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A Newsletter on Developments in the Law for Clients and Friends of Vernis & Bowling

IS ATTORNEY/CLIENT PRIVILEGED COMMUNICATIONS BETWEEN A CLAIMS REPRESENTATIVE AND THEIR COUNSEL DISCOVERABLE IN A FIRST-PARTY BAD FAITH ACTION?

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In Genovese v. Provident Life & Accident Insurance Company, the Florida Supreme Court addressed whether the communications between a claim representative and their attorney must be disclosed in a subsequent bad faith action brought by an insured. In this case, the Plaintiff brought a statutory first-party bad faith action against Provident, after Provident terminated the monthly payments under Genovese's disability income policy. During that litigation, Genovese's counsel requested Provident's entire litigation file, including all correspondence and communication between the attorneys representing Provident and Provident's agents regarding Genovese's claims for benefits. The trial court issued an order compelling production of these documents and that order was appealed to the Fourth District Court of Appeals, who quashed that order. The matter was brought up to the Florida Supreme Court for review.

The Florida Supreme Court first looked at their ruling in the matter of Allstate v. Ruiz, which concerned the application of the work product privilege to shield documents from discovery in insurance bad faith matters. The Florida Supreme Court concluded that "work product materials, which were defined as contained in the underlying claim in related litigation file material..." were discoverable in first party bad faith actions.

In this case however, the court was asked to decide whether the attorney/client privilege should be treated the same as the work-product privilege when it comes to a first party bad faith claim against an insurer. In their analysis, the court considered the reasoning for each of these privileges. The work product privilege is designed to keep private the investigation and thought process of an insurer in evaluating and making decisions on a particular claim. The attorney/client privilege, a completely distinct concept, has a purpose to encourage full and frank communication between the attorney and the client. The court reasoned that this significant goal of the privilege would be severely hampered if an insurer were aware that it's communication with it's attorney, which were not intended to be disclosed, could be revealed upon request by the insured at a later date. Consequently, the court ruled that when an insured brings a bad faith claim against its insurer, the insured may not discover those privileged communications that occurred between the insurer and its counsel during the underlying action. If you would like more information concerning this article, please contact G. Jeffrey Vernis at GJVernis@national-law.com or at 561-775-9822.

YOU'VE GOT A POLICE REPORT: IS IT PRIVILEGED?

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If I had a dollar for every time a Plaintiff's attorney told me; "the police report or information in it is not admissible", I'd have a lot of dollars. If I had a dollar for every time the Plaintiff's attorney was correct in their generic statement, I'd have a lot fewer dollars. It is true that Florida law provides certain limitations to the use of accident reports or the information contained in them, in any trial, civil or criminal, arising out of the accident. However, the language of the statute is fairly specific and no case interpreting the statute has declared that the accident reports are inadmissible or privileged across the board. Florida Statute §316.006(4)(2011), formerly §316.006(5), §316.066(7) and Fla. Stat. §317.17, in its most current form, provides in part:

* * *

(4) Except as specified in this subsection, each crash report made by a person involved in a crash and any statement made by such person to a law enforcement officer, for the purpose of completing a crash report required by this section, shall be without prejudice to the individual so reporting. Such report or statement may not be used as evidence in a trial, civil or criminal. . . .

The balance of this subsection incorporates modifications following the Florida Supreme Court decision in Brackin v. Boles, 452 So.2d 540 (Fla. 1984). In Brackin, supra, the Court was faced with the question of admissibility for the blood alcohol test of an at fault driver in a subsequent civil trial. Both the trial court and appellate court found that evidence of the blood alcohol level of the defendant/driver, was not admissible pursuant to Fla. Stat. §316.066 (1981), and two

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older case decisions, State v. Mitchell, 245 So.2d 618 (Fla. 1971), and State v. Coffey, 212 So.2d 632 (Fla. 1968).

The Florida Supreme Court in Brackin, carefully analyzed the language of the statute and though dealing with a blood test as opposed to a communication by a witness, the court declared that:

The tangible evidence of the accident, i.e., location of the accident, vehicles locations, skid marks, damage to vehicles, all observed by the investigating officer, are not confidential and may be admitted into evidence by the investigating police officer. Brackin at 544.

The Court also declared a blood test is not a communication from a person involved in an accident. Brackin at 544. The Florida Supreme Court further reasoned:

There is no justification or logical reason for holding as privileged, the results of a blood alcohol test directed by an investigating officer who prepared an accident report. The statute only prohibits the use of communications 'made by persons involved in accidents' in order to avoid a Fifth Amendment violation…

We clearly and emphatically hold that the purpose of the statute is to clothe with statutory immunity only such statements and communications as the driver, owner or occupant of a vehicle is compelled to make in order to comply with his or her statutory duty under section 316.066(1) and (2). Brackin at 544.

