



MondayMonday

Everything Old Is New Again

April 7, 2014

We begin this week absent one friend. Mickey Rooney was so much a part of our lives. He lived inside the black and white RCA in our East Flatbush living room and would come out only at select times. Maybe we would be lucky enough to catch “Babes in Arms” on the Early Show while Mommy cooked dinner in the kitchen, or an “Andy Hardy” movie on a Saturday morning when other kids were watching cartoons. Later, we’d marvel at Mickey and Spencer Tracy in “Boys’ Town” or Mickey’s impeccable performance in “The Human Comedy.”

But who would have thought that Mickey would be with us on one of the biggest nights of our life? We were at Lenox Hill Hospital in 1987 and so was Mickey. Our wife lay in a hospital bed, somewhere between natural delivery and an emergency C-section. She had been in labor with the First Daughter for over 20 hours. Dressed for a deposition and not a bedside vigil, we stood in a suit and hard business shoes, holding her hand, for each of those 20 hours. The next few hours would tell the tale and the very thought of all the horrible things that could happen during those next few hours left us dead cold with fear.



On the television, as he had always been, was Mickey, with Judy, in “Girl Crazy.” Made in 1943, it did not recognize failure; it only identified hope and a happy future. We held her hand and Mickey held ours and somehow, we all got through that night just fine. “I’ve got my girl,” sang Mickey, “Who could ask for anything more?” How right he was.

Oftimes, we are our own worst enemies and courts are no different. In 1997, the Court of Appeals decided *Trincere v. County of Suffolk*, 90 N.Y.2d 1997, a memorandum decision which single-handedly would fill appellate calendars throughout the state to this day with trip and fall cases which, in ancient times, would have simply been tried by a jury. Instead, we would be treated forevermore to the sight of four or five justices on an appellate bench acting as some sort of über-jury, viewing photographs re-printed in a record to discern whether or not a defect was “trivial” as a matter of law.

And so, in *DeViva v. Bourbon Street Fine Foods & Spirit*, 2014 NY Slip Op 02255 (2d Dep’t 4/2/14), decid-

ed some 17 years later, here we go again.

In this complicated fact pattern, plaintiff trips and falls over a sidewalk flagstone abutting defendant’s premises. Defendant claims, on this motion for summary judgment, that the defect is trivial and Supreme Court agrees. On appeal, it’s out with the magnifying glasses as this “Trial by Kodak” begins.

The Second Department, in keeping with *Trincere*, examines “the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury.” Of course, there’s no guidance, since *Trincere* provides that there is no “minimal dimension test” or ‘per se’ rule” requiring a certain height of depth to be actionable.

In place and instead of a jury trial, we are directed to look at plaintiff’s “poor quality black and white photograph” in the record. It is of “such poor quality that it is impossible to determine whether the alleged defect is trivial as a matter of law.” Better yet, defendant’s own photos were never acknowledged by plaintiff as being representative of the condition where he fell.

What’s an appellate court to do? Reverse and tell the parties to try their case to a jury instead. You mean, to some sort of “trier of fact?” Brilliant! Wish we’d thought of that.

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