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COURT OF APPEALS  
STATE OF NEW YORK

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KNIGHT,

Respondent,

-against-

NO. 92

DEWITT REHABILITATION AND NURSING  
CENTER, INC.,

Appellant.

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20 Eagle Street  
Albany, New York  
October 15, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN  
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE WILSON: Next case on the calendar is  
2 Knight v. Dewitt Rehabilitation and Nursing Center.

3 MR. O'CONNELL: Good afternoon. May it please  
4 the court. My name is William O'Connell, from Goldberg  
5 Segalla, and I represent the defendant-appellant, Dewitt  
6 Rehabilitation and Nursing Center. This is a case about a  
7 forum selection clause.

8 JUDGE TROUTMAN: But before you get to the forum  
9 selection clause - - -

10 MR. O'CONNELL: Certainly, Your Honor.

11 JUDGE TROUTMAN: - - - and get the benefit of  
12 that clause, don't you have to first have a valid contract?

13 MR. O'CONNELL: Your Honor, I believe you have to  
14 - - - my client, as the person seeking to assert the forum  
15 clause, has to make an initial showing that the clause was  
16 applicable and enforceable, and I believe we made a very  
17 strong initial showing of that.

18 JUDGE CANNATARO: How do you do that? What's the  
19 method for authenticating a contract?

20 MR. O'CONNELL: The method in this case is  
21 circumstantial evidence, and we provided a host of it. We  
22 provided two forty-four-page admission agreements with  
23 DocuSign initials and signatures of the decedent, which  
24 resembled it, but you - - - it's docu - - -

25 JUDGE SINGAS: You never made that argument to



1 the Supreme Court, though, right? That it was  
2 authenticated via circumstantial evidence.

3 MR. O'CONNELL: Well, we used circumstantial  
4 evidence only. We did not have direct evidence of any  
5 witness or anybody who could say that the decedent signed  
6 it. And later on, counsel, in his opening brief to the  
7 Appellate Division, put in a footnote that that is another  
8 way of - - - of proving to authenticate a contract. And  
9 that was the type of evidence we used. And I did start  
10 using that term, although, I didn't use it in the beginning  
11 in the Supreme Court. But it's our - - -

12 JUDGE GARCIA: Counsel - - -

13 MR. O'CONNELL: Yes?

14 JUDGE GARCIA: - - - let me ask you this, this -  
15 - - you started off saying this is a forum selection  
16 clause. And it seems to me this is a subset of a forum  
17 selection clause, right? Because it's an intra-state forum  
18 selection clause. It's a venue motion. You could have a  
19 forum selection clause that says this case should be  
20 brought in Minnesota. Right. You don't move to dismiss.  
21 You don't move under article 5 - - - 501 in that case.  
22 Right.

23 MR. O'CONNELL: Correct.

24 JUDGE GARCIA: So you're bringing a motion under  
25 501 and 510, whatever. Do you think the standard in

1           considering the contract in that case is the same as  
2           considering it for a change of venue out of the state, or a  
3           motion for summary judgment, or even a motion to dismiss,  
4           or a trial exhibit - - - you know, it's going to go into a  
5           trial, or is it something else?

6                     MR. O'CONNELL: I believe the standard is  
7           different. I believe it's lesser, certainly, than a  
8           summary judgment standard, as I - - -

9                     JUDGE GARCIA: How would you quantify that  
10          difference?

11                    MR. O'CONNELL: Well, I would quantify it by  
12          making clear from the case law, which is the Court of  
13          Appeals has said in this case, prima - - - a forum  
14          selection clause is prima facie valid and enforceable  
15          unless shown by the resisting party to be unreasonable.  
16          And then the longer appellate - - -

17                    JUDGE GARCIA: To me - - -

18                    MR. O'CONNELL: Yeah.

19                    JUDGE GARCIA: - - - that goes more to the issue  
20          of you have a valid contract, what do you have to do to get  
21          out from under that venue selection clause in a valid  
22          contract? You're not disputing you have a contract.  
23          You're saying you shouldn't enforce the venue part of that.  
24          That, to me, is a very different burden than the burden on  
25          the proponent of enforcement coming forward and saying,

1 this isn't a document I found on the street and you know,  
2 hey, whatever, it has your signature on it, and in some way  
3 authenticating for the court that this is an agreement  
4 where you have agreed to this venue change.

5 MR. O'CONNELL: Your Honor, if I understand - - -  
6 it's our position that there is an initial showing that has  
7 to be made, and that's lesser than the showing that would  
8 ultimately have to be made - - -

9 CHIEF JUDGE WILSON: Just - - - I'm having the  
10 same difficulty, I think, which is I'm not sure why - - -  
11 the question here isn't just - - - I - - - the question, it  
12 seems to me, is just is this signature authentic? Right?  
13 I mean, if this has been a contract for the sale of widgets  
14 as opposed to the contract for the admission to a nursing  
15 home, I'm not sure why the analysis about how to  
16 authenticate the signature is any different. It's just a  
17 contract.

