

THERE IS A CRACK IN THE WALL: IS IT A RESULT OF SINKHOLE ACTIVITY?



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Florida sinkholes have made national headlines in recent months. Media reports focus on events known as “catastrophic ground collapse” where sinkhole activity causes the earth’s surface to collapse into a subterranean void. These natural phenomena can destroy a building, and though exceptionally rare, cause serious injury or death. The economic toll of catastrophic ground collapse that occurs on a homeowner’s property is also significant, as property damage can exceed insurance policy limits without taking into consideration the costs to stabilize the earth.

So what is all the fuss about when it comes to Florida sinkhole claims when a catastrophic ground collapse event rarely occurs? The answer lies in Florida Sinkhole Statute §627.706.

Fla. Stat. §627.706(h) defines “Sinkhole” as “a landform created by subsidence of soil, sediment, or rock as underlying strata are dissolved by groundwater. A sinkhole forms by collapse into subterranean voids created by dissolution of limestone or dolostone or by subsidence as these strata are dissolved.”

Section (i) defines “Sinkhole Activity” as “settlement or systematic weakening of the earth supporting the covered building only if the settlement or systematic weakening results from contemporaneous movement or raveling of soils, sediments, or rock

materials into subterranean voids created by the effect of water on a limestone or similar rock formation.”

Based upon the Florida Legislature’s definitions of Sinkhole and Sinkhole Activity, a catastrophic ground collapse event is not required to present a sinkhole claim in Florida. A homeowner simply needs a geotechnical investigation with a final opinion that Sinkhole Activity - as defined by statute - is occurring below the surface of, or near, an insured building. Sinkhole Activity simply needs to be close enough in proximity to an insured building where the geotechnical engineer may opine, within a reasonable degree of professional probability, that Sinkhole Activity can be identified as at least a contributing cause of the observed distress (e.g., a crack in the wall) at the building.

As one would expect, the phrase “Sinkhole Activity” is the basis for the hundreds of millions of dollars in sinkhole claims in Florida. As with any profession, geotechnical engineers agree to disagree on what is sinkhole activity, and the statutory definition of “Sinkhole Activity” does little to reduce professional disagreement.

This firm has handled more than 100 sinkhole cases in recent months where alleged Sinkhole Activity is the basis for litigation. There are a handful of “experts” who make a comfortable living traveling from one plaintiffs’ firm to another, conducting peer reviews of geotechnical reports where they analyze the soil data collected during the insurer’s statutory geotechnical investigation. For a nominal fee, these “experts” will review the soil data, determine if they agree with the conclusion of the insurer’s geotechnical engineer, and issue an opinion of their own.

Although these “experts” have testified at deposition that they reject cases based upon peer review, they have no quantifying data to qualify their testimony that they, in fact, do not issue opposing opinions in each and every peer review where an insurer’s geotechnical engineer has ruled out Sinkhole Activity as a cause of the distress to the property.

It is my opinion that a case is born when a plaintiffs’ expert conducts a peer review. My office encounters “expert” opinions that either dispute the presence of sinkhole activity or dispute the method of repair in cases where sinkhole activity is confirmed. In response, the firm has developed successful litigation tactics for these cases where sinkhole activity is the basis for litigation and/or the method of repair is at issue. These defenses should be preserved early in the handling of the insurer’s sinkhole investigation to ensure a smooth claims handling for the insured and the insurer.

It should also come as no surprise that an insurer’s policy language in conjunction with the Florida Sinkhole Statute should serve as an essential roadmap to handling a sinkhole claim. There are many traps to avoid, and plaintiffs’ firms seem to spend more time creating traps than seeking to resolve sinkhole claims on their merits. If you or your company would like more information about sinkhole claims handling, or you would like for us to conduct a CE Course on how to effectively handle a sinkhole claim, please contact our Clearwater office’s managing attorney, Ken Amos, at KAmos@National-Law.com.

HOW SHOULD THE CLAIMS PROFESSIONAL EVALUATE A DEMAND FOR INDEMNIFICATION IN AN ALABAMA CONSTRUCTION CASE SCENARIO?



