



MondayMonday

Know Which Way The Ice Flows

October 20, 2014

With Governor Cuomo's nomination of Third Department Justice Leslie Stein, the numbers on the judicial die to be cast by Cuomo become clearer. Indeed, there is much in play on the table. Judge Ciparick, appointed by Cuomo père, retired last year and was replaced by Judge Abdus-Salaam. The death of Judge Jones in that same year brought Judge Rivera to the Court. Having already appointed these two justices, Cuomo could have just as easily reappointed Judge Graffeo, who could have then served for 8 more years before mandatory retirement, but did not.

What's up? Well, for the first thing, the Court now shifts to 4:3 Democratic (Judge Graffeo was Republican; appointee Stein is not.) If the message of Mario Cuomo is followed, however, that is meaningless. "You leave your politics at home. The Court of Appeals doesn't have the same problems as the Supreme Court of the United States. I never heard anyone complain, 'The fix was in.'" Recall that Mario nominated more judges to the Court of Appeals than any other governor in New York State history.

But Mario is not Andrew. Mario Cuomo had a certain closeness with



the Court, having clerked for Judge Burke. For Andrew, on the other hand, the closest he got to the Court was attending Albany Law School (as did nominee Stein); the closest to litigation a year at the Manhattan DA's office. Nonetheless, our good friend and Court expert, Prof. Vincent Bonventre, of Albany Law School, assured *Capital* last year that "both Cuomos understand the Court of Appeals' power and influence, and the practical implications of the court's working philosophy on criminal-justice and economic matters." Now, however, he concedes that "nobody seems to have much of an idea about his [Andrew's] intent in regards to the Court[.]"

Perhaps more important, is that to court-watchers, the Court honestly seems happier nowadays than in the past. Happy judges make happy lawyers. Who will the new nominee be in January when Judge Smith, another Republican, reaches mandatory retirement age? Your guess.

We love *Rodriguez v. Woods*, 2014 Slip Op 06887 (1st Dep't 10/14/14). It deals with snowfall and ic-

ing and re-icing and slipping & falling and dirty ice and layers of ice and sufficient time to clear and all the marvelously arcane principles we deal with every day.

Four inches of snow fell four days before plaintiff's fall; 1/2" fell three days before and 2/10 fell two days before the fall. This was followed by non-freezing rain and several hours of non-freezing temperatures. However, on the day of the accident, the temperature plunged to below freezing. Plaintiff's expert confirmed that the warmer temperatures melted the smaller amounts of snow and that the patch of ice that plaintiff fell on was from the earlier snowfall, leaving the City with no proof that it had insufficient time to clear the area. The City offered no meteorological evidence to the contrary. Other than the brief period of warming, the temperatures had remained below freezing during the entire period of over four days.

The First Dept. rejected the motion court's view that the affidavit of plaintiff's expert was "all speculation." "It was based on undisputed meteorological events, took plaintiff's description of the ice (layered) into account, and explained how the meteorological events led to the formation of that particular patch of ice." Whether the ice formed 4 days prior to the accident, with sufficient time to clear, was a jury question, as was what the City did with all that time.

©Jay L. T. Breakstone, 2014. *MondayMonday* is published by PARKER WAICHMAN LLP, a National Law Firm, offering appellate counsel to the profession, together with trial counsel and referral/co-counsel in cases involving significant damages. 1.800.LAW.INFO (800.529.4636) Contact jbekastone@yourlawyer.com. For the online version, visit www.monday-monday.yourlawyer.com.