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NEWSLETTER

The Advantages of Alternative Dispute Resolution in the Litigation Process

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***Excerpt from the AM Best April 2024 "Best Insurance Law Podcast"**

Greg is a trial and appellate attorney, and his practice areas include tort litigation, insurance law, coverage issues, first-party claims, construction defect, professional liability, premises liability, trucking liability, and appellate practice.

Greg also has extensive experience utilizing methods of alternative dispute resolution and has been approved by the North Carolina Dispute Resolution Commission as a certified Superior Court mediator. Greg has counseled clients including pre-litigation consultation and claim evaluation and has tried over 200 cases to verdict in the District and Superior Courts of North Carolina.

Q Greg, for our first question today, what major changes have you seen in the legal process since you first began handling claims?

A I've been admitted to practice for 34 years. I've been in an active defense civil litigation practice for 32 years. The major change is the advent of alternative dispute resolution.

A good example is that when I started practicing, it took about three years for a civil lawsuit to get into the courtroom for resolution. Most often what I would find is that I might be number 15 on a trial calendar for any given week, and report to

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Get To Know

Hunter O'Connor, Attorney, FL Keys/ Islamorada

Favorite Place:
The Exumas.

Sports Team:
Unfortunately, I am stuck being a Dolphins fan.

Hobbies:
Anything on the water, diving, fishing, etc.

Favorite Song:
Having a young daughter at home I would have to say my favorite songs right now are either Hop Little Bunny or Walkin' at the Zoo.

What's your favorite thing about working at Vernis & Bowling?
My favorite thing about working at Vernis & Bowling is the familial culture that has been fostered. People have your back and I really appreciate the "in this together" attitude. I think that is something special and is what really sets this place apart from other firms.

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calendar call at 10:00 AM on a Monday morning, and suddenly I'm number one, because the parties have been talking over the weekend.

We were seeing a lot of courthouse steps settlements, which is certainly not advantageous to those of us on the defense, where we're looking to resolve claims as promptly and efficiently as possible. With the advent of alternative dispute resolution and mediation, now in Buncombe County, I'm showing up on a trial calendar in about 11 to 15 months.

I'm a strong advocate of ADR. I think it works. I've tried over 200 lawsuits to jury verdict, but a lot of that was in the early '90s. I was part of, I guess, the test audience among participants for alternative dispute resolution.

In our court system here in North Carolina, there are two levels of trial courts. You've got District Court, which currently the jurisdictional amount is for claims up to $25,000. For Superior Court, it will be claims worth over $25,000, keeping in mind that that's a subjective assessment, and it's totally in the hands of plaintiff and plaintiff's counsel as to where they file a lawsuit.

The majority of lawsuits that we settled for less than $10,000 are still being filed in Superior Court because the default ADR method is mediation. District Court used to default to arbitration at one time because it was funded by the North Carolina legislature. It was a nonbinding, one hour hearing.

The parties split the one hour. If it's a plaintiff and defendant, plaintiff gets 30 minutes, defendant gets 30 minutes. The rules of procedure and the rules of evidence are relaxed, and you get an arbitrator. At one point, the parties could select an arbitrator.

Once it was defunded by the legislature, certain counties decided to keep it going. The parties would combined, pay a $100 fee, which was the fee that the court system was paying the arbitrator. A disinterested attorney would come over and serve as arbitrator and make $100, basically, for an hour.

You get a decision within three days, and each party has the right to appeal by requesting a trial de novo, if you will, how it's referred to even though we hadn't been through a trial yet. You file a request for trial de novo, and you get your District Court trial.

Mediation, obviously you have a mediator. If you reach an agreement, it's reduced to writing that's considered contractually binding and enforceable. As I put it to the parties when I'm mediator or to the plaintiff when we are about to consummate a settlement agreement, "Once you sign off on this agreement, and you're walking across the parking lot leaving the building today, and you decide, 'Well, maybe I shouldn't have done that, it's a little bit late once you've inked that agreement."

I've seen much better success and a greater ability for the parties to control the outcome with mediation. Arbitration, back when the parties could agree on an arbitrator, I think had a much more favorable outcome in terms of it being less likely that it would get appealed than I'm seeing now with court appointed arbitrators.

I'm seeing a higher appeal rate now that they've changed the process. I understand why they did it. Number one, the legislature defunded arbitration. The counties were having to support it. You have to generate an order assigning your case to arbitration, giving the parties 21 days to designate somebody. I'd say maybe 50 percent or higher didn't respond. They got appointed an arbitrator anyway.

Thankfully, the state court system is rolling out electronic filing and electronic access to the court files, which we oddly have not had in North Carolina.

We're working through some quirks in the system.

Q Greg, what impact has big data and software programs had on the legal process?

A That's a wide open question. As I said, North Carolina has just started going to electronic filing and electronic access. Certainly, social media has had an impact on claim evaluation. To dovetail into mediation, I had an instance where a plaintiff alleged that he couldn't do all these various activities, and he was a young fellow.

"I can't do all the fun things that I used to do. It's impacted my job." We're talking about what was basically a soft tissue/spine injury. Unfortunately, the young fellow had forgotten to whitewash his social media.

We had found during the period of time that he said he couldn't do all these things, that he's actually at the end of a towrope behind a ski boat, bouncing all over Lake Norman, having a grand old time.