18 MR. O'CONNELL: Well, fair enough, Your Honor.  
19 And I can just speak really to the authentication. In this  
20 case, it can be by circumstantial evidence. And in our  
21 case, we provided two agreements with multiple signatures,  
22 with a statement - - - a notice statement in it that says  
23 that you're - - - the residents entry into this facility is  
24 conditioned on the execution of this agreement, which  
25 certainly suggests that she would not have gone into the

1 facility, which she did. And they don't dispute that on  
2 the dates when these were signed that she actually went  
3 into the facility and that that end - - - well, really,  
4 that's it - - -

5 JUDGE CANNATARO: But Counsel, isn't that a  
6 little - - -

7 MR. O'CONNELL: Yeah.

8 JUDGE CANNATARO: - - - different? That - - -  
9 you know, the circumstantial evidence you're talking about  
10 would tend to show that that is the genuine contract that  
11 you have on file - - -

12 MR. O'CONNELL: Uh-huh.

13 JUDGE CANNATARO: - - - at your business, but it  
14 doesn't really address the question, which is the core  
15 issue in the case, whether this is the individual who  
16 executed that contract. It's - - - it's - - - it's  
17 different. And I don't know that any of the circumstantial  
18 evidence that you put in, and correct me if I'm wrong,  
19 please, actually tends to establish the authenticity of the  
20 signer.

21 MR. O'CONNELL: Well, I - - - I respectfully  
22 disagree with that, Your Honor. I mean, if we have two  
23 admission agreements that were allegedly signed by the  
24 decedent - - -

25 JUDGE CANNATARO: Yeah.



1 MR. O'CONNELL: - - - and the decedent was in the  
2 facility on those dates and signed an agreement that said -  
3 - - or allegedly signed an agreement that said it's  
4 conditioned on your execution - - -

5 JUDGE CANNATARO: Fair enough, Counsel, but you  
6 didn't have the person who was in the room allegedly with  
7 the petitioner when she signed the contract to say, you  
8 know, I was in the room with this person, and I told him  
9 that they can't be admitted unless they sign this  
10 agreement, and that's when they signed the agreement. None  
11 of that is part of your circumstantial evidence in this  
12 case, right?

13 MR. O'CONNELL: No, and that wouldn't be  
14 circumstantial evidence anyway. That would be direct  
15 evidence.

16 JUDGE CANNATARO: That'd be pretty direct  
17 evidence. Yeah.

18 MR. O'CONNELL: But we don't have that person.  
19 Obviously, they were unavailable, and they could not sign  
20 this, so we had to put in the evidence that we did have,  
21 and we did on our motion to change the - - -

22 JUDGE TROUTMAN: So when it's challenged - - - if  
23 the validity of the contract is challenged by the other  
24 side, then you don't necessarily have the proof. There's a  
25 question. There's a question of fact as to is it valid or

1 is it invalid? There's a contest going on, and many of the  
2 cases that were cited are cited at - - - are cases where  
3 it's assumed the contract is valid, and you're just going  
4 to the venue aspect.

5 MR. O'CONNELL: That's true, Your Honor. But  
6 I'll give you one case, the Chow case, which I mentioned in  
7 my brief, said both levels. And that was a case where  
8 there also was a disputed fact about whether the son who  
9 signed an admission agree - - -

10 JUDGE GARCIA: But that case, they signed it.  
11 They accepted they signed it.

12 JUDGE TROUTMAN: Uh-huh.

13 JUDGE GARCIA: It wasn't that the son didn't sign  
14 the contract. The question there was does the son have  
15 authority to sign - - -

16 JUDGE TROUTMAN: Authority.

17 JUDGE GARCIA: - - - the contract, which is a  
18 very different issue than we have here.

19 MR. O'CONNELL: With respect, Judge, I don't see  
20 how. It - - - doesn't that go to the authority of the - -  
21 -

22 JUDGE GARCIA: Let's say they came in and - - -

23 MR. O'CONNELL: - - - and the enforceability - -  
24 -

25 JUDGE GARCIA: I'm sorry. That they said - - -

1 the son says, I never signed that. That's our case. That  
2 case was, I signed that, but I didn't have authority to  
3 sign that. So you're not contesting that the document's  
4 authentic or not authentic, you're contesting the power of  
5 the person to enter into the agreement.

6 MR. O'CONNELL: True. But isn't the result the  
7 same? The result is that the forum clause can't be  
8 enforced because there's either not an authenticated  
9 signature, or because someone didn't have authority to sign  
10 it - - -

11 JUDGE RIVERA: The grounds - - - the grounds are  
12 very different, which affects the analysis. But let me - -  
13 - let me ask you a different question.

14 MR. O'CONNELL: Uh-huh.

15 JUDGE RIVERA: I understand your point about the  
16 circumstantial evidence that you - - - you proffered. What  
17 if all you did was put forward the - - - the - - - the - -  
18 - the signature, alleging that it was hers? That's it.  
19 The signature, the initials. And that was all you put  
20 forth.

21 MR. O'CONNELL: I would say - - - and in - - -

22 JUDGE RIVERA: Is that enough? I'm just trying  
23 to see where that line is drawn.

24 MR. O'CONNELL: Not enough. Not enough.

25 JUDGE RIVERA: That's not enough.



1 MR. O'CONNELL: Yeah - - -

2 JUDGE RIVERA: Why is that not enough?

3 MR. O'CONNELL: It's not enough because it didn't  
4 have the additional evidence that we had in this case,  
5 which included the Trimarchi affidavit, which went - - -

6 CHIEF JUDGE WILSON: Well, so let me - - - let me  
7 ask - - - sorry - - - let me ask you - - -

8 MR. O'CONNELL: Yes, Judge.

9 CHIEF JUDGE WILSON: - - - a general proposition.

10 MR. O'CONNELL: Yes, Judge.

11 CHIEF JUDGE WILSON: So if somebody shows up in  
12 court with a contract that's signed.

13 MR. O'CONNELL: Yes.

14 CHIEF JUDGE WILSON: Right. And the - - - and  
15 signed by the counterparty, and the other side says, well,  
16 this is not my signature, is there a presumption that the  
17 contract is valid - - - or a different way of asking - - -  
18 the signature is valid? Or is there - - - asked - - - a  
19 different way of asking it is whose burden is it initially  
20 to come forward with evidence that the signature on the  
21 contract is not what it appears to be?

