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Hon. Richard A. Dollinger

BILLY JOEL: THE MINSTREL TESTIFIES OR HOW THE RULES OF EVIDENCE HANDCUFF THE PIANO MAN

Hon. Richard A. Dollinger[*]

It's 9 o'clock on the Monday
The students they all stumble in
They're bleary eyed and all out of sorts
From the reading their Prosser on Torts.
One says "can you sing me a Joel song
Billy never goes wrong
He's lyrical too and always makes sense
Even under the Rules of Evidence"[1]

Billy Joel is one of America's poets. He has through a cavalcade of songs, worked magic in the hearts of millions. His lyrics capture the thoughts of a modern Romeo, seeking the maiden who can subdue his passionate heart. Billy Joel songs are about "courting" – the pulsating rituals of boy-meets-girl, girl-spurns-boy – and "witnessing" – the hard-working man struggling for his family and friends. But, even poets have a day of reckoning: a day when their sublime world of rhythm and rhyme must be reconciled with the other courts: the courts of law.

Before we tinkle the ivories of Mr. Joel's songs, a word about hearsay. Hearsay, under both federal and state law, is an out-of-court statement offered in court for its truthfulness.[2] Because it is often considered inherently unreliable, hearsay – one person's rendition of what another person said as being the truth of the thing asserted – is never admitted before a court unless an exception exists under the

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[1] *Billy Joel Goes to Law School* (author's composition), borrowed from BILLY JOEL, *The Piano Man*, *on* PIANO MAN (Columbia Records 1973).

[2] *See* FED. R. EVID. 801(c) "'Hearsay' means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." *Id.*

rules of evidence.[3] An out-of-court statement offered for a reason other than its truth is not hearsay, and consequently, its admission is not barred.[4] New York courts apply the same rule through common law.[5] Billy Joel's songs, if sung in a courtroom, may all be some form of hearsay; but for this article, a reader needs to engage in a "willing suspension of disbelief for the moment, which constitutes poetic faith,"[6] as Mr. Joel's songs are examined as though they were proof offered in a courtroom and the rules of evidence, applicable to attorneys for centuries, are applied to this hipster.

To paraphrase Mark Antony: "So let it be with [Joel]."[7] When the minstrel comes into our courtrooms, the lines on the page and the notes on the scale become subjected to our ancient rules regarding the admissibility of evidence. Like the ancient scores and operatic flourishes utilized by the modern songwriter, the rules of evidence, long sharpened by common law judges seeking the truth, impose a rubric of rules designed to summon truth from the human experience.[8] The rules of evidence are the conventions of law – the blank sheets of music – in which witnesses, in all their frailty, and truth, collide.

I. COULD BILLY JOEL GET INTO THE COURTROOM AND PLAY HIS PIANO?

What would happen if the poet laureate of Long Island wandered into our courtrooms, brought his piano into the well and started to play?

The first issue would be whether he could bring the piano into the courtroom at all. The piano is a piece of real evidence and, presumably, Mr. Joel would need to establish a proper evidentiary foundation for allowing the jury to observe Mr. Joel play the piano.[9] He

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[3] State v. Floyd, 2 N.E.3d 204 (N.Y. 2013).

[4] *See* FED. R. EVID. 802. *See also* United States v. Arbolaez, 450 F.3d 1283, 1290 (11th Cir. 2006) (per curiam).

[5] *See, e.g.*, People v. Rosario, 958 N.E.2d 93, 104 (N.Y. 2011) (Smith, J., dissenting) "In general, the hearsay rule prohibits the admission into evidence of out-of-court statements to prove the truth of the matter stated." *Id.*

[6] SAMUEL TAYLOR COLERIDGE, BIOGRAPHIA LITERARIA ch. 14 (1834).

[7] WILLIAM SHAKESPEARE, JULIUS CAESAR, act 3, sc. 2.

[8] FED. R. EVID. 102.

[9] Cach, LLC v. NE Enters., LLC, 993 N.Y.S.2d 643, 43 Misc. 3d 1232(A) at *1-2 (N.Y. Sup. Ct. Seneca County 2014).

would need personal knowledge of the piano and its operation.[10] As a witness, Mr. Joel would need to be able to state that he was "familiar" with the piano.[11] The ultimate question - whether the real evidence in the form of piano is relevant or helpful to the jury - might require more proof.[12]

The second issue would be whether Mr. Joel's playing of the piano is a form of demonstrative evidence that would be admissible in a courtroom. Demonstrative evidence (or real evidence) is defined as, "evidence addressed directly to the senses of the trier of the facts."[13] In *Harvey v. Mazal American Partners*,[14] the Court of Appeals noted that:

> [D]emonstrative evidence, when "validly and carefully used," is highly convincing . . . "[T]hough tests and demonstrations in the courtroom are not lightly to be rejected when they would play a positive and helpful role in the ascertainment of truth, courts must be alert to the danger that, when ill-designed or not properly relevant to the point at issue, instead of being helpful they may serve but to mislead, confuse, divert or otherwise prejudice the purposes of the trial . . . . When there is such a threat, the trial court itself must decide in the exercise of a sound discretion based on the nature of the proffered proof and the context in which it is offered, whether the value of the evidence outweighs its potential for prejudice."[15]

Under these circumstances, the New York courts are reluctant to allow "demonstrations" in any trials, and that judicial reluctance may be heightened if the "demonstration" involves a musical instrument.

However, there was at least one exception in which a New York court allowed a musical performance in the courtroom. In *Riddle v. Memorial Hospital*,[16] an accomplished violinist fell in a hospi-

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[10] *Id.* at *1.

[11] *See* Stark v. Gopinathan, 2015 WL 7070064, at *6 (N.Y. Sup. Ct. 2015) (discussing the need for an expert to be familiar with objects relevant to the disputed issues).

[12] *See* People v. Young, 850 N.E.2d 623 (N.Y. 2006).

[13] People v. Higgins, 392 N.Y.S.2d 800, 801 (Sup. Ct. Bronx County 1977) (citing RICHARDSON, EVIDENCE § 127 (10th ed. 1973).

[14] 590 N.E.2d 224 (N.Y. 1992).

[15] *Id.* at 227 (quoting People v. Acevedo, 358 N.E.2d 495 (N.Y. 1976)).

