

A Snow Story By Carter G. Phillips



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Part One

My favorite Supreme Court story begins on Sunday January 7, 1996, when I woke up early in the morning and saw about ten inches of new snow on the ground that fell overnight. This came as a surprise because the weather forecast was that the snow storm was going to stay east over the Atlantic and hit further north – Philadelphia or thereabouts. Not only did it hit DC, but also ten inches was just the beginning. The official tally at Reagan was 17 inches but at Dulles it was 24 inches. Where we lived in McLean, it was nearly two feet of snow before it was finished.

Usually when I tell the story, I remind people of how well DC handles snow. When there is a prediction of snow, DC area schools close. When there are two or three inches of snow, life here is like a pandemic hit and there is no bottled water or toilet paper to be found within 50 miles. Seven or more inches turns every major roadway into and out of DC into a parking lot. I have no idea where everyone who abandons their car goes, but traffic does not move.

None of this would make any difference to most people. It is an excuse to take a few days off – actually the whole week as it turned out. But my problem was that I had an oral argument scheduled for Monday January 8 at 10 AM. And not just any case – a railroad case, *Norfolk & Western RR v. Hiles* [*i*] that posed the riveting question: Is a railroad liable, under the federal Safety Appliance Act, for injuries incurred by a railroad employee while trying to straighten a misaligned drawbar? Does it get any better than that? I have argued seven railroad cases in the Supreme Court. There actually was a conflict between the Seventh Circuit, which held the answer is no and the Illinois Supreme Court, which held the answer is yes. This meant that whether a plaintiff could recover for an injury caused by being between two rail cars literally depended on whether he or she went to the courthouse on one side of the street or the other.

I was up early on Sunday and had laid out my argument prep materials in an office in my basement. But when our two children got up, I went out and played in the snow with them. It was pretty clear to me that I was not going to be able to shovel the snow during the day because snow was predicted to restart in the afternoon. Also, our housing development had no hope of snow removal. When I went back in to start working on my argument, my wife told me I was wasting my time because there was no way the Supreme Court was going to have oral argument on Monday. No one could get to the Court. Deep down I knew she was right, but until I got confirmation that the Court was closed, I thought it better to be fully prepared, just in case. I was watching TV some and the scroll at the bottom of the screen showed closings and literally everything else within 100 miles of DC was closed, but there was no mention of the Supreme Court.

And then at about 3 pm the phone rang and it was the Clerk of the Court – Bill Suter – and he said, “The Chief Justice welcomes the pleasure of your company tomorrow morning at 10 AM. Oral argument will proceed as scheduled.” I asked Bill if the Chief Justice had any suggestions on exactly how I was supposed to get to Court with 24 inches of snow on the ground and Bill helpfully told me: “The Chief Justice leaves that to your discretion.” So now I am beginning to get a little nervous because I live about ten miles from the Court and there is no way I can get my car out of our development. Moreover, the Metro was closed. Bus service was terminated. So I started calling taxi and sedan services to see if someone could provide me with a ride. About an hour into that process with nothing to show for it other than no answers or “no way” responses, I was really starting to be very concerned.

Then my daughter, Jessica, asked if I would like her to call her friend, Meg, and see how her Dad was going to get to the Court. Meg was Meg Scalia and her Dad was the Justice. She and Jessica had been classmates pretty much all through elementary and middle school and had classes together at Langley High School. I thanked Jessica, but said that I did not really want her to call Meg. Sometime later, Sue said that she would be happy to call Maureen Scalia, the Justice’s wife, because they served on some high school committees together, and again I declined that gracious offer. But when the clock got to 7 pm and my only apparent hope was either walk in waist deep snow or tell Chief Justice Rehnquist that I couldn’t make it, I asked Jessica to get the Langley School Directory and sure enough there was Meg’s name, address and phone number. So with some trepidation I dialed the number.

Justice Scalia answered and I said: “Justice Scalia, my name is Carter Phillips, and I don’t know if you recognize my name . . .” and Justice Scalia interrupted and said, “Of course I recognize you, Carter, you argue in front of us all the time.” On that note I said, “funny you should mention that because I have the first oral argument at the Court tomorrow and am a bit worried about how to get there. How do you plan to get to the Court?”

