter. Lynch, as it happened, met with Dunn about five weeks later and then another three or four times. He also spoke with him on the phone several times. Lynch's testimony was that as soon as he met Dunn in person he recognized his voice as that of his caller. If the jury accepted the voice identification, the source of the letter would be no great leap. As the Court wrote:

"If the telephone message came from Dunn, the internal evidence of the letter shows that it came from the same source. The letter refers to the conversation, repeats its substance, and confirms it." 215 N.Y. 423.

This is an example of (powerful) circumstantial proof of the source of the letter but offers no tools for Dewitt to use to attempt to prove who wrote the signatures and alleged initials on its admission agreements.

Young v. Crescent Coffee, Inc., 222 AD 3d 704 (2nd Dept 2023), is also no help to Dewitt. It is not even a circumstantial evidence case.

Young involved an injury to a delivery truck driver whose foot fell into a gap between the back of his truck and a loading dock. Two of the defendants sued were Feinrose, the owner of the premises, and Goodrich, Feinrose's property manager.

Goodrich moved for summary judgment claiming that Feinrose was an out-of-possession property owner and that its own duty extended no further than Feinrose's. That motion was denied because the lease defining Feinrose's status had not been authenticated. As the Court noted, "a private document offered to prove the existence of a valid contract cannot be admitted into evidence unless its authenticity and genuineness are first properly established." 222 AD 3d 705.

Goodrich moved for reargument, relying on the testimony of its manager along with a supplemental affidavit. The Supreme Court granted reargument, found that the evidence from the manager was sufficient to authenticate the signatures on the lease agreement, and granted the defendants' summary judgment motions. On appeal, however, the grant of summary judgment was reversed because factual issues concerning the status of the loading dock and the scope of Goodrich's responsibilities under the management agreement.

This case is one of many supporting our argument about the need for authentication of signatures on private documents offered to prove the existence of contracts. Although Dewitt writes that this case means that "a writing may be authenticated by deposition testimony and circumstantial evidence", Brief 22, that observation is inapt. There was no circumstantial evidence in this case and to the contrary Dewitt has neither circumstantial evidence nor deposition testimony (it never produced Morales) to offer to authenticate what it claims to be Ms. Knight's signature and initials.

People v. Murray, 122 AD 2d 81 (2nd Dept 1986), *lv. denied*, 68 NY 2d 916 (1986), is remote from this case. It involved the authentication of two letters written by the defendant to the victim. One of the letters referred to a prior telephone conversation between the defendant and the victim and was authenticated by circumstantial evidence. The second letter, like the first, was signed with the defendant's nickname and the jury had a basis to compare the handwriting of the two letters and decide whether the defendant wrote the second one and to what weight these notes were entitled.

Finally, *Anzalone v. State Farm Mut. Ins. Co.*, 92 AD 2d 238 (2nd Dept 1983), actually does present circumstantial evidence, though not any useful to determining this case.

Anzalone was a declaratory judgment action arising out of an automobile crash. The defendant's insurance company claimed that its policy had been cancelled before the crash due to its insured's having failed to make payments to the bank out of which the premiums were to be paid.

Supreme Court found that the bank had cancelled the policy before the crash. On appeal, the plaintiffs argued that the insurance company had failed to prove its claimed cancellation below.

The circumstantial evidence appears in *dicta* at 92 AD 2d 239, where the Court noted that "[i]n the absence of any denial from the defendant or contrary evidence, the authenticity of the defendant's signature on the finance agreement may be reasonably inferred from the fact that she paid at least five premium payments."

The Appellate Division found that the policy had not been cancelled and was still in effect because State Farm could not prove that it had cancelled in strict compliance with Banking Law § 576.

While the auto case defendant's repeated deposits into the account out of which the premium payments were made is circumstantial evidence that the signature on the bank's finance agreement was hers, that has no bearing on this case. Dewitt has not pointed to any comparable act by Ms. Knight that indicates that the signatures and initials at issue were hers – because there is

no such act. Its statement that "similarly strong circumstantial evidence existed that the Decedent electronically signed the Admission Agreements, they were adequately authenticated," Brief 23, is empty rhetoric.

DEWITT'S ARGUMENT THAT MS. KNIGHT'S SIGNATURE WAS AN ELECTRONIC SIGNATURE AND THEREFORE PRESUMED AUTHENTIC IS BASELESS

Dewitt argues in Point III of its Brief that the signatures and initials that it attributes to Ms. Knight are "electronic signatures" and therefore must be presumed to be genuine.

This argument was not raised in Supreme Court or in the initial appeal to the Appellate Division. It appears for the first time on Page 12 of Dewitt's affirmation in support of its motion for reargument to that court. NYSCEF DOC. NO. 15. Therefore, like Dewitt's circumstantial evidence argument about the genuineness of the claimed signatures, it should not be considered by this Court. *Henry v. New Jersey Transit Corporation*, *supra*; *U.S. Bank National Association v. DLJ Mortgage Capital, Inc., supra*. 33 As with Dewitt's newly minted "circumstantial evidence" claim, neither of the lower courts had a chance to analyze this claim.

