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LEADERSHIP

Walton Lantaff Announces New Managing Partner Allison C. Hartnett; WLSC Now Woman-led Firm

On February 3, 2020, the Firm elected Allison C. Hartnett, Esq. as the Firm's Managing Partner, the first female to hold the position in the Firm's 85-year history.

Outgoing managing partner Richard G. Rosenblum said "I have been both proud and humbled to represent the Firm in this role for ten years and thank all for their support. The Partners have always had the philosophy that the responsibilities of running the Firm be shared and after ten years, it is time for a change."

Ms. Hartnett, who hails from Connecticut, is fond of telling the story of how she has

See HARTNETT on page 2

Allison C. Hartnett, Esq.

PROPERTY INSURANCE DEFENSE

Novel 'Avarez Defense' a Powerful Weapon in Any Arsenal for Insurance defense

Outrageous estimates for repairs following property damage are sometimes a matter of debate.

The recently minted *Alvarez* Defense has become an important sword in Florida homeowner's property insurance carriers' arsenal against overstated, excessive, and false claims. Every Florida insurance defense attorney and adjuster should be aware of and utilizing this very effective defense. The *Alvarez* Defense establishes that an excessive and overly exaggerated estimate constitutes a false statement under an insurer's policy preventing any and all recovery by the insured.

It is axiomatic that Florida suffers from a negative litigation climate that is in many ways driven by excessive estimates written by public adjusters, estimators, and the always nebulous "loss consultant" trying to skirt the line between public adjuster and estimator. The script is well-known at this point. The

Please see ALVAREZ DEFENSE on page 4

TRAVELING IN EUROPE: David and Allison Hartnett and their children Alex and Katelyn.

HARTNETT, from page 1

wanted to be a lawyer since she was very young. She even wrote an essay in elementary school about what she wanted to be when she grew up . . . and of course the answer was "a lawyer." After attending Bunnell High School in Stratford, Connecticut, and undergraduate school at the University of Connecticut, she found her way to law school in sunny Miami where she met her future husband.

It was while she was still in law school that Ms. Hartnett came to the Firm as a law clerk. She never left!

After graduating from The University of Miami School of Law, she began as an associate and focused on insurance defense. Honing her skills in the Firm's large workers' compensation section, she was rewarded with regular promotions — first to Junior Partner, and then to Senior Partner.

In addition to her dedication to her clients, Ms. Hartnett always found time for her family, including her husband David Hartnett (also an attorney) and their two children, Alex Hartnett, a recent graduate of Vassar College, and Katelyn Hartnett, a student at Gulliver Preparatory School in Miami. Those who know her are not surprised that she found the time to be a troop leader in Tropical South Florida Girl Scouts counsel or that she was huge fan of her son's baseball teams and her daughter's soccer teams.

Over the years her primary focus has been on representing Employers and Carriers and assisting them in their labor and workers' compensation issues. Her commitment to the workers' compensation community included her membership in the Miami-Dade Workers' Compensation Section of the Bar, including Committee Chair from 2006 to 2009 as well as her membership on the Friends of 440 Board of Directors, including the President from 2006 to 2009.

In 2009, she was honored as the Employer/Carrier Attorney of the Year Award by the Friends of 440, a charitable organization that she has served since 1988. An earlier recipient of the same Friends of 440 award, Bernard I. Probst, Esq. said that Ms. Hartnett's "hard work and efforts through the years made [her] a wonderful choice to carry on the great tradition of this great Firm."

In addition to her charitable work, Ms. Hartnett has been an advocate for women in the law and initiated a variety of different programs designed to allow for the development of collegial mentoring and professional development including special luncheons and more recently a book club.

It is in this spirit that she has often nurtured the careers of young "lady lawyers" and why the Firm is so proud that Ms. Hartnett was selected to be the first female Managing Partner in the Firm's remarkably long 85-years-plus history.

For many years Ms. Hartnett served as the office manager of the statewide firm's largest office – Miami. This challenging position has prepared her for the many different responsibilities of the Managing Partner.

— Michele E. Ready, Esq.

