



# MondayMonday

## A Moment To Catch One's Breath

October 24, 2016

A man whose name is assigned to obscurity, Herman Hupfeld of Montclair, New Jersey, penned some of the best known lyrics to any song and it's his words which sum it up best for us this morning: "It's still the same old story/A fight for love and glory/A case of do or die/The fundamental things apply/As time goes by."

In the sturm und drang of this election year, we were reminded that the basics always remain the same. Midweek found us in the heartland, Minnesota, for argument in the 8th Circuit. The morning farm report told us that there would be a shortage of string beans until the December crop from Florida showed up on the market and that an 8% rise in the California almond crop would depress prices, which had actually been quite high over the past five years. String beans and almonds, never out of date.

Where are we going with this? There are so many things we rely on in the United States; so many gifts we take for granted, like bountiful farmlands which feed not only us, but the world. That is, until they are threatened. It took World War II to vault Herman Hupfeld's song into "Casablanca" and it took Donald Trump to remind us of how much we take for granted the peaceful transfer of power in this country.

Each new president, after inauguration, sits down at the desk in the Oval Office, opens the center drawer and reads a private letter left by the former occupant. George H. Bush's letter to Bill Clinton has been



made public. "You will be our President when you read this note," President Bush said, and there will be "very tough times. But don't take the critics to heart and don't let them "discourage you or push you off course." Bush then closed his letter to Clinton: "Your success is our country's success. I am rooting hard for you. Good luck — George." Together, we stand.

The fundamental things do apply in the long run and civility is never out of date. Nor is democracy . . . or class.

It would be all too easy to talk today about the Court of Appeals' decision in *Rivera v. Montefiore Med. Ctr.*, 2016 NY Slip Op 06854 (10/20/16), but you all know that the Court has now reaffirmed what we already knew. CPLR 3101(d), while it requires "a summary of the grounds for each expert's opinion" is a discretionary tool of the trial courts. Consequently, those trial courts "possess broad discretion in their supervision of expert disclosure under CPLR 3101(d)(1)" and can pretty decide when they think preclusion is necessary — or when it's not. Such as here, where even if a defendant's disclosure was deficient (it didn't include the basis for the expert's opinion as to the lack of causation), at least it wasn't misleading. The trial court held that plaintiff's problem, instead, was the timing of the objection, which was not made until trial, and to assess that was not an abuse of discretion. "[T]he time

to challenge the statement's content had passed because the basis of the objection was readily apparent from the face of the disclosure statement and could have been raised — and potentially cured — before trial."

No, we'll focus on *Emenike v. Ginsburg Dev.*, 2016 NY Slip Op 06882 (1st Dep't 10/20/16), a case where a Norway Spruce fell on decedent's car and crushed him to death. Decedent's widow rushed out of their house to his side, only to witness his suffocation. So, does the widow have a claim for negligent infliction of emotional distress from being in the "zone of danger"?

Yes, says AD1 and gives no further discussion to the subject, other than citing to its decision in *Garcia v. Lawrence Hosp.*, 5 A.D.3d 227 (1st Dep't 2004). In *Garcia*, plaintiff brought her baby to the hospital for breast-feeding after she had been medically sedated. That sedative caused her to fall asleep on top of the baby and suffocate him during a period of time she had been left alone with the child and unsupervised by the hospital.

While the hospital argued that the mother had no action for emotional injury because she was asleep and not in the zone-of-danger or ever exposed to any bodily harm of her own, the court rejected that construct completely. "All there need be to recover for emotional injury here is breach of a duty owing from defendant to plaintiff that results directly in emotional harm, and 'evidence sufficient to guarantee the genuineness of the claim', *i.e.*, and 'index of reliability,' such as, for example, contemporaneous or consequential physical injury." [citations omitted] That standard precisely covers the widow here.

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