[16] 349 N.Y.S.2d 855 (App. Div. 3d Dep't 1973).

tal.[17] As a result of the fall, she complained that her ability to use her forearm and play the violin was "substantially impaired."[18] During the trial, the court allowed an expert witness to play the violin as a demonstration of the ability of injured plaintiff to play the violin.[19] The Appellate Division held that the issue of whether the demonstrative evidence could be heard by the jury was dependent upon the "relevancy and value of such evidence" for the jury.[20] The expert testified that he heard a tape of the injured plaintiff perform before the injury and then testified that he observed the difficulties the plaintiff endured "as she played and explained how it was impossible to execute certain technical movements without full use of the left arm."[21] The Appellate Division held:

> [W]e find no abuse of discretion on the part of the Trial Judge, and no prejudice by any implication to be drawn from the demonstration to the effect that [the plaintiff] could perform at a certain degree of proficiency, because there had been ample evidence from the other witnesses as to her skill and proficiency as well as proper instructions to the jury from the court. Certainly, the demonstration was not sensational or calculated to disrupt the "calm judicial atmosphere of a court of justice" nor did it tend to confuse the issues of the case.[22]

But not all demonstrations by witnesses are allowed: the courts have a sense of decorum. A witness who sought to demonstrate an injury in an automobile crash was not allowed to demonstrate his shaky hands while trying to pour a drink.[23] More recently, in *Schou v. Whiteley,*[24] the plaintiff had a scar from a lumbar fusion that he want-

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[17] *Id.* at 857.

[18] *Id.* at 858.

[19] *Id.*

[20] *Id.*

[21] *Riddle*, 349 N.Y.S.2d at 858.

[22] *Id.* at 855 (citation omitted).

[23] Clark v. Brooklyn Heights R.R., 69 N.E. 647, 647 (N.Y. 1904). The decision noted that "[w]hen, however, proof is attempted to be made by allowing the plaintiff to act out upon a judicial stage before the jurors what he, or his physicians, have testified to be some nervous affection, resulting from an injury, the exhibition is improper because unfair. As something under the sole control of the witness himself, it is beyond the ordinary tests of examination." *Id.*

[24] 780 N.Y.S.2d 659 (App. Div. 3d Dep't 2004).

ed to show the jury, a move that would have required him to remove his pants.[25] The Appellate Division affirmed that "the-take-off-your-pants" demonstration was, properly, not permitted by the trial court in the exercise of its discretion.[26]

In sum, Billy Joel could likely play the piano in the New York courts for demonstrative purposes, under certain circumstances. However, any flourishes, excessive celebration, over-the-top whoop-dee doops - "hello, Central Islipians" shout-outs - or exposing of his buttocks might be ruled out of order or, at least, would require a more powerful precautionary instruction to the jury.

II. COULD MR. JOEL TESTIFY ABOUT "*THE UPTOWN GIRL*?"

In his song *Uptown Girl*, Joel spins a yarn about the fictional girl who eagerly awaits his earthy urban charm. In it, he chants:

She's been living in her uptown world
I bet she never had a backstreet guy
I bet her mama never told her why
I'm gonna try for an uptown girl
She's been living in her white bread world
As long as anyone with hot blood can
And now she's looking for a downtown man
That's what I am[27]

However, when he comes into court, his chant may encounter an attorney's favorite courtroom word: "objection." Initially, the court would inquire as to whether these statements are based on observation. A witness can testify, based on first-hand knowledge, of where someone else resided.[28] However, the characterization of the "uptown world" and the description of the songster as a "backstreet guy" are statements of opinion. Initially, the question for a court considering these statements would be whether they are admissible opinions offered by a lay witness. There are two theories regarding the admissibility of these types of statements. Under Rule 701 of the Federal Rules of Evidence, "if the witness is not testifying as an expert, his testimony in the form of opinions is limited to one that is (a)

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[25] *Id.* at 662.
[26] *Id.*
[27] BILLY JOEL, *Uptown Girl*, *on* An INNOCENT MAN (Columbia Records 1983).
[28] United States *ex rel.* Allen v. La Vallee, 411 F.2d 241, 242 (2d Cir. 1969).

rationally based on the witness's perception" and "(b) helpful to a clear understanding of his testimony or the determination of a fact in issue."[29] In *Randolph v. Collectramatic Inc.*,[30] the court reasoned that "[t]he primary purpose of Rule 701 is to allow nonexpert witnesses to give opinion testimony when, as a matter of practical necessity, events which they have personally observed cannot otherwise be fully presented to the court or the jury."[31] The New York Court of Appeals follows the same rule.[32] For example, "a lay witness is ordinarily permitted to testify as to the estimated speed of an automobile based upon the prevalence of automobiles in society and the frequency with which most people view them at various speeds."[33] In short, if most people know a fact – where uptown begins and downtown ends, for example – then a lay witness can testify to it.[34]

Under these rules, it is debatable whether a court would permit anyone other than an expert to characterize a young girl as "an uptown girl." Similarly, the courts may be unlikely to allow anyone, even an experienced "Long Islander," to state that he "bet she never had a backstreet guy." The New York courts have frowned upon speculation as to another person's state of mind.[35] In some cases, evidence may be admissible, if not "offered for the purpose of establishing the truth thereof, but merely to establish the defendant's state of mind."[36] However, in this case, the songster's declaration regarding the "Uptown Girl" and "his bet" that "she's never had a backstreet guy" is not evidence of his state of mind: he is speculating as to her state of mind and thus, his statement is inadmissible.

However, the following statement in the song – "a downtown man, that's what I am" – may be admissible under the "state of mind" exception to the hearsay rule. The rule is simply stated:

No testimonial effect need be given to the declaration,

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[29] FED. R. EVID. 701 (a)-(b).

[30] 590 F.2d 844 (10th Cir. 1979).

[31] *Id.* at 846 (citing WEINSTEIN'S EVIDENCE ¶ 701(02) (1977)).

[32] Ferguson v. Hubble, 97 N.Y. 507, 512-14 (1884).

[33] Lynch v. Dobler Chevrolet, Inc., 855 N.Y.S.2d 172, 172 (App. Div. 2d Dep't 2008).

[34] *See* FED. R. EVID. 701 (a)-(c).

[35] *See, e.g.*, People v. Walker, 475 N.E.2d 445, 446 (N.Y. 1984) (holding that where there was insufficient evidence to establish the defendant's "extreme emotional disturbance," charging the jury with that defense "would have invited the jury to impermissibly speculate as to the defendant's state of mind at the time of the shooting").

[36] People v. Barr, 874 N.Y.S.2d 384, 384 (App. Div. 2d Dep't 2009) (quoting People v. Boyd, 683 N.Y.S.2d 271, 272 (App. Div. 2d Dep't 1998)).

