Clark Fountain welcomes referrals of personal injury, products liability, medical malpractice and other cases that require extensive time and resources. We handle cases throughout the state and across the country. Since 1997, Florida Bar Board Certified Appellate Attorney, Julie H. Littky-Rubin has prepared and disseminated The Week In Torts to fellow practitioners. Ms. Littky-Rubin handles trial support and appeals for attorneys throughout the state.

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CASES FROM THE WEEK OF AUGUST 22, 2014

ONCE INSURER CONFESSES JUDGMENT FOR POLICY LIMITS, TRIAL COURT LACKS JURISDICTION TO TAKE ANY ACTION OTHER THAN TO ENTER JUDGMENT IN THE AMOUNT OF THE UM POLICY LIMITS IN FAVOR OF THE INSURED - - TRIAL COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW BY ALLOWING INSURED TO AMEND COMPLAINT TO ADD COUNT FOR DECLARATORY JUDGMENT TO DETERMINE APPORTIONMENT OF LIABILITY AND TOTAL AMOUNT OF DAMAGES - - INSURED NOT PRECLUDED FROM LITIGATING DAMAGES ON ISSUE OF BAD FAITH CLAIM WHICH IS SEPARATE AND DISTINCT FROM THE JUDGMENT ENTERED, BASED ON THE INSURED’S CONTRACTUAL OBLIGATION UNDER THE POLICY.

Geico v. Barber, 39 Fla. L. Weekly D1727 (Fla. 5th DCA August 15, 2014):

Plaintiff sued Geico for UM benefits and filed a civil remedy notice. After learning that plaintiff underwent surgery, several years later, Geico finally served a policy limits proposal for settlement, which the insured did not accept. Geico then filed a Notice of Confession of Judgment and Motion for Entry of Confessed Judgment, stating that it confessed judgment in the amount of its $10,000 policy limits.

Before the trial court ruled on Geico's motion to enter judgment, the plaintiff filed a motion to amend his complaint to assert separate claims for UM benefits and bad faith. Plaintiff also filed a declaratory judgment count to determine liability and the total amount of damages he sustained in the accident.

The court granted Geico's motion to enter judgment, but also granted plaintiff's motion to amend the pleadings to add a count for declaratory relief finding that the plaintiff's request to add a bad faith claim was not ripe. As a result, the plaintiff filed a Second Amended Complaint seeking only a declaratory judgment to determine the apportionment of liability and the total amount of damages. Read more here.

SUA SPONTE ORDER REQUIRING FORMER COUNSEL TO ALLOW SUCCESSOR COUNSEL TO INSPECT AND COPY DOCUMENTS IN CLIENT FILE OVER WHICH FORMER COUNSEL HAD ASSERTED A RETAINING LIEN, AMOUNTED TO A DEPARTURE FROM THE ESSENTIAL REQUIREMENTS OF LAW

Heims v. GMS Marine Service Corp., 39 Fla. L. Weekly D1700 (Fla. 4th DCA August 13, 2014):

An attorney and his firm petitioned for certiorari review of a sua sponte order requiring them to allow successor counsel to inspect and copy documents in the firm's file. The lawyer and firm had asserted a retaining lien over the file, and refused to provide records until the client paid its bill.

The court agreed with the attorneys that requiring disclosure of their file would render the retaining lien meaningless. It also noted that this was not one of those rare cases which warranted disclosure of the attorney's file without payment of the attorney's fee or security. Read more here.

TRIAL COURT LACKED JURISDICTION TO HEAR PENDING MOTION FOR §57.105 FEES WHERE THE MOTION WAS FILED AFTER THE CASE HAD BEEN VOLUNTARILY DISMISSED

Pomeranz & Landsman Corp. v. Miami Marlins., 39 Fla. L. Weekly D1704 (Fla. 4th DCA August 13, 2014):

Generally a voluntary dismissal under Rule 1.420(a)(1) terminates a trial court's jurisdiction over a matter. A trial court has continuing jurisdiction to consider §57.105 motion for sanctions only where the motion for sanctions was filed with the court before the voluntary dismissal.