Back in the day, if you didn't file a request to set your case for trial or a certificate of readiness, your case just sat there until somebody realized it's on the radar.

The tactical question for me was as a defense attorney, do I spring this on him and potentially not settle and have him cook up some reason why? "Well, I just had a good day, but man, I paid for it for months afterwards." My choice was, I shared it with the mediator. As a mediator, I tell the parties, "I'm going to feel free to share with the other side what you tell me unless you tell me not to."

I shared these photographs and social media posts with the mediator and with the statement that, "You can't tell him what you saw, but you can tell him that what you saw is going to be very detrimental to his case." We ultimately settled the case. It was a plaintiff's attorney whom I'd worked with numerous times over the years.

Another way technology has impacted litigation is, and I have told my children who are now adults this, assume that you are on a camera wherever you are. You might have a dash cam in an auto case or trucking case showing a very minor impact, or it could be good or bad for either side. Of course, having the ability to sort of look into the criminal and civil history of claimants has been invaluable. They've got a string of convictions for things that would be admissible as basically an attack on their credibility. You've got access.

Back in the day, if you didn't file a request to set your case for trial or a certificate of readiness, your case just sat there until somebody realized it's on the radar. Now we've got a Chief Justice of the Supreme Court, who is the overseer of the state court system.

He has made it very plain to the local officials, the senior resident Superior Court judges, Chief District Court judges, and the trial court administrators and coordinators about wanting to move cases along and reduce pendings, and not have claims hanging around forever. He's set some very strict guidelines about how quickly lawsuits should be resolved.

Q Back to ADR, Greg. How does that offer an advantage for insurance carriers, say, as opposed to going to trial?

A Well, I'll tell you this. Prior to COVID in North Carolina, you met in person. You would gather at an attorney's office or Mecklenburg County here in the Charlotte Courthouse has an ADR suite with a larger conference room and then breakout rooms. That accomplished a number of things.

Number one, part of the mediation, the ADR process, is to give the plaintiff the sense that they've had their day quasi "in court" albeit in a formal required manner, but yet a more informal process than going into a courtroom with a judge and a clerk and a bailiff and 12 jurors and that scenario.

It satisfied the plaintiff's need to feel that they've had their day. They've had their say. Either they said it, or the attorney has said it. They're sitting across from the party that they wanted to express that to.

The flip side of that is, you've got Greg Lewis or some defense attorney sitting across the table and explaining to the plaintiff that, while we understand that their evaluation of their case is very subjective,

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VERDICTS & DISPOSITIONS

Isam J. Alsafeer (Melbourne, FL) (Property) obtained a Final Judgment for Defendant Citizens Property Insurance Corporation in an action brought by WeDry & Restore, LLC pursuant to an assignment of benefits regarding water damage sustained to the insured's residence. The cause of action arose when WeDry & Restore, LLC performed water mitigation services for Citizens' insured. WeDry alleged in its Complaint that it obtained an assignment of benefits from Citizens' insured for its services for a loss related to water damage that occurred on September 3, 2021 and that Citizens failed to pay WeDry for the services it performed which it was entitled to pursuant to the assignment of benefits and that Citizens breached the policy. WeDry also attached a copy of the assignment of benefits documentation to its Complaint.

WeDry alleged in its Complaint that it obtained an assignment of benefits from Citizens' insured for its services for a loss related to water damage that occurred on September 3, 2021 and that Citizens failed to pay WeDry for the services it performed

A motion to dismiss was filed in the case asserting that assignment agreements executed after July 1, 2019 were required to comply with Fla. Stat. 627.7152 and that WeDry's assignment was invalid and unenforceable on its face as it failed to comply with the requirements set forth in the statute. The County Court held a case management conference in which Citizens' motion was heard and an order was issued by Judge Burke in Palm Beach County granting the motion, entering Final Judgment in favor of Citizens. The order specifically found that the assignment of benefits failed to comply with Fla. Stat. 627.7152(2)(a)(4) and was invalid and unenforceable which could not be corrected and denied WeDry the ability to amend its Complaint.

Philip J. Fairman (Fort Myers, FL) (Governmental Law) obtained a Final Summary Judgment in Lee County, Florida. The Plaintiffs claimed that the child passenger on the School Board's school bus was blinded when he was struck in the eye by an unsecured seat belt after the bus braked suddenly.

Between July 2018 and July 2021, the Plaintiffs retained a series of different attorneys to represent them in their claim against the School Board. Each of those retained attorneys served the School Board with separate pre-suit notices of their claim. In total 5 pre-suit notices were served on the School Board.

The School Board's Motion for Summary Judgment asserted that all of the five pre-suit notices were deficient and failed to comply with the pre-suit notice requirements of Florida Statutes Section 768.28. Plaintiff's attorney in his response to the School Board's Motion for Summary Judgment did not address the notices prepared by the prior attorneys. The trial court agreed with the School Board's position that the plaintiff waived any arguments as to notices filed by any previous attorneys and held that the School Board was entitled to Summary Judgment as to the notices served by the Plaintiff's previous attorneys. With respect to the notice that the Plaintiff's current attorney served, the School Board asserted in a supporting affidavit that it had never received that notice. During discovery Plaintiff's attorney was unable to produce the green mailing card showing receipt in hand by the School Board of the pre-suit notice, however, Plaintiff's attorney filed his affidavit stating his office mailed the pre-suit notice in the usual course of business to the School Board. The trial court agreed with the School Board's argument that the mailbox rule did not apply to

sovereign immunity cases and held in the absence of a (green) mailing card showing receipt of the letter, the School Board was entitled to Summary Judgment.