> but the fact that such a declaration was made by the [declarant], whether true or false, is compelling evidence of her feelings toward, and relations to, [the proponent]. As such it is not excluded under the hearsay rule but is admissible as a verbal act.[37]

In this instance, the declarant is making a statement indicative of his state of mind. If relevant to any issue before the court, this statement should be admissible.

One other statement in *Uptown Girl* could find its way into the trial transcript. In his description of this girl, the songster states:

> And when she's walking
> She's looking so fine.[38]

This statement, albeit refined and impressionistic, is a present sense impression that should be admitted. In analogous context, a witness was allowed to describe a spring day as "beautiful."[39] If a witness can describe a day as "beautiful," then Mr. Joel can describe his "Uptown Girl" as "looking so fine."

III. WHO STARTED THE "FIRE" IF MR. JOEL DID NOT? NEGATIVE HEARSAY

In his rhythmic celebration of all things relevant to the 20th Century - *We Didn't Start the Fire*[40] - Mr. Joel creates a time-travelogue through the most renowned century since men started walking erect. In the song, he corrals Edsel automobiles, British politician sex, and Bridge on the River Kwai - all that's missing is the Colonel Bogey March - and the potpourri of personalities and places of our shared time. At its core, he declares:

> We didn't start the fire
> It was always burning
> Since the world's been turning
> We didn't start the fire
> No we didn't light it
> But we tried to fight it.[41]

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[37] Loetsch v. New York City Omnibus Corp., 52 N.E.2d 448, 449 (N.Y. 1943).
[38] BILLY JOEL, *Uptown Girl*, *on* An INNOCENT MAN (Columbia Records 1983).
[39] Rubino v. New York, 498 N.Y.S.2d 831, 832 (App. Div. 1st Dep't 1986).
[40] BILLY JOEL, *We Didn't Start the Fire*, *on* STORM FRONT (Columbia Records 1989).
[41] *Id.*

If he tried to deny, "starting" that fire, would a court of law allow his denial to be admitted? Could a court find that the other personages - Walter Winchell, Malcolm X, Buddy Holly, among others - named by Mr. Joel actually started the fire? The answer lies in a discussion about "negative evidence," or its corollary, "negative hearsay." The doctrine finds its best demonstration in the "unrung bell" example in *Leary v. Fitchburg R.R.* The court in *Leary* noted:

> There was a failure of proof by the plaintiff that the passenger train was not giving proper precautionary signals of its approach. There was but one witness on this question. To him the following question was put: "You may state whether the passenger engine bell was ringing at that time." He answered**:** "No, sir; I didn't hear it." On his cross-examination he said**:** "I didn't hear any bell**.** I wasn't listening. I wasn't anticipating anything. I didn't listen for a bell." This mere negative evidence is without any value.[42]

As this court noted, you cannot prove a "positive" – the bell did not ring – by proof of a "negative" – the fact that it was not heard. In this song, the artist's relying on a "negative" – while lyrically energizing Mr. Joel's song – gives a jury no proof of "who stared the fire." The songster's statement is somewhat comparable to the testimony of a record keeper, who testifies to a lack of entries in certain records and seeks to have the fact-finder conclude that such a record does not - and never did - exist.[43] The New York Civil Procedure Law and Regulations, (CPLR) provides for the admissibility and prima facie effect of a limited type of negative hearsay.[44] As one court noted:

> A statement signed by the custodian of public records "that he has made diligent search of the records and found no record or entry of a specified nature, is prima facie evidence that the records contain no such record or entry," if the statement is accompanied by a certificate as to the signatory's legal custody of the rec-

[42] Leary v. Fitchburg R. R., 65 N.Y.S. 699, 702 (App. Div. 3d Dep't 1900).

[43] Whitfield v. City of New York, 847 N.Y.S.2d 899, 16 Misc.3d 1115(A), at *1 (Sup. Ct. Kings County 2007) (explaining that negative hearsay is a statement "as to the absence of a business record or entry in establishing the nonexistence or nonoccurrence of a fact or event not recorded.").

[44] N.Y. C.P.L.R. 4521 (McKinney 2013).

ords.[45]

The New York courts have dealt with negative hearsay in other contexts. Statements of the absence of a business record as establishing the nonexistence or nonoccurrence of a fact or event not recorded are regularly proffered by an affidavit on a motion for summary judgment in sidewalk and roadway accident cases.[46] In *Whitfield v. City of New York*, Justice Battaglia stated, "[t]he evidentiary value of 'negative hearsay' in New York State courts is clouded by a divergence between what the courts say, or at least have said in the past, and what they do, at least now."[47] The court noted that there is no provision in the CPLR addressing whether an "unsuccessful search for a record or entry in the business records of a private party" leads to the conclusion that the record or entry did not exist.[48] Until recently, the law in New York was understood to be that "[s]uch evidence, completely negative, has uniformly been held to be hearsay in character and incompetent and irrelevant."[49] Nonetheless, the *Whitfield* court considered the negative hearsay - the absence of proof in the record - as sufficient to oppose a motion for summary judgment, noting:

> To sum up, the only New York decisional authority that expressly addresses whether the absence of a business record or entry can be evidence of the nonexistence or nonoccurrence of a fact or event not recorded states clearly that it cannot, but more recent authority accepts the evidence in particular circumstances, sometimes with qualification, without even noting the doctrinal statements that would preclude it. It does seem clear, however, that, to the extent "negative hearsay" is accepted in New York outside of the public records context, it is treated within the construct of the business records exception to the hearsay rule.[50]

The court added that more recent authorities have held that "a litigant

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[45] *Whitfield*, 847 N.Y.S.2d at *2 (quoting N.Y. C.P.L.R. 4521).
[46] *Id.* at *4.
[47] *Id.* at *1.
[48] *Id.* at *2.
[49] *Id.* at *2.
[50] *Whitfield*, 847 N.Y.S.2d at *4.

may prove through negative inference . . . the non-occurrence of an event or transaction from the absence of an entry in a business's records where such records normally contain like information."[51] Negative hearsay, once thought extinct in New York, may have new life.

The Federal Rules of Evidence are a step ahead of New York in dealing with negative hearsay. Federal Rule 803(10) excludes evidence of the absence of a public record or an entry in a public record from the hearsay rule. It provides:

> To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.[52]

This rule relies on the dependability of public records and the due diligence of record keepers and simply leads to an inference that a document, which would be otherwise filed, may not exist. Mr. Joel may be a record maker, sell oodles of records and generate concert attendance records, but he hardly qualifies as a record keeper in the sense of the rules. Simply put, Mr. Joel's denial that "we didn't start the fire" raises a suggestion that someone else did. He does not disclose whom the "we" is, but adds that whoever it is, they "tried to fight it." Given the nature of this song, any reasonable court might find it difficult to countenance Mr. Joel's negative disclaimer. In any reasonable rendition of this song, he brings a lot of "fire" to it. If he did not start the fire, this song - in its gusto, all-out, "fan-the-flames" rendition - only accelerates its burning. A jury - or an audience - encountering this form of negative hearsay would have a hard time believing that Mr. Joel did not start the fire.

