MondayMonday

Spoliation Lives in 1st Department

January 13, 2014

We are growing so tired of the subject of gay marriage. Seemingly, in some states, there is time for this debate. Obviously, these states need assign no time for discussions relating to education or unemployment or even, perish the thought, public improvements. Instead, gay marriage is the single most important impediment to the happiness of their citizens, whom they presume to all be of one mind and sexual preference.

The Supreme Court will face this question sooner or later. Indeed, most Court-watchers suggest the former, especially in view of the Court's temporary stay of *Herbert v. Kitchen* last week, which allowed gay marriages in Utah.

So, the world (or at least Utah) is safe once again. Of course, there are still children going hungry every night in Utah, there are people out of work in Utah, there are schools which are not properly educating students in Utah, there are houses being foreclosed in Utah, there are people without medical care in Utah, but thankfully, there are no more gay marriages in Utah.

For people who believe that they know best what their god wants, and could care less what

other's believe, we can only recall the conceit of the trial court judge as related in *Loving v. Virginia*, 388 U.S. 1 (1967): "'Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.'"

It's now 2014. Does it ever end?

We enter the new year with, of all things, a spoliation case that, miracle of miracles, actually contains a sanction for a defendant's destructive conduct. Will wonders never cease?

In *Malouf v. Equinox Holdings, Inc.*, 2014 NY Slip Op 00165 (1st Dep't 1/9/14), plaintiff was injured when she fell off a treadmill in defendant's gym. The treadmill was not operating properly and plaintiff reported its malfunction immediately to the gym's staff and a claims defense form was prepared by a gym employee and forwarded to defendant's legal department.

So, where's the treadmill now? That's a good question and one which plaintiff couldn't get a satisfactory answer to. Defendant couldn't produce the treadmill for inspection and couldn't provide any information as to when it was removed from the gym. All the paperwork on the treadmill was missing and the best that could be gleaned from the gym's manager is that it was replaced as part of an equipment upgrade that occurred sometime prior to September 2010 (the accident occurred in 2008).

Though the action wasn't commenced until 2009, defendant gym was on notice that it might be needed for future litigation, as evidenced by the claims defense form filled out by its own employee and forwarded to its own legal department. The failure to take affirmative steps to prevent destruction of the treadmill was spoliation by the gym.

The motion of plaintiff and third-defendant was granted below and it is affirmed here. Defendant gym is now barred from arguing at trial that the subject treadmill was operating properly or was free from defects. Defendant's third-party complaint for indemnification is stricken, since the treadmill was "a key piece of evidence that is not available for inspection."

Is this the new state of spoliation law? We are not that optimistic.