Carl Bober and Paulette Fouts (Hollywood, FL) (Property) obtained a Defense Verdict on behalf of their client, Citizens Property Insurance Corporation, in a first party property breach of contract action brought by Plaintiffs against their homeowners insurance carrier in a jury trial that took place in Fort Lauderdale, Florida. Of interest, the Broward County courthouse was ordered closed due to rain, high winds and flooding, just before the jury went out to deliberate. The parties and the jury nevertheless came to the closed courthouse to deliberate in this windstorm damage case, and the jury rendered a verdict in favor of our client.

Plaintiffs brought a breach of contract suit regarding a residential property insurance claim to their home related to a windstorm claim. Plaintiffs reported a claim for damage to their roof and water damage to the interior of their home, which Citizens denied due to long-term wear and tear in addition to the absence of any peril-created opening in the roof, as well as for pre-existing damages. The Plaintiffs initially sought payment for the complete replacement of their roof reportedly due to tornado-like winds as well as repairs to ceilings and walls in several rooms at the property, although they eventually withdrew their interior damages claim. Plaintiff's expert Architect Zachary Wethington testified at trial that the Plaintiffs' roof had been significantly damaged due to winds preceding the reported DOL, and that the Plaintiffs subsequently discovered the damage when numerous interior leaks occurred throughout a number of rooms inside their home. For the defense, expert engineer Jeffrey Sanchez testified that there was in fact wind damage to the roof but that it was related to a prior storm, Hurricane Irma, which was outside the policy period, and that the remainder of the damaged portions of the roof were due to wear, tear and deterioration.

The jury found in favor of Citizens finding that Plaintiffs failed to meet their initial burden to prove that their property sustained a direct physical loss due to wind during the policy period. Defendant's motion seeking the recovery of Citizens' attorney's fees and costs is pending.

Plaintiff's Demand at Trial: $83,179.59, then reduced at trial to $36,325.43 for the roof only, plus claimed attorney's fees and costs in excess of $100K+.

Michael Becker (Atlanta, GA) (Negligence/Property Damage) obtained Summary Judgment on behalf of a defendant plumbing company in the State Court of Forsyth County, Georgia.

The Plaintiffs sought over $250,000.00 in damages, plus attorney's fees, relating to allegedly negligent plumbing performed during a home remodel. Subcontractors not named as defendants in the suit installed a manifold in the master bathroom. The following night, excessive water pressure caused a factory-installed temporary plastic cap to blow off, resulting in significant water damage. Plaintiffs argued that the Defendants knew or should have known that the house water pressure exceeded code and turned the water off prior to leaving. However, Plaintiffs' expert testified that an undersized and failed expansion tank plumbed to the water heaters, all of which pre-dated the Plaintiffs purchase of the residence, caused the excessive pressure. None of the named Defendants or the unnamed subcontractors were engaged or asked to perform any inspections or repairs relating to the water heaters, expansion tank, or water pressure.

At Summary Judgment, Defendants argued that the subcontractors were independent contractors and therefore Defendants were not liable for their negligence. Defendants further argued that Georgia law does not impose a duty upon plumbers to inspect, repair, or warn beyond the work for which they are hired. Plaintiffs argued in response that Defendants were liable based upon statutory exceptions imposing liability where the work is wrongful in itself and

Verdicts & Dispositions, Continued

where the wrongful conduct violates a duty imposed by an express contract. As to the first argument, Defendants replied that the exception only applies when the contract itself calls for wrongful conduct, not when an independent contractor commits a wrongful act beyond the terms of the contract. As to the second argument, Defendants replied that the exception only applies where the contract contains an express provision that the principal will be liable for the conduct of its independent contractors. The only contract in the record, Defendants argued, contained no such provision, and further, the parties executed it after the occurrence and water damage at issue, so it did not govern the previous work.

The Court agreed and granted Summary Judgment to the Defendants.

Kimberly Sheridan, Michael Becker and law clerk, Turner LaFiandra-McCall (Atlanta, GA) (Premises Liability) obtained Summary Judgment in the State Court of Hall County, Georgia. Plaintiff fell down Defendants' stairs and alleged that the stairs posed a hazard.

The Plaintiff filed suit on a premises liability theory, claiming that she sustained injuries after falling down the stairs at Defendant's Airbnb rental. In her deposition, Plaintiff stated that she took off her shoes and socks and walked up the stairs barefoot after entering the house, admitting they (that) she placed her feet on each step and looked at the steps while walking up them with her luggage. When descending the stairs, Plaintiff did not use the handrail, lost her footing approximately halfway down and fell. Plaintiff alleged that the stairs were a static hazardous condition in that they were too steep and not compliant with building codes, alleging in her complaint only that there was "…a dangerous condition (to wit: unsafe stairs)." Plaintiff also paid an expert to inspect the stairs and draft a report.