22 MR. O'CONNELL: I think in - - - in the initial  
23 showing that would be made in - - - in any sort of contract  
24 case would be my burden to make a showing that it was the  
25 decedent's signature, and I believe we did that. Did we

1 prove it with - - -

2 JUDGE HALLIGAN: So you agree that you have that  
3 - - -

4 MR. O'CONNELL: I'm sorry. Yes, Judge?

5 JUDGE HALLIGAN: Sorry, you - - - I - - - I - - -  
6 maybe I wasn't following your arguments. I thought in your  
7 brief you were suggesting that you have no burden to show  
8 authentication, as opposed to arguing that you have  
9 successfully met that burden. So are you agreeing that you  
10 do have some obligation to show that the contract is  
11 authentic? And if so, what exactly is - - - is the nature  
12 of that burden?

13 MR. O'CONNELL: I believe we do have an initial  
14 burden.

15 JUDGE HALLIGAN: Uh-huh.

16 MR. O'CONNELL: And - - - and there is - - - in -  
17 - - in New York law, there are phrases like that initial  
18 showing that are lesser. It can be - - - I - - - in my  
19 brief, I mentioned jurisdiction. There are some limited  
20 things where you have to make an initial showing, but you  
21 don't have the burden of proof entirely - - - the burden of  
22 persuasion, so - - -

23 JUDGE HALLIGAN: But wait, so - - - so what is -  
24 - -

25 JUDGE CANNATARO: So you have a burden of



1 production - - -

2 MR. O'CONNELL: I have a - - -

3 JUDGE CANNATARO: - - - with respect to the  
4 document.

5 MR. O'CONNELL: I do have a burden of production,  
6 and - - -

7 JUDGE CANNATARO: But you don't have the burden  
8 of persuasion. So if there's a claim, like Chief Judge  
9 said, that's not my signature, it's not your burden to  
10 persuade that that is an authentic signature. It's the  
11 person who's contesting it, or am I misapprehending your  
12 argument?

13 MR. O'CONNELL: No, that's - - - that's exactly  
14 right. And - - -

15 JUDGE HALLIGAN: But how does that work?

16 JUDGE RIVERA: So the doesn't satisfy the burden  
17 of production or doesn't satisfy the burden of persuasion?  
18 The signature on its own. What I started out asking you  
19 about.

20 MR. O'CONNELL: It satisfies the burden of  
21 production.

22 JUDGE RIVERA: But not necessarily persuasion.

23 MR. O'CONNELL: Correct. But - - -

24 JUDGE RIVERA: If it's challenged. Yeah.

25 MR. O'CONNELL: - - - the other factors that I've

1 mentioned also strengthen my - - - my initial showing and  
2 my initial burden to show that this this of - - - this, of  
3 course, is - - - is the decedent. I mean, she's there.  
4 She does - - -

5 CHIEF JUDGE WILSON: Well, let me ask you - - -

6 MR. O'CONNELL: Yes, Chief Judge.

7 CHIEF JUDGE WILSON: - - - try my question a  
8 different way. Same contract for widgets. I come into  
9 court. It's signed. Right. And the - - - my adversary  
10 says, wait, this is not my signature. Is that enough,  
11 then, to put that at issue, or do they have to - - - if - -  
12 - do they need an affidavit from the person whose signature  
13 it is saying, I - - - this is not actually my signature.  
14 What do they need to do?

15 MR. O'CONNELL: You - - - your factual said that  
16 the person came in and said that's not my signature,  
17 correct?

18 CHIEF JUDGE WILSON: Let's say they - - - yeah,  
19 if - - - let's say that they say that under oath. That's  
20 sufficient, I assume, to put it under, right? What if - -  
21 -

22 MR. O'CONNELL: Well, I'd say it's fairly - - -

23 CHIEF JUDGE WILSON: Right.

24 MR. O'CONNELL: - - - compelling - - -

25 CHIEF JUDGE WILSON: Right.



1 MR. O'CONNELL: - - - information, but - - -

2 CHIEF JUDGE WILSON: Okay. But - - - but you  
3 might be able to prove otherwise.

4 MR. O'CONNELL: You might be able to prove  
5 otherwise.

6 CHIEF JUDGE WILSON: Right. So let me - - - so  
7 let's say you don't have an affidavit from that person.  
8 The other party's papers just assert this is not actually  
9 the signatory's signature, just that assertion with no  
10 proof. What happens then? Your burden?

11 MR. O'CONNELL: I - - - I - - -

12 CHIEF JUDGE WILSON: Their burden to put  
13 something in?

14 MR. O'CONNELL: The bur - - - the burden itself  
15 is on the person who's challenging - - -

16 CHIEF JUDGE WILSON: Okay.

17 MR. O'CONNELL: - - - that clause - - -

18 CHIEF JUDGE WILSON: So they got to - - -

19 MR. O'CONNELL: - - - and it remains there - - -

20 CHIEF JUDGE WILSON: - - - they've got to put in  
21 something with evidentiary value to raise that issue, not  
22 simply assert it.