By **Jim Patterson**, Vernis & Bowling of Southern Alabama, LLC

AV rated by Martindale-Hubbell

Your insured has entered into a subcontract with a general contractor, and has performed its work on a project. A personal injury claim was later made against the general contractor for something that happened during your insured's work on this project. The injury occurred somewhere on the job site. The general contractor has now come to your insured and demanded indemnification, based on an indemnification clause in the operative subcontract. While the GC's demand seems to indicate there is no wiggle room for your insured to avoid indemnification, there may actually be.

How should a claims professional evaluate a demand for indemnification in Alabama? We recommend a three step approach.

The first and most obvious step is to examine the facts surrounding the accident at issue. Some obvious avenues of inquiry would be: When did the accident occur? How did the accident occur? Did this accident have anything to do with your insured subcontractor's original scope of work on the project? Was your insured's scope of work changed at any point during the project? (If so, by whom and when? Then: Did this accident have anything to do with your insured subcontractor's revised scope of work on the project?) What is the cause in fact of the accident alleged? Who was injured? What was their job? If the injured party was not working on the project, why were they there? Did the alleged accident arise out of the insured subcontractor's own work on the project, or was something else involved? Obtaining the answer to these and other obvious questions will point the claims professional in the direction he/she needs to go.

The next recommended step would be to take a recorded statement from your insured, reviewing their scope of work on the project; what, if anything your insured knows of the alleged accident; and whether or not your insured believes he had any responsibility for said accident. Honest answers to these questions will also help the claims professional determine how to proceed. [Note: These inquiries are arguably protected as

material gathered in anticipation of litigation.] During this part of the claim evaluation, the claims professional should always obtain a copy of the relevant subcontract and any and all addendums thereto. Also, the claims professional should obtain any change orders issued by the GC that your insured sub may have.

The third recommended step in any indemnification investigation is this: Before merely accepting the GC's demand for indemnification based on the facts as discovered, examine—or have someone familiar with Alabama law examine—the relevant subcontract to evaluate the specific language within the indemnification clause, so as to gauge the strength or weakness of the indemnification agreement in context of the operative facts.

In doing so, ask yourself these questions:

I. Is the indemnification language broad?

There are generally three types of indemnity agreements in Alabama, and obviously, the language in any indemnification clause is critical. The first type of indemnity agreement, favored by most general contractors operating in the state, is the most broad and draconian form. We will call it "Type 1 Indemnification." Type 1 Indemnification makes the Indemnitor responsible for its own negligence, as well as indemnifying any negligence on the part of the GC, as well as indemnifying the negligence of third parties like the Architect and Engineers. The other types of indemnification agreements provide lesser forms of indemnification, for example when the Indemnitor assumes responsibility for the risk except if the risk is caused by the active negligence of the indemnitee (Type II), or where the Indemnitor assumes responsibility for the risk but only if the indemnitee is without any fault whatsoever (Type III). The second and third forms of indemnification will not be discussed in this article, because they leave ample room for arguing that a GC may not be entitled to indemnification, depending on the facts.

However, as to the broad form Type I Indemnification agreement, an example of the key language to watch out for in such a draconian document is as follows:

"Subcontractor shall defend, indemnify, and hold General Contractor harmless from and against **any and all claims**, including those caused by the negligent actions of the general contractor... to the extent said allegations **arise out of or result from**, or are related in any way to **work on the project**..."

Words such as "from and against any and all claims," and "arising out of or resulting from work on the project," are a

definite red flag. The claims professional noting such language in an indemnity agreement must be aware that this language, strung together, is a blatant attempt to make the indemnification clause all encompassing—or more simply put—as broad as it can be.

The claims professional may also identify language in a broad form Type I Indemnification agreement whereby the subcontractor “does not agree to indemnify the GC for its sole negligence” or “does not agree to indemnify a GC for intentional or willful misconduct.” Make no mistake. This kind of language is only a bit of “sleight of hand,” designed to disguise the true nature of the contract from the gullible subcontractor without counsel, who will agree to sign just about anything to keep his men employed. Think of it this way: Because the general contractor functions through its subcontractors for the most part, and because intentional willful misconduct resulting in injury on the part of a GC is virtually non-existent, there is rarely a circumstance where the general contractor can be said to have acted alone to the point where indemnification can be defeated by the “sole negligence” or by the “intentional or willful misconduct” exclusion.