The Court held that the blood alcohol test would be admissible. Thus, subsequent codifications of §316.066, added the following language to subsection (4) cited above:

However, subject to the applicable Rules of Evidence, a law enforcement officer at a criminal trial may testify as to any statement made to the officer by the person involved in the crash, if that persons privilege against self-incrimination is not violated. The results of breath, urine and blood tests administered as provided in §316.1932 or §316.1933, are not confidential and are admissible into evidence in accordance with the provisions of §316.1934(2).

Therefore, the statute presently provides that objective testing conducted in the course of an investigation and directed by the officer, is admissible and is not privileged under §316.066. But, the logic and reasoning of the Florida Supreme Court in Brackin v. Boles, should not have been surprising. This interpretation of the privilege, pursuant to the statutory language, had long been followed by the Florida courts. Going back to Lobree v. Caporossi, 139 So.2d 510, (2d DCA 1962), the Second DCA, when evaluating the predecessor statute §317.17, stated:

It is not the written report or testimony of the officer which is privileged as such. The privilege attaches to that part of the officers report or testimony which was obtained by him from a person who was required to make a report. (Emphasis added). Lobree at 512-513.

The Florida Supreme Court held as much in Brackin when stating the purpose of the statute was to 'clothe with statutory immunity only such statements and communications as the driver, owner, or occupant of the vehicle is compelled to make'. The same logic was applied by the 4th DCA just months before the Brackin decision. In McTevia v. Schrag, 446 So.2d 1183 (4th DCA 1984), the court stated:

. . . We learn that certain persons, the driver or the owner or an occupant, if the driver is incapacitated, are required to make a report if their vehicle is involved in an accident, resulting in bodily injury or death or severe property damage. Such a report or statement made to an investigating officer, forming the basis of his report, are privileged and cannot be used in subsequent litigation arising out of the accident except for purposes not relevant here. **This privilege enures only to those required to make the report. . . . It does not apply to statements of other witnesses or persons who may volunteer information to the investigating officer**. (Emphasis added). (Citations omitted). McTevia at 1184-1185.

So, when looking to the admissibility of an accident report or any information contained in the accident report, the most important question to answer is whether the information sought is **from a person who is obligated by statute to make the report**. If they are not obligated to make the report, the privilege does not attach. This means that information from eyewitnesses not involved in the accident, pedestrian eye witnesses or passengers in the accident vehicle who are not the owner or operator of the vehicle involved is most likely admissible. [Keep in mind that the officer must still be determined by the court to be an expert so he can testify regarding any hearsay or inadmissible information that he is relying upon, but that evaluation is not part of this discussion.]

The next important issue to evaluate when determining the admissibility of the report involves the type of evidence you are trying to admit. If it is tangible evidence that can be gathered by the investigating officer through his own observation or testing, i.e. blood, urine, or breath tests, measurements, skid marks, locations of vehicles, etc., the information is not protected by the accident report privilege. See, Brackin supra.

Lastly, the Third DCA has carved out another exception to the accident report privilege which provides that an officer conducting an investigation into an accident who has administered Miranda warnings to a driver involved in an accident, may testify about statements from the driver despite the accident report privilege, if the individual waives his Miranda rights. Following the Florida Supreme Court declarations on the issue, the 3d DCA in Alexander v. Penske Logistics, Inc., 867 So.2d 418 (3d DCA 2003), reh'g den. (2004), declared:

"No accident report privilege attached to the statements made by the truck driver to Trooper Tierney. . . . To clarify our decision, we emphasize that the privilege granted under Section §316.066, is applicable if no Miranda warnings are given. Further, if a law enforcement officer gives any indication to a defendant that he or she must respond to questions concerning the investigation of an accident, there must be an express statement by the law enforcement official to the defendant that "this is now a criminal investigation" followed immediately by Miranda warnings before any statement by the defendant may be admitted. Alexander at 420-421.

So, the next time Plaintiff's counsel tells you 'that doesn't come in – it's the accident report privilege', bet him a dollar.

If you would like more information concerning this article, please contact Eric Knuth at EKnuth@ national-law.com or at 305-895-3035.

NEW RULES FOR FLORIDA MEDIATIONS

On November 3, 2011, the Florida Supreme Court adopted some new, more stringent rules for Florida mediations. Effective January 1, 2012, absent an agreement or waiver of the parties, these new rules apply to all Florida mediations. The new rules require the attendance at mediation by the parties, the party's attorney, and if insurance is involved, a representative from that party's insurance carrier with full authority to settle, must also be present.

