MondayMonday

Limiting Facts Through 3212(g)

December 14, 2015

What to do? Those who would kill us from abroad do so because we let them in; we admit them to our home. Killers at our doorstep and we open the door. It makes no sense and surely doesn't to Mr. Trump. Only let in the good people; the people like us. Anyone else is a danger to public safety, as candidate Trump can confirm.

We certainly would never exclude people like George Sakato. He was an American, though his parents were born near Hiroshima. The family fled to Phoenix to avoid internment during World War II. Joe (that was his nickname), fought in Germany with the 442nd Regimental Combat Team, the most decorated unit of the war. Joe jumped into a foxhole during a German counterattack, grabbed a German rifle and rallied his buddies. Joe killed killed 12 Nazi soldiers and took 4 as prisoners. Later injured, Joe came home, got married and for the next 60 years, the Sakatos spent their time together ballroom dancing, which they loved almost as much as they loved each other.

And, of course, not immigrants like Ted Tibor. The U.S. Army liberated what was left of Ted from the Mauthausen concentration camp. His whole family was dead. Ted promised that if he ever got to America, he'd pay America back. And that's exactly what he did. Ted enlisted in 1948. During the Korean War in 1950, Ted single-handedly defended a hill for 24-hours in the face of attacking Chinese troops so that his buddies could escape. Captured by the enemy, he was sent to a prison camp, where he stole food to keep his fellow prisoners alive. You see, Ted knew something about prison camps.

Joe Sakato was Japanese; Ted Tiber was Jewish. People hated them because of it and that's why it took a bit of time before they received their Congressional Medals of Honor. No, we sure don't want to close the door on guys like Joe and Ted, who kept us free, or even those like Friedrich Drumpf, from Germany, a restaurateur who made his money in the Gold Rush. Did Friedrich get a medal? No. But his grandson might just end up being President. As Ted Tibor, who died last week, said: "It's a wonderful, beautiful country. We are all very lucky." Even you, Mr. Trump, because we let your Grandpa Friedrich in too.

Justice Dillon of the Second Department dipped deep into Article 32 of the CPLR last week to find a pearl; the darling of the Appellate Term, CPLR 3212(g).

To all the world, *Phillip v. D & D Carting*, 2015 NY Slip Op 09084 (2d Dep't 12/9/15), was just another HIR, "hit in the rear" case. Vehicle #1 was a passenger van; Vehicle #2 was a garbage truck. Plaintiff was a passenger in Veh #1 when it stopped on Flatbush Avenue to discharge passengers. Veh #2 tried to stop at the red light behind Veh #1, but according to its driver, was unable to do so, skidding on oil in the roadway. The driver also claimed that Veh #1 was parked blocking a moving lane of traffic, all causing Veh #2 to strike Veh #1, injuring the plaintiff-passenger. After paper discovery, but before EBTs, plaintiff moved for summary judgment against both vehicles.

Why not? Belted in her seat, plaintiff surely wasn't the cause of her own injuries. Veh #2's driver did that, plaintiff says. But Veh #2 says he skidded on oil, even taking a picture of it. Plus, what about Veh #1's sloppy parking? Isn't that a factor too?

Maybe, says Justice Dillon, and that precludes SJ here. Plaintiff hasn't proven Veh #2 at fault. There was that oil on the roadway and Veh #1's parking in the lane of traffic. The Court "cautioned" trial courts to be careful and avoid concluding that just because a plaintiff is a passenger in the lead vehicle in an HIR case she is entitled to judgment against the rear vehicle. The standard SJ factors still apply.

But wait. There's that little thing they do in the Appellate Term: "In circumstances such as these, the court may appropriately exercise the discretion granted by CPLR 3212(g), which authorizes it to make an order specifying 'what facts are not in dispute or are incontrovertible,' so that they may 'be deemed established for all purposes in the action.'" Plaintiff walks away with an order directing that she is "free from comparative fault in the happening of the accident," salvaging something from the denial of her SJ motion. Not half bad. To what other uses could this nifty section be applied? Our mind works overtime. Let's see . . . .