WINDSTORM COVERAGE DEFENSE

Court Swayed by Walton Lantaff's Defense – that Normal Wear Led to Water Damage, not Roofing Issue

Melissa V. Jordon, in the Miami Office of the Firm, recently succeeded on a Motion for Summary Judgment on a 'wear and tear' policy defense on behalf of Citizens Property Insurance Corporation.

The case concerned an Assignment of Benefits (AOB) Plaintiff, seeking damages for their invoice for mitigation work to the subject property where a claimed roof-leak water loss was submitted to Citizens under a DP3 policy. The policy provided language that did not allow coverage for damage to the interior of the property unless there was a covered opening, as well as language that excluded losses that were the result of wear and tear. The denial correspondence, while citing both portions of the policy, mainly addressed the denial towards wear and tear.

Melissa V. Jordon, Esq.

In Defendant's Motion for Summary Judgment, the argument asserted was that the field adjuster and the engineer who inspected the property after the loss, determined there were no observable openings in the roof, rather, any damage to the roof appeared to be the result of wear, tear and deterioration of the roofing system.

Jordon prepared affidavits to this affect that were attached to the Motion as supporting evidence for the Motion for Summary Judgment. Additionally, Jordon obtained deposition testimony from the Plaintiff Corporate Representative, and the Insured, who both confirmed that they did not know if Plaintiff company went on the roof, if a tarp had been placed on the roof, or whether the leaks had stopped or been repaired.

At the hearing, Jordon explained to the Court the evidence submitted to

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substantiate the Motion for Summary Judgement, including the affidavits of Kathy Bohannan, the Engineer, and CPIC's corporate representative, as well as citing to the fact Plaintiff's lacked any evidence contrary to Defendant's motion, as no motion or contrary evidence was submitted to rebut the Motion for Summary Judgment.

In granting the Defendant's Motion for Summary Judgment, the Court explained its reliance on the field adjuster and engineer's affidavits stating that the loss was the result of wear and tear. Based on this information, the Court found Defendant had set forth sufficient evidence to support its motion for summary judgment to shift the burden back to Plaintiff to provide evidence to rebut Defendant's assertions.

As the Court reviewed the record and information provided at the hearing, and found that Plaintiff failed to submit any substantive evidence in response to Defendant's Motion, the Court ruled Defendant had submitted sufficient information and evidence to establish there was no question of material fact, and found Summary Final Judgment proper in favor of Defendant.

— Melissa V. Jordon, Esq.

CONGRATULATIONS

Three dynamic women have been promoted to Junior Partner at Walton Lantaff Schroeder & Carson this year:

MELISSA JORDON, ESQ.
(Miami)

BRITTANY G. MELENDEZ, ESQ.
(Orlando + Tampa)

LAURA WEINFELD, ESQ.
(Miami)

