MondayMonday

An Appellate Division Procedural

February 6, 2017

It was a week to be proud of this thing of ours; of the life we chose. Whether it was lawyers coming to the defense of confused refugees at JFK, an Acting Attorney General standing her ground on what she thought was right or wrong under the law, or a 49-year old Supreme Court nominee standing as the next in the line of storied guardians of all that makes us right and good, lawyers led the way. We may not be the conscience of the country, but we are the custodians of its laws; we may not be right all the time, but we speak our minds while others cower in silence; and when push comes to shove, we will take the rule of law over the mob, the blowhard or the bigot every time. We are lawyers, and we believe.

That being said, what are we to make of this young judge from the west? Most assuredly, he represents a distinct minority on the Court. He is a Protestant (Epsicopalian), and there hasn't been one of those rarities on the Court since Justice Stevens retired in 2010. Of course, had Judge Garland been approved before the prior tenant at 1600 Pennsylvania Avenue moved out, the Protestant Problem would have been solved.

Is religious diversity that important on the Court? Some say not. However, there is something sort of unsettling about a Court composed of only Roman Catholics and Jews. But what about Justices Kagan or Ginsberg? What group do they represent? Women or Jews? Well, let's split the baby and say

one is deemed solely Jewish while the other is deemed solely female for diversity purposes. Justice Breyer is a problem because we've run out of permissible Jews. However, he is married to the daughter of the 1st Viscount Blakenham, so that qualifies him for the British seat, last occupied by 38-year old Justice James Iredell, an Anglican, appointed by Washington in 1790. Now, we're rolling!

We don't care what religion Justice Sotomayor is, because she fills the Hispanic seat. The same goes for Justice Thomas, who fills the black one. With Justice Scalia deceased, Justice Alito fills the Italian-American seat.

That leaves us with Justice Kennedy and the Chief Justice, who are both Roman Catholic. If we give the Roman Catholic seat to Justice Kennedy, what minority does the Chief Justice serve? He was born in Buffalo!

President Obama once said that the smartest political move he could make regarding a Supreme Court appointment was "to nominate an openly gay, Protestant guy." Well, half a loaf is better than none for his successor.

You might notice that despite our day job addressing appellate issues, we rarely review a case on appellate procedure here in *MondayMonday.* That's because there are very few of such cases reported and, unless they impact trial lawyers, we don't believe *MondayMonday* has the space to mention them. But there are exceptions, like last week's *Powell v. City of New York*, 2017 NY Slip Op 00576 (1st Dep't 1/31/17).

Following a jury trial verdict for defendant in a premises liability case, the trial court granted plaintiff's CPLR 4404(a) motion and set aside the jury's verdict that the City was negligent, but that its negligence was not the proximate cause of plaintiff's injuries. AD1 reversed that ruling and reinstated the defendant's verdict, remanding the case back to Supreme Court and directing the clerk to enter judgment dismissing the complaint. 116 A.D.3d 589 (1st Dep't 2014). Now plaintiff returns to the Appellate Division, seeking to have it review that judgment.

Which it cannot. As the Court reminds, the judgment is not appealable as a matter of right under CPLR 5701(a), a statute which clearly provides that a judgment which is entered "subsequent to an order of the appellate division which dispenses of all the issues in the action" is not appealable. CPLR 5701(a)(1).

While plaintiff respondend to the City's original appeal, she did not cross-appeal. Plaintiff claims she couldn't, because she was not aggrieved, which she is now. Plaintiff's mistake was not moving to set aside the verdict "upon erroneous evidentiary ruling(s)," which would have rendered the App Div's ruling on less than all the issues, allowing this new appeal to go forward.

The App Div's quandry is clear: "Were we to consider this appeal on its merits, this Court would be in the untenable position of reviewing its own order from the prior appeal." The Court also rejected considering this appeal as a reargument of the for-