In addition, the new rules require, that unless there is an agreement between the parties to waive this requirement, each party must file, ten (10) days prior to the date of mediation, a notice identifying the person or persons who will be attending the mediation conference as a party representative or as the insurance carrier representative, and confirming that those persons have the full authority to settle the matter without further consultation with any other person. "Full authority" is defined as the authority to settle in at least the amount of the Plaintiff's last demand. Again, this only means authority and the rules specifically state that there is no requirement by any party or their representatives to make any offer, or enter into any settlement agreement. They just must present at the mediation with authority to enter into an agreement, but there is no mandate or requirement that any agreement be achieved.

The new rules for mediation, effective January 1, 2012, adds the requirement that each party file a notice identifying the person who will be attending the mediation conference, requires that all parties attend the mediation, including insureds, and if insurance is involved, requires that the representative attending the mediation must have "authority to settle" in at least the amount of the Plaintiff's last demand, but again, makes no mandate that requires any party to enter into a settlement agreement. These requirements may be waived by agreement of the parties. Failure to comply with these requirements may result in sanctions, including awarding the cost of mediation and attorney's fees against the party who violated the requirements of this rule.

If you have any questions pertaining to these new rules, please contact me at 561-775-9822 or gjvernis@florida-law.com.

ANNOUNCEMENTS:

We are pleased to announce that Robert C Bowling was selected to be among South Florida Business Journal's Leading Lawyers. This is a significant honor the South Florida Business Journal's recognition signals the firm's constant effort to deliver excellent device to its clients. In addition, American Registry seconded the honor and added Robert C. Bowling to the ARegistry of Business Excellence@. American Registry recognizes excellence in top businesses and professionals.

Karen Nissen was a guest speaker at the Florida Department of Children & Families Dependency Summit Conference. It is a conference for all persons involved with child abuse investigations in the State of Florida. DCF selected Ms. Nissen as the defense attorney in the State to be on a panel.

We are pleased to announce that John F. (Jack) Janecky (Mobile, AL/Southern Alabama) has been appointed to serve as Alabama State Liaison to the Workers' Compensation Section of DRI.

Congratulations to **John F. (Jack) Janecky (Mobile, AL/Southern Alabama)** for being selected for inclusion on the 2012 edition of The Best Lawyers in America in the practice of Workers' Compensation Law - Employers.

Congratulations to **John W. Hamilton (Clearwater, FL)** who celebrates 50 years of practicing law in 2012.

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VERDICTS & DISPOSITIONS

Eric J. Knuth (Miami) recently obtained 2 summary judgments in 2 different counties using the sexual molestation and intentional act exclusions contained within the insured's homeowners policy of insurance. In Declaratory Judgment Actions entitled St. Johns Insurance Co. v. Gloria Verdeja et al. , case #10-07961 CA 32, pending in Miami-Dade County, and St. Johns Ins. Co. v. James T. Byrne, et.al., case # 562010CA003624, pending in St. Lucie County, Eric argued there was no duty to defend or indemnify the insured's in the underlying actions filed against them because application of the intentional act and sexual molestation exclusions precluded coverage under their policies. In both cases, the wife of the perpetrator was claiming that she was an "innocent" spouse. However, the allegations in each underlying complaint claimed at least some knowledge on the part of the spouse to the perpetrator's actions. Thus, it was argued that there could be no "negligent" act on the part of the innocent spouse. Rather, the "innocent" spouse's inaction **was actually an intentional act**.

Most importantly, it was argued that the sexual molestation exclusion was not limited by the intent of the act. Regardless of whether the allegations in the underlying complaint were phrased as intentional or negligent acts by the insured's, the plain language of the policy excluded **any claim** related to sexual molestation, abuse or corporal punishment. As a reminder to keep watching case decisions even after your motions are filed, note that Eric submitted supplemental briefs alerting the courts to the decision of the 4th DCA in Valero v. Florida Insurance Guaranty Association, So.3d, 2011 WL 710143 (Fla. App. 4 Dist., 3/2/11) which was almost directly on point. In Valero, the sexual molestation exclusion language was nearly identical to the language in the St. John's policies. The court found the policy language for molestation exclusions was unambiguous. Though **BOTH** motions were filed before the 4th DCA handed down its decision in the Miami-Dade and St. Lucie courts found Valero persuasive and agreed that the sexual molestation exclusion in the St. Johns policy was clear, unambiguous and summary judgment was proper.

Terry D. Dixon (Deland) obtained a defense verdict in the case of Neidl v. Panda Express, Inc. A jury found Panda Express, Inc., was not to blame for a woman's fall that she claimed was caused by noodles on the floor.