23 MR. O'CONNELL: Correct.

24 CHIEF JUDGE WILSON: Is that your view - - -  
25 okay.

1 MR. O'CONNELL: And in this case, obviously, once  
2 we shift over to the opponents, this court has used the  
3 phrase in one of its cases - - -

4 CHIEF JUDGE WILSON: Well, in here, they did put  
5 it in something, right? They put in an exemplar.

6 MR. O'CONNELL: They did. They did.

7 CHIEF JUDGE WILSON: And they put in - - - right?

8 MR. O'CONNELL: And it was, in the terms of this  
9 court, no more than a bald assertion of forgery.

10 JUDGE CANNATARO: Even with an exemplar?

11 MR. O'CONNELL: Even with an exemplar that's  
12 unidentified. It was not told where the document came  
13 from. It was - - - it had two signatures of the decedent  
14 and apparently her husband - - -

15 JUDGE RIVERA: Well, doesn't that go to the  
16 weight to be afforded that particular piece of evidence  
17 that they were putting in?

18 MR. O'CONNELL: Well, I understand, and I'm  
19 explaining - - -

20 JUDGE RIVERA: Which is whether or not they  
21 produced anything.

22 MR. O'CONNELL: Well, they did produce some  
23 evidence. And it's my opinion that, under the case law,  
24 that really doesn't satisfy it. There's no handwriting  
25 expert. They don't identify the exemplar, where it came

1 from. The statute speaks on that - - - the CPLR. The  
2 comparison is weak. It's between a handwritten and a  
3 DocuSign signature, so it's - - -

4 JUDGE CANNATARO: So your rule, as I understand  
5 it, is to meet your burden of persuasion - - - not yours -  
6 - - to - - - for your adversary to have met their burden of  
7 persuasion with respect to the authenticity of the  
8 signature, they would have to establish the authenticity of  
9 the exemplar, A; and then produce some competent evidence  
10 as to why the two examples don't match up, i.e., they'd  
11 have to call a handwriting expert to say that these are not  
12 the same signature.

13 MR. O'CONNELL: Yes, except - - - I'll just  
14 qualify that. The law does say that they don't have to  
15 actually produce a handwriting expert, but obviously, it  
16 would make the proof that much more persuasive if they did.  
17 In this case, they didn't, and it's the - - -

18 JUDGE CANNATARO: Is it - - -

19 MR. O'CONNELL: - - - plaintiff himself who's  
20 giving his handwriting opinions.

21 JUDGE HALLIGAN: So - - - so - - - so your  
22 position is you produce the contract, and then your  
23 adversary says not her signature. Obviously she's  
24 deceased. We can't get an affidavit from her. And then  
25 the burden of persuasion flips, is this your view, to your



1 adversary to show that, in fact, it's not her signature?

2 MR. O'CONNELL: Yes, that is my position. And  
3 that position, you have to look at the other avenues in the  
4 standard, and whether it's overreaching or fraud or in  
5 violation of contravention of public policy. All - - - not  
6 all easy things to prove either, I would say. But that is  
7 the case law burden that we've had. And the First  
8 Department followed it for a long time until this case.  
9 And we've already discussed - - -

10 JUDGE HALLIGAN: And - - - and if - - - if - - -

11 MR. O'CONNELL: Yes, Your - - -

12 JUDGE HALLIGAN: - - - if your adversary had  
13 authenticated the exemplar, would that have been enough? I  
14 under - - - I - - - I - - - I thought I heard you say the  
15 handwriting expert would have been helpful, but not  
16 necessary.

17 MR. O'CONNELL: Yeah.

18 JUDGE HALLIGAN: So the authentication of the  
19 exemplar would have been sufficient to meet the burden of  
20 persuasion or to - - - to push it back to you.

21 MR. O'CONNELL: Yeah. I don't think it would  
22 have been sufficient.

23 JUDGE HALLIGAN: So what would have been needed  
24 if a handwriting expert was not necessary?

25 MR. O'CONNELL: I'm not sure what would have been

1 - - - I - - - I - - - I - - - I think it would be very  
2 close in terms of deciding who prevails in that - - - in  
3 that point. But that's where this case really comes down  
4 to, is who has the burden in the first place. And if - - -  
5 if - - - if they - - -

6 CHIEF JUDGE WILSON: Well - - - or does it - - -  
7 does it come down to that, or does it come down to the - -  
8 - the, you know, Supreme Court here had the exemplar in  
9 front of it - - -

10 MR. O'CONNELL: Uh-huh.

11 CHIEF JUDGE WILSON: - - - and it made a factual  
12 determination that the two were not - - - yeah, that - - -  
13 that was not sufficient to meet - - -

14 JUDGE HALLIGAN: Uh-huh.

15 CHIEF JUDGE WILSON: - - - you know, to show that  
16 these signatures were not hers, but you know, perhaps with  
17 the date on the exemplar or something like that, couldn't  
18 Supreme Court have made the other finding?

19 MR. O'CONNELL: Well, the Supreme Court in this  
20 case ruled in - - - in my client's favor.

21 CHIEF JUDGE WILSON: Right.

22 MR. O'CONNELL: Okay.

23 CHIEF JUDGE WILSON: No, correct. Right.

24 MR. O'CONNELL: I thought you said the opposite.  
25 I'm sorry.



1 CHIEF JUDGE WILSON: No. No. Ruled in your - -  
2 - but - - - but there is - - -

3 MR. O'CONNELL: I misheard that.

4 CHIEF JUDGE WILSON: - - - evidence here. And  
5 couldn't Supreme - - - essentially, we've got a factual  
6 finding from Supreme Court.