First, the Defense argued that that Plaintiff was on notice of any alleged hazard because she traversed the stairs prior to her fall. Second, the Defense argued that the Plaintiff could not maintain her claim because there was no evidence the Defendants had knowledge of an alleged hazard. Third, the Defense argued that there was no competent evidence on whether a hazard existed. Last, the Defense argued that an alleged hazard was open and obvious to the Plaintiff. There is no duty to warn of the obvious.

The court granted the motion and entered Judgment in favor of the Defense.

Carl Bober and Paulette Fouts (Hollywood, FL) (Property) obtained their second Defense Verdict in the past month on behalf of their client, Citizens Property Insurance Corporation, in a first-party property declaratory action related to Hurricane Irma brought by Plaintiffs against their homeowners' insurance carrier in a jury trial that took place in Fort Lauderdale, Florida.

Plaintiff alleged that the stairs were a static hazardous condition in that they were too steep and not compliant with building codes, alleging in her complaint only that there was "...a dangerous condition (to wit: unsafe stairs)."

Plaintiffs brought a declaratory relief action regarding a residential property insurance claim to their home related

to a Hurricane Irma claim. Plaintiffs initially reported the claim for damage to their roof, exterior wall and to the interior of their home over two years and eight months after the hurricane, claiming that they reported the loss as soon as they became aware of leaks into their living room which occurred through their exterior stucco wall, and that they did not know the damage was caused by the hurricane until just before reporting it when they were informed of its cause by their public adjuster. After investigating, Citizens denied the claim due to its late reporting having severely prejudiced their ability to fairly investigate the loss. Plaintiffs subsequently filed suit and provided Citizens with the report of an engineer, Al Brizuela, who testified at trial that the damages he observed following his inspection were clearly caused by winds experienced during Hurricane Irma. For the defense, expert engineer, Neil Greenspoon, testified on behalf of Citizens that there was no wind damage to the Plaintiffs' property caused by Hurricane Irma, and that both the leaks and issues the homeowners experienced were due to defective installation of the exterior stucco wall and the interior flooring in the residence. He also found evidence of damage that pre-existed the policy period in this case.

The jury found in favor of Citizens finding that Plaintiffs failed to meet their initial burden to prove that their property sustained a direct physical loss during the policy period. Defendant's motion seeking the recovery of Citizens' costs, and potentially its attorney's fees, is pending.

Plaintiff's Demand prior to trial: $150K inclusive of attorney's fees and costs

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Michael Becker (Atlanta, GA) (UM/UIM) obtained Summary Judgment on behalf of an uninsured/underinsured motorist carrier in the State Court of Gwinnett County, Georgia.

Plaintiff alleged general damages and over $100,000.00 in medical special damages, including shoulder surgery, from a motorcycle crash. According to the Plaintiff, the defendant made a U-turn in front of her and she could not stop her motorcycle in time, rear-ending the defendant. The defendant denied liability. Plaintiff sought benefits from her uninsured/underinsured motorist carrier.

At Summary Judgment, the uninsured motorist carrier argued that the Plaintiff failed to give prompt notice of the accident as required by the terms of her policy because her first notice was service of the suit almost two years later. Plaintiff countered that 1. she notified the uninsured motorist carrier five months after the accident, introducing a letter she purportedly sent but the carrier never received; 2. that the uninsured motorist carrier waived its right to contest coverage by not reserving its rights before answering; 3. that the uninsured motorist carrier was not prejudiced by the late notice; and 4. She was not aware of her underinsured status until over two years after the accident.

The uninsured motorist carrier argued in response that because the uninsured motorist carrier never received the letter, it never received notice, but that regardless five months was not prompt; that uninsured motorist carriers are not required to reserve rights before defending themselves in a suit; that the dissipation of evidence and fading of witnesses' memories prejudiced it; and that the plaintiff knew she was underinsured within days of the accident, as evidenced by her notice to a separate uninsured motorist carrier three days after the accident.

The Court agreed and granted Summary Judgment to the uninsured motorist carrier.

Christopher Sabater and law clerk, Nikolos Reinson (Miami, FL) (Property Damage) obtained Partial Summary Judgment in the State Court of Miami Dade County, Florida. Plaintiffs were seeking to recover attorney's fees/costs against Defendant on a paid property claim.

The Plaintiff's filed suit against the carrier for breach of contract, claiming that they sustained property damage after Hurricane Irma. The carrier investigated the claim and

Verdicts & Dispositions, Continued

opened coverage for the property damage. During litigation, the Plaintiffs and the carrier almost settled the claim. However, before the settlement was finalized, the carrier became insolvent, and the claim was taken over by Florida Insurance Guarantee Association ("FIGA").

The Defense argued that the Plaintiffs' claim was covered, and FIGA did not deny the claim. Therefore, this type of claim would not entitle Plaintiffs to recoverable attorney's fees/costs. Section 631.70 of the Florida Statutes provides that attorneys' fees shall not be applicable to any claim presented to FIGA, except where FIGA denies a covered claim by affirmative action other than delay. Moreover, FIGA does not stand in the shoes of prior insolvent carriers. FIGA is a separate entity that can choose to bind itself to the actions of the prior carrier or can make its own defense when it takes over a claim. A Plaintiff cannot bind FIGA to the actions of a prior insolvent carrier simply because FIGA gets substituted as the party defendant.

The court granted the motion and entered partial judgment in favor of the Defense.