Elaine Neidl claimed the fall resulted in a fracture of the 5th metatarsal and caused a lumbar disc herniation for which surgery was recommended. Plaintiff counsel contended that Panda Express, Inc.'s maintenance program was insufficient because the staff failed to timely inspect the premises. Ms. Neidl claimed that the noodles had been on the floor for at least 30 minutes.

Defense counsel argued that Panda Express, Inc., had a maintenance program wherein the property was inspected every 30 minutes. Defense counsel was able to locate an independent witness who testified that while there was food on the floor where the Plaintiff fell, she testified that the remainder of the store was immaculate. Based on the testimony of the independent witness and the presentation of testimony showing Panda Express, Inc. required its employees to conduct inspections every 30 minutes the jury returned a defense verdict.

Patrick D. Hinchey (DeLand) Rose Healthcare (a/a/o Pandya) v. Infinity Insurance; Florida 5th District Case No. 5D11-727. Successful opposition of Plaintiff/Petitioner's Petition for Writ of Certiorari. This contentious PIP matter was litigated over the course of several years at the trial level prior to the entry of summary judgment for Infinity Insurance in Orange County Court due to Plaintiff's failure to comply with statutory requirements for billing under section 627.736(5)(d), Florida Statutes, thus failing to provide notice of a covered loss. The Plaintiff then appealed the summary judgment, arguing waiver and estoppel as to Infinity's applicable affirmative defenses. The Ninth Circuit Court sitting in its appellate capacity affirmed the trial court's summary judgment. See Rose Healthcare (a/a/o Pandya) v. Infinity Insurance,16 Fla. L. Weekly Supp. 666a (Fla. 9th Cir. Ct. (Appellate) May 8, 2009). Plaintiff/Appellant thereafter filed a Petition for Writ of Certiorari, which was ultimately denied by the Fifth District Court. Prior to the Circuit Court's affirmance of the summary judgment, Plaintiff offered to settle this case for a global amount of $500,000.00; however, upon the District Court's denial of the Petition for Writ of Certiorari, Plaintiff received nothing.

Carl Bober, Esq. and Steven J. Getman, Esq. (Ft. Lauderdale/Hollywood, FL) for the Defendant in the case styled Bruce Manchester v. Citizens Property Insurance Corporation, Case No. 09-60313 13, 17th Circuit Court, Broward County Florida. The Plaintiff claimed that his home had sustained over $100,000.00 in property damage as a result of Hurricane Wilma. At the onset of litigation one of Citizens's principle defense to the claim was that, per the conditions of the policy, the claim was barred because the Plaintiff did "not promptly" report the loss. The Plaintiff contended that he did not know that he could report a claim for hurricane damage without there being portions of the roof missing, so he made repairs to the interior and to the roof on his own. However, he maintained no photographs depicting the condition of the roof or interior in the wake of Hurricane Wilma and prior to making repairs. The claim was not reported to Citizens until December 22, 2008. By the time Citizens inspected the property many of the damages had been repaired and therefore the claim was denied on the basis (inter alia) that the Plaintiff had failed to comply with the "prompt notice" of the loss condition in the policy and the resulting prejudice imparted upon Citizens. During deposition, Plaintiff testified that it was not until several years later, upon meeting his public adjuster, that he was made aware that he could file a claim. These issues were presented to the Court via Citizens's motion for summary judgment. Shortly after the filing of the motion for summary judgment, Plaintiff's counsel contacted counsel for Citizens and advised they would be inclined to accept a nominal proposal for settlement. A proposal for settlement in the amount of $1,000.00 was served upon the Plaintiff, who later accepted the same.

