MondayMonday

Little Doesn't Mean Wrong

March 2, 2015

We are dragging, as participants in a daily parade of somnambulists. Perhaps it's the weather, whose February display has been cast in but a single shade of grey. All we know is that when we look into the eyes of colleagues and staff, we see a glaze resembling the top layer of spoiled milk.

This mid-winter's malaise has surely affected Washington, where even fighting amongst themselves hasn't seemed to stem the tide of legislative boredom. Even the Supreme Court this week filed a plurality opinion dealing with a fisherman charged with criminally destroying an underweight grouper under Sarbanes-Oxley. The Court, with Ginsberg on one side and Kagan on the other, actually tussled over whether the fish was a "tangible object" under the statute, designed to keep corporate evildoers from shredding critical documents. Justice Alito, who made the plurality, was reduced to arguing ejusdem generis. What better principle for warming a cold winter's night?

During oral argument on the case (*U.S. v. Yates*), Justice Scalia turned to the government and, in almost so many words, asked what nimrod decided to prosecute a case about a grouper to the Supreme Court? Didn't they have anything better to do? The answer: No.

The question, however, reveals a deeper truth. Like this numbing winter, it is what it is. Live with it. If you're bored, read Latin by the fireside and wait for Spring.

For appellate lawyers, it is "the People's Court." Which is why most of us avoid the Appellate Term like the plague. There's nothing like arguing against a *pro se* litigant wearing an "I'm With Stupid" sweatshirt to three judges crammed onto a bench designed for one. However, in light of the 1st Dep't decision in *Bouet v. City of New York* [2015 NY Slip Op 01567 (1st Dep't 2/24/15], the AppTerm's decision in 2010's *Cunningham v. City of New York*, 28 Misc.3d 84 (App.T., 1st Dep't, 2010) looks suspiciously like *Marbury v. Madison.*

Jacqueline Bouet was struck by a vehicle while crossing the street in Manhattan. NYPD officers neglected to record the identity of the operator or owner of the offending vehicle. AD1 decides that the City is entitled to SJ because the investigation at the scene is a "governmental function" and, without a "special duty", the City cannot be held liable for negligence.

In *Cunningham,* AppT1 had found that such duties were not discretionary and enacted particularly for the benefit of plaintiff's class, *i.e.*, auto accident victims. This created a special relationship between plaintiff and the NYPD.

In *Bouet*, AD1 felt the absence of a private right of action under the VTL for failure to exercise their reporting duties was fatal, while in *Cunninghmam,* AppT1 says that the Legislature "left the mechanism of enforcement to the court."

Who wins? AD1, of course: "We find *Cunningham* unpersuasive and decline to follow it." It's good to be king.