MondayMonday

SIP Trumps SJ On Eagle Street

May 9, 2016

Baseball consistently teaches lessons that are far broader, both in reach and scope, than Abner Doubleday ever intended. What is really special about baseball, though, is that the education starts in our youth and continues throughout our older years. Like hikers in the forest, all we have to do is stop and listen quietly in order to learn.

On Saturday night, at the Home for Retired Trial Lawyers, the TV Room was agog as 42-year old Bartolo Colon, who began his major league career in 1997, hit his first home run. Colon suckered the Padres Jimmy Shields into offering up a 2-strike, 85 mph, cupcake of a fastball, which Colon then sent 357-feet into left field. As Colon took a leisurely tour of the bases (at a speed reminiscent of your Uncle Myron shopping for underwear at Costco,) the boys in the TV Room spiked their Ensure with Gray Goose and cheered him on. One senile barrister even tried calling his old calendar service to answer "Ready."

Oh, the lesson? It's too obvious. It's what kids know and what adults are taught to forget. There's always time. There's always a tomorrow. In the scheme of things, it's not how you start, it's how you finish. You never give up so long as you can make it to the plate and, when you get there, you give it your best. Because, the baseball gods—- who share a kinship with the trial gods — don't write the story from the end to the beginning, or from the beginning to the end. They write the story as

of now; as of the moment; as of the instant you step up to the plate. That's why, on a Saturday night in May, a kid from the Dominican Republic, who grew up without electricity or running water, who picked beans at 12 with his family in order to live, found himself at home plate, playing baseball for a team and a city who loved him. Age was meaningless; time was not a factor; there was only the moment. Colon gave his best at that moment; the baseball gods answered; and we are all saved, bathing in the glow.

Dissents in the Court of Appeals are surely not unheard of; they occur with some frequency. But somewhat rarer are those dissents which go to the very core of an essential principle and, by carefully marshaling the record, entirely unbalance the majority opinion. So, in our "new" Court of Appeals, when we find a 4:3 dissent, we stand up and take notice.

It's all so simple. What's the fuss? A New York State Trooper arrives at the trooper barracks at 6:50 AM in a "wintry mix" of snow, sleet and rain. Walking out to his vehicle at 8:15 AM, he is injured, slipping on a patch of ice. AD2 dismisses the complaint on the basis of the "storm in progress" doctrine, but grants leave to appeal. In a short decision, the COA affirms on the same basis. *Sherman v. New York State Thruway Authority*, 2016 NY Slip Op 03546 (5/5/16).

But Judge Rivera, writing for the dissent, has problems. She sees in the record before the Court "triable issues of material fact" as to "whether the storm in question had ended, and if so whether a reasonable period of time had passed" to hold defendant liable for the trooper's injuries.

The SIP doctrine, Judge Rivera explains, "reflects practical concerns related to the challenges and dangers of maintaining property in reasonably safe conditions during inclement weather." Plainly put, it's hard and could be dangerous to clear snow when continuing snow and ice just re-covers the walkways as soon as they are cleaned. But, the trooper said that when he left the barracks at 8:15 AM, there was only a light rain falling—no "wintry mix." Both the climatological report and two road cleaning operators confirmed that at 7 AM, it was only raining.

Above-freezing rain does not come within the SIP doctrine, explains Judge Rivera, and the Court has never held so before. When an ice storm changes due to warming weather into mere rain, the storm is over. "In other words, if the storm conditions had passed, such that there was only above-freezing rain, then the justification for the storm-in–progress rule no longer holds water."

On a summary judgment motion, reminds the dissent, the Court must "view the facts in the light most favorable" to the non-moving party and "indulge all available inferences" favorable to that non-moving party. There are bluntly obvious questions of fact here and, that being said, the Court should have denied SJ. That's the way it's supposed to be done.

Yes, a dissent, but a clear indication that someone is listening.