Kenneth E. Amos, Jr. (Clearwater) in the case styled Johnson v. LJ Diner & Lounge, Inc. Plaintiff brought suit against a diner and lounge for injuries resulting from an attack on a patron by a fellow patron. Plaintiff was in the parking lot attempting to obtain a license plate number from a woman who one minute earlier had assaulted another patron in the lounge while the victim was singing karaoke. While in the defendant's parking lot, Plaintiff was subsequently attacked by the woman's boyfriend with one punch that rendered the plaintiff unconscious, causing him to fall face first into the asphalt where it was believed he sustained his injuries. The plaintiff suffered a broken neck, fractured skull, fractured occipital, and severe lacerations to the head and face requiring 17 staples in his head. The defendant denied any co-extensive duty to the plaintiff to provide security to defendant's patrons because there was no Azone of risk@ created by the defendant's conduct of holding karaoke night three nights a week. There was no evidence of constructive or actual notice of prior violent conduct on the defendant's premises with the assailant or third parties. We successfully excluded all prior police reports, the plaintiff's economist and the plaintiff's liability expert from testifying at trial. At trial, plaintiff argued that the co-extensive duty was assumed when the lounge owner voluntarily provided bouncers to patrol the lounge during the evening of the karaoke. The duty issue was a question of law for the judge to decide at the end of the plaintiff's presentation of his case. After calling eight witnesses the plaintiff was ready to call his liability expert who had never been disqualified, and had testified in 28 states with almost 40 years of experience as a "security" expert. We argued that the expert was "over qualified" to submit an opinion in this case; therefore, he was unqualified as an expert with our set of facts. The expert was experienced in civil rights excessive force cases involving police officers and trained security guards such as Wackenhut or Wells Fargo. The judge agreed that he was unqualified and his discovery deposition opinions were "overreaching" and "inconsistent with the facts of this case." In the judge's ruling, disqualifying the liability expert, he hinted that plaintiff had yet to establish evidence of a duty. However, the judge fell short of issuing a directed verdict in favor of the defendant because plaintiff had four witnesses remaining to testify at trial. It was remotely possible that evidence may have been introduced as to actual or constructive notice of prior violent conduct on the premises, yet any evidence adduced would have been contrary to the discovery prior to trial. The plaintiff was seeking more than $500,000.00 in damages and settled on day four of the trial (without calling his remaining witnesses) in the amount of $40,000.00, which was less than the costs the plaintiff's attorney had in the file.

Carl Bober and Joshua Bruce (Ft. Lauderdale/Hollywood, FL) obtained a defense verdict following a nine day jury trial that took place in West Palm Beach, Florida, in the case of Christopher Coverdale v. Kenneth Vedernjak and Stephanie Vedernjak. Plaintiff sought damages at trial in excess of $15,000,000.00, claiming that he required a kidney transplant along with renal dialysis in the interim, in addition to an open reduction and internal fixation surgery caused by a comminuted fracture to his femur, as the result of a fall which occurred at our clients' home.

Plaintiff was a 49 year old residential property appraiser who was conducting a property inspection at the home of our clients, and fell in the area of a two step-down change in elevation from the living room of the home to a converted carport. Plaintiff initially suffered a comminuted fracture of his femur at the time of his fall, and was hospitalized for 10 days during which he had open reduction and internal fixation surgery to his leg. Additionally, he further claimed that his kidney, which had been previously transplanted fifteen years earlier but had been functioning well until the time of the incident, sustained an acute tubular necrosis injury which three months after his fall resulted in total kidney failure necessitating both dialysis as well as the need for a new kidney transplant. Plaintiff claimed that the area of his fall was very dark at the time of his appraisal inspection, and that our clients were negligent because the two-step down change in elevation violated the Standard Building Code due to uneven height in the risers and because the converted carport was improperly being used for habitable purposes. He also asserted that the Defendant homeowners were aware of the dark and dangerous condition at their home, but failed to correct the condition or warn the Plaintiff of its existence.

Plaintiff testified at trial that due to the very dark conditions he did not see nor expect the presence of the two step-down change in elevation. With respect to his injuries, Plaintiff presented the testimony of two nephrologists (including the University of Miami Renal Transplant Center Medical Director), both of whom related his kidney failure and present requirement for dialysis combined with the need for a kidney transplant, to the fall he sustained. Plaintiff's expert economist Bernard Pettingill testified that, based upon the plan prepared by Plaintiff's medical case manager expert Lawrence Forman, that the cost of plaintiff's medical care and treatment for the remainder of his life in the event he did not receive a transplant would exceed $4,950,000.00. In his closing argument, Plaintiff's counsel sought the award of this amount and then additionally asked the jury to further award up to "double or triple" that amount for the Plaintiff's pain and suffering.

For the defense, it was argued that the Plaintiff, who was an experienced residential property appraiser, could have easily avoided the incident if he had merely turned on the lights in the home or asked that they be turned on. Plaintiff himself admitted that the steps would have been easy to see if the lights were on. The defense further argued that any claimed Code violations did not cause or contribute to the Plaintiff's fall since by his own statement he never stepped down on to the second step where the incident occurred. Moreover, expert testimony was also presented on these issues by defendant's expert engineer (who testified that he found no Code violations at the property) and defendant's expert residential appraiser, who testified that it was the Plaintiff's duty as a certified appraiser to insure that there was adequate lighting to properly perform his inspection. Finally, the defense then presented the testimony of a leading expert nephrologist, Dr. Terry Strom (co-director of the Harvard University Medical School Transplant Center), who testified that the Plaintiff's kidney failure with dialysis and need for a transplant were not the result of his fall, but were instead due to an unrelated reduction in the dosage of his anti-rejection medication.

