THE WEEK IN TORTS

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CASES FROM THE WEEK OF JULY 25, 2014

ERROR TO DENY DEFENDANT'S MOTION TO VACATE DEFAULT JUDGMENT, WHERE SUBSTITUTED SERVICE WAS EFFECTUATED ON DEFENDANT'S SISTER AT MIAMI CONDO, BUT DEFENDANT PROVIDED EVIDENCE THAT THE MIAMI CONDO WAS NOT HIS USUAL PLACE OF ABODE, AND HIS SISTER DID NOT RESIDE THERE

Stettner v. Richardson, 39 Fla. L. Weekly D1481 (Fla. 3rd DCA July 16, 2014):

The court found it was necessary to remand for an evidentiary hearing to resolve these disputed issues of fact. It was also error to deny the motion to set aside the sheriff's sale of the defendant's condo without a hearing, where there was a factual issue as to whether the defendant or his attorney had properly received notice of the sale to begin with.

TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT FOR DEFENDANT ON BASIS THAT DECEDENT IN TOBACCO CASE, WHOSE SMOKING-RELATED ILLNESS MANIFESTED ITSELF BEFORE HE MOVED TO FLORIDA WAS NOT A MEMBER OF THE *ENGLE* CLASS AND THAT THE WRONGFUL DEATH ACTION WAS BARRED BY THE STATUTE OF LIMITATIONS

Damianakis v. Phillip Morris, 39 Fla. L. Weekly D1496 (Fla. July 18, 2014):

In this very involved tobacco litigation quagmire, the court found that the fact the decedent's disease may have manifested itself before he moved to Florida, did not necessarily exclude him from the class as long as he was a citizen or resident of Florida as of the cut-off date, and his or her smoking-related illness manifested on or before that date. In that instance, the person may still take advantage of the one-year filing window. The court did certify conflict with the decisions in *Rearick v. R.J. Reynolds*, 68 So.3d 944 (Fla. 3rd DCA 2011) and *Bishop v. R.J. Reynolds*, 96 So.3d 464 (Fla. 5th DCA 2012).

PLAINTIFF IS NOT ENTITLED TO CERTIORARI REVIEW OF AN ORDER STAYING PENDING LITIGATION OF OTHER ACTIONS CONTAINING SIMILAR CLAIMS--THE TRIAL COURT'S ORDER WAS A *STAY* OF THE ACTION AND NOT AN ABATEMENT

Flaig v. Sullivan, 39 Fla. L. Weekly D1505 (Fla. 2nd DCA July 18, 2014):

Plaintiff filed a derivative lawsuit against the respondents. There were similar claims to those underlying the five counts in the derivative suit that were at issue in two other pending lawsuits. The parties in the three various lawsuits, although somewhat overlapping, were not identical however.

After a hearing on a number of motions in the suit, the court stated that the claims being brought by the plaintiff were duplicative of other pending litigation. It found that as long as the other cases were being prosecuted, abated this action.

The plaintiff pointed out that abatement pending resolution of other lawsuits is only proper **if the identities of the parties in the lawsuits are identical** (which they were not here).

An important difference between abating a suit and "staying" it is that the abatement **terminates** the action necessitating a refiling, whereas a stay merely **pauses** the proceedings in the stayed suit until the happening of a contingency.

Although the court said it views a stay order under its certiorari jurisdiction, it denied the petition in this case. It denied the petition because the order staying the proceeding properly provided that the directive suit could go forward if the issues raised were not decided in other litigation. Thus, any resulting delay or inconvenience to the parties would not suffice as the irreparable harm needed to permit the court to issue the writ.

Kind Regards

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