Novel 'Alvarez Defense' a powerful weapon in your arsenal for insurance defense

ALVAREZ DEFENSE, from page 1

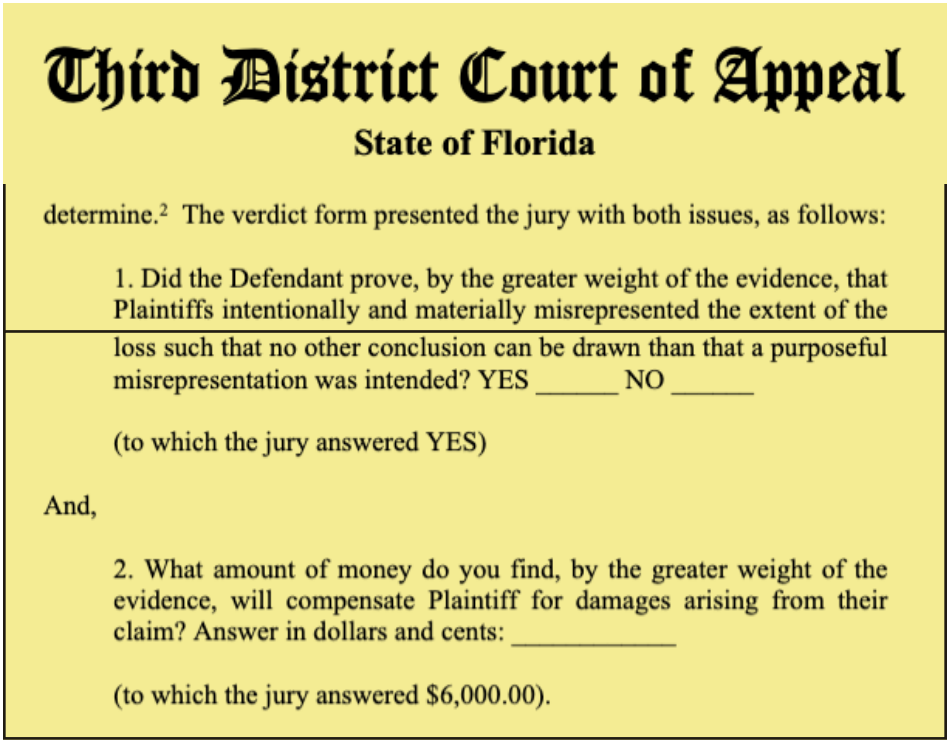
insured's public adjuster, estimator, or loss consultant writes an incredibly excessive estimate that is a gross and intentional overstatement of the actual damages that the property sustained. Naturally, the insurer does not pay this estimate. The insured's plaintiff attorney then sues the insurer, relies on the hope that the jury awards at least $0.01 more than the insurer paid pre-suit (so as to trigger statutory fee entitlement under Florida Statute § 627.428), and holds this potential fee entitlement as leverage over the insurer to extract an undeserved amount. This strategy is based on the jury's tendency to play King Solomon and split the difference between estimates. Indeed, to trigger fee entitlement, all the plaintiff attorney needs to obtain is any amount more than the insurer paid pre-suit.

Ian Ronderos, Esq.

The hypothetical scenario described above plays out in claims offices and courtrooms across the state to the detriment of Florida insurers and insureds, who end up suffering the costs of higher premiums. This circumstance begs for a solution. Enter the *Alvarez* Defense.

On April 17, 2019, the Third District Court of Appeal of Florida issued its opinion in the case of *Alvarez v. State Farm Florida. Ins. Co.,* 2019 WL 1646121, rev. denied 2019 WL6248551.

This seminal opinion gives rise to the eponymous *Alvarez* Defense described above. In Alvarez, the Plaintiffs submitted an estimate that the Defendant asserted constituted a false statement. See Id. The verdict form submitted the following question to the jury: "1. Did the Defendant prove, by the greater weight of the evidence, that Plaintiffs intentionally and materially misrepresented the extent of the loss such that no other conclusion can be drawn than that a purposeful misrepresentation was intended? YES _____ NO _____" *Id.* at 3. The jury returned an answer of 'Yes.' *See Id.*



Third District Court of Appeal

State of Florida

determine.[2] The verdict form presented the jury with both issues, as follows:

1. Did the Defendant prove, by the greater weight of the evidence, that Plaintiffs intentionally and materially misrepresented the extent of the loss such that no other conclusion can be drawn than that a purposeful misrepresentation was intended? YES _____ NO _____

(to which the jury answered YES)

And,

2. What amount of money do you find, by the greater weight of the evidence, will compensate Plaintiff for damages arising from their claim? Answer in dollars and cents: _____

(to which the jury answered $6,000.00).

Curiously, the jury in *Alvarez* also provided a monetary award for the Plaintiffs. See Id. The Plaintiffs argued that it was a 'compromise verdict' and the Plaintiff should still receive the jury's award. The judge made the correct decision, and issued judgment not withstanding verdict in favor of State Farm (the insurer), ruling that "the jury's verdict finding material misrepresentation voided the Homeowners' coverage for the claimed loss." Id. at 3. The Third DCA affirmed. See Id.

The importance of this ruling cannot be understated. The Alvarez case conclusively stands for the proposition that an exaggerated, overstated, or inflated estimate can constitute a false statement or material misrepresentation and that said false statement or material misrepresentation can void the insured's ability to recover any damages whatsoever.

By eliminating the ability to recover any damages, the court has prevented plaintiff's counsels who submit exaggerated estimates from recovering a fee. This defense turns the table on the script described above, where the plaintiff's counsel submits the estimate and uses recovery of any amount to threaten a fee and leverage an unwarranted settlement. Now, the insurer possesses a fighting chance to eliminate the false claim and the unwarranted fee by means of the Alvarez Defense.