The jury deliberated just over 25 minutes before deciding that there was no negligence on the part of the Defendants. Plantiff's Motion for New Trial was denied, and after the Court found our clients were entitled to the recovery of their attorney's fees and costs, Plaintiff dismissed his appeal.

Carl Bober (Ft. Lauderdale/Hollywood, FL) obtained a defense verdict and prevailed on counterclaims for fraudulent misrepresentation and fraudulent inducement related to a total fire loss to the Plaintiff's home resulting in breach of contract action against her homeowner's insurer in a jury trial that took place in Fort Lauderdale, Florida, in the case of Lisa Lentz v. Citizens Property Insurance Corporation.

The case involved a total fire loss to the Plaintiff's home located in

Coconut Creek, Florida. Plaintiff brought a breach of contract action against her insurer, Citizens Property Insurance Corporation, alleging that it had failed to pay for losses that were covered under her homeowner's policy of insurance. Citizens denied these allegations, and asserted in its defense as well as in a counterclaim that the Plaintiff, who at the time was a licensed insurance agent, had made fraudulent misrepresentations in her application for homeowner's insurance. Specifically, Plaintiff had contended that, acting as her own insurance agent, she had applied for and bound herself a policy of insurance with Citizens one week prior to the fire occurring at her home. For the defense, although a policy of insurance had in fact initially been issued by Citizens to the Plaintiff and some additional living expenses benefits paid to her, Citizens subsequent claims investigation revealed that the Plaintiff had in fact electronically submitted her application for homeowner's insurance while her home was literally on fire. At trial, Plaintiff denied the allegations of fraudulent misrepresentation and sought the full recovery of her insurance policy limits for the costs to repair her home as well as its contents, along with attorney's fees, costs and prejudgment interest. Citizens in its counterclaim sought the recovery of its prior payments to the Plaintiff, along with its attorney's fees, costs and other damages.

Plaintiff sought the award of the policy limits for her dwelling, contents, and additional living expense coverage. The jury found that the Plaintiff made a fraudulent misrepresentation in her application for insurance to Citizens, and the court entered a Final Judgment in favor of Citizens and against the Plaintiff in excess of $174,000.00.

After a two-day bench trial, the Twentieth Judicial Circuit in and for Lee County, Florida, McHugh, J., entered a final judgment in favor of Evanston Park Condominium Association, Inc., a condominium association, on August 2, 2011. The Association was successfully represented by Patrick H. Gonyea, Esq., department head of the Labor and Employment and Director and Officer Liability Divisions of Vernis & Bowling of Miami, P.A. The case involved a dispute between the Association and a unit owner. Plaintiff/unit owner claimed the Association violated the provisions of the Florida Condominium Act, Chapter 718, Fla. Stat., and the Association's original governing documents by improperly amending the original Declaration of Condominium to: (1) authorize the Board of Directors to alter common elements without membership approval so long as the total cost of any proposed alteration was less than or equal to $15,000; and (2) by closing down the community's swimming pool, a common element, without procuring 100% membership approval. Plaintiff also alleged that the Association violated the provisions of Chapter 718 by failing to allow Plaintiff to inspect the Association's official records (financial information) despite Plaintiff's alleged proper request therefor. In 2000, the Association proposed to amend its original Declaration to allow the Board to effect material alterations to the common elements without membership authorization but only if the proposed alteration cost less than $15,000. The amendment was approved by the membership. Plaintiff did not object to the amendment. In 2009, and as a result of its poor financial performance due to unit owners' failure to meet their required monthly obligations, the Association was unable to maintain/repair the community's swimming pool. Thus, the Board voted to close the amenity. Among other things, Plaintiff argued that the actions taken by the Association were in contravention of Florida law and the Association's governing documents in that alterations to common elements require 100% membership approval and that the Plaintiff should reasonably be entitled to the common elements and amenities that existed when he took title to his unit. The Judge found, among other things, that the Association did not violate any of the provisions of Chapter 718 or the provisions contained in the original or the Amended Declaration because the amendment at issue was procedural in nature and did not materially affect Plaintiff's vested rights in the common element at issue, as the common element, although no longer a swimming pool, still exists. The Court denied Plaintiff's request for injunctive relief seeking to compel the Association to restore the swimming pool and declared valid, as a matter of law, the provision in the Amended Declaration authorizing the Board to act, in certain instances, without membership approval. The Court also found that the Association did not deny Plaintiff access to the official records, and, therefore, also did not violate the applicable provisions of Chapter 718. The final judgment denied Plaintiff's request for relief on all three counts set forth in the Amended Complaint. Moreover, the Court declared the Association the prevailing party for purposes of recovering its attorneys' fees and costs pursuant to the Amended Declaration and Section 718.303, Fla. Stat. In accordance with Rule 1.525, Fla.R.Civ.P., the Association filed its motion for attorneys' fees and costs and is currently awaiting a hearing thereon. The matter was filed under the style Paul Albertson v. Evanston Park Condominium Association, Inc., Case No. 09-CA-005415.