A brief digression is in order here. I knew where the Scalias lived because Jessica had gone to parties at their house. But I knew exactly how the Justice drove to get to work because the main road that runs closest to my house then was Georgetown Pike, which if you are coming from Washington and heading toward Great Falls, reduces from two lanes to one about 1000 yards after you turn onto the Pike from Route 123 (Dolley Madison Boulevard). And I cannot count the number of times Justice Scalia cut me off from that right lane as I was heading home at night. We must have kept somewhat similar work schedules or maybe he just waited for me because it seemed almost a nightly occurrence. Fortunately, I never honked my horn or made any gestures I might regret later.

But what I did know is that if the Justice was going to the Court on January 8, he had to take Georgetown Pike to get there.

Justice Scalia said that the Marshal had called him and that the plan was that the Court was going to send a four-wheel drive vehicle out to pick him up, then it was going to go down the road a ways and “pick up Tony” (Justice Kennedy to me), and then they were going to pick up the Chief in Arlington and head to the Court. I told him that I realized this was a strange request, “But do you think there is any way I can catch a ride with you?” The Justice said, “That is an unorthodox request, but under the circumstances, let me call the Marshal and see what he says and I’ll call you back.”

Five minutes later the phone rang and when I answered it, the Justice said, “Hi Carter, this is Nino (Justice Scalia to me), and the Marshal is fine with allowing you to come along with us. He said that the arrangements were for the car to try to arrive unusually early just in case we run into problems. So the driver will try to get Tony and me around 7 AM and so we should get to Langley High School around 7:15 or so. But I’ll call you when we are about to leave my house.” I told him that sounded like a plan and got my mind ready for my oral argument.

I woke up very early the next morning and was dressed and ready to go well before 7 AM, but 7 came and passed, 7:15, 7:30, 7:45 – nothing. My wife said: “They are not coming for you; they never were going to come for you.” Just what I needed, but then the phone rang and again it was “Nino” – Justice Scalia to me – and it turned out that the four-wheel drive vehicle was able to get all the way from DC out past route 123 and up Georgetown Pike, but when the car tried to turn down Balls Hill Court to get to the Justices’ houses, it had gotten stuck in the snow. The good news was that the car was now unstuck, but the bad news was that the car still could not go any further than Georgetown Pike. So “Nino” and “Tony” were going to have to walk to the car and obviously would be a little later than they planned. I told the Justice that I would head out to Georgetown Pike by Langley High School right away and looked forward to seeing him when they arrived. My view was that if I didn’t make it to Court and they didn’t make it to Court, then Chief Justice Rehnquist couldn’t be too angry with me.

So I walked the quarter mile between our house and Georgetown Pike. It was incredible; more than 20 inches of snow that was essentially untouched. There were no humans to be seen. I did see a large dog run by at one point while I was standing by the side of the road, and the dog lifted his leg to relieve himself on a tree not far from where I was standing. I had a heavy coat and an Ohio State stocking cap on my head. As I was standing there, it struck me that this was no way to get ready for a Supreme Court argument. It seemed completely surreal.

Then in the distance I saw a vehicle coming down Georgetown Pike toward me. As it pulled up beside me, two passengers hopped out of the car and opened the back and threw their coats off. The two Justices were panting and sweating because they had just walked a half-mile in waist deep snow and were pretty worn out. As the car started heading toward Dolley Madison Blvd, I was struck by the image, which was me sitting behind the driver, with Justice Kennedy in the back seat sitting to my right, and Justice Scalia in the passenger seat in the front, wearing a short- sleeve white shirt and a Russian fur hat. Now I was certain that my situation could not be more surreal until we pulled up to Dolley Madison Blvd, which is a major intersection in Northern Virginia (about a block from the CIA) and Justice Scalia turns to the driver and says: “This an emergency; we are running late for a Court hearing. By the authority invested in me, I authorize you to run this red light.” Justice Kennedy in the back says: “What are you talking about, Nino, we have no authority to run red lights.” And Scalia answers, “I don’t care; this is an emergency. Run that light!” And the driver did just that. Moreover, on Justice Scalia’s orders (and authority), the driver ran every stoplight and stop sign between my house and the Supreme Court building.

