



MondayMonday

The Weather Outside Is Frightful

December 12, 2016

John Glenn was one of our heroes. It started when we were a child. He was One of the Seven; a Mercury astronaut; something more than a mere human; a guide to the future. To this day, we can still name all Seven, because in those days, we looked only to the heavens. Earth was a place where they fought wars, exploded horrible bombs, hated people because of color and gave unnecessary homework. John Glenn lived in that other world, where being in “Zero-G” meant you’d “feel fine.” Glenn was our guy; an American, but we knew that in Russia, there were kids just like us who found their hero in Yuri Gagarin. That made those Russian kids more like us. We were all starchildren, headed to a place which would only define us as being from a place called Earth.

Mark Twain did not grow up in the same world we did, but he knew a hero when he saw one. “Our heroes,” said Twain, “are men who do things which we recognize, with regret, and sometimes with a secret shame, that we cannot do.” For the longest time, we thought that was John Glenn in 1962. We were right then, but we would be wrong now.

The John Glenn who is our hero today is the John Glenn who, at age 77, flew to that special world once again on the Space Shuttle. Coming back, he said that too many people when they got old, thought they had to live their lives by the calendar. “You know, old folks can have dreams, too, as well as young folks, and then work toward them. And to



have a dream like this come true for me is just a terrific experience.”

When we are feeling old; when we are down because it seems like we no longer control our destiny; when we are more concerned about the voyage than the destination, we think of John Glenn. Our Hero. Who even at 95 could smile at the stars and say “Zero-G and I feel fine.” Godspeed, John Glenn. Welcome home.

The weather grew colder last week and, as day follows night, winter follows fall. Before we know it, we’ll be heavily involved in our favorite winter sport: The Snow and Ice Case. Courtesy of the Second Department, we didn’t have to rummage around the fur hats and gloves in the closet to find *Aronov v. St. Vincent’s Housing Development Fund Company*, 2016 NY Slip Op 08190 (2d Dep’t 12/7/16).

Plaintiff slipped and fell on ice on the sidewalk in front of the entrance to an apartment building on Staten Island. Defendants moved for SJ invoking the “storm in progress” rule. SIP says that a property owner can’t be held responsible for accumulations of snow and ice unless an adequate period of time has passed after the storm has ended to enable the property owner to, as AD2 puts it “ameliorate the hazards caused by the storm.” SIP is chock full of all sorts of reasonableness filters and a property owner is required to act with “reasonable care” in

this amelioration process.

So what’s the problem in this case? Simple. What happens if the property owner doesn’t wait until the storm has ended, but goes out into the melee and clears snow and ice during the storm’s progress? Does this make him more or less responsible for a slip and fall?

None of the above. “If a property owner has elected to clear a sidewalk during a storm in progress, the owner is required to act with reasonable care and may be liable if its efforts create a hazardous condition or exacerbate a natural hazard created by the storm.” In other words—the rule is the same. “The mere failure of a defendant to remove all the snow and ice, without more, does not establish that the defendant increased the risk of harm.”

In this case, Plaintiff failed to show how whatever interim procedures the property owner undertook while the storm raged on either “created or exacerbated” the icy condition in front of the property. The grant of SJ to Defendants is affirmed.

Some of you might wonder where the old shibboleth of “removing the snow from the sidewalk may have exposed a layer of bare ice beneath the snow” disappeared to. It didn’t. Plaintiff here failed to prove that theory, supported by only “conjecture and speculation.”

That may be true and it may not be, but it doesn’t take AD2 to remind the best of us that while the SIP rule is annoyingly flexible, the “making matters worse” fact pattern is not. An expert is needed, unless, of course, the judge is a former postal carrier. Then, you’re in like Flynn. *Experientia omnia docet*. Nothing teaches like experience, including slipping on ice.

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