Atlanta WC Team (Atlanta, GA) (Workers' Compensation) defended Playcore Group and Ace American Insurance Company c/o ESIS at a hearing before Judge Richard H. Sapp, III. The case involved a medically compensable claim whereby the claimant was injured on August 4, 2021, when he slipped and fell on wet concrete while working as a mixer. He alleged an injury to his neck and was authorized to undertake treatment under workers' compensation. A few days later, on August 9, 2021, the claimant was seen at Adventist Medical Group. He was seen again on August 26, 2021, and recommended for physical therapy. On both occasions, he was released to light duty with restrictions of no lifting over 15 lbs. and no twisting. There was no further medical treatment undertaken by the claimant for the next two years, until an IME was performed on July 27, 2023. The sole issue presented for adjudication at hearing was the claimant's request for TTD benefits from September 20, 2021, forward and continuing. For his part, the claimant testified that following his work accident he continued working for Playcore Group for approximately six weeks, but that the company did not honor his light duty restrictions. He further alleged that his symptoms worsened, and that he did not undertake any additional, full-time employment after his last day of work with Playcore.

On cross-examination, however, the claimant admitted that he began working for a relative on a chicken farm as early as November of 2022, at least 2-3 days per week earning $110.00 per day. He further admitted that he eventually stopped working at the farm because he had some "savings". Additionally, 2 witnesses testified on behalf of Playcore Group. Mr. Lopez spoke about how the claimant was accommodated with light duty work and told not to exceed his work restrictions. Ms. Figueroa echoed this point, and specifically discussed a conference in September of 2021 whereby the claimant was reminded of his 15 lb. work restrictions. She also noted how the claimant was difficult to reach in terms of trying to assist him with medical care. Furthermore, she testified that the same modified duty job had been and continued to be available. Upon review of all testimony and evidence, Judge Sapp concluded that the claimant failed to meet his burden of proving entitlement to TTD benefits. He found the evidence demonstrated that the employer provided suitable modified duty work within the claimant's assigned restrictions, and there was no justification for the claimant's failure to remain on the job being offered. Finally, he determined that while the IME physician imposed a more restrictive release on July 27, 2023, the claimant failed to prove these more restrictive limitations were related to the on-the-job injury.

Kenneth Amos and Brandt Carlson (St. Petersburg, FL) (Automobile Liability) had a defense positive result at a jury trial held in Hillsborough County Florida, against the largest plaintiff's firm in the country. The Plaintiff was a 22-year-old female (and sympathetically 9 months pregnant at the time

of trial), who complained of injuries to her neck and back stemming from a rear-end automobile accident on November 12, 2019. At trial, Plaintiff requested more than $6,000,000.00 in damages for past and future medical care, as well as for pain and suffering. Multiple treating providers and experts testified live at trial. After deliberations, the jury found the Plaintiff comparatively at fault for the subject accident and only awarded Plaintiff a total of $86,938.74 in damages (which was only 1.45% of their requested damages). The jury specifically found that the Plaintiff had not sustained a permanent injury, and did not award Plaintiff any amounts for future medical care or past or future pain and suffering.

Phillip Jones (Tampa, Florida) (Property) obtained a Summary Judgment in Hillsborough County Florida.

Plaintiff brought a homeowner's breach of contract claim in relation to an interior plumbing loss. Citizens accepted coverage for the loss and provided payment of $10,000.00 pursuant to a water damage sub-limit contained in the policy. The Plaintiff argued that an additional amount was owed under the policy.

At the hearing on the motion for Summary Judgment, Plaintiff argued that there was mold damage and that an additional $10,000.00 would be due under the policy. Citizens argued that the complaint did not allege a claim for mold damage and that Plaintiff did not submit any evidence to show that any additional mold damage or coverage was owed.

The Court agreed with Citizens and granted Final Summary Judgment in its favor.

Phillip Jones (Tampa, Florida) (Property) obtained a Summary Judgment in Hillsborough County Florida.

Plaintiff brought a homeowner's breach of contract claim in relation to an alleged windstorm resulting in damage to the Plaintiff's roof. After investigating the claim, Citizens denied coverage as the roof did not show any damage related to a covered peril and instead exhibited signs of wear and tear.

At the hearing on the motion for Summary Judgment, Plaintiff submitted an affidavit alleging there was no damage to the roof before the storm, but damage after the storm. Therefore, Plaintiff argued that the alleged storm had to be the cause of the damage to the roof.

At the hearing on the motion for Summary Judgment, Plaintiff argued that there was mold damage and that an additional $10,000.00 would be due under the policy.

Citizens argued that the affidavit contradicted the deposition testimony, wherein the Plaintiff testified that he never observed the alleged damages and never got on the roof. Citizens presented an affidavit of an expert who opined that the damage to the roof was a result of wear/tear and age-related deterioration.

The Court agreed with Citizens that the claim was excluded under the policy and granted Final Summary Judgment in Citizen's favor.

Michael Barratt (Birmingham, Alabama) (Workers' Compensation) obtained a Summary Judgment in Talladega County, Alabama.