7 MR. O'CONNELL: Right.

8 CHIEF JUDGE WILSON: And there is some point  
9 where, you know, the exemplar is a little bit better or  
10 whatever it is where Supreme Court could have found against  
11 you.

12 MR. O'CONNELL: That is possible - - -

13 CHIEF JUDGE WILSON: And there's nothing much we  
14 could do about that because that's a finding of fact based  
15 on evidence in the record.

16 MR. O'CONNELL: Right. But that's not what  
17 happened here.

18 CHIEF JUDGE WILSON: I understand that.

19 MR. O'CONNELL: And it's a DocuSign signature.  
20 And that comparison is really - - - not really ever going  
21 to work.

22 CHIEF JUDGE WILSON: I understand that. But for  
23 example, if there had been a DocuSign signature from Mrs.  
24 Knight a year earlier and they looked very different - - -

25 MR. O'CONNELL: Different case.



1 CHIEF JUDGE WILSON: Right.

2 MR. O'CONNELL: Your Honor, if there aren't any  
3 other questions, I appreciate it. Thank you.

4 CHIEF JUDGE WILSON: Thank you.

5 MR. LEFTT: Good afternoon, Your Honors.

6 JUDGE TROUTMAN: Who has the initial burden with  
7 respect to the validity of the contract itself?

8 MR. LEFTT: So with the - - - with the respect to  
9 the validity of the contract itself?

10 JUDGE TROUTMAN: Before you get to venue or  
11 forum, don't you have to first have a valid contract?

12 MR. LEFTT: I would say to that yes, of course,  
13 but I - - -

14 JUDGE TROUTMAN: And was the validity of the  
15 contract challenged here?

16 MR. LEFTT: It's hard to answer that question  
17 without first recognizing the fact that, as lawyers, we're  
18 only supposed to look at things that are actually in  
19 evidence that we can consider. So while the issues of  
20 forgery or forum selection are interesting, and while I  
21 understand that - - - that my colleague here would want to  
22 make this case about forum selection, which is a loser of  
23 an argument for me, I'll - - - I'll confess something to  
24 you that I probably shouldn't in the Court of Appeals. My  
25 first time ever here. I never really understood that there

1 was the need for a - - - a dual statement in the business  
2 record exception to hearsay. I never really understood why  
3 a document had to be made in the ordinary course of  
4 business, and then it was - - -

5 CHIEF JUDGE WILSON: But can I stop you there?  
6 Because I don't understand that we're talking about hearsay  
7 at all, right?

8 JUDGE TROUTMAN: Right.

9 MR. LEFTT: Well - - -

10 CHIEF JUDGE WILSON: This is just authentication.

11 MR. LEFTT: But there's no document that we  
12 should even be looking at. They haven't - - -

13 CHIEF JUDGE WILSON: Well, there's a - - -

14 MR. LEFTT: - - - figured out any way whatsoever  
15 to admit this contract to the court.

16 CHIEF JUDGE WILSON: There is a contract, and it  
17 has - - -

18 MR. LEFTT: Maybe.

19 CHIEF JUDGE WILSON: Well, there's - - - there's  
20 an agreement. It's titled agreement. I know you're saying  
21 that your client didn't sign it, or we don't know that your  
22 client signed it.

23 MR. LEFTT: I - - - I - - - right. It's just a  
24 piece of paper.

25 CHIEF JUDGE WILSON: But there is - - - there is

1 a piece of paper that has terms in it and has initials on  
2 the bottom of the pages, and it has a signatures in various  
3 places.

4 MR. LEFTT: I agree with you.

5 CHIEF JUDGE WILSON: Okay. So your - - - I think  
6 I agree with you that this is not about a foreign - - -  
7 forum selection clause. And this has nothing to do with  
8 the law in forum selection clauses, right?

9 MR. LEFTT: I agree with that. Correct.

10 CHIEF JUDGE WILSON: This is just about what has  
11 to be done to authenticate a signature on a contract.

12 MR. LEFTT: Well, that's one way of looking at  
13 it, except that whether you look at a signature on a  
14 contract which has been admitted into evidence through the  
15 business record exception or some other exception, or else  
16 - - -

17 CHIEF JUDGE WILSON: No, I don't - - -

18 MR. LEFTT: - - - whether the contract itself has  
19 a valid signature on it - - -

20 JUDGE GARCIA: So your idea of this case would be  
21 they just forgot to put half the business record sentence  
22 in their affidavit, and otherwise, it would have been fine.  
23 But that's what we're deciding, as the Court of Appeals;  
24 they left out half the hearsay exception rule, so you win.

25 MR. LEFTT: I would say, at that point, once

1 there's an actual document in evidence to look at, the  
2 burden would become more difficult for proving this - - -

3 JUDGE GARCIA: But this case, we could just  
4 decide by saying they forgot to put half the business rule  
5 - - - record ruling - - -

6 MR. LEFTT: Not only could you decide that, but  
7 you should.

8 JUDGE CANNATARO: So - - -

9 JUDGE GARCIA: But that rule, I think, has a lot  
10 of sway to me. If a judge is looking at a document and  
11 saying, is this going back into the jury room, particularly  
12 in a criminal trial, hearsay exceptions, this is a venue  
13 change motion. They come forward and they say this is a  
14 contract. They put in what they put in circumstantially,  
15 let's say, or indicia of reliability. This is what it is.  
16 Is that enough to shift it to you to come in and say, yeah,  
17 well, that may be a contract, but I didn't sign it. So I'm  
18 having trouble understanding where this - - - the Chief  
19 Judge, I think, was getting at, hearsay rule comes in - - -

20 JUDGE TROUTMAN: Uh-huh.

21 JUDGE GARCIA: - - - with respect to a judge  
22 who's making a determination on a venue change motion.

23 MR. LEFTT: Well, so - - - so the question is - -  
24 -

25 JUDGE GARCIA: It's going to be easy, just put in



1 a business record all the time.