II. Is indemnification expressed in clear and unequivocal language, and was the contract containing indemnification entered into knowingly, evenhandedly with valid consideration?

The “leading case” on the current state of indemnification law in Alabama is *Industrial Tile, Inc. v. Stewart*, 388 So.2d 171 (Ala. 1980). Frankly, it is a bit old, and is arguably modified by the *Doster* case as discussed in part III below. However, in this case out of Mobile County, Plaintiff John Stewart was employed by subcontractor J & J Construction, which had been hired by Courtaulds North America, Inc. for work at a local chemical plant. Industrial Tile, Inc. was another contractor working for Courtaulds. An employee of Industrial Tile was electrocuted when a mobile hydraulic crane operated by Industrial Tile came into contact with a 7,200 volt electric line which was installed, owned, and maintained by Courtaulds. *Id.* at 172. Plaintiff John Stewart came to the aid of the injured Industrial Tile employee, and was himself injured in the process. Stewart sued Courtaulds, Industrial Tile, and others alleging that his injury was caused by the negligence of Courtaulds in installing and maintaining the high voltage lines in an un-insulated fashion, and by Industrial Tile’s negligent operation of the crane which came into contact with the un-insulated wires. *Id.* at 172. At trial, the jury returned a verdict against both Courtaulds and Industrial Tile, and the trial court entered a judgment against Courtaulds on its cross-claim for indemnity against Industrial Tile. *Id.* Courtaulds appealed.

The Alabama Supreme Court reversed, noting that “a contract may validly provide for indemnification of one against, or relief him from liability for, his own future acts of negligence provided the indemnity against such negligence is made unequivocally clear in the contract.” *Id.* at 174. In so doing, the Alabama Supreme Court admittedly rejected its own rule established just two years prior, which stood for the proposition that “a contract which permits the indemnification of the indemnity against his own wrongs is void as against public policy.” *Id.* at 176. Instead, the Industrial Tile Court held that such indemnification agreements

will be upheld **if expressed and clear and unequivocal language, assuming the contract was entered into knowingly, evenhandedly with valid consideration.** *Id.* (emphasis added).

General Contractors love to point to the *Industrial Tile, Inc. v. Stewart* case when demanding indemnification. However, as will be explained below, do not be fooled. When the Industrial Tile court asked whether indemnification was expressed in “clear and unequivocal language,” it created an avenue of inquiry whereby the talents of any attorney drafting an indemnification clause can be put to the test. In the last case he was involved with of this nature, the undersigned hired an Eighth Grade English teacher as his expert, because the Eighth Grade is where we learn to diagram sentences, learn about dependent and independent clauses, and generally refine all we have learned with respect to grammar and punctuation. In that particular case, the English teacher was not only of the opinion that the indemnification agreement was ambiguous— and thus capable of more than one interpretation, she also rendered a scathing opinion about the writing skills of the attorney who drafted it, stating that if he were one of her students, she would have failed him.

III. Is indemnification claimed by one guilty of wrongdoing, i.e. was the GC the cause of the injury?

General contractors in Alabama love to point to a particular 11th Circuit federal court decision rendered back in year 2007 as evidence that when the magic words “arising under” are placed in an indemnification agreement, this absolutely requires a subcontractor to indemnify a general contractor, even for the general contractor’s own wrongs. The undersigned faced this exact argument in a situation where a general contractor’s negligence during an apartment construction project allowed his subcontractor’s employee to fall to his death. Unbelievably, the general contractor turned on this subcontractor and demanded indemnification, despite the fact that the subcontractor had already paid workers’ compensation death benefits for the employee.

The case relied on by that GC for the proposition that the magic words “arising under” mandated indemnification for the death of the sub’s employee, was a dispute between insurers arguing to resolve excess liability obligations between them in the context of a construction accident. See *Twin City Fire Insurance Company, Inc. v. Ohio Casualty Insurance Company, Inc.*, 480 F. 3d 1254 (11th Cir. 2007). However, those who proffer this decision as evidence that Alabama will always uphold indemnification agreements fail to recall that this dispute was in the context of resolving liability obligations between excess insurers after the underlying tort case had been settled.