Jose Pete Font, Esq. and Steve Getman, Esq. (Ft. Lauderdale/Hollywood, FL) for the Defendant in the case styled Shawn Lovins v. Citizens Property Insurance Corporation, Case No. 10-4005 12, 17th Circuit Court, Broward County Florida. The Plaintiff claimed that his home had sustained nearly $100,000.00 in property damage due to a leaking roof. At the onset of litigation one of Citizens' principle defenses to the claim was that per the conditions of the policy the claim was barred because the Plaintiff did "not promptly" report the loss. The Plaintiff contended that he had provided prompt notice to his insurance agent and therefore he complied with the policy since it permitted notice to "our agent." This issue was presented to the Court via Citizens's motion for summary judgment. Additional issues set forth in the motion for summary judgment were that the Plaintiff had failed to exercise reasonable means to protect his property after the loss as required by the conditions of the policy and that the loss fell under a policy exclusion since it was the consequence of long term water seepage and leakage occurring over the course of weeks and months. At the hearing, it was argued that the Plaintiff failed to establish that the agent to whom the claim was reported was Citizens' agent and therefore as a matter of law Citizens was entitled to summary judgment on the issue of late notice. Furthermore, it was contended that the testimony of the Plaintiff did not allow any reasonable juror to conclude that the Plaintiff had taken reasonable steps to mitigate his damages or that the damages sought were not the result of long terms water seepage. The Court agreed with Citizens' position and granted final summary judgment. At the time the summary judgment was granted Citizens had an outstanding proposal for settlement and admissions which created entitlement to attorney's fees and costs.

Jose Pete Font, Esq. and Steven Getman, Esq. (Fort Lauderdale/Hollywood, FL) for the Defendant in the case styled Paul and Sely Siguenza v. Citizens Property Insurance Corporation, Case No. 09-53410 CA 21, 11th Circuit Court, Dade County Florida. In this case the Plaintiffs claimed approximately $90,000.00 in damage to their home due to Hurricane Wilma related wind and water damage. The claim was not reported to Citizens until January of 2009. By the time Citizens inspected the property many of the damages had been repaired and therefore the claim was denied on the basis (inter alia) that the Plaintiffs had failed to comply with the "prompt notice" of the loss condition in the policy. For their part, and

in the form of deposition testimony and affidavit, the Plaintiffs claimed that they had complied with the policy condition since they reported the loss on multiple occasions to their agent shortly after the loss and the agent never complied with the promises that he was going to call them back to process the claim. As far as complying with notice requirement via an agent, Citizens policy read that you can give notice to "your producer, who is to give immediate notice to us." At the hearing it was argued on Citizens' part that the notice requirement via an agent was a two part conjunctive requirement and that even if the Court believed that the Plaintiffs did give notice to the agent, Citizens was entitled to final summary judgment since there was no evidence that the agent had given notice to Citizens. Moreover, absent a showing of an agency relationship between Citizens and the agent, the knowledge of the agent could not be imputed upon Citizens. The Court agreed with Citizens' position and granted final summary judgment in Citizens' favor. Further, the Court granted final summary judgment in Citizens favor on the basis that the Plaintiff did not comply with policy condition requiring them to maintain receipts/invoices for the repairs that were said to have been performed after the hurricane.

Jose Pete Font, Esq. and Mike Odrobina, Esq. (Ft. Lauderdale/Hollywood, FL) in the case styled Wide Open MRI v. National Specialty Insurance Co., Case No. 10-4005 12, 17th Circuit Court, Broward County Florida. Pursuant to an assignment of benefits the MRI provider claimed that they were entitled to PIP benefits for an MRI that it performed on the Defendant's omnibus insured. At the onset of litigation the principle issue was whether the claimant was properly deemed an omnibus insured since a background search revealed that there were registered motor vehicles in his household. After the deposition of the omnibus insured, however, it was determined that coverage was appropriate because the listed vehicles belong to nonresident relatives that resided in the home that was illegally divided into a duplex. That said, during the same deposition it was established that the insured could not provide basic information regarding his injuries, course of care and persons he treated with. Therefore, the Defendant pursued the defenses that the treatment was not reasonable, necessary and related and that the insured had concealed and misrepresented material facts and circumstances surrounding the loss. After a five day jury trial on the issues, a verdict in National Specialty's favor was obtained. This verdict followed two summary judgments obtained in National Specialty's favor in companion cases styled as: Physicians Pain (a/a/o Charles Dor) v. National Speciality Insurance Co. and Pain Management (a/a/o Charles Dor) v. National Speciality Insurance Co. The issues in these case that allowed for summary judgment were that the medical providers were not entitled to PIP benefits since they did not "lawfully render" the treatment. The specific provision that the court found they violated was Fla. Stat. § 456.053, which is known as the patient self referral act.

