MondayMonday

No Excuse For Bad Behavior

May 19, 2014

So what bothers us this week? What bit of foolishness committed by others has offended the curmudgeon? What off-hand comment has insulted him? What seemingly benign act has injured him?

None. The sun shone this past weekend and its heat comforted the old man in us. The light was bright and the flowers on the back deck colorful. The ice was cold as was the gin. All was right with the world.

So what did we do? We found something to argue about. As lawyers, we know that no day is complete without a good argument It lightens the blood and is good for the constitution. Indeed, it settles the stomach, drains the bile and rotates the tires, all in one.

We argued about grammar. When dealing with a noun that ends in an "s", how do we form the possessive? Add an apostrophe after the "s"? Add an apostrophe after the final "s" and then add another "s"? It's no problem when dealing with singular nouns (a hard day's night), but what about plural nouns or proper nouns ending in "s"? Is it "Charles's car" or "Charles' car"? Is it "the class's hour"? As the gin warmed, so did the argument. Only a fool would add an apostrophe and

an "s". We learned that in bloody grade school at P.S. 219. Didn't they teach that in Canarsie, we chided She Who Must Be Obeyed? In East Flatbush, we were far better educated.

The reality is, it doesn't matter. There is no right answer (unless you're married.) Our suggestion? Add an apostrophe and an "s" to nouns that end in "s" to begin with. Then, for proper nouns, add only the apostrophe, as in "get me the Jones' car" Even craftier, form the plural first, then add the apostrophe, as in "get me the Joneses' car" or "the classes' hours." Hell, pass the gin.

The movies hail the activist judge; the jurist who takes command of his or her courtroom, pacing the bench like a lion, asking questions of witnesses and attorneys alike. Not content with judging, this is the judge who steps beyond the robes, girds his loins and enters the fray.

In reality, it's all nonsense and the judge who decides that bench knows better than bar insults them both when, at trial, he seizes control from the attorneys before him.

In *Fudge v. Long Island Jewish*, 2014 NY Slip Op 03481 (2d Dep't 5/14/14), the court made short shrift of a Queens County justice who decided that a plaintiff need not even finish his opening, before *sua sponte* dismissing the complaint. Interrupting the opening statement (an act of rank discourtesy under any view of the law), the judge seized the day, however improperly.

That won't do, says the Second Department. While there may be unusual circumstances where the court could justifiably dismiss a complaint *after* the opening statement, that is just not the same thing. The power to dismiss a complaint, *sua sponte*, is only to be used "sparingly" and only in the face of "extraordinary circumstances." There was nothing extraordinary here. The trial justice's action was "based upon pure conjecture and surmise, without any legal basis, and absent any evidentiary proof."

Here's the best part, though. It seems another justice of the same court had previously ruled in the case that triable issues of fact did exist as to whether the individual defendants had departed from accepted standards of care and whether these departures were the proximate cause of plaintiff's injuries. In the old days, we would call that the "law of the case," decided by a judge of "coordinate jurisdiction." In the 2d AD, they still do.