In this case, the respondent served its motion for sanctions after the 21-day safe harbor period, but did not file the motion with the court upon expiration of the 21-day safe harbor provision. Several months later, the case was voluntarily dismissed. Read more here.

TRIAL COURT ERRED IN DISMISSING WRONGFUL DEATH COMPLAINT UPON FINDING THAT COMPLAINT AGAINST TOBACCO COMPANIES COULD NOT BE AMENDED AFTER INITIAL PLAINTIFF DIED DURING PENDENCY OF ACTION - - WRONGFUL DEATH CLAIM IS NOT REQUIRED TO BE BROUGHT AS A NEW AND SEPARATE CAUSE OF ACTION WHEN THE PLAINTIFF DIES DURING PENDENCY OF A PERSONAL INJURY ACTION AND THE STATUTE OF LIMITATIONS DID NOT BAR THE ABILITY TO AMEND THE COMPLAINT TO ADD THE WRONGFUL DEATH COUNT BECAUSE THE AMENDMENT RELATED BACK

Roden v. R.J. Reynolds, 39 Fla. L. Weekly D1706 (Fla. 4th DCA August 13, 2014):

The case brings up the issue of whether a personal injury complaint can be amended upon the death of an injured party plaintiff, to add a wrongful death claim. Recently, the Supreme Court rejected the idea that personal injury claim is extinguished upon the death of the plaintiff. Thus, the court found that the wrongful death claim will relate back to the filing of the original complaint, and is not time-barred. Read more here.

FACT THAT TRIAL COURT ENTERED SUMMARY JUDGMENT FOR DEFENDANT POLICE OFFICER ON THE BASIS THAT SHE WAS ENTITLED TO QUALIFIED IMMUNITY DOES NOT NECESSARILY MEAN THAT THE PLAINTIFF'S CLAIMS LACK FACTUAL SUPPORT - - NO ABUSE OF DISCRETION IN DENYING THE MOTION FOR ATTORNEY'S FEES PURSUANT TO §57.105

Phillips v. Garcia, 39 Fla. L. Weekly D1712 (Fla. 3rd DCA August 13, 2014). Read more here.

THERE IS NO BRIGHT LINE RULE THAT A JUROR WHO HAS HAD PERSONAL EXPERIENCE RELATING TO THE CASE MUST NECESSARILY BE STRICKEN FOR CAUSE

Gonzalez v. State, 39 Fla. L. Weekly D1717 (Fla. 3rd DCA August 13, 2014):

In this criminal case for lewd and lascivious molestation of a child, one of the jurors stated in voir dire that she had been molested as a child, but had maintained throughout questioning that she could be fair and impartial. Read more here.

TRIAL COURT ERRED IN OVERRULING DEFENDANT'S OBJECTION TO STATE'S PEREMPTORY STRIKE OF AFRICAN-AMERICAN VENIREPERSON WITHOUT DETERMINING THE GENUINENESS OF THE STATE'S RACE-NEUTRAL REASON FOR THE STRIKE - - HOWEVER WHERE THE JURY WAS SWORN ONLY MINUTES AFTER THE INITIAL OBJECTION TO PEREMPTORY STRIKE, IT WAS NOT NECESSARY TO RENEW THE OBJECTION IN ORDER TO PRESERVE THE ISSUE FOR APPEAL

Smith v. State, 2014 WL 3953307 (1st DCA August 14, 2014):

It is always necessary when a party challenges a prospective juror who is in a protected class, that if the opposing party objects, the trial court must seek a race-neutral reason from the party making the strike, and then determine the genuineness of that reason.

This case is also helpful about answering the extent of what one needs to do to preserve an objection. Here the court found it was not necessary to renew the objection when the jury was sworn only minutes after the initial objection to the strike (generally, one must object before panel is sworn). Of course that does not give clear cut direct guidance in how long is too long to save an argument for preservation, but it does provide some authority in the event one finds him or herself in such a predicament on appeal. Read more here.

Best Regards,

Julie H. Littky-Rubin