It is essential for carriers and insurance defense practitioners to remember to assert this affirmative defense in their pleadings. If it is not pled, it may not be available at trial. Such a crucial

The importance of this ruling cannot be understated. The Alvarez case conclusively stands for the proposition that an exaggerated, overstated, or inflated estimate can constitute a false statement or material misrepresentation and that said false statement or material misrepresentation can void the insured's ability to recover any damages whatsoever.

and important defense should be pled. When pleading same, one should look at the specific policy language forbidding false statements or material misrepresentations. If a particular policy requires materiality, plead materiality. Also, make sure to plead sufficient facts to withstand a Motion to Strike.

When deposing a plaintiff who has submitted a false or exaggerated estimate, it is important to confront said plaintiff with the estimate and see how the plaintiff justifies it. Practitioners should also challenge the estimator to support the estimate. Sometimes discovery will reveal the presence of overlapping damages already paid for in a prior claim, or old, never repaired damage that was not claimed, but that was clearly unrelated to the subject loss and claimed in the insured's excessive estimate. Including such damages in an estimate constitutes a false statement on its own apart from the Alvarez Defense, but, also, certainly supports and strengthens an Alvarez Defense.

Sometimes on the eve of trial, the plaintiff will submit a new lower and more reasonable estimate. This is often part of an attempt to obtain unwarranted attorney's fees. The situation often plays out as follows: The plaintiff's counsel will submit an extremely exaggerated and excessive estimate and then proceed to litigate the case to the hilt, building up very large numbers of hours. Faced with this clearly false estimate, the insurer obviously chooses not to pay it. Then at the eleventh hour, the plaintiff's counsel produces a new, reasonable estimate that is a fraction of the false estimate's total and sometimes barely in excess of what the insurer paid pre-suit. The obvious goal is to appear reasonable to the jury, obtain a small judgment in favor of the plaintiff, and obtain a grossly excessive fee based on the unnecessary litigation that the plaintiff's counsel himself or herself drummed up. The cart (the fee) is before the horse (the actual claim), so to speak, as this litigation tactic serves only the plaintiff's attorney.

The *Alvarez* Defense is extremely helpful in this scenario. When the plaintiff attempts to withdraw the estimate, the defense counsel should refuse and insist that the prior estimate is relevant to the properly pled Alvarez Defense and must be presented to the jury. If defense counsel has a thorough exhibit list listing the plaintiff's excessive estimate, the judge would be hard-pressed and likely subject to reversal if the judge permitted the plaintiff to shift the entire playing field right before trial (usually after discovery has cut-off too) by denying the insurer to present evidence timely disclosed and clearly in support of a well-plead affirmative defense.

Florida insurers and insureds have too long suffered under the burden of vexatious litigation designed to extract excessive damage payments and unwarranted legal fees from both Florida insurance companies and the public itself (via higher premiums). While the deck sometimes feels stacked against insurers, the Alvarez Defense presents a crucial and important tool that permits insurers to obtain a defense verdict. A defense verdict eliminates the fee entitlement that drives so much of this litigation. This potentially decisive defense shifts the playing field upon which insurance litigation is being litigated in such a manner that plaintiffs and their counsel need to be aware of the significant risks they face by submitting excessive estimates prepared by unscrupulous public adjusters, estimators, or loss consultants. Florida insurers need not file for or obtain summary judgment on every case to make use of the *Alvarez* Defense either. Its mere presence is a useful bargaining tool at mediation tables and informal negotiations. Skilled attorneys and adjusters can leverage this defense to obtain effective results for homeowner's insurance carriers throughout the State.

— Ian Ronderos, Esq.

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INSURANCE DEFENSE

False Statement by Hurricane Irma Claimant Leads to Successful Motion for Summary Judgment

Associate Mike Nesper, who is part of the firm's Miami office, successfully raised the material false statement defense in the 11th Judicial Circuit in Miami-Dade County, where Mr. Nesper obtained a Final Judgment against Plaintiff based on his Motion for Summary Judgment on Plaintiff's False Statements.

Mike Nesper, Esq.