Jose Font, Esq. and Frantz Nelson, Esq. for the Plaintiff PIP insurer. This case was resolved via a confidential settlement agreement and therefore the name of the parties cannot be disclosed. The facts of the litigation were that the insurer claimed that the medical care provider engaged in a systemic scheme to defraud them of PIP benefits over the course of three years. More specifically, some examples of the fraud were as follows: to induce treatment and referrals from attorneys, the provider offered permanent impairment ratings that had no factual basis; to maximize PIP benefits and in violation of Fla. Stat. § 817.505 (kickback statute), the provider billed approximately $2,000 for diagnostic testing that was provided by another provider at cost of $135; to operate a second clinic the provider used unlicensed and untrained individuals to act as the clinic's medical director and treating doctor; a form course of care was provided to every patient irrespective of the patient's condition and symptomatology; permanent impairments reports, initial physician evaluations and other medical records were prepared by unlicensed individuals; and treatment was systemically billed for which was not in fact provided. After considering record evidence the Court declared that the provider was a "charlatan" and granted the insurer's motion for leave to amend to assert punitive damages. Thereafter, the provider sought mediation and the case was settled. The terms of the settlement were that for a period of twenty-five years the provider was required to provide treatment to the insurer's insureds at no cost to the insurer or its insureds. Furthermore, the provider agreed to pay $100,000.00. As part of the settlement agreement and to avoid a bankruptcy discharge of the liability, it was specifically stated that the settlement was pursuant to the insurer's claim for fraud and therefore could not be discharged pursuant to 11 U.S.C. § 532(a)(2)(A).

Jose Pete Font, Esq. (Ft. Lauderdale/Hollywood, FL) for the Defendant in the case styled Patricia and Adolfo Camargo v. Citizens Property Insurance Corporation, Case No. 10-23828 CA 03, 17th Circuit Court, Dade County Florida. The Plaintiffs filed suit seeking declaratory relief and an order compelling appraisal in relation to damage that their home sustained as a result of broken water supply line underneath their kitchen sink. In support of the claim the Plaintiffs submitted invoices from various vendors. One of the vendors was scheduled for deposition and the Plaintiffs counsel contacted defense counsel on the eve of the deposition to advise that they needed to reschedule the deposition due to a scheduling conflict. At this point the vendor was advised of the cancellation and was asked to submit to a voluntary sworn statement. The vendor agreed and during the course of the sworn statement it was conceded that the invoices were fraudulent. Thereafter counsel for the Plaintiffs were provided a copy of the sworn statement and then she decided to withdrew from the case. In light of the evidence against them, shortly after counsel's withdrawal the Plaintiffs agreed to submit to a joint voluntary dismissal with prejudice.

G. Jeffrey Vernis (N. Palm Beach), tried the matter of Hazel Pagan v. Brian Buckelew in Martin County, Florida. This action involved an automobile accident, where the Plaintiff's vehicle was struck from the rear, causing it to spin. The Plaintiff was taken by air ambulance to the hospital where she remained for four days until she was transferred to a rehabilitation center where she remained for two weeks to regain strength in her legs and to learn to walk again. Plaintiff subsequently underwent a percutaneous discectomy at L4-L5 and L5-S1, as well as a meniscectomy of her right knee and subsequently a complete ACL reconstruction of her right knee. The total amount of the medical expenses were $219,000.00. The defendant, Mr. Buckelew, contended that he was struck by a phantom vehicle, causing him to exit his lane of travel, resulting in the contact with the rear of the Plaintiff's vehicle. The Plaintiff retained an accident reconstruction expert to seek to discredit the existence of a phantom vehicle, who prepared simulations for use at trial. The case was given to the jury on October 28th and after an approximately 45 minute deliberation, the jury returned a verdict for the defense. The defendant has filed his motion to tax attorney's fees, pursuant to the previously filed proposal for settlement and costs.

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