2 MR. LEFTT: Yeah. If they had put in a business  
3 record exception, we'd be in a different position right  
4 now. I think we would.

5 CHIEF JUDGE WILSON: So how do you do - - - how -  
6 - -

7 MR. LEFTT: Also, I would say - - -

8 CHIEF JUDGE WILSON: Well, go ahead, finish.

9 MR. LEFTT: - - - the question that the Supreme -  
10 - - that - - - that the Court of Appeals here really has to  
11 answer, which is going to be very difficult for you to  
12 answer, is where is Morales? Right. Because that's the  
13 person who signed all of these documents - - -

14 JUDGE GARCIA: Let's say, in an ordinary case,  
15 Morales has died. Not, but let's say he has. So that  
16 means they never get the contract in?

17 MR. LEFTT: No, there are other ways to  
18 authenticate contracts. There's - - -

19 JUDGE CANNATARO: What are those other ways?

20 MR. LEFTT: There's lists of ways. I mean - - -

21 JUDGE GARCIA: So why can't they do it  
22 circumstantially?

23 MR. LEFTT: Why can't they? I think they can.

24 JUDGE GARCIA: So then it just becomes a debate  
25 over whether this was enough.

1 MR. LEFTT: Well, I don't think they did do it  
2 circumstantially, yes - - -

3 JUDGE RIVERA: It strikes me part of the  
4 confusion is it's a contracts case. They say they have a  
5 contract. They say they have an agreement. They say it  
6 was signed by the decedent. Your position is there is no  
7 written agreement, which I don't know what your claim is  
8 going to be based on. But you're saying there is no  
9 written agreement, full stop. And then they come back and  
10 say, here is some circumstantial evidence as to why,  
11 indeed, this is the decedent's signature, which is what  
12 you're calling this business rule exception. Right. This  
13 is the way we otherwise maintain this kind of a document.  
14 That's - - - that's - - - I think, if I'm hearing you  
15 correctly, that's where you're making this argument about  
16 the business rule - - -

17 MR. LEFTT: If I could try, like, a different way  
18 - - -

19 JUDGE RIVERA: Oh, but - - - well, be - - - yeah.  
20 Okay.

21 MR. LEFTT: I - - -

22 JUDGE RIVERA: But just to be clear, if we just  
23 stop with it's a contract, and they're arguing that this is  
24 the decedent's signature. Right. And they make that  
25 statement, and you come in and say, no, it is not, and

1 here's some evidence on my side to show you that it's not.

2 MR. LEFTT: So if they authenticated it properly,  
3 the document itself, and now the document's in court, and  
4 then they had an affidavit from Morales saying I witnessed  
5 the signature itself, and then we alleged forgery, I would  
6 say yes, we'd be very - - -

7 CHIEF JUDGE WILSON: So how do you - - - how do  
8 you deal with our Banco Popular case?

9 JUDGE GARCIA: Yeah.

10 MR. LEFTT: Can you refresh me a little bit?

11 CHIEF JUDGE WILSON: Sure.

12 MR. LEFTT: Sorry. Can I re-read - - -

13 CHIEF JUDGE WILSON: So I can - - - I can read  
14 you from it, basically.

15 MR. LEFTT: And just find it right now.

16 CHIEF JUDGE WILSON: Somebody named Albaz  
17 submitted an affidavit in opposition to the motion in which  
18 she claimed that her own signature on the bank documents  
19 had been forged. She tendered exemplars of her signature  
20 to an expert, the expert opined - - -

21 MR. LEFTT: Yes, I'm familiar - - -

22 CHIEF JUDGE WILSON: Right.

23 MR. LEFTT: I'm familiar with it - - -

24 CHIEF JUDGE WILSON: And we said, this doesn't  
25 get you there.



1 MR. LEFTT: That - - -

2 CHIEF JUDGE WILSON: You have - - - you have less  
3 here than that.

4 MR. LEFTT: In that case, the expert was - - -  
5 there was a hearing held, and the expert was determined to  
6 be equivocal about whether the signature - - -

7 CHIEF JUDGE WILSON: Right. And here, you don't  
8 have an expert at all, which is less - - -

9 MR. LEFTT: But we don't have a document at all.

10 CHIEF JUDGE WILSON: - - - which is less - - -  
11 well, no, that's not true.

12 MR. LEFTT: You've shifted the burden to us now  
13 to prove forgery - - -

14 CHIEF JUDGE WILSON: That's exactly, I think,  
15 what Banco Popular says.

16 MR. LEFTT: No, I think - - -

17 CHIEF JUDGE WILSON: She alleged forgery. She  
18 said this is not my signature. She herself said that.  
19 Right.

20 MR. LEFTT: But in Banco Popular, there was  
21 already a document that was authenticated that was in  
22 evidence. And now she was saying, hey, that's not - - -  
23 Banco - - -

24 CHIEF JUDGE WILSON: What's the document in  
25 evidence?

1 MR. LEFTT: The contract.

2 CHIEF JUDGE WILSON: Right. There's a contract  
3 here.

4 MR. LEFTT: I don't - - - I don't know that there  
5 is a contract - - -

6 CHIEF JUDGE WILSON: She's saying the same - - -  
7 she's - - - and she's saying the same thing, too. She's  
8 saying this is not my signature on this document.