Plaintiff had two claims, a Hurricane Irma claim and a broken pipe claim. Plaintiff submitted an estimate for each claim, which contained overlapping damages. Plaintiff then submitted revised estimates for each claim — with the amount of overlapping damages tripling from the original estimates.

Plaintiff's two claims arose just 77 days apart. There was no evidence that Plaintiff made any repairs between her Irma and broken pipe claims, and therefore, Plaintiff made material false statements. Opposing counsel argued that the estimates could be revised, so any overlap could be remedied. Mr. Nesper argued that Plaintiff did, in fact, submit revised estimates, which contained triple the amount of duplicative damages.

Crucial to Mr. Nesper's argument was Plaintiff's admission that there was duplicative damages. Plaintiff argued the overlap was minimal, and therefore, was not a material false statement.

Mr. Nesper argued that any overlap, no matter what amount, is material in a breach of contract action where the central issue is damages.

Furthermore, Mr. Nesper argued that both claims involved the same parties, same counsel, and same estimator.

Plaintiff knew she was claiming duplicative damages, and yet, Plaintiff still presented those invalid estimates to Defendant for payment. Plaintiff's counsel should have removed any overlap before submitting the estimates to Defendant for payment. However, this did not happen.

Mr. Nesper read directly from the subject insurance policy, which explicitly states that Defendant provides no coverage if Plaintiff makes a material false statement related to the insurance coverage. That is precisely what Plaintiff did.

After hearing argument and reviewing the motion and supporting evidence, the Judge granted final summary judgment in favor of Defendant.

— Michael Nesper, Esq.

Note: Michael Nesper joined WLSC Miami Office in December 2019.

WLSC Sponsors Florida Association of Women Lawyers' Judicial Reception

Associate Ingrid P. Benson-Villegas attended the 37th Annual Judicial Reception that the Miami-Dade Chapter of the Florida Association for Women Lawyers held on December 13, 2019, wherein the Honorable Rodolfo Ruiz was honored. Ms. Benson-Villegas is pictured with the Honorable Rodolfo Ruiz, the Honorable Robert Luck, and the Honorable Nushin Sayfie. Walton Lantaff Schroeder & Carson LLP sponsored the Judicial Reception and was included in the program. Hundreds of lawyers and members of the judiciary were present at the Judicial Reception. Ms. Benson-Villegas is on the Board of Directors of MDFAWL and is also Chair of the Public Relations Committee for the organization.

WLSC Associate Benson-Villegas Recognized as 'Leader in the Law'

The Florida Association for Women Lawyers ("FAWL") recognized WLSC Associate Ingrid Benson-Villegas as a Leader in the Law at its Awards and Installation Ceremony on June 26, 2019. The Leader in the Law Award recognizes outstanding women who have made significant impacts in their communities.

INSURANCE DEFENSE

‘Horizontal Immunity’ Defense Prevails

Laura R. Weinfeld, Esq.

On November 19, 2019, Laura R. Weinfeld, who was recently promoted to junior partner, successfully researched, drafted and argued a motion for summary judgment before Judge Veronica A. Diaz on behalf of the defendant in the case of Guadalupe Arias v. LSG Sky Chefs North America Solutions, Inc., Case Number 2015-013648, in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida.

The case turned on Sky Chef’s workers’ compensation immunity defense. More specifically, “horizontal” immunity under 440.10(1)(e) applies where a plaintiff is a subcontractor who has received workers’ compensation benefits as a result of the subject accident, and the defendant is a subcontractor of the same contractor, engaging in the same project or contract work. This immunity is a complete defense to the action and warrants entry of summary judgment where there is no genuine issue of material fact regarding the relevant details of the employment of the parties.

JULIAN MACEDO ON FLICKR (CC)

Judge Diaz ruled that because the pleadings and evidence on file showed that there was no genuine issue as to any material fact that both the plaintiff and the defendant were subcontractors of American Airlines, and engaged in providing services on the same project, under Vallejos v. LAN Cargo, 116 So. 3d 545 (Fla. 3rd DCA 2013), the defendant was entitled to workers’ compensation immunity under Fla. Stat. § 440.10. Judge Veronica A. Diaz subsequently entered a final judgment after granting the defendant’s motion for final summary judgment.

