



MondayMonday

Don't Monkey With The Evidence

July 7, 2014

Simon and Garfunkel sang of their friend, Andrew Goodman: "He was my brother/Five years older than I/He was my brother/Twenty-three years old the day he died." The boys had met Goodman at Queens College. Andrew had grown up on West 86th Street in Manhattan and came from a family where social justice was not just a word, but a call to action. Though he was accepted to the University of Wisconsin's Honors Program, pneumonia hit and that's how Paul Simon found him at Queens College.

But June 21, 1964, found Goodman together with another New Yorker, from New Rochelle, Michael Schwerner, who was 25, and James Chaney, 21, from Meridian, Mississippi. They were in Neshoba County, Mississippi, on behalf of CORE, the Congress of Racial Equality, registering rural blacks to vote.

Three young men, two white and Jewish from New York, and one black, from their own state, were viewed as a major threat by the Knights of the Mississippi Klan. So they killed them and buried them with a bulldozer. The extent of the complicity of others in those killings



included local, state and even federal officials, the latter in the person of the FBI's J. Edgar Hoover, who simply didn't care to investigate civil rights cases. It was Lyndon Johnson who would use the deaths to pass the Civil Rights Act of 1964 two weeks later.

"He was singin' on his knees/An angry mob trailed along/They shot my brother dead/Because he hated what was wrong."

We spent some of July 4th watching movies, from "Yankee Doodle Dandy" to "Dawn Patrol." But it is this line from "Patton" which resonates this morning: "I love it. God help me I do love it so. I love it more than my life." Of course, we speak of evidence cases, not tank battles, though there is some metaphor lying in wait there.

It's *Nelson v. Friends of Associated Beth Rivka School for Girls*, 2014 NY Slip Op 04908 (2d Dep't 7/2/14) which catches our eye this morning. Little Leah fell in Defendants' preschool playground, where she was a student. Plaintiffs claimed she fell on the monkey bars, with Defendants admitting that these monkey bars were

not suitable for one of her tender years. The problem was that Defendants also claimed that Leah did not fall from the monkey bars, but from an orange ladder which was age-appropriate. In fact, Defendants contended that Leah had been improperly coached to say "monkey bars" when asked what she fell from. They did it during jury selection and repeated it at trial. In order to defuse that argument, Plaintiffs wanted to admit an emergency room report to counter the claim of recent fabrication. Moreover, the ER report was also germane to the medical treatment Leah received. The trial court disagreed and barred the testimony, so Defendants mentioned the recent fabrication again during summation to seal the deal.

That was error and the Second Department reminds that an out-of-court statement made before there was a motive to falsify is admissible after the testimony of the witness is attacked as a recent fabrication. It wasn't that Defendants were claiming that Leah was mistaken, but that she was lying and coached to do so. Oh, and if that wasn't enough, Leah's statement in the ER was also germane to her medical treatment as well. Game, set, match.

In Kings County, where the case was tried, the spirit of Dean Prince lives, at least on Monroe Place.

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