9 MR. LEFTT: No. But if we had said, hey, look,  
10 let's all agree that we're going to admit this contract,  
11 and now we're going to claim that it's forgery, and you're  
12 going to claim that it's authentic, then we'd be fighting  
13 over a signature - - -

14 JUDGE TROUTMAN: So are you saying that the  
15 validity - - -

16 JUDGE RIVERA: Okay. Let's say we disagree with  
17 you, and - - - and we say, as the Chief Judge has been  
18 suggesting to you, it's a contract. Contract is in, and it  
19 is about authentication, as in Banco Popular, basically  
20 control, and you've lost.

21 MR. LEFTT: Well, no, I mean, I think in that  
22 case there's a hearing held to determine the credibility of  
23 this expert and - - - and their opinion, and it was found  
24 to be an equivocal opinion on some - - -

25 CHIEF JUDGE WILSON: Well, if you'd had an

1 expert, then they could have had a hearing, but you have  
2 less. You don't even have an equivocal expert. You can no  
3 expert.

4 MR. LEFTT: They could've had a hearing on my - -  
5 - on my - - - there's no expert needed. That's clearly  
6 been determined. So they could have had a hearing on - - -  
7 on the validity of the decedent's son, who says that's not  
8 the signature.

9 CHIEF JUDGE WILSON: Right. The court heard  
10 that, right?

11 MR. LEFTT: No.

12 CHIEF JUDGE WILSON: And just - - - just like  
13 here, Ms. Albaz said, this is not my own signature.

14 MR. LEFTT: The court didn't take any evidence of  
15 any kind. They just - - - the - - - Judge Kelley just  
16 looked and said, this is a bald assertion of forgery, and  
17 it's not enough.

18 CHIEF JUDGE WILSON: Right. Because - - -  
19 because you didn't tender an affidavit saying, this is not  
20 my mother's signature.

21 MR. LEFTT: We did.

22 CHIEF JUDGE WILSON: Well, then there's evidence.  
23 Then we're going in circles here.

24 JUDGE CANNATARO: I'm sorry. What did Justice  
25 Kelley look at when - - - to - - - to come to the



1 conclusion that it was a bald assertion of forgery?

2 MR. LEFTT: The affidavit from the son and  
3 exemplar signatures.

4 JUDGE CANNATARO: And an appended agreement,  
5 right? I mean, the affidavit had the agreement attached to  
6 it.

7 CHIEF JUDGE WILSON: And an affidavit from  
8 Trimarchi.

9 MR. LEFTT: And an affidavit from Trimarchi,  
10 which the affidavit Trimarchi is - - -

11 JUDGE CANNATARO: I'm - - - I'm - - - I'm trying  
12 to explore the contours of your argument that there's no  
13 contract in evidence here.

14 MR. LEFTT: I don't think that you can put a  
15 document before the court without some authentication of  
16 the document, like a business records exception.

17 CHIEF JUDGE WILSON: That's not authentication;  
18 that's hearsay.

19 JUDGE CANNATARO: Yeah, that's an exception to  
20 hearsay.

21 MR. LEFTT: But that's what brings the document  
22 into court first. And then we can look at the document and  
23 say, this is wrong. This is right - - -

24 JUDGE SINGAS: For trial purposes or for motion  
25 practice?

1 MR. LEFTT: For anything. I think you need - - -  
2 look, we can all agree that if - - -

3 JUDGE GARCIA: But let's say they had the person  
4 who signed it, and they just came in and said, yeah, I was  
5 there and they signed it.

6 MR. LEFTT: Totally different case.

7 JUDGE GARCIA: Now, you - - - but then don't you  
8 have a hearsay problem?

9 MR. LEFTT: If they had the Trimarchi affidavit,  
10 and that person - - -

11 JUDGE GARCIA: But you'd need both.

12 MR. LEFTT: - - - then yes, they have the - - -  
13 the hearsay problem.

14 JUDGE GARCIA: But you'd still need the business  
15 exception. If you had the person who came in and said, I  
16 was in the room, this person signed it, would you still  
17 need Trimarchi to say the two parts of the business  
18 exception?

19 MR. LEFTT: Yes. Yes. And I think we can all  
20 agree that if the decedent sued in New York County, as  
21 here, and the defendant said, hey, this is the wrong venue,  
22 this should be in Nassau County, and they opened their  
23 drawer and they pulled out the Knight file from the drawer,  
24 and they looked, and there was just a blank contract with  
25 no signatures on it, they wouldn't bring this motion. They

1 wouldn't say, hey, here's a contract. Let's put this  
2 before the judge, and let's use circumstantial evidence to  
3 show somehow she got into this nursing home. Here's a  
4 blank document, but it does have this on it. Let's - - -  
5 let's put it before the court. It is a contract - - -

6 JUDGE HALLIGAN: But that's obviously not what we  
7 have here, right?

8 MR. LEFTT: Yeah - - - well, we're one step above  
9 that. And some people might think that that's exactly what  
10 happened. They looked in a drawer. They found two out of  
11 the three admissions agreements. She was admitted three  
12 times to that nursing home. The most recent one is missing  
13 - - -

14 JUDGE GARCIA: Where is that in the record that  
15 she was admitted three times?

16 MR. LEFTT: It's in the decision, and it's in our  
17 papers.

18 JUDGE GARCIA: Because I saw in your complaint it  
19 has the dates that she was a resident of this particular  
20 facility.