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[51] *Id.* at *5.

[52] FED. R. EVID. 803(10). *See also* Cameron v. Camden Military Acad., No. 3:12-846-JFA, 2013 U.S. Dist. LEXIS 81594, at *8 (D.S.C. June 11, 2013) (holding that the testimony by former cadets that they "never heard of" anyone being hazed or mistreated at CMA would not be inadmissible inasmuch as it was negative hearsay).

IV. *SCENES FROM AN ITALIAN RESTAURANT* – A PAST RECOLLECTION RECORDED?

In his romantic remembrance of a rendezvous at "our Italian restaurant," Mr. Joel sings of an old romance, a time gone by. The narrator intones:

> Everyone said they were crazy
> "Brenda you know you're much too lazy
> Eddie could never afford to live that kind of life."
> But there we were wavin' Brenda and Eddie good-bye.[53]

If Mr. Joel offered this line in court and counsel objected, the court might face the question of whether it should be admitted under the past recollection recorded exception to the rule against hearsay. This doctrine has a long history of acceptance in New York. In 1858, the Court of Appeals held that a written memorandum made at or about the time of the occurrence, by a witness who cannot at the time of trial recollect the facts, but who testifies that he or she is confident that he or she knew the memorandum to be correct when it was made, need not be sworn to the facts in positive terms.[54] Instead, the memorandum itself is received in connection with and as auxiliary to the oral testimony.[55] To be admitted, "the witness must swear that he or she 'has no present recollection whatever of the facts sworn to.'"[56] In addition, the witness must testify that he or she "observed the matter recorded, the recollection was fairly fresh when recorded or adopted, . . . [and] that the record correctly represent[s] his [or her] knowledge and recollection when made."[57] Importantly, the recollection by the witness must be characterized as "fairly fresh."[58]

"The rationale for the doctrine is that the recorded infor-

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[53] BILLY JOEL, *Scenes from an Italian Restaurant*, *on* THE STRANGER (Columbia Records 1977).

[54] Russell v Hudson River R. R., 17 N.Y. 134, 140 (1858).

[55] *Id.*

[56] People v. Somarriba, 597 N.Y.S.2d 32, 33 (App. Div. 1st Dep't 1993) (quoting *Russell*, 17 N.Y. at 139-40).

[57] People v. Taylor, 598 N.E.2d 693, 696 (N.Y. 1992).

[58] *See* People v. DiTommaso, 2 N.Y.S.3d 494, 498 (App. Div. 1st Dep't 2015) (holding that a six-year gap between the events and the recording of the recollection prevented the use of such recording); People v. Wilkinson, 990 N.Y.S.2d 270, 272 (App. Div. 2d Dep't 2014) (holding that a one-year gap between when the witness heard the statement and when it was recorded before a grand jury prevented the use of the past recollection recorded).

mation is essential to further the truth-seeking function of the trial proceeding and that when the conditions for admission have been met, there is sufficient assurance of the accuracy of the recordation and its trustworthiness."[59] More than a century ago, the Court of Appeals recognized the probative value of such recordings by stating that "[t]o exclude such a record, when shown to have been honestly made, would be to reject the best and frequently the only means of arriving at truth."[60] Importantly, the recording, if admitted, "is not independent evidence of the facts contained therein, but is supplementary to the testimony of the witness."[61] Likewise, "[t]he witness' testimony and the writing's contents are to be taken together and treated in combination as if the witness had testified to the contents of the writing based on present knowledge."[62] As always, "[a]dmission of the memorandum is a matter . . . of the court's discretion in determining whether the proponent has made a sufficient showing of the accuracy of the recording and its reliability."[63]

In this case, the entire story rendered in *Scenes from an Italian Restaurant*, including the statement about Brenda and Eddie, may be admissible in court. This may be the case if Mr. Joel could demonstrate that the "recording" - the song - was written or recorded in the past; that it was accurate at the time written; that the "recording" occurred somewhat contemporaneously with the actual event; and that at the time of trial, Mr. Joel had no present recollection of the event. The song would also have to meet the "fairly fresh" requirement, meaning that it was penned – but not necessarily recorded – shortly after it occurred. In all likelihood, under the past recollection recorded exception, a jury might be permitted to hear the entire story of Brenda and Eddie and the "bottle of red, bottle of white" imbibed at Mr. Joel's favorite Italian restaurant.

V. *PIANO MAN* – SPONTANEOUS DECLARATIONS, STATE OF MIND, AND STATEMENT OF PRESENT INTENTION

In the tour of the barroom in the song *Piano Man*,[64] Mr. Joel

[59] People v. Taylor, 598 N.E.2d 693, 696 (N.Y. 1992).
[60] Halsey v. Sinsebaugh, 15 N.Y. 485, 488 (1857).
[61] *Taylor*, 598 N.E.2d at 696.
[62] *Id.*
[63] *Id.*
[64] BILLY JOEL, *Piano Man*, *on* PIANO MAN (Columbia Records 1973).

captures the cries and shouts of the bar regulars as they slosh and nosh through the night. One patron shouts: "'Son can you play me a memory/ I'm not really sure how it goes/ But it's sad and it's sweet/ And I knew it complete/ When I wore a younger man's clothes.'"[65] John, his friend at the bar, says to him, "'Bill, I believe this killing me/ . . . Well, I'm sure that I could be a movie star/ If I could get out this place.'"[66] Apparently, the "pretty good crowd for a Saturday" - "sit at the bar and put bread in [his] jar/ And say, 'Man, what are you doing here?'"[67] If he sauntered into the courtroom as a witness to the events at the bar, the issue would be whether Mr. Joel could testify to the comments made by his barroom buddies.

In the first statement - "Son can you play me a memory" - lies the heart of the hearsay rule. An out-of-court statement may be admitted in a trial as evidence of a party's reaction to the statement.[68] In the highly publicized New York Court of Appeals case, *People v. Harris*,[69] the court held that a threatening hearsay statement could be admitted in a murder trial for the limited purpose of providing context as to defendant's reaction to the statement.[70] Six months before disappearing, the victim in *Harris* told two family members that her husband - the defendant - said that he "would not need a gun to kill her, the police would never find her body and he would never be arrested."[71] At trial, the defendant denied making the statements, but the family members testified that when confronted with the statements, the defendant replied that "he may have said something like that but that did not mean that he was going to kill [his wife]."[72] The trial court admitted the statements,[73] but gave only a cursory limiting instruction and declined a more detailed version because it would

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[65] *Id.*

[66] *Id.* This refrain may have been borrowed from a song by the Animals, *We Gotta Get out of this Place*, written by Barry Mann and Cynthia Weil (MGM 1965).