Verdicts & Dispositions, Continued

Plaintiff brought a workers' compensation claim against his Employer claiming lumbar and cervical injuries from multiple lifting incidents. The Plaintiff claimed that he was permanently and totally disabled and was seeking both medical, vocational, and indemnity benefits. Defendant filed a Motion for Summary Judgment arguing that the claim was filed outside of the statute of limitations and that no benefits were owed. The Plaintiff claimed multiple dates of injury that were within the statute of limitations and filed an Amended Complaint to include new dates of injury. At the hearing, the Defendant established to the Court that the dates alleged were inconsistent with the Plaintiff's prior testimony, medical records, and employment records and that the actual date of injury occurred outside of the statute of limitations.

Plaintiffs brought a breach of contract action regarding a residential property insurance claim to their home related to a reported windstorm loss.

The Court agreed with the Employer and granted Final Summary Judgment in the Defendant's Favor.

Maloree McDonough (Birmingham, AL) (Automobile Liability) obtained a Defense Verdict in the Circuit Court of Jefferson County, Alabama in a disputed liability auto accident case against an Allstate insured. The three Plaintiffs claimed they had the right of way at an intersection and that the Defendant ran a red light. The Defendant testified that she had the green light upon entering the intersection and that the Plaintiffs ran the red light and struck her vehicle. The Plaintiffs called one witness who claimed to be in the vehicle behind them at the intersection and testified that the Plaintiffs had the green light. One independent witness also testified for the Defendant, stating that she was across the intersection from the Defendant and that the lights on their road were green. All three Plaintiffs claimed Emergency Room treatment and physical and mental pain and suffering. One Plaintiff also claimed permanent injury due to a facial scar.

Despite the conflicting testimony at trial, the jury returned a Judgment for the Defendant on all three claims after 45 minutes of deliberation.

Matt Bernstein (Deland, FL) (E&O) Plaintiffs purchased a vacant lot with the intent to clear the land and build a home. After going under contract but before closing, the Seller's real estate agent (the Insured) emailed the Plaintiffs' agent, "Just making sure you notified the buyers that we informed you of the wetlands on the lot", to which Plaintiffs' agent quickly replied "Yes, the buyers have been notified". A month later, the transaction closed, and Plaintiffs cleared the lot, but were then fined by the EPA for clearing protected wetlands. Plaintiffs sued the Insured, the seller, and their own agent for failing to disclose a material fact (the presence of wetlands on the property). We moved for Judgment on the Pleadings, as the Plaintiffs attached the email correspondence between the agents to their Complaint. The Judge granted our Motion after finding the Insured's email to Plaintiffs' agent constituted the necessary disclosure. We will be pursuing attorneys' fees and costs pursuant to a "prevailing party" attorney's fees provision in the subject contract.

Ashley N. Landrum (Palm Beach) (E&O) obtained a Dismissal with Prejudice on a Motion to Dismiss a First Amended Complaint. Plaintiff was a licensed Real Estate Associate affiliated with a Brokerage Firm who filed suit against the Insured and other entities seeking over a quarter of a million dollars for a lost commission arising from the sale of a home

in Wellington, Florida which she claimed entitlement to as the procuring cause. The Plaintiff originally brought the lawsuit on her own behalf seeking to recover the commission arising from the sale of the property. The Court dismissed the lawsuit due to her lack of standing per Fla. Stat. § 475.72(1)(d). Florida Statute § 475.72(1)(d) precludes a real estate agent from commencing or maintaining any action for a commission or compensation in connection with a real estate brokerage transaction against any person, except a person registered as her or his employer at the time the sales associate performed the act or rendered the service for which the commission or compensation is due.

In an apparent attempt to circumvent the statute, Plaintiff then filed a First Amended Complaint as assignee of the Brokerage Firm still seeking the lost commission. The Defendants again filed Motions to Dismiss the First Amended Complaint due to Plaintiff's continued lack of standing as a matter of law per Florida Statute § 475.72(1)(d). In a detailed and comprehensive Order dismissing the case with prejudice, the Court clearly found that "Because the Plaintiff was the real estate sales associate, not the broker involved in the transaction which is the subject of this lawsuit, whether she brings this action in her individual name or in her name as an assignee of the broker, she does not have standing, pursuant to Fla. Stat. § 475.42(1)(d), to 'commence or maintain any action for a commission or compensation in connection with a real estate brokerage transaction against any person except a person registered as her or his employer at the time the sales associate performed the act or rendered the service for which the commission or compensation is due'. . .

Semantics cannot get around the clear language and intent of the Legislature that [Plaintiff] does not have standing to commence or maintain this action, or any action, against the Defendants for a commission or compensation in connection with the real estate transaction which is the subject of this lawsuit. This is not a procedural technicality as suggested by the Plaintiff. This is Florida law established by the Legislature within the Florida Statutes, and Florida Appellate Courts applying that Statute §475.42(1)(d) to similar facts in Bergin.

Carl Bober and Paulette Fouts (Hollywood, FL) (Property) obtained a Defense Verdict on behalf of their client, Citizens Property Insurance Corporation, in a first-party property breach of contract action related to a windstorm claim brought by Plaintiffs against their homeowners' insurance carrier in a jury trial that took place in Broward County Circuit Court.