Defense Tip: making sure that such affirmative defenses are discovered early enough to be raised at the summary judgment phase will save your client’s time and money.

WLSC COURTROOM VICTORY

Notice of Dismissal with Prejudice Ordered on Principle of *Res Judicata*

Associate Joanna L. Bragman prevailed in court on an argument against Plaintiff’s Motion to Reopen a case addressing both Hurricane Matthew and Hurricane Irma damages to a property, which had been previously dismissed by the Court for failure to comply with a previous court order to obtain new counsel and for lack of prosecution.

Joanna L. Bragman, Esq.

In court, Ms. Bragman argued that the subject lawsuit had been filed in March 2018 asserting breach of contract on both hurricane claims, and a subsequent lawsuit was filed in February 2019 regarding the same two claims. Plaintiff voluntarily dismissed the subsequent suit with prejudice in April 2019 – allegedly upon realization that the subject lawsuit had been filed previously. However, the subject lawsuit was dismissed without prejudice by the Court twenty-two (22) days prior to Plaintiff’s dismissal with prejudice in the subsequent suit, and six (6) days prior to their Notice of Appearance in the subject suit.

The principle of res judicata is that a cause of action cannot be relitigated after the rendering of a final judgment.

The crux of Ms. Bragman’s argument was that due to the Plaintiff’s voluntary dismissal with prejudice in the subsequent lawsuit, addressing the same two claims as in the subject lawsuit, a final judgment had been rendered, and the subject lawsuit could not be reopened or relitigated – *res judicata*.

Plaintiff argued that the subsequent lawsuit was dismissed with prejudice by mistake, being unaware the Court previously dismissed the subject lawsuit without prejudice.

However, the timeline did not add up. How could it be argued that Plaintiff dismissed the subsequent lawsuit upon knowledge of the subject lawsuit’s existence, but then waited twenty-eight (28) days to file their Notice of Appearance? It cannot. There was no mistake. Plaintiff’s own act of voluntarily dismissing the subsequent lawsuit with prejudice prevented Plaintiff from reopening the subject lawsuit.

The Judge, after hearing both arguments and reviewing the Plaintiff’s Motion and Defendant’s Response thereto, denied Plaintiff’s Motion to Reopen the subject case – which was heard in the alternative as Plaintiff’s Motion to Vacate the Court’s prior dismissal – as futile due to the subsequent lawsuit addressing the same two identical claims under the principle of *res judicata*.

The Judge further ordered the subject case dismissed with prejudice and for the Clerk to re-close the matter. Based on Plaintiff’s own actions, Plaintiff is now unable to recover on either of these two claims, Plaintiff’s attorneys cannot recover fees, and the Insurer has been protective from duplicative litigation.

—Joanna L. Bragman, Esq.

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WORKERS' COMPENSATION

Victory for the Defense in Denied 'First Aggressor' Claim

On an extraordinary set of facts and video evidence, the Judge of Compensation Claims (the Hon. Carol Stephenson), held that the Employer/Carrier met their burden of proving that the Claimant acted with the willful intention of injuring himself and therefore his claim for workers' compensation benefits was denied.


Gregg Margre, Esq.

The Claimant was a bus driver for the County of Palm Beach. While driving on his route, he picked up a passenger who refused to pay. The Claimant/Driver eventually stepped off the bus suggesting that the passenger needed to pay or get off the bus. Eventually, the driver gave up and proceeded on his route.

During the ensuing ride, the passenger was verbally abusive and belligerent. Despite enduring racial slurs, the Claimant/Driver maintained his composure up until the point when the passenger spit in his face. At that point, in an apparent impulsive act, he fought back and struck the passenger and injured his hand.

The Judge of Compensation Claims, while sympathetic to the abuse that the Claimant endured, stated "certainly, with all the provocation he endured here [the Claimant's] anger could be viewed as justifiable. But we no longer live in the wild, wild West where people can simply take justice into their own hands.

We have the law, the law here directs me to make a finding of whether the Claimant had the willful intention to injure or kill himself or another, which I so do."

Congratulations to Senior Partner Gregg Margre a for his successful defense in this claim.

—Michele E. Ready, Esq.