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A Note to Our Subscribers – If you would like to receive our FYI letters and other firm bulletins via e-mail please send an e-mail request to paige@colanerifirm.com and we'll be happy to add you to the electronic distribution list.

WE ARE PLEASED TO ANNOUNCE THAT JANET COLANERI IS NOW LICENSED TO PRACTICE IN OKLAHOMA!

Batson Challenge – Moving Party and Jurors Need Not Be the Same Race. Kassem v. State. Defendant pleaded not guilty in municipal court to a charge of failure to obey a traffic control device. The jury subsequently found Defendant guilty and assessed his punishment at a \$200 fine. Defendant filed a motion for new trial and appealed to the County Criminal Court at Law, which affirmed his conviction. In the County Court, a pool of 14 jurors was summoned for jury selection. Of the 14 jurors, six were African-American. The State struck three of the six African-American jurors with its peremptory challenges. Defendant made a motion under *Batson v Kentucky* (476 U.S. 79) arguing that “the State used 100 percent [of its peremptory strikes] toward African-Americans that

comprise approximately a third or maybe 40 percent of the panel.” The court denied Defendant’s motion because “[the stricken jurors have] to be the same race as the defendant.” Defendant requested that “the State argue why *Batson* applies or not.” The State agreed to briefly state its reasons and offered racially neutral reasons for striking two of the three jurors, but it gave no explanation for the third juror struck by the State. The trial court refused to modify its ruling on Defendant’s *Batson* motion after the State articulated its reasons. Two African Americans served on the jury, and another African American, a corrections officer who indicated that he had a low opinion of defense attorneys, was struck by the defense. The Court of Appeals reversed and remanded, stating that using a peremptory challenge to strike a potential juror because of race violates the Equal Protection Clause, as well as Article 35.261 of the Texas Code of Criminal Procedure. Because *Batson* protects the juror’s right to be free from discrimination as well as the defendant’s, the defendant need not be the same race as the jurors who were struck. A defendant’s *Batson* challenge to a peremptory strike is a three-step process. The defendant must first make a *prima facie* case of racial discrimination, based on the totality of relevant facts about the prosecutor’s

conduct during the trial. If the defendant makes a *prima facie* case, the burden then shifts to the State to present a race-neutral reason for its challenged strike, a reason that is “a clear and reasonably specific explanation of [the] legitimate reasons” for exercising its strike. When the prosecutor responds with a race-neutral explanation, the defendant may rebut the State’s explanation. In the third step, the trial court must decide whether the defendant carried the burden to establish purposeful discrimination. A defendant is entitled to a new trial if even a single juror is wrongfully excluded from serving.

Evidence of Injured Driver’s Intoxication Was Improperly Excluded. *PPC*

Transportation v Metcalf. The Court of Appeals reversed & remanded this auto accident case for a new trial, finding that the trial court improperly excluded evidence that the driver of a truck that collided with a tractor-trailer (blocking the lane intended for oncoming traffic and injuring all three people in the truck) had consumed 10 beers before the accident.

Family Member Exclusion Prohibits Stacking of Liability and UM/UIM Coverage. *Charida v Allstate Indemnity Co.*

Plaintiff was severely injured while riding in a car owned and driven by her father (which was insured by Defendant Allstate) after her father failed to stop at a red light and collided with another car. After exhausting the available coverage under the liability provision of her father’s policy, Plaintiff sought to recover under the underinsured motorist provision of the policy and sued when Defendant denied coverage. Summary judgment was granted for Allstate based on the policy’s family member exclusion.

Insurer Entitled To Subrogation Rights In Settlement Funds. *Osborne v Jauregui, Inc.*

Defendant Jauregui was the architect and builder of a house purchased by the Osbornes. State Farm provided the Osbornes’ homeowners insurance policy. After mold was discovered in the house, State Farm paid \$1,874,687 in mold-related claims. Despite receiving those payments, the Osbornes sued Jauregui and numerous subcontractors. The Osbornes ultimately settled with the subcontractors before trial for more than \$1 million. After the jury found that the Osbornes had suffered \$835,000 in damages, the trial court applied a settlement credit in Jauregui’s favor and entered judgment that the Osbornes take nothing on their claims. The trial court declined to award attorneys’ fees to the Osbornes or to grant State Farm subrogation rights to the proceeds from the Osbornes’ settlement with the subcontractors. The Court of Appeals reversed the trial court’s finding and held that the trial court’s refusal to allow State Farm subrogation rights against the settlement proceeds was clearly allowed by policy terms.

Insufficient Evidence Supported Mental Anguish Damages. *Tramun v. Broadway.*

Defendant reported Plaintiff, a former general manager of his car dealership, to the District Attorney for alleged embezzlement in conjunction with mismanagement of the dealership. A grand jury returned a “no bill” when presented with a theft indictment. Plaintiff successfully sued for malicious prosecution and slander. Defendant appealed and the Court of Appeals reversed the \$500,000 award for mental anguish caused by Defendant’s malicious prosecution. Since Plaintiff did not see a psychiatrist or psychologist and refused antidepressants offered by his family doctor, he did not

provide sufficient evidence of the nature, duration, or severity of his mental anguish.

Failure To Grant A Continuance Was Not An Abuse Of Discretion. *Pandozy v Shamis*. Plaintiff sued Defendant realtor to recover a \$35,000 commission after the sale of a building that Plaintiff owner-financed resulted in foreclosure when the buyer stopped making payments. On appeal, Plaintiff complained of the summary judgment rendered in Defendant's favor and the trial court's denial of his motion for a continuance. The Court of Appeals affirmed the summary judgment, finding that Plaintiff failed to file a summary judgment response and also failed to present evidence raising a genuine issue of material fact on challenged elements of his causes of action. Also, since the grounds for Plaintiff's motion for continuance were the withdrawal of counsel, Plaintiff failed to show that his failure to be represented at trial was not due to his own fault or negligence.

DID YOU KNOW...ODD LAWS THAT ARE ACTUALLY ON THE BOOKS:

- In Alabama, it is illegal to wear a fake mustache that causes laughter in church.
- In Michigan, a man legally owns his wife's hair.
- In Kansas it is illegal to shoot rabbits from a motorboat.
- It is illegal to catch fish with your bare hands in Kansas.

- In Washington State it is against the law to sleep in an outhouse without the owner's permission.
- In Alabama it is illegal to play dominos on Sunday.
- In Texas it is illegal to put graffiti on someone else's cow (I guess that means you can mark up your own cow all you want!)
- In New York it is illegal to throw a bat someone's head for fun.
- In California it is a misdemeanor to shoot at any kind of game from a moving vehicle, unless the target is a whale.
- In Nogales, Arizona it is illegal to wear suspenders.
- In Atlanta, Georgia it is illegal to tie a giraffe to a telephone pole or street lamp.
- In North Carolina elephants may not be used to plow cotton fields (was this really a problem??)
- In Kentucky, anyone who has been drinking is "sober" until he or she "cannot hold onto the ground".
- In Illinois it is illegal for anyone to give lighted cigars to dogs, cats and other domesticated animals kept as pets.

SEE YOU NEXT MONTH!!!