Had that claim been raised properly in either of the lower courts, it should have been dismissed out of hand. It has no legal merit. Fundamentally, it is a product of faulty analysis: the conflation of different

entities (the electronic, certified records addressed by this Court in *People v. Kangas*, 28 NY 3d 984 [2016] and the non-certified, dubiously electronic record of the purported admission agreements), leading to misleading arguments.

Dewitt writes that "[a]s the [Appellate Division] majority recognized, even electronic signatures enjoy the presumption of genuineness" and goes on to state that "Dewitt was entitled to a presumption that the Decedent's signatures were authentic and that the Admission Agreements were valid and enforceable." Brief 37. This argument doesn't withstand even a casual glance.

The first quote mischaracterizes what the Appellate Division majority "recognized." In fact, the court wrote that "the signature on a written instrument that has been entered into evidence *may* enjoy a presumption of genuineness." Record 166. That court then cited as examples CPLR 4538 (effect of a certificate of acknowledgement) and Uniform Commercial Code § 3-307 (treatment of signature on a negotiable instrument). Leaving aside the Appellate Division's implicit holding that the agreements here were not admissible into evidence because a proper business record foundation had not been established, we must understand that sentence in context.

The court's use of the word "may" means that a signature on such a document can sometimes, but not always, enjoy this presumption. The examples are very different from the documents in this case.

The first example is CPLR 4538, which applies to signatures accompanied by a certificate of acknowledgement – which this was not.

The second is a signature on a negotiable instrument within the meaning of the Uniform Commercial Code. The UCC presents a closed legal system that has nothing to do with nursing home admission agreements.

In the UCC system, there are specific definitions for the terms used:

A "signature" (UCC § 3-410 [2]) is made on an instrument.

An "instrument" (UCC § 3-102 [1] [e]) is a negotiable instrument.

A "negotiable instrument" (UCC 3-104 [1] and [2]) is a draft, check, certificate of deposit or note (each of which is, of course, also defined).

UCC §3-307 simply says how a "signature" within the UCC Article 3 meaning (i.e., on a negotiable instrument) is to be treated. It is admitted unless denied in pleadings and is subject to various types of challenges and presumptions.

Even Dewitt does not argue that its admission agreements are acknowledged or are negotiable instruments. Thus, the "signature" and alleged initials enjoy no presumption of genuineness.

Assuming that the claimed signature and initials constitute electronic signatures under the State Technology Law (STL), something far from clear[12], then, under STL §304 (2), then they "have the same validity and effect as the use of a signature affixed by hand" which, in this context where there is no authentication, is none. Dewitt's pronouncement that it is "entitled to a presumption that the Decedent's signatures were authentic and that the Admission Agreements were valid and enforceable," Brief 37, is a statement of wishful thinking, not controlling law.

Further confusion surrounds this area because Dewitt appears to assume that the agreements allegedly signed by Ms. Knight were created electronically on the Docusign platform and criticizes the Appellate Division majority for not making the same assumption. This Court's decision in *People v. Kangas*, 28 NY 3d 984 (2016), holds that the protections required in CPLR 4539 (b) do not apply to a document originally created in electronic form, as distinguished from created in hard copy form and uploaded. Docusign itself explains, in its website, how documents are created in its system. https://www.docusign.com/products/document-generation [last

[12] Section 302 (3)'s definition is ""Electronic signature" shall mean an electronic sound, symbol, or process, attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the record." The claimed signatures and initials are not sounds or symbols. The term "process" is not defined in the STL or in any regulations or cases we have been able to locate.

accessed on April 29, 2024]. The process starts with a hard-copy document that is imported into Docusign's software. The software allows fillable blanks to be inserted into the uploaded document.

From what we can deduce, the end product is not like the document admitted in *Kangas* at all. It has no state (or any other) certifications and Dewitt has not shown that there is any way in examining its documents to show that the signatures and initials were added by hand by a particular person (much less that Ms. Knight was that particular person) as distinguished from being added digitally. It also cannot tell us when those "writings" were added. In short, the Appellate Division's concerns about genuineness were well founded. We've already showed that Dewitt's "presumption" doesn't exist. This poorly explained and dubiously secure document system is no candidate for a new presumption of genuineness.

Without Dewitt's non-existent presumption, there is nothing for Ms. Knight's Estate to "overcome." The "signature," such as it is, remains unauthenticated and there is no enforceable venue selection contract.

THE *CAIO* CASE HAS NO BEARING ON THIS CASE.

Caio, inexplicably relied on by Dewitt, like this case, involves a forum-selection clause in a nursing home admission agreement. That is where the resemblance between our case and that one begins and ends.

In this case, the two-out-of-three contracts produced fail to meet the business record exception and are inadmissible hearsay. Beyond that insurmountable hurdle, nobody with knowledge of who wrote Ms. Knight's name and alleged initials on the Dewitt agreements has been produced and no proof that she signed and initialed these documents has been submitted[13].