Plaintiffs brought a breach of contract action regarding a residential property insurance claim to their home related to a reported windstorm loss. Plaintiffs sought the replacement of their roof and payment for damages to the interior of their home. After an inspection by an independent adjuster, Citizens denied their claim due to exclusions in the policy of insurance for wear, tear and deterioration to the roof, as well as the lack of a peril-created opening at the property. Plaintiffs subsequently filed suit and provided Citizens with the report of an engineer who testified at trial that the damages he observed to the Plaintiffs' roof were clearly caused by the winds experienced during the reported wind event and that due to the extensive nature of the physical loss the shingle roof had to be replaced, as well as a newer flat roof that had been installed in 2012. He also correlated the interior damage to leaks caused by the windstorm. For the defense, an expert engineer testified on behalf of Citizens that there was no wind damage to the Plaintiffs' property caused by the reported windstorm, and that the leaks the homeowners experienced were due to significant ponding which caused long-term deterioration of the flat roof portion of the roofing system. He also used nine years of aerial photographs of the Plaintiffs' property preceding the reported date of loss to show the jury the progression of the deterioration due to the ponding.

The jury found in favor of Citizens finding that the damage to the Plaintiffs' property was due to wear, tear and deterioration. Defendant's motion seeking the recovery of Citizens' attorney's fees and costs is pending.

Plaintiff's demand during trial was $125,000.00 inclusive of attorney's fees and costs.

Verdicts & Dispositions, Continued

Carl Bober and Ashley Arias (Hollywood, FL) (Property) obtained a Defense Verdict on behalf of their client, Citizens Property Insurance Corporation, in a first-party property breach of contract action related to a windstorm claim in a jury trial that took place in Fort Lauderdale, Florida.

Plaintiffs brought a breach of contract action regarding a residential property insurance claim to their home related to a reported windstorm loss. Plaintiffs sought reimbursement for paid repairs to their roof and payment for damages to the interior of their home. After an inspection by an independent adjuster, Citizens denied their claim due to exclusions in the policy of insurance for wear, tear and deterioration to the roof, as well as the lack of a peril-created opening at the property. Plaintiffs subsequently filed suit and provided Citizens with the report of a general contractor, who testified at trial that the damages he observed to the Plaintiffs' roof were clearly caused by uplift to the concrete tiles as the result of the winds experienced during the reported wind event. He also correlated the interior damage to leaks caused by the windstorm. For the defense, the expert roofing contractor and expert engineer testified on behalf of Citizens that there was no wind damage to the Plaintiffs' property caused by the reported windstorm, and that the leaks the homeowners experienced were due to long-term deterioration of the roofing system and windows respectively. Plaintiffs' own roofing repair records, which they failed to share with their own trial expert, proved the long-term deterioration.

The jury found in favor of Citizens finding that the damage to the Plaintiffs' property was due to wear, tear and deterioration. Defendant's motion seeking the recovery of Citizens' attorney's fees and costs is pending.

Carl Bober and Ashley Arias (Hollywood, FL) (Property)obtained a Defense Verdict on behalf of their client, Citizens Property Insurance Corporation, in a first-party property breach of contract action related to a windstorm claim brought by Plaintiffs against their homeowners' insurance carrier in a jury trial that took place in Fort Lauderdale, Florida.

Plaintiffs brought a breach of contract action regarding a residential property insurance claim to their property related to a reported windstorm loss. Plaintiffs sought payment for the replacement of their roof and resulting water damages to the interior of their home. Plaintiffs had purchased their home six months before the windstorm after obtaining an inspection report from a licensed home inspector indicating that the roof had no leaks and still had a number of years of useful life remaining.

After an inspection by an independent adjuster, Citizens denied their claim due to exclusions in the policy of insurance for wear, tear, and deterioration to the roof, as well as the lack of a peril-created opening at the property. Plaintiffs subsequently filed suit and argued that there had been no leaks at the property until the reported windstorm, and that Citizens had elected to insure the property despite any present claims of pre-existing wear and tear. Plaintiffs also provided Citizens with the report of a licensed professional engineer, Roy Bodman, who testified at trial that the damages he observed to the Plaintiffs' roof were caused by uplift and 'chatter' to the concrete tiles as the result of the winds experienced during the reported wind event. He also correlated the interior damage to leaks caused by the windstorm. For the defense, expert engineer, Shawn Bunch, testified on behalf of Citizens that there was no wind damage to the Plaintiffs' property caused by the reported windstorm, and that the leaks the homeowners experienced were due to long-term deterioration of the roofing system, including evident repairs to the same areas being claimed by the Plaintiffs.

The jury found in favor of Citizens finding that the damage to the Plaintiffs' property was due to wear, tear and deterioration. Defendant's motion seeking the recovery of Citizens' attorney's fees and costs is pending.

Continued from page 3

"What is my pain and suffering worth?" From our standpoint, it's more of an objective evaluation. I go so far as to tell the other side, "We're not just pulling numbers out of the air."

We are also factoring in what's coming out of the jury boxes in the state of North Carolina and judgments coming out of the court system. This was supported by our local trial court administrator. There was a period of time there where the trial court administrator here in Charlotte was documenting the top offer, the lowest demand, and what was the judgment.

Similar to what I understand insurance industry metrics tracked, he was reporting that roughly between 70 and 80 percent of plaintiffs were leaving money on the table. I can make that argument and the plaintiff can understand that "This isn't directed at me. They're not lowballing me. They're coming up with a range of what other people have settled for."

"What is my pain and suffering worth?" From our standpoint, it's more of an objective evaluation.