[67] *Id.*

[68] People v. James, 717 N.E.2d 1052, 1055 (N.Y. 1999).

[69] 978 N.E.2d 1246 (N.Y. 2012).

[70] *Id.* at 1250.

[71] *Id.* at 1248.

[72] *Id.* at n.2.

[73] These statements could also be considered statements by a party opponent, which almost always are admissible. *See* Grucci v. Grucci, 981 N.E.2d 248, 251 (N.Y. 2012). The rationale for admitting such statements is that an extrajudicial statement by a party opponent, inconsistent with the party's position in the litigation, is presumptively reliable. *See* Reed v. McCord, 54 N.E. 737, 740 (N.Y. 1899) (reasoning that "it is highly improbable that a party will admit or state anything against himself or against his own interest unless it is true.").

"unnecessarily confuse the jury."[74] However, as a demonstration of the limitations and prejudicial dangers inherent in hearsay, the Court of Appeals held that the trial court's failure to give a detailed limiting instruction was improper.[75] The court highlighted the danger of allowing a jury to hear any hearsay comments:

> [The trial court] opted instead to charge the jury that the statements constituted hearsay which would not normally be allowed in evidence because its truthfulness could not be tested under oath, and then stated: "You, the jury, may consider that testimony regarding this episode and determine what evidentiary value, if any, you choose to assign to the exchange that occurred between [the victim's family members] and . . . [the defendant]."
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> The trial court's failure to issue the appropriate limiting instruction was not harmless. In a case where there was no body or weapon, and the evidence against defendant was purely circumstantial, the danger that the jury accepted [the victim's] statements for truth was real. Although the court's instruction explained why the statements were admitted in evidence, it failed to apprise the jury that the statements were not to be considered for their truth. This error was compounded when the prosecutor in his summation relied on those statements as direct evidence that defendant had, in fact, murdered [the victim] and successfully hid her body, as he purportedly threatened [the victim] that he would do.[76]

What makes this case an example of the vagaries of the hearsay rule is evident when comparing the Court of Appeals decision to the Appellate Division decision on the same point. The Appellate Division held that the statement was properly admitted and that the trial court's limited precautionary instruction was sufficient to eliminate any prejudice:

> [T]he victim's statements were recounted by [the sis-

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[74] *Harris*, 978 N.E.2d at 1250.
[75] *Id.*
[76] *Id.*

> ters-in-law] to clarify the substance of the threats that defendant acknowledged making when they confronted him. Moreover, while the court did not explicitly instruct the jury that the statements were not admitted for their truth, the court explained that the victim's statements would normally be considered inadmissible hearsay, but the witnesses "were permitted to refer to those alleged statements for the sole purpose of explaining that they confronted [defendant] with those statements at the Cooperstown dinner. And they were then permitted to describe [defendant's] reaction to those statements." The instruction was sufficient to direct the jury that the statements should be considered only for their non-hearsay purpose, i.e., as context for the confrontation between defendant and his sisters-in-law. (Citations omitted). To the extent that the dissent[77] takes issue with the People referring to those statements in their summation, we note that [the sisters-in-law] testified that defendant admitted making the statements. The People were permitted and entitled to refer to that admission for its truthfulness, as well as the materially indistinguishable threat overhead by [the hairdresser], which was admitted for its truth.[78]

Under these rules, the "Old Man's" comment may come in as some evidence of his disposition.

The other option to admit the "Old Man's" comment might be as an excited utterance, another exception to the hearsay rule. The rule is stated as follows by the Court of Appeals:

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[77] *People v. Harris*, 928 N.Y.S.2d 114, 120-22, 133 (3d Dep't 2011) (One of the Appellate Division judges dissented.).

[78] *Id.* at 120-22, *rev'd*, 978 N.E.2d 1246 (2012). An important exception to the hearsay rule is found in the testimony of another witness in the case. *Harris*, 928 N.Y.S.2d at 120-22. A hairdresser testified regarding a telephone conversation that the victim had with defendant during her last salon appointment in July 2001. *Id.* The victim tipped her cell phone so the hairdresser could hear defendant, who told the victim: "Drop the divorce proceedings. I will f … ing kill you, Michele. Do you hear me? I will f … ing kill you. I can make you disappear. F … you, you bitch. Drop the divorce proceedings." *Id.*; *see also Harris*, 928 N.Y.S.2d at 120. (The hairdresser's testimony can be admitted for its truthfulness as a statement by a party opponent. But, it also gives credence to an old Clairol adage: "[o]nly her hairdresser knows for sure." In this author's experience, anything told to a hairdresser is always true sometimes.).

> The familiar common-law hearsay exception for excited utterances, formerly called spontaneous declarations, has been recognized by the New York Court of Appeals for nearly a century. The principle is easily stated. An out-of-court statement is properly admissible under the excited utterance exception when made under the stress of excitement caused by an external event, and not the product of studied reflection and possible fabrication. Underlying this exception is the assumption that a person under the influence of the excitement precipitated by an external startling event will lack the reflective capacity essential for fabrication and, accordingly, any utterance he makes will be spontaneous and trustworthy. Accordingly, under certain circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control. An excited utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection.[79]

The court further held that:

> Stating the rule is simple. Determining a declarant's mental state—that is, whether at the time the utterance was made a declarant was in fact under the stress of excitement caused by an external event sufficient to still his or her reflective faculties is considerably more difficult.[80]

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[79] People v. Johnson, 804 N.E.2d 402, 405-6 (N.Y. 2003).

[80] *Id.* at 405. The Court of Appeals acknowledged, in a footnote:

> Regrettably, there is no simple, sure-fire test such as that once proposed by the late Irving Younger: "How do you recognize an excited utterance? I can tell you. If hearsay is offered and it begins with 'My God,' and ends with an exclamation point, it is an excited utterance" (Younger, An Irreverent Introduction to Hearsay, at 33 [ABA Section of Litig Monograph Series No. 3, 1977]). Neither exclamation nor punctuation can be determinative. Rather, courts must take into account that a variety of circumstances may determine whether a declarant remains under the stress of a startling event.

