MondayMonday

Runner Up In Rochester

January 9, 2017

We returned to the City from the far reaches of the Other Coast in the hopes that November was but a nightmare which, in our absence, had been healed by an awakening. Fat chance. It is freezing here, we have a head cold, all the work we left on our desk is still right where we left it, and The President-Elect and the Prime Minister of Russia are the new Odd Couple. Nightmare? We'd settle for a nightmare at this point.

Amply fortified by a few days in the vineyards of the Napa Valley, we then spent New Year's in Las Vegas. The Emerald City never really changes, though it appears to do so. While there were less scantily clad women on the stages (and more on the casino floor), we couldn't quite get used to what appeared to be a plethora of munchkins on the loose everywhere. In between the slot machines, dodging the cigarette girls, jamming up the restaurants and whining incessantly. We had thought that Vegas had learned its lesson that children and gambling don't mix years ago. It's experiment in Disneyfication had ended miserably, with the handle (the amount spent on gambling) sinking ominously in direct proportion to the number of children permitted entry at the McCarran Airport border checkpoint. However, perhaps due to the special New Year's weekend, the little darlings were being inflicted by their parents on every poor schlub trying to make an eight the hard way.

We love children and used to be

one ourselves. On this trip, we even had our children with us, though they are now adults. Las Vegas is for adults and anyone who takes their young children there should be required to comp everyone else to at least a nice dinner at the Golden Steer.

Of course, in the language of Mario Puzo, Las Vegas was invented by a child. "There was this kid I grew up with * * * Later on he had an idea to build a city out of a desert stop-over for GI's on the way to the West Coast. That kid's name was Moe Greene, and the city he invented was Las Vegas. This was a great man, a man of vision and guts. And there isn't even a plaque or a singpost or a statute of him in that town!" But there are booster seats in every restaurant and changing tables in every bathroom on The Strip. We know, we know, be nice. As Vegas' former mayor, Oscar Goodman would say, "Hatred is not what Las Vegas is about." Okay, so put a Gummi Bear in our martini.

Remember those halcyon days of yesteryear when we were all content in our belief that for liability under Labor Law 240(1), something had to fall from a significant height? Things were simpler then. After all, if a tripping defect had to be more-than-trivial under *Trincere*, didn't it make sense that a falling object case under the Labor Law had to suffer under that same "more-than-trivial" standard?

Then came *Runner*, where the Court of Appeals let us know that we had been all wrong; that the key to 240(1) liability was not height, but "a physically significant elevation differential." Huh? Well, you see, that standard requires looking at "the weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent." An 800 pound reel of wire rolling a few feet and jamming a worker's hands that were being used to guide it down four stairs made out a case for Labor Law liability.

At least three judges of the 4th Department, however, don't seem to have gotten the message in *Kuhn v. Giovenniello*, 2016 NY Slip Op 08633 (4th Dep't, 12/23/16). Plaintiff here was removing and replacing a sewer pipe in a pizzeria when he was sruck by the falling pipe and hit in the shoulder. The pipe weighed 60 pounds and was about a foot over plaintiff's head. The majority holds that those facts alone make any "height differential" *de minimus*.

But the dissent, written by the Presiding Justice, sees it differently. The pipe which fell, 5-7 feet long and weighing between 60-80 pounds, broke loose an fell on plaintiff. Even though the "elevation differential" was slight, the "'activity clearly posed a significant risk to [his] safety due to the position of the heavy [pipe] above [his head], . . . '" That being the case, and citing *Runner*, the evidence was "sufficient to establish as a matter of law that 'plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk from a physically significant elevation differential'."

It's good to see that some folks are keeping up with the newest slip