MondayMonday

Play The Game? Know The Rules

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The true marvel of the internet is not the easy access to pornography, but the easy access to ideas. Enter Keith Pandolfi's confession in *The Case for Bad Coffee* [seriouseats.com]. In the space of a lifetime, it's not the latté at Starbuck's you remember, but that one cup of java at the Market Diner (may it rest in peace.)

We agree. As the weekend passed, we came to realize that on our anniversary (Halloween), as a couple, we had only consistently, if at all, agreed on one thing in our marriage: Coffee. For now over 33 years, we had started our mornings with only one coffee: Chock full o' Nuts. That yellow and black can had seen us through births and deaths, hurricanes and college admissions, more money and less money, and a fair modicum of "just another day" days. Sure, it may be "the heavenly coffee" and "the coffee a millionaire's money can't buy", but it's been more than that. At the same time, it's also been less than that biblical, never changing point in an ever changing world. It's just coffee and that is it's beauty.

On the Sunday morning after our anniversary, following Saturday's martini or two, a Broadway show, a fine late dinner and a nice Cabernet, we appeared in the kitchen. There were our children, our bagels and our coffee, Chock full o' Nuts. Each, in their own way, proclaiming that all was right with the world; that we had survived the darkness; that something we did over 30 years ago came out right after all. The coffee? It had been playing silent witness to that miracle, every morning, one cup at a time, for as long as we both could remember.

Regular readers here know that we are suckers for cases dealing with evidentiary principles, no more so, perhaps, than the avid baseball fan who is fascinated by the Ivy Rule at Wrigley Field. The rules of the game are the core logic of those who play it, or love it, or both.

In *Cruz v. City of New York*, NY Slip Op 07910 (1st Dep't 10/29/15), the trial court allowed an undisclosed witness to testify at trial. AD1 finds no problem there, as the witness was doing nothing more than laying the foundation for the admission of a statement by a non-party witness. Whether under common law or CPLR 4514, one of the few evidence-based provisions of the CPLR, no disclosure was required. Also, adds AD1, the witness's testimony was not hearsay.

What about that prior inconsistent statement ("PIS") itself? The court's admission was correct as well. While the non-party witness eventually disclaimed her signature on the PIS, having previously testified otherwise, under CPLR 4514, the opposing party "was permitted to 'introduce proof' to the contrary." And then, of course, the statement could come in, though not provided in discovery, for "there is no indication in the record that production of the statement was sought and refused." Ultimately, all this discussion is rather meaningless, AD1 concludes, for plaintiff never requested a jury charge that the statement could only be considered for impeachment purposes, thereby failing to preserve the absence of the charge on appeal.

More? How about a trip north to AD3? *Zupan v. Price Chopper Operating Co.*, NY Slip Op 07893 (3d Dep't, 10/29/15) is a fairly typical slip and fall on water in a supermarket. Defendant's cashier—and plaintiff's cousin—made a written statement favorable to plaintiff after the fall, as well as an oral statement to plaintiff herself to the same effect. The statements dealt with defendant's notice of a leaking ice machine which produced the water upon which plaintiff took her spill.

Since the cashier had filled out a maintenance report one hour before the fall noting the leak, but could not recall the form or the leak, the trial court was correct in admitting the statement as a past recollection recorded.

But what about the cashier's oral statement to plaintiff, recalled by plaintiff at her deposition, i.e., the machine was broken and she had asked someone to clean up the leaking water? Isn't that hearsay?

Sure, but this was an SJ motion, where hearsay, "sufficiently corroborated" by proof in admissible form, can be considered, which it was here by defendant's employees, who confirmed water in the same area. Under these questions, SJ can't be granted, notwithstanding that "plaintiff is unable to establish the source of the water on the floor." Query: Does the cashier keep her job?