The Old Man's comment may qualify as an "excited utterance." The Court of Appeals said that a court, in deciding whether to admit such a statement may consider that the declarant is "under the influence of excitement precipitated by an external startling event."[81] The Old Man in this story is clearly "under the influence" and no doubt, Bill Joel's emergence in the bar room could be considered "an external startling event." Given the Old Man's "love affair with his tonic and gin,"[82] it is likely that when shouting to the Piano Man, his "considerations of self-interest could not have been brought fully to bear by reasoned reflection."[83] Under these circumstances, his entire comment –slurred from atop his bar stool– may qualify as an "excited utterance" exception to the hearsay rule.

When these rules are applied to "Old Man" in the first stanza of the "*Piano Man*,"[84] the remark, as relayed by the Piano Man, may also be admissible as part of the state of mind. A state of mind, if relevant, may be proved by contemporaneous declarations of feeling or intent.[85] The "state of mind" rule is discussed extensively by the Court of Appeals in *People v. James*.[86] In *James*, the court examined, at some length, the Supreme Court decision in *Mutual Life Ins. Co. v. Hillmon*.[87] The *James* court stated:

> Jurisdiction after jurisdiction of State and Federal courts have determined to follow the lead of *Hillmon* and *Hunter* in admitting against criminal defendants (upon establishment of an appropriate foundation) the statements of a declarant's intention to perform acts entailing the participation jointly or cooperatively of the non-declarant accused. We also adopt that rule.[88]

Apart from *Hillmon*, the New York courts have admitted declarations by a patient to bystanders or physicians as evidence of suffering or

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Id.

[81] *Id.*

[82] BILLY JOEL, *Piano Man*, *on* PIANO MAN (Columbia Records 1973).

[83] People v. Fratello, 706 N.E.2d 1173, 1175 (N.Y. 1998).

[84] BILLY JOEL, *Piano Man*, *on* PIANO MAN (Columbia Records 1973).

[85] Mutual Life Ins., Co. v. Hillmon, 145 U.S. 285, 295 (1892).

[86] 717 N.E.2d 1052 (N.Y. 1990).

[87] 145 U.S. 285 (1892). The impact of *Hillmon* on hearsay rules, generally, is worth an extended discussion. The Court of Appeals in *People v. James*, 717 N.E.2d 1052 (N.Y. 1990), dissected it at length and the *Hillmon* opinion is worth the read just for that analysis.

[88] *James*, 717 N.E.2d at 1058-59.

symptoms.[89] Whether the "Old Man" is suffering may be the subject of debate: he is, after all, "making love to his tonic and gin."[90] But, in all likelihood, the statement by the "Old Man," relayed through the Piano Man, is admitted.

John the bartender's statement, "Bill, I believe this is killing me." "Well, I'm sure I could be a movie star, if I could get out this place"[91] - would also be admissible under another exception to the hearsay rule: a statement of present intention. In *People v. Becoats*,[92] a witness attempted to testify that she heard another person say that he was going to kill another.[93] The trial court excluded the testimony.[94] The Court of Appeals, while finding other grounds for the admission, nonetheless considered the statement within the "present intention" exception to the hearsay rule.[95] John's present intention – head to Hollywood if he could get out the bar– would be admissible under that exception.

The final quoted line in the song –"Man, what are you doin' here?"[96]– is simply not hearsay. The statement would not be admissible for its truthfulness, but simply for the fact that it was said.[97] In the alternative, the phrase might qualify as a "spontaneous declaration," uttered by several lost souls in the bar. The New York courts have admitted other spontaneous declarations over a hearsay objection, like the defendant who told his mother in an interrogation room: "he wants to know why I shot him."[98]

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[89] Jiminian v. St. Barnabas Hosp., 923 N.Y.S.2d 323, 648 (App. Div. 1st Dep't 2011).

[90] BILLY JOEL, *Piano Man*, *on* PIANO MAN (Columbia Records 1973).

[91] *Id.*

[92] 958 N.E.2d 865 (N.Y. 2011).

[93] *Id.* at 871.

[94] *Id.*

[95] *Id.*

[96] BILLY JOEL, *Piano Man*, *on* PIANO MAN (Columbia Records 1973).

[97] People v. Caban, 833 N.E.2d 213, 217 (N.Y. 2005); People v. Ozuna, 811 N.Y.S.2d 646, 649 (App. Div. 1st Dep't 2006). It should be noted that "[C]omplainant's out-of-court statement ("Tell your son to call me") would appear to be a "verbal act" that is admissible merely because it was said." *Id.*

[98] People v. Perino, 19 N.Y.3d 85 (2012) *contra* Brown v. Simon, 123 A.D.3d 1120 (App. Div. 2d Dep't 2014). A statement that another child "did it" was not a spontaneous declaration admissible in a sexual abuse hearing. *Id.*

VI. THE *NEW YORK STATE OF MIND* - IS IT AN EXCEPTION TO THE HEARSAY RULE AND IS MR. JOEL AN EXPERT ON THE ISSUE UNDER THE FRYE DOCTRINE?

In one of his earliest hits –*New York State of Mind*– Mr. Joel gives his listeners a nostalgic tour of the Big Apple.[99] It is redolent with memories of the young rocker taking stock of the Big City, "taking a Greyhound on the Hudson River Line . . . in a New York State of Mind."[100] He mentions the New York Times and the Daily News, Chinatown and Riverside and adds that it "all comes to reality . . . and I don't have any reasons, I've left them all behind in a New York State of Mind."[101] As conceded earlier, any hearer can testify to words proffered by another if they reflect his or her state of mind under the state of mind exception. But, can Mr. Joel testify on this point if he is testifying not to his state of mind, but to a "New York State of Mind?"

Mr. Joel's ability to testify about the New York "State of Mind" would require that he be qualified as an "expert" on the New York State of Mind. As an "expert" he could offer his opinion on what that state of mind was and describe his own reflections as fitting that exalted state. To decide whether he is "an expert" in New York plunges the court into the nuances of the *Frye* doctrine in New York. In *Frye v. United States*,[102] the court rejected the testimony of a defense expert regarding the results of a "systolic blood pressure deception test" - an early type of polygraph test - because it had not yet "gained such standing and scientific recognition among physiological and psychological authorities."[103] Such recognition "would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments made thus far made."[104] The *Frye* test turns on "acceptance by the relevant scientific community," and the New York Court of Appeals has never "insisted that the particular procedure be 'unanimously indorsed'" by scientists rather the evidence must simply be "generally acceptable as reliable."[105] The

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[99] BILLY JOEL, *New York State of Mind*, *on* TURNSTILES (Columbia Records 1976).