Justice Scalia had decided to risk all of our lives to ensure that we made it to the Court on time by running all stop lights and stop signs. In truth, the risk was pretty minimal because it was still relatively early in the morning and there were very few cars braving the snow.

Part Two

What did we talk about in the car? Justice Kennedy observed that this was the modern- day version of riding the Circuit when Justices and the lawyers used to travel together to hold hearings. In those days, they either rode horseback or went by stagecoach. He pointed out that if we ended up in a snow bank, the plan was to send the lawyer (that would be me) out to see how deep the snow is. Both of the Justices complained a lot about how stupid it was that the Chief Justice decided to hold the oral arguments in awful weather conditions. They could not believe they were “taking their lives into their own hands to get to an oral argument.” As they complained, it struck me that if I had been a justice I think I would have told the Chief, I’m not coming and you can’t make me. But I didn’t see much point in saying that since they obviously had made a different decision. And what about the Chief? Justice Scalia had said that we were going to pick him up too. But because of the delay, the Marshal’s office sent a separate car to retrieve him. So it was just the four of us in the car.

Driving carefully, we arrived at the Court and the car pulled into the garage under the Court. For some reason, Justice Breyer was down at the bottom of the

driveway, guiding cars as they came into garage area. This tickled Kennedy and Scalia; they could not fathom what he was doing. This was only Breyer's second Term on the Court, so Scalia speculated that he was being hazed. In any event, Breyer pointed the car to go toward the elevators that lead into the Courthouse. There actually are two elevators – one for mere mortals like me and one for the Justices. We got to my elevator first and after thanking them for the ride, Justice Scalia looked at his watch and said: "It's only 9:30; hell, Phillips, I still have time to read your brief." That was the only comment about the case during our ride together.

When I arrived in the lawyers lounge on the first floor of the Court, my co-counsel from Illinois hugged me. He was so happy that I had arrived. He was afraid they were going to make him argue the case. He had flown in on Friday and stayed at a hotel near the Court. So he had just walked over. It turned out actually that there were supposed to be three arguments that day, but the Clerk of the Court informed us that lawyers for both parties had not been able to get to DC over the weekend and that the third argument would be postponed and argued later in the Term.

When I went into the Courtroom itself, it was shockingly empty and quiet. There was no one from the press, no spectators, no law clerks that I could see, just a couple of guards and one or two people from the Clerk's office. It was as still as I had ever seen the Court except during my clerkship year when I would sneak into the Courtroom late at night, which is both cool and a bit eerie. The only lighting is very dim and located above the friezes. I remember being told a story that one of the Justices took his grandson into the Courtroom at night and the little boy asked "Where is God?" I understand that reaction.

As always, right at 10 AM, the Justices walked onto the bench and took their seats, but there were only seven of them. The Chief Justice announced that "Justice Stevens and Justice Souter are absent" but that they would participate in the decision of the cases being argued. And then the Chief added cryptically: "Justice Souter may arrive momentarily." And the Chief announced the case and said: "Mr. Phillips," to which I responded with the traditional, "Thank you. Mr. Chief Justice and May it please the Court."

Sometime during the middle of my argument, Justice Souter walked onto the bench from behind the curtains and sat in his seat. He was hunched over and was looking down. And in fact he kept his head down during much of the entire argument. I don't believe I ever saw his eyes and he did not ask me any questions, which never happened in any of my arguments since he joined the Court. Other than Souter's tardy appearance, there was nothing particularly memorable about the actual argument. The case involved a railroad employee

who noticed that the drawbar that allows two rail cars to stay connected was misaligned and he went to push the bar to align it properly on the track and injured his back. The relevant portion of the Safety Appliance Act was passed in the 19th Century to eliminate railroad employees having to squeeze between rail cars to put a pin into a coupling device that would allow the two cars to couple. But the plaintiff and Illinois state court system said that the statute should be read to impose liability for any injuries that occur in connection with coupling cars. To help me prepare for the oral argument, the railroad had sent me a captivating video called “Couplers and Coupling.” The title is far more provocative than the video.

