MondayMonday

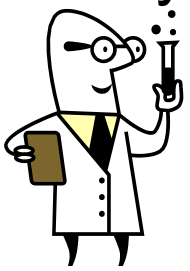
New Star Sited Over Albany

October 14, 2013

Like it or not, the one thing we can say about our court system is that it reaches decisions. At the end of the day, something happens. It might be right or wrong, but cases don't end in a draw. Apparently, that is a luxury not enjoyed by the other two branches of the government.

Observing Congress over the last weeks would be funny, were our representatives not actually being paid for their inability to govern. The cost of American democracy is dear indeed, and goes far beyond a Congressman's salary or office staff. When our government doesn't work right, everyone pays, but no one earns.

That's not to say that all this Miasma on the Hill is anything new. Will Rogers may have believed that we should "never blame a legislative body for not doing something. When they do nothing, they don't hurt anybody. When they do something is when they become dangerous." But what are we to do when doing nothing causes some other thing to happen? Something bad? What then? Is inertia so endemic to the process that we simply ignore it?



We suggest that, at a minimum, we can ignore those who failed to act when they ask us to act on their behalf. Fair is fair. If party is more important than people, so be it. Ask your party chairman to vote for you in November; we won't. We'll just do nothing, or vote for someone else. We've had good teachers.

First things first. In our discussion of *Doerr v. Goldsmith* in last week's *MondayMonday,* we told you that the two dog owners who caused the accident were on bicycles when they enticed their pooch to jump from one to another. That would have been quite a carnival act, were it true, but it wasn't. As Greg Bagen, *Monday Monday* reader and attorney for plaintiff clarifies, the dog owners were walking, not biking at the time of the incident. So, we put Ringling Bros. on hold for the moment and offer our *mea culpa* instead.

The angels sing (as they used to more regularly) when the Court of Appeals recognizes a new cause of action in response to a harm being done to citizens of the state. That is precisely what the Chief Judge did in deciding *Landon v. Kroll Laboratory Specialists*, 2013 NY Slip Op 06597 (10/10/13) last week. Defendant, a drug-testing lab, negligently reported a false positive drug report pertaining to a probationer which caused the plaintiff to suffer loss of rights and status. Luckily, the probationer had his own his own contemporaneous drug test and caught defendant red-handed.

The Court confirms, once again, that under *Espinal*, one can assume a duty of care to others outside of a contract such that the failure to exercise reasonable care in the performance of that contract will constitute the launching of a force or instrument of harm.

Nothing new there (see *Moch*), but the threat of opening up the mythical "floodgates of litigation" still brings the dissent of Judges Pigott and Read. Conceding that the majority "creates a new cause of action against third-party drug testing laboratories for 'negligent testing'," the dissent would hold that only the Probation Department was in a position to object to that negligence. Judge Smith, a lone, third dissenter, finds that the tort of defamation would serve the plaintiff here just as well without "invent[ing] a new tort." But a new tort, like a new star, brightens our belief in the future, for it is born of the stuff of the past. *Moch* lives.