[100] *Id.*

[101] *Id.*

[102] 293 F. 1013 (D.C. Cir. 1923), *superseded by* FED. R. EVID. 702, *as recognized in* Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

[103] *Frye*, 293 F. at 1013.

[104] *Id.*

[105] Cornell v. 360 W. 51st St. Realty, LLC, 9 N.E.3d 884, 896-97 (N.Y. 2014).

Court of Appeals has said that a court may exclude the expert's opinion if "there is simply too great an analytical gap between the data and the opinion proffered."[106]

Importantly, the Court of Appeals in *Cornell* again rejected an attempt to engraft the *Frye* test's main competitor - the standard set out by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc*.,[107]– into New York law. *Daubert*, which like *Frye* focuses on principles and methodology, calls upon a trial court to consider a nonexclusive list of four factors when assessing the evidentiary reliability of "scientific evidence," or, in this case, "expert musical evidence."

> (1) whether the theory or technique about which the expert is testifying can be tested;
> (2) whether the object of the testimony "has been subjected to peer review and publication";
> (3) the known or potential error rate of the theory or technique; and
> (4) general acceptance in the relevant scientific community, which, although no longer the sole factor, "can yet have a bearing on the inquiry."[108]

When we compare these two roles and apply them to Mr. Joel, Mr. Joel should be happy he is better than Bruce Springsteen - he was not just "*Born in the USA*,"[109] he was born in New York, a *Frye* state and, under its jurisprudence, he's more likely than not to be an expert on the "*New York State of Mind*."

Under the *Frye* rule, Mr. Joel can strut into "expert status." His record sales, his Long Island roots, his knowledge of the Long Island Sound - he may be "the expert" on both the musical "Long Island Sound" and the "*New York State of Mind*." It is hard to fathom a more expert opinion on the New York State of Mind than Mr. Joel. In reaching this conclusion, any court would not need to hold that Mr. Joel is the only expert on the "*New York State of Mind*." There is some evidence that even a New Jersey native, properly tuned, can achieve "expert" status on issues involving the New York State of

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[106] *Id.* at 897.

[107] 509 U.S. 579 (1993).

[108] *Id.* at 593-94.

[109] BRUCE SPRINGSTEEN, *Born in the USA*, *on* BORN IN THE USA (A&R Recordings, Inc. 1977).

Mind, but most New Yorkers consider Hoboken's hero - Francis Sinatra - to be a "New York, New York" guy anyway. New York has enough room to have two "experts" on the New York State of Mind.

VII. "*SHE'S ALWAYS A WOMAN*" - REPUTATION EVIDENCE

In his paean to women –and perhaps one woman, in particular– Mr. Joel rhapsodizes about this idyllic, in a 20th century sort of way, embodiment of femininity.[110] "She may be frequently kind and she's suddenly cruel" and "[s]he can do as she pleases, she's nobody's fool," but, in the end "she's always a woman to me."[111] If he starts to chant these qualities in the courtroom, should a hearsay objection be sustained? Can Mr. Joel testify to her character in this fashion?

The answer lies in "reputation" or "character" evidence. The Court of Appeals of New York has described "reputation" evidence as "the aggregate tenor of what others say or do not say about him is the raw material from which that character may be established."[112] "A reputation may grow wherever an individual's associations are of such quantity and quality as to permit someone to be personally observed by a sufficient number of individuals to give reasonable assurance of reliability."[113] "In short, the evidence must demonstrate a reputation rather than merely 'individual and independent deal-

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[110] Daniel Hartley, *John Lewis Ad: Analysis*, WORDPRESS, https://thinkingblueguitars.wordpress.com/2010/04/30/john-lewis-ad-analysis/ (last visited Feb. 23, 2016).

[111] BILLY JOEL, *She's Always a Woman*, *on* THE STRANGER (A&R Recordings, Inc. 1977).

[112] People v. Bouton, 405 N.E.2d 699, 703 (N.Y. 1980):

> The rule, however, is subject to a number of qualifications of which here relevant is the limitation that the reputation be specific to a particular community. In the relatively immobile societal climate, in which the rule originally developed, the inhabitants of the geographical area in which a defendant resided were assumed to comprise the only community in which the general opinion of him would be a reliable gauge of character. However, the law has not been static in this regard. In harmony with the dynamics of modern social organization, particularly the phenomenon of urbanization, it came to recognize that an individual may have multiple and varied bases around which a reputation might form. So, he might be better known in the community of his employment and in the circle of his vocational fellows, where opportunities to evidence the traits at stake may occur with greater frequency than in the environs of his dwelling place, nestled in the anonymity of a large city or suburb.

Id.

[113] *Id.* at 704.

ings.'"[114] Reputation evidence is most often utilized in criminal cases where "the proper method of proving character is by testimony of a defendant's reputation in the community for the particular trait relating to and controverting the crime charged, such as honesty, veracity, peacefulness, or a law-abiding nature."[115] Conversely, a witness may testify that another witness "has a bad reputation in the community for truth and veracity."[116] The purpose of this provision is to allow a jury "a full picture of the witnesses presented . . . ."[117]

In this case, Mr. Joel evokes a familiarity with this woman's behavior among the general community - he knows that she can kill with a smile or wound with her eyes. He makes it clear that he is not the woman's only victim, after all, "she can take you or leave you" and "she'll carelessly cut you and laugh while you're bleeding." This woman's reputation is based, in Mr. Joel's mind, on his intimate associations with her and these connections are of such quantity and quality as to permit her character to be personally observed by a sufficient number of individuals - including the heart-struck Mr. Joel - to give reasonable assurance of reliability to the declaration that "she's always a woman to me."[118] Any listener would get the sense that all these facts constitute her reputation in a broad community - or at least in the infinite landscape of Mr. Joel's imagination. Stretching the rules to their limit, a court would admit this song in the trial.

VIII. TAKING JUDICIAL NOTICE OF MR. JOEL AS THE "LONG ISLAND SOUND"

As a final exercise, one rule of evidence stands out. In New York, "a court may take judicial notice of facts[,] which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy."[119] To qualify for judicial notice, the evidence must be a "matter[] of common knowledge within

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[114] *Id.*

[115] Howard v. McGinnis, 632 F. Supp. 2d 253, 267 (W.D.N.Y. 2009) (citing People v. Berge, 478 N.Y.S.2d 433, 434 (App. Div. 4th Dep't 1984)).

[116] People v. Fernandez, 950 N.E.2d 126, 130 (N.Y. 2011) (citing People v. Pavao, 451 N.E.2d 216 (N.Y. 1983)).

