MondayMonday

The Hard Part of Judging

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Exactly what is it that judges do? Many of us have come to believe that a large number of judges seek to avoid making difficult decisions, which can take the form of either deciding cases along predetermined lines that are easy, even if incorrect, or else not really deciding cases at all, but devising ways to punt the ball to another judge at another time.

That problem is apparently no different in the Sixth Circuit which, just last week, in *DeBoer v. Snyder,* upheld state laws banning same-sex marriages in four states, *i.e.,* Kentucky, Michigan, Ohio and Tennessee. Judge Sutton wrote a beautifully crafted majority decision for himself and Judge Cook, which questioned, at the deepest philosophical levels, whether any court had the right to decide these issues. "This is a case about change—and how best to handle it under the United States Constitution," said Judge Sutton. In the end, the judge determined that courts had no business determining such basic rights. "When the courts do not let the people resolve new social issues like this one, they perpetuate the idea that the heroes in these changes are judges and lawyers." Better, said the majority, to let the people decide "through the customary political process[.]"

Nonsense, said the sole dissenting member of the panel, Judge Martha Daughtrey. She began by quoting Cardozo: "The great tides and currents which engulf the rest of men do not turn aside in their course to pass the judges by." The problem with the majority opinion, said the lone dissenter, is that while it makes for great political philosophy, it is not judging. "[A]s an appellate court decision, it wholly fails to grapple with the relevant constitutional question in this appeal: whether a state's constitutional prohibition of same-sex marriage violates equal protection under the Fourteenth Amendment." The answer to that question does not rely on *vox populi*, concludes Judge Daughtery, but *the law.* In other words, for a lifetime appointment and a nice salary ($200K+), make a decision.

John Vinasco was working for a company hired by defendants to remove a 200-pound metal gate from their premises. He was injured when the gate, held up by a hoist from the building, fell hitting him and the unsecured ladder he was standing on, dashing them both to the ground.

In a bifurcated trial, the trial court denied Vinasco's motion for a directed verdict on Labor Law 240(1). The jury's eventual verdict found no liability on the part of defendants for failing to provide proper protection to Vinasco.

The trial court's denial of plaintiff's post-trial motion under CPLR 4401 was improvident, says the 2d Department in *Vinasco v. Intell Times Sq. Hotel, LLC*, 2014 NY Slip Op 07497 (2d Dep't, 11/5/14). There was no rational way in which the jury could find that the hoist which held the gate up was adequate under 240 (1), or that the unsecured ladder provided proper protection, or that both were not the proximate cause of plaintiff's injuries.

But if things were so clear, then why was there no DV at the close of plaintiff's case? And if they remained that clear after all the evidence was in, why no J-NOV after the erroneous verdict? The answer, we believe, is that same ingrained philosophy that prevents some judges from, well, judging. The cost of that failure is great, both in time and money. Moreover, as many of us in the plaintiff's bar suspect, such "inabilities" are too frequently not distributed evenly on both sides of the caption.

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