The facts were these: In *Twin City*, one of two excess insurers (Ohio Casualty) argued that because the accident there did not actually “arise out of” its insured’s (G A West’s) work but instead was caused solely by another entity (Alabama River Pulpwood), indemnification per the terms of its’ insured’s indemnification agreement was not triggered. *Id.* at 1264. The 11th Circuit disagreed, interpreting the arising under language as broadly as it could. However, when placed in context, this (interpreting

the arising under language as broadly as it could) was because the Twin City case was one between insurers looking to get out of obligations under a contract of insurance. The 11th Circuit correctly pointed out that under Alabama law, it was required to interpret ambiguities in insurance contracts in favor of the insured. *Id.* Any issue of whether there was any ambiguity within the terms of the indemnification agreement between actual parties was never raised in that case.

However, as if to support the “arising under/arising out of” argument– notwithstanding that they did not have a dog in the fight, the 11th Circuit went on to state:

“Courts have consistently held that but-for causation is enough to constitute “arising out of.” In the course of interpreting Alabama law, the court in *Davis Constructors & Eng’rs, Inc. v. Hartford Acc. & Indem. Co.*, 308 F. Supp. 792 (M. D. Ala. 1968) construed similar language to include an accident where the indemnitee’s negligence was the sole cause. *Id.* at 795. Courts generally interpret “arising out of” in this broad sense. See *Mid-Continent Cas. Co. v. Swift Energy Co.*, 206 F. 3d 487, 498 (5th Cir. 2000) (collecting cases). There is no indication that Alabama would adopt a different interpretation. To the contrary, Alabama law instructs that ambiguities in insurance contracts are to be interpreted in favor of the insured. See *Jordan v. Nat’l Acc. Ins. Underwriters, Inc.*, 922 F. 2d 732, 734 (11th Cir. 1991).” *Id.* at 1264.

Because all of us who live and work in Alabama know the feds love to meddle in Alabama law, and presumably to answer any such assertion by a federal court that “arising under” language mandates always upholding indemnification, the Alabama Supreme Court inserted a footnote in its *Doster Construction* case, decided in 2009 (after the dates of all of the above cited cases) which presumably provides a better understanding of how the Alabama Supreme Court–and not the federal 11th Circuit– would rule in a situation where an indemnitee claimed defense and indemnification for the indemnitee’s own wrongs.

In the case of *Doster Construction Co., Inc. v. Marathon Electrical Contractors, Inc.*, an electrical subcontractor’s employee was injured when a crane operated by another subcontractor was put in motion and collided with a scissor lift. *Doster Construction Co., Inc. v. Marathon Electrical Contractors, Inc.*, 32 So. 3d 1277, 1281 (Ala. 2009). *Doster*, the general contractor on that job, had a contract with the electrical subcontractor (*Marathon*) whose employee was injured. *Id.* at 1283. Notwithstanding that a third subcontractor arguably caused the injuries to *Marathon*’s employee and *Marathon* did not, *Doster* demanded that *Marathon* defend it. The *Doster/Marathon* subcontract contained broad indemnification language whereby *Marathon* not only agreed to indemnify *Doster* for *Marathon*’s own negligence, but also agreed to indemnify *Doster* against, and assume any obligations of *Doster* for all liabilities, claims, suits, actions, proceedings, etc. that arise in any way [“arising under” language] directly or indirectly from *Marathon*’s failure to carry out work in a safe manner. *Id.* at 1283. Importantly, the *Doster/Marathon* indemnification clause “contained no exception for any loss to which *Doster*’s own negligence may have contributed.” *Id.*

Based on the unique facts of that case, the Alabama Supreme Court ultimately determined that it was required to enforce the *Doster/Marathon* indemnification agreement as written. *Doster*, 32 So. 2d 1277, 1284. **However, by way of a footnote the Alabama Supreme Court emphasized that the issue of the adequacy or inadequacy of the indemnification language within the *Doster/Marathon* subcontract was not presented on appeal:**