COVID had somewhat of an impact on that. We went to all remote. We are still doing remote. I would say that there are cases that are perfectly appropriate for remote type mediations. However, there are very clearly cases that warrant in person conferences because, yes, the plaintiff has had their day, but there's also an anxiety factor for the plaintiff. They've got to come in.

They're sitting in a room with lawyers, and claims professionals, and people hammering them on why their claim isn't worth what they think it is, and how "70 percent of juries are not going to do better by you."

As I said at the beginning, it gives the parties the opportunity to be in control. We've been dug in on an evaluation and an offer. We go to mediation and my claims professional is sitting next to me. We hear the opening. We split up into caucus breakout sessions. Then, he looks at me and he says, "Man, that was impressive, and we've got this case underevaluated."

Flipside, we had an opportunity to look at the plaintiff, size up the plaintiff, hear what the plaintiff had to say, and either we think our evaluation is spot on or, "Man, maybe we had too much money on this case. I don't think that person's going to come across very well."

It's all about who's going to be in control of the ultimate outcome. With ADR, particularly mediation, the parties have the greatest degree of control.

Q Greg, one final question today. What do you expect for the future?

A I expect that the plaintiffs' bar will continue to employ new and innovative ways of wringing money from the defense.

A good example of what I expect and the tactics that the other side is using: you used to have a trucking accident and they'd sue the driver, and they'd sue the trucking company. That was the end of it. I've got several open cases now where the playbook has changed. Yes, they started with the driver. Then, they sued, of course, the owner, trucking company.

Now, they're bringing in the broker. I am currently representing a shipper. The allegation is that my shipper of product was negligent because of the manner in which they vetted a carriage broker.

Then, you've got your carrier and you've got your driver. They're continuously looking for ways to advance the cause of their clients.

The trucking case stands out in my mind as the most vivid example of, "OK, let's see how we can blow this case as large as possible, get as many deep pockets at the table, and paint the whole industry as everybody's trying to make money to the detriment of the folks on the highways of the nation."

STAY UP TO DATE on all Things Vernis & Bowling

Janette Smith (Islamorada, FL) was named the 2024 H. Hamilton "Chip" Rice, Jr. Award honoree.

The award is presented annually by the City, County, and Local Government Law (CCLGL) Section and is awarded annually to one local government attorney who has served the section with distinction through mentoring, teaching, and leadership.

The award ceremony took place at CCLGL Section's 47th Annual Local Government Law in Florida Conference.

Janette was also selected as a speaker at the conference, where she presented an update on AI and Technology. Vernis & Bowling was a Platinum sponsor of the event.

G. Jeffrey Vernis, Managing Partner, spoke at the ALM Complex Claims & Litigation Forum. His topic was "Hot to Roadblock Runaway Verdicts—Tactics to Mitigate Your Risks in Court".

Vernis & Bowling sponsored the Women in Insurance Execusummit. Tammy Bouker, National Director of Client Services & Development, was a panel speaker at the event.

COMMUNITY ENGAGEMENT

Vernis & Bowling of St. Petersburg, FL sponsored book awards for the top first semester 1L students at Stetson College of Law. Ken Amos, Managing Attorney, presented the awards to the students at the Gulfport Campus.

Vernis & Bowling celebrated Earth Day on April 22. Each office distributed wildflower seed packets to employees to help beautify the planet.Vernis & Bowling's DE&I initiative for 2024 is "Year of Action".

Each office will be collecting canned goods/non-perishable items and donating them monthly to a local food bank.

Vernis & Bowling celebrated Heart Month in February. Employees wore red clothing, and the firm shared resources on the prevention of heart disease.

CLIENT FEEDBACK

"Thank you so much for getting all this information to me so quickly. I am very pleased with how this process was handled and all the communication you provided as well as the communication you were able to have with the PC. Thank you again for all your help."

regarding Carter Hale in Mobile

"This was very well written and informative. Thank you so much for capturing the facts so well!" -

regarding Ashley Landrum, Palm Beach

"Matt was great on this file! He picked it up and was able to settle it for a very good deal, very quickly! I was impressed as you know that the condo claims are never easy ones! He did very well and hope to work with him again!"

regarding Matt Bernstein, Deland

"You and Alec make a great team. You guys are super awesome!"

regarding Cody McCollum and Alec Young, Atlanta

"I just wanted to pass along to you that I recently worked with Brandt Carlson and Anthony True on a complex golf cart case and they did an excellent job, were very responsive and we held several defense planning conferences that kept me up-to-date on the case."

regarding Brandt Carlson and Anthony True, St. Petersburg

"William has been one of the best defense attorneys he has worked with. He is always helpful and responsive."

regarding William Kratochvil, Ft. Myers

" I would love to take the opportunity to tell you how much I appreciated working with David Willis. His knowledge of GA work comp was encyclopedic and his experience with other plaintiff attorneys helped many settlements get done. From the beginning of the time that I started handling GA, he had to hold my hand when dealing with state forms and laws, and was extremely patient at the beginning. After handling claims for a couple of years, I became the GA expert at my company and David is the main reason and the source of most of my knowledge. I would welcome the chance to work with David again in the future. "

regarding David Willis, Atlanta

"Vernis & Bowling's D&O department is the best third-party defense group that I have ever had the pleasure of working with. Your work product is top notch!"

regarding the Palm Beach D&O department

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