In any event, the argument ended, the case was submitted, and now I was at the Supreme Court trying to figure out what to do or where to go. The good news was that the Metro was once again running – underground – which meant I could get back to our offices on Eye St. but I still would not have an easy time getting back to Northern Virginia. Sadly, snow removal in those days in DC was basically the sun. And there had not been a lot of that. Accordingly, the buses were still not running and taxi and sedan services were only available for emergencies. So I was once again stuck. Having bothered Justice Scalia the day before, I decided to call Justice Kennedy’s chambers and sure enough, he answered the phone himself. I told him who I was and said, “I so enjoyed riding with you and Justice Scalia to Court this morning, is there any way I can catch a ride back?” He put me on hold, called the Marshal and told me that would be no problem. The same car and driver were planning to head back to McLean with the Justices and they could meet me at 18th and Pennsylvania Avenue. So I walked down there at the assigned time and met the car. The good news is that since the emergency was over, the driver was allowed to stop at all of the stoplights and stop signs on our way home. Apparently, Justice Scalia’s authority had expired.

So there are a number of postscripts to this story.

Postscript number 1 came some years later when I was at the White House. Justice Kennedy was going to swear in our Chicago partner, John Levi, as the Chair of the Legal Services Corporation. As often happens when there is a public gathering, everyone tends to stay away from the Justice in the room. Part of that could be because Justices are guarded by very large human beings and they can be intimidating. So I decided it seemed stupid to leave Justice Kennedy all alone before the swearing-in ceremony and walked over and struck up a conversation. And in the middle of our chat, he put his arm around my shoulders and he said: “Carter, you know that ‘snow story?’ I tell that story all the time.” I responded: “Justice Kennedy, I have told that story a few times myself.”

Postscript number 2 happened the next week. I was at the Supreme Court Historical Society annual dinner and purely by chance I was seated beside Justice Kennedy's wife. She did not know me and so I introduced myself as "the lawyer who rode into Court with her husband and Justice Scalia on the snow day in 1996." Her face lit up and she said, "I have heard Tony tell that story more times than I can count." And then she said her favorite image from that day was watching the two justices heading toward the car and Justice Kennedy having to carry Justice Scalia's briefcase because he couldn't keep it out of the snow. The image of that will stick with me forever.

Postscript number 3 came when Justice Souter retired. I wrote him a letter thanking him for his service on the Court and how much I appreciated the opportunity to argue before him over the years. His letter in response was pretty remarkable. I won't quote it all here, but he did explain what happened on January 8 when he showed up late. He turned down the Marshal's offer of a ride to the Court because he is from New Hampshire and so would have no problem getting to the Court in his front-wheel drive VW Golf. Sadly, he did not make it much more than a block before he got stuck in a snowdrift and had to go back and call the Court to send him a car. By the time he arrived at the Court, I already was arguing, although why the Chief didn't postpone the argument for ten minutes has always been a mystery to me. Once Justice Souter took the bench, apparently the Justices' primary focus was to send him notes commenting on the inability of the Justice from the North to get to work on time. So while I was arguing earnestly in favor of my railroad client, the Justices were acting like grade school students, passing notes to each other.

The final postscript occurred just the year before Justice Scalia passed away. He and I were seated together at the Supreme Court Historical Society's annual dinner. Again, I think that was largely fortuitous. And sometime during the dinner, the Justice told the snow story to others at the table and he did an excellent job of telling it. But when he was finished, I said: "Justice Scalia, that was well done and just as I remembered it with one notable oversight. You left out the part where you ordered the driver of the car to run all of the stoplights and stop signs on the way to the Court." He looked at me and responded: "I don't remember doing that." and he paused for a second and followed up, "But I have to admit that sounds an awful lot like something I would have done."

[\[i\] 516 U.S. 400 \(1996\).](#)