“FN2. Ordinarily, indemnification for an indemnitee’s own negligence requires “clear and unequivocal language.” *Harsco Corp. v. Navistar Int’l Transp. Corp.*, 630 So. 2d 1008, 1011 (Ala. 1993) (citing *Industrial Tile v. Stewart*, 388 So. 2d 171, 176 (Ala. 1980)). The indemnification clause at issue here includes the following sentence: “[*Marathon*’s] obligation to defend and indemnify the Indemnitees shall not be diminished or excused merely because the negligence or other breach of a legal duty on the part of any Indemnitee also contributed to the Indemnified Loss.” **No issue is presented all on appeal as to the adequacy of this language.**” *Doster*, 32 So. 2d 1277, 1283 (emphasis added).

The *Doster* Court went on to say that under the circumstances presented, “unless the terms of the indemnity clause are in some way ambiguous, we are required to enforce it as written.” *Id.* (emphasis added).

Now, given that FN2 of the *Doster Construction* case virtually invites an appeal on the issue of the adequacy of contractual language seeking indemnification for an indemnitee’s own wrongs, and understanding that such agreements are clearly disfavored under Alabama law, the issue of the adequacy of the indemnification language within any Alabama subcontract wherein a GC tries to obtain indemnification for its own negligence should be placed squarely before the Alabama Supreme Court.

Thus, if you are a claims professional investigating a demand for indemnification made by a General Contractor, and the General Contractor’s counsel argues that the term “arising out of,” or “arising under” – as set forth in its own indemnification agreement– requires or somehow mandates indemnification for the GC’s own negligence under the holding in *Twin City Fire Insurance Company, Inc. v. Ohio Casualty Insurance Company, Inc.*, 480 F. 3d 1254 (11th Cir. 2007), given the discussion regarding indemnification in the more recent *Doster Construction* case wherein the Alabama Supreme Court virtually invited an appeal on the issue in FN 2, we recommend that you contact the undersigned to determine how best to proceed.

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We are pleased to announce the addition of the following attorneys to the VERNIS & BOWLING team.



Alisa W. Ellenburg

Alisa W. Ellenburg was born in Atlanta, Georgia. In 1985, she graduated from the University of Georgia in Athens, Georgia with a Bachelor of Arts degree in Journalism and Political Science. Alisa earned her Juris Doctorate degree in 1997 from the Vanderbilt University School of Law. Since earning her law degree, Alisa has focused her practice

primarily on servicing insurance and self-insured clients.

She has extensive experience, including first chair trial and appellate work, in the areas of trucking and cargo commercial vehicle liability, insurance coverage disputes and first party claims, premises liability,

automobile liability and uninsured motorist coverage, construction defects, employment, products liability and personal injury/wrongful death claims. She also has expertise in subrogation matters, garnishment and collections, and state and municipal regulatory compliance cases.

Alisa is married and has one daughter. She is actively involved in the Smyrna Upward Youth Sports Program as a coach, volunteer and motivational speaker. She enjoys hiking, traveling, biking and running. She has successfully summited Mount Kilimanjaro in Tanzania, Africa and has completed several marathons, half-marathons and sprint distance triathlons.



Scott Bell

Scott Bell was born in Denver, Colorado, but raised in The South. He was graduated from the Plan II Honors program of the University of Texas in 1988. Thereafter, in 1993, he earned his J.D. from the Washington College of Law of the American University located in Washington, D.C.

Scott has been engaged in the practice of law since 1993 and is licensed in Georgia, Tennessee, Colorado and Texas. He is authorized to practice law before all state courts in each of these jurisdictions. He is also licensed to practice before the U.S. District Courts for the Middle and Northern Districts of Georgia, the District of Colorado and the Southern District of Texas and as well as the U.S. Court of

Appeals for the Tenth Circuit. Scott has focused his practice on civil litigation and has experience representing defendants in automobile liability, premises liability, bad faith/extra-contractual liability, construction and construction defect litigation, commercial vehicle liability, common carrier liability, coverage litigation, professional malpractice litigation, SIU/fraud matters, general liability, products liability and uninsured/underinsured motorist liability.