[117] *Id.* at 131.

[118] BILLY JOEL, *She's Always a Woman*, *on* THE STRANGER (A&R Recordings, Inc. 1977).

[119] Hamilton v. Miller, 15 N.E.3d 1199, 1204 (N.Y. 2014) (citing People v. Jones, 539 N.E.2d 96 (N.Y. 1989)).

the court's jurisdiction."[120] New York courts can take judicial notice of federal and foreign state law.[121] Courts can take judicial notice of the sunrise,[122] prior court orders,[123] court records,[124] actuarial tables showing life expectancy,[125] court records in other proceedings,[126] an incorrect address for a courthouse,[127] the population of a city,[128] regulations of the Department of Housing and Urban Development,[129] a date on the calendar,[130] movement of the stock market:[131] all of these facts are the subject of judicial notice. Judicial notice has moved into the 21st century: a court can also take judicial notice of new technologies and websites.[132] Google maps have also become the subject of judicial notice to plot distance and driving time.[133] "Courts common-

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[120] People v. Watkins, 867 N.Y.S.2d 19, 20 Misc. 3d 1117 (A), at *4 n.1 (N.Y. City Crim. Ct. 2008).

[121] *See* N.Y. C.P.L.R. § 4511(b) (McKinney 1962) (stating that "[e]very court may take judicial notice without request of . . . the laws of the foreign countries or their political subdivisions.").

[122] People v. Schreier, 5 N.E.3d 985 at n.* (N.Y. 2014); *See also* People v. Bhagwandin, 989 N.Y.S.2d 300 (App. Div. 2d Dep't 2014) (holding that it was in "the court's discretion to decline to take judicial notice" of what constitutes "civil twilight"); *compare* Ceglia v. Zuckerberg, 2013 WL 1208558, at *49 (W.D.N.Y. 2013) (Courts can take judicial notice of daylight savings time.).

[123] *See* Matter of Devon EE., 4 N.Y.S.3d 340, 341 n.1 (App. Div. 3d Dep't 2015) (denying motion to strike since the court "can take judicial notice of subsequent Family Court orders . . . .").

[124] *See* Caudill v. Rochester Inst. of Tech., 125 A.D.3d 1392, 1393 (App. Div. 4th Dep't 2015) (taking judicial notice of its own records when the court order was "not contained in the record on appeal," but was submitted to the "court on earlier motions related to the appeal . . . .").

[125] *See* Vincent v. Landi, 998 N.Y.S.2d 495, 501 (App. Div. 3d Dep't 2014) (mentioning that the trial court took judicial notice of actuarial tables which indicated the plaintiff's life expectancy).

[126] *See* Monarch Consulting, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 993 N.Y.S.2d 275, 287 (App. Div. 1st Dep't 2014) (stating that in the state of New York appellate courts may take judicial notice of "official court records in other proceedings.").

[127] *See* Segway of N.Y., Inc. v. Udit Group, Inc., 992 N.Y.S.2d 524, 527-28 (App. Div. 2d Dep't 2014) (taking judicial notice of the incorrect address given in the notice of motion "was not merely a misspelling of the correct address . . . .").

[128] *See* Matter of Vescera v. Stewart, 991 N.Y.S.2d 378, 379 (App. Div. 4th Dep't 2014) (mentioning that judicial notice can be taken to "note of the fact that the population of" a city exceeds a certain number).

[129] *See* Owens v. Miesch, 987 N.Y.S.2d 780, 782 (App. Div. 4th Dep't 2014) (holding that "the court properly took judicial notice of the applicable HUD regulations with respect to RHA's motion.").

[130] *See* People v. Jarvis, 978 N.Y.S.2d 522, 525 (App. Div. 4th Dep't 2014).

[131] *See* Marlinski v. Marlinski, 974 N.Y.S.2d 200, 205 (App. Div. 4th Dep't 2013).

[132] *See* LaSonde v. Seabrook, 933 N.Y.S.2d 195, 199 n.8 (App. Div. 1st Dep't 2011).

[133] *See* Carreiro v. Colbert, 5 N.Y.S.3d 327 (N.Y. Sup. Ct. 2014).

ly use internet mapping tools to take judicial notice of distance and geography."[134]

While it has a new 21st century sheen, this ancient rule in New York is exemplified. In *Hunter v. N.Y., Ont. & W. R.R. Co.*,[135] the plaintiff was sitting on top of a freight car as it passed through the tunnel and the plaintiff struck the tunnel arch and, as a result, he was injured.[136] The distance between the top of the car and the inside of the arch at the top was four feet and seven inches.[137] The trial judge let the jury decide, "if the plaintiff was sitting down . . . whether his head would reach to that height."[138] The jury returned a plaintiff's verdict.[139] The Court of Appeals questioned "whether we will accept that finding . . . or whether we will take judicial notice of the height of the human body and the measurements of its separate parts, and . . . reverse a judgment that is based upon a finding clearly contrary to the laws of nature."[140] The court ordered a new trial, taking judicial notice that a man's average height is less than six feet; and that differences in height stem mainly from differences in leg length.[141] Therefore, the plaintiff could not have struck his forehead against the arch while sitting unless he was at least nine feet tall, a height for which there is no authenticated instance in human history.[142] The court noted that while plaintiff may have been tall, and the jury may properly have acted upon its inspection of him, "a fact so rare in the course of nature should be made apparent in some way on the record."[143]

If a court in New York can take judicial notice of almost every undisputed fact - from the height of the average man to the time of the sunrise - any court would be well within its discretion to take judicial notice of another undisputed fact: Billy Joel is "a fact so rare in the course of nature:" the original 20th century New Yorker. He is the voice of New York and his music brings New York's panorama of people and places to the world.

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[134] *See* Rindfleisch v. Gentiva Health Sys., Inc., 752 F. Supp. 2d 246, 259 n.13 (E.D.N.Y. 2010).
[135] 23 N.E. 9 (N.Y. 1889).
[136] *Id.*
[137] *Id.* at 10.
[138] *Id.*
[139] *Hunter*, 23 N.E. at 10.
[140] *Id.*
[141] *Id.* at 11.
[142] *Id.*
[143] *Id.*

Any objection to that ruling is overruled. The verdict is final.

Epilogue
(Borrowed from the Bard from Stratford on Avon – Mid-summer Night's Dream)

If this judge has offended,
Think, but this, and all is mended –
That you have but slumbered here
While these cases, citations, and arguments did appear.
And this weak and idle theme,
No more yielding, but a dream,
But, when the evidence is all tolled
It celebrates the glory of Billy Joel.