21 MR. LEFTT: We - - - it has the dates where there  
22 was malpractice committed, yes.

23 JUDGE GARCIA: But it doesn't say when she went  
24 in and out. Right. So it seems to me that maybe two - - -  
25 and I guess it's not really relevant - - - but these two

1 cover the stays for those periods of time.

2 MR. LEFTT: Well, the third - - - the third  
3 admission was after these two. So in the last argument, we  
4 heard that the most recent argument - - - the most recent  
5 agreement should be the operative one. We don't have that  
6 at all to look at here. We don't even have the exemplars  
7 from the last agreement that she signed, the Morales  
8 signature on it. We don't have any of it. Morales'  
9 signature on all of the contracts that they did provide  
10 looks exactly the same. It looks like that could have been  
11 done at any time, in any case - - -

12 JUDGE RIVERA: So I'm just - - - I - - - I'm a  
13 little confused on - - - on some of this chronology, but is  
14 - - - is the position that she was brought to this facility  
15 or she herself came to this facility not wanting to be  
16 admitted, but they admitted her. I'm not understanding.

17 MR. LEFTT: I - - - I mean, I don't know the  
18 answers to that, but I can assume no one wants to go into a  
19 nursing home. And I assume at eighty-nine, she was brought  
20 there, but - - -

21 JUDGE RIVERA: Uh-huh.

22 MR. LEFTT: - - - not against her will of any  
23 kind. It's just unclear whether she ever signed any - - -

24 JUDGE RIVERA: The - - - your argument was that  
25 it is a forgery. Your argument wasn't that she wasn't

1 competent to have made these decisions.

2 MR. LEFTT: No, that's not our argument.

3 JUDGE RIVERA: Right? Yeah. Okay.

4 JUDGE CANNATARO: But it does - - -

5 JUDGE SINGAS: Well, where does that leave you,  
6 ultimately, if there's no contract?

7 MR. LEFTT: In New York County litigating a  
8 malpractice case where - - - where we started.

9 JUDGE GARCIA: Right. And that's what's  
10 different, it seems, to me about this case. In an ordinary  
11 contract case, the rights are basically defined by the con  
12 - - - contractual agreement. And you're not going to  
13 really say part of this is good and the venue clause isn't  
14 good. But you have a separate freestanding malpractice  
15 claim that this admission document really doesn't affect at  
16 all, right?

17 MR. LEFTT: You - - - you - - - you - - - well,  
18 that's one way to look at it. Although, you don't want to  
19 really hear my opinion on forum selection clauses because -  
20 - -

21 JUDGE GARCIA: I'm just saying it's different  
22 factually - - - it's different factually than - - - than  
23 other cases like this with venue selection clauses, because  
24 the contract really isn't the operable document giving rise  
25 to the right you're trying to enforce or the wrong you're

1           trying to remedy - - -

2                   MR. LEFTT: In other words, the worst thing that  
3           could possibly happen that you all could do to my case is  
4           move it from one place to another where we'd still be  
5           litigating the same issues.

6                   JUDGE RIVERA: No, I - - - I think the points - -  
7           -

8                   MR. LEFTT: That's true.

9                   JUDGE RIVERA: - - - no, I think the - - - well,  
10          I may be wrong, but I understood these points that are  
11          going back and forth with you are if - - - if you're  
12          challenging the signature and the signature is a forgery or  
13          not - - - or not the decedent's signature, let me put it  
14          that way, and not with any authorization on behalf of the  
15          decedent to sign. But then there was no written agreement.  
16          And so then it's what claim survives. I think Judge  
17          Garcia's pointing out that there may very well be at least  
18          one claim that survives, even without a written agreement.  
19          That was the point, not about the forum selection - - -

20                   MR. LEFTT: Yes. Without a written agreement, we  
21          still have the same medical malpractice case - - -

22                   JUDGE GARCIA: We have a malpractice - - -

23                   JUDGE CANNATARO: It's about the freestanding  
24          malpractice - - -

25                   MR. LEFTT: - - - but we're trying it in Nassau

1 County.

2 JUDGE RIVERA: That's point. That's point.

3 JUDGE GARCIA: And that's unusual in a contract -

4 - -

5 JUDGE CANNATARO: Right.

6 JUDGE RIVERA: That's the point.

7 JUDGE GARCIA: - - - venue situation where you're

8 enforcing the rights of that contract. You're not

9 enforcing anything under that admissions agreement.

10 JUDGE CANNATARO: Right.

11 JUDGE GARCIA: You have a freestanding

12 malpractice claim, correct?

13 JUDGE RIVERA: Yeah. Correct.

14 MR. LEFTT: Yeah. I - - - I don't know that much

15 about other contracts. I mean, I - - - I'm a personal

16 injury lawyer, but I assume you're right when you say that.

17 I just think we never reach the issues in this case of

18 changing venue based on what they've provided and what they

19 started in court, and we should be back in New York County.

20 Thank you.

21 CHIEF JUDGE WILSON: Thank you.

22 Thank you, Counsel?

23 MR. O'CONNELL: No rebuttal, Your Honor.

24 CHIEF JUDGE WILSON: Yeah. I don't think you've

25 asked to save any.



1 MR. O'CONNELL: I did not ask, and I was thinking  
2 that, should I, but I'm going to say no, thank you. I  
3 appreciate it.

4 CHIEF JUDGE WILSON: Thank you.

5 (Court is adjourned)

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C E R T I F I C A T I O N

I, Christian C. Amis, certify that the foregoing transcript of proceedings in the Court of Appeals of Knight v. Dewitt Rehabilitation and

Nursing Center, No. 92 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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