In *Caio*, everyone knew who had signed the agreement: the resident's son, Marcos Caio (Marcos), *Caio v. Throgs Neck Rehabilitation and Nursing Center, et al.,* 2021-01100 Record on Appeal, NYSCEF DOC. NO. 6, p. 99[14]. Marcos, as the Appellate Division held, had been proved by Throgs Neck to have been his father's designated representative. 197 A. D. 3d at 1030. There was no controversy on this issue. As Throgs Neck wrote in its Reply Brief:

> "the decedent's son, Marcos Caio, executed a contractual agreement for the sole purpose of facilitating his father's admission to Throgs Neck for subacute care and rehabilitation. It is an undisputed fact that Marcos Caio

[13] The notion that someone other than Ms. Knight could easily have written her name and initials on the Dewitt papers is not far-fetched. For example, if an institutional audit or routine chart review was pending and someone realized that these papers had never been properly signed and initialed, a zealous or self-protecting Dewitt employee could have taken the initiative to solve the potential problem - especially if that employee had been responsible for ensuring that Ms. Knight had signed and initialed the papers initially. Administrative sloppiness is far from unknown in the health care industry and this case in which only two out of three admissions have purported admission agreements and the person who supposedly witnessed the execution of those agreements has vanished does not seem to be a paragon of good procedures carefully followed. Even worse is that the absence of a third admission agreement and of the supposed witness are left unexplained.

[14] This Court may take judicial notice of undisputed court records and files. *Long v. State*, 7 NY 3d 269, 275 (2006); *People v. Petgen*, 55 NY 2d 529, 536 (1982) (Opinion of Meyer, J. dissenting).

> executed the agreement as his father's Designated Representative. It is an undisputed fact that the plaintiff has never challenged the authenticity of the Admission Agreement, nor has the plaintiff (or Marcos Caio) ever asserted, much less actually established, that Marcos Caio lacked the authority to execute the Admission Agreement on behalf of his father[15]."

id. Reply Brief for Defendants-Appellants, NYSCEF DOC. NO. 11, p. 3-4.

In light of these circumstances, the Appellate Division understandably found that Throgs Neck had no obligation to offer an affidavit by a person having personal knowledge of the circumstances under which the admission agreement was executed – whatever that was intended to mean. This left the plaintiff to show a reason, applying the CPLR 510 standard, why the venue-selection clause, in an admissible contract with a known signature, should not be enforced. No such reason was forthcoming, and the clause was upheld.

Caio provides no useful precedent on how a court confronted with the facts in our case should decide. It doesn't even offer any guidance. Our case involves an inadmissible "contract", an unknown signer/initialer[16], and no indication that anyone saw Ms. Knight sign/initial any of the documents here. *Caio* arises from completely different facts: an identified signer with

[15] In this, as in all other quoted excerpts of documents, the syntax, punctuation, and capitalization are reproduced as they exist in the original.

[16] Or more than one such person. We showed through the Affidavit of James Knight that the signatures and initials on the admission agreements were dissimilar, with different slants and different spacing between letters in the words. [144]

undisputed authority to sign on behalf of the resident, and an admissible agreement.

Aside from the obvious differences we just set forth, the post-decision history of the two cases shows a consensus that they are on different analytical tracks.

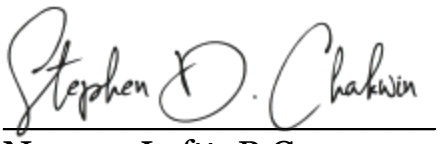
Andreyeva was decided on January 20, 2021. *Caio* on September 28, 2021. *Caio* does not mention *Andreyeva*. The briefs to the First Department in *Caio* do not cite *Andreyeva*. We have found only one case that cites both *Caio* and *Andreyeva*. This is *Allen v. Morningside Acquisition I, LLC,* 205 AD 3d 861 (2nd Dept 2022). Notably, there is no suggestion in that case that *Andreyeva* and *Caio* are inconsistent with each other. *Allen* cites *Andreyeva* as an example of a case in which a nursing home defendant failed to properly authenticate an admission agreement with a venue-selection provision, 205 AD 3d 862, and cited *Caio* in a string cite of cases containing "general principles" on forum-selection clauses. 205 AD 3d 864. As we noted in Footnote 2 above, neither the Supreme Court nor Dewitt's counsel cited *Caio* in the Supreme Court motion practice in this case.

Caio is nothing more than a red herring that Dewitt sought to use to distract the courts from its own failure to meet its initial burden of proof.

CONCLUSION

The proper venue in this action is New York County. The claimed basis for a change of venue to Nassau County is the nonexistent – or at least unenforceable – contract. Without that claimed contract, there is no basis in this case for any venue other than New York County, where the parties lived or were located. The Appellate Division's Order should be affirmed.

DATED: May 1, 2024



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NEW YORK STATE COURT OF APPEALS
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I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using WordPerfect.

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Dated: May 1, 2024