MondayMonday

View From In Front Of The Bench

September 26, 2016

As the song lyric goes, we've been away from you a long time. And while the world of big-time PI practice scarcely compares to Gershwin's Swanee River, the sentiment is the same. "Somehow I feel/Your love is real/Near you I want to be."

Treacle behind us, much has happened since last we met in May. The man we thought was a buffoon now nips at the heels of the woman who is probably one of the most qualified presidential candidates in history, save the incumbents or their Number Twos. What does this say about us? Absolutely nothing and surely, nothing bad.

Americans are optimists. In Brooklyn, we believed that the Dodgers could win the World Series and anyone who was here in 1955 knows that believing can make it so. If the difference between accident and proof is repetition, then we submit 1969 for your analysis.

How can some believe that Donald Trump can be transformed by the waters of the Potomac into Abraham Lincoln? Because we are Americans and Americans believe. It's been that way since '76, when a bunch of pissants challenged the Empire and won.

The real danger here is not Election Day, but the day after. America can survive either Trump or Clinton; what we cannot survive is hating each other. Hate is a virus that, once loosed, cannot be controlled. It will kill all that is good in us.

We respect the fair fight; the essential contest. Our job, even before voting for President, is making sure that we don't denigrate those who disagree with us. To do so is to ransom our future. After both candidates are long gone, we will still be here, together, looking for leaders worthy of such a marvelous citizenry.

Sometimes, as we throw our bodies against the wall, we can't help but wonder if the bruises are worth it. There are those who listen and those who don't; those who agree and those who never will. But those realities are no salve to losing or, even worse, never winning.

Grossman v. TCR, 2016 NY Slip Op 06114 (1st Dep't 9/22/16) is a fine little case which reaffirms the basic principles of the classic slip and fall case in a commercial establishment. Plaintiff slipped and fell on water in Defendant health club's locker room. This happened after Plaintiff swam in the health club's pool, used the poolside showers, and then walked down the corridor to the men's locker room. The ceramic floor from poolside up to the locker room area was covered in what is known as Dri-Dek, a matting that prevented water from accumulating and creating a slippery condition. However, the matting ended as the corridor approached the entrance to the locker room and it was there that Plaintiff slipped and injured himself due to water on the ceramic tiles.

On this motion for SJ, Defendant admitted that it knew the floor was wet in that area. However, it was unable to show that on the day of the fall it had set up "wet floor" signs at the location or mopped the area where Plaintiff fell. Though Defendant testified that it did such things regularly, there was no schedule, log or checklist to confirm it was done at that time. The AD denied SJ.

Nothing unusual here, right? Wrong, says the two justices dissenting. The water on the ceramic tile floor was "incidental to the locker room's intended use" and the mere presence of water on a tiled floor in a health club cannot support an action for negligence as a matter of law. But wasn't this in a corridor going from the pool to the locker room and not adjacent to the pool? Sure, says the dissent, but wasn't there a drain in the floor and didn't Defendant testify the area was wet and had to be mopped every 10-15 minutes, and didn't Plaintiff say that the area was frequently wet. After all, the drain alone "demonstrates that the presence of water on the floor in that area was contemplated in the design of the complex as necessarily incidental to its use[.]" So much for every permissible inference being drawn in favor of the non-moving party.

Ranting will do no good, for to some, "[a]llowing a plaintiff to recover for an injury resulting from his own imprudent assumption that the floor in this area of the locker room was bone-dry because he saw no large puddle to water is, in essence, to impose strict liability on defendant."

That might be true, but one has to leave the bench and make that argument to a jury to prevail, scarcely a task for the faint of heart.