CRASH! WHAT DO WE DO NOW? CONSIDERATIONS FOR IMMEDIATE RESPONSE TO COMMERCIAL VEHICLE ACCIDENTS



By Alisa W. Elenburg, Esq.
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Whether you are a motor carrier or an insurer, time is of the essence in the aftermath of a tractor trailer accident. Your response in the hours – and preferably even minutes—following the accident can make or break your ability to accurately evaluate and effectively defend the case in the coming years of litigation.

Although you may think you will have plenty of time to investigate and build your case before any such accident eventually results in litigation, what you do in the first few hours after the accident can be more effective than years and years of efforts by the best trucking lawyer in the business. As the years roll on, witnesses disappear. Documents are destroyed. Police reports are often replete with inaccuracies or omissions despite the officer's best efforts at the scene. Memories fail. Vehicles are crushed, melted, sold, repaired and returned to service. Road marks are paved over or fade out, and accident scene photography – if in fact there is any – is most often unreliable and incomplete at best.

So don't wait until after the accident to get your ducks in a row. Plan now. As the old saying goes, "if you fail to plan, you plan to fail." Make sure your accident response plan is ready, and all the key players are educated and prepared for implementation – before the crash. Here are a few reminders:

1. The DQ File: A Foundation for Success – The first phase of your accident response preparedness should begin with the hiring of the driver. The federal regulations require the maintenance of what is known as a Driver Qualification or "DQ" file for every driver of a commercial motor vehicle. The DQ file may be, but is not required to be, combined with the driver's personnel file. The contents of the DQ file should be complete to satisfy the requirements of the federal regulations and updated accurately and faithfully. All documents pertaining to the hiring of the driver should be placed in the DQ file within 30 days

of the driver's hire date. Your driver's DQ file should contain a copy of the driver's valid, current Commercial Driver's License; the driver's application and list of references of past trucking employers; validation that these references were checked and the information received; safety performance history with previous employers; three year driving history for all states in which driver has held a valid driver's license during that time period; medical examiner's certificate of DOT physicals for three previous years (and after May 21, 2014 verification that the driver was certified by a medical examiner listed on the National Registry of Certified Medical Examiners), pre-hire and random drug and alcohol screen results; results of pre-hire road test, documentation of an annual review of the driver's driving record and any motor vehicle violations for the past three years. Maintenance of a DQ file that stands up to the rigors of the federal regulations can go a long way in defending against claims of negligent hiring, supervision, training and retention against the motor carrier and will assist in defending the driver, as well.

2. Driver Logs: Hours of Service Records Can Tell the Story

The hours of service logs for each driver as required by the federal regulations must be preserved for six months. Many motor carriers have standard retention and destruction policies. Such policies must comply with the six month retention requirement. A driver's logs should be examined immediately following an accident to spot any gaps of information or inaccuracies. These driver logs should also be compared to trip receipts, weigh station records, gas receipts, bills of lading, driver cell phone records and other information from the tractor's onboard computer or GPS to determine accuracy of the information and spot any mistakes or violations of the regulations early on. Accurate hours of service logs which comply with the federal regulations can provide evidence important to defending against allegations of fatigue or driver inattention.

3. A Picture is Worth a Thousand Words

– Equipping your driver with a disposable camera can at least document basic evidence which could be critical to an accident reconstruction expert years down the road. Photographs of the positions of the vehicles and their positions relative to one another, any markings on the roadway, and any mile markers or points of interest which could later provide keys to locating the exact site of the accident scene can all potentially make the difference in a subsequent investigation and reconstruction. Driver and witness

statements years afterward can be fraught with inaccuracies and gaps, but photographs can help tell the real story. Many states have specially trained teams of officers on their highway patrol who are dispatched to accidents involving fatalities and more serious injuries. The officers often have specialized accident investigation and reconstruction training and many times conduct a full-scale investigation and reconstruction of accidents meeting certain criteria. Their files often include, in addition to the standard accident report, photographs, scene measurements, interviews with witnesses, and the officer's field notes. These officers generally have at least some knowledge of how to spot significant markings on the roadway, measure distances (such as site distances or distances from point of impact to point of final rest), and document factors going to conspicuity issues when relevant.

4. The Automobiles – In some cases, the other automobile involved in accidents with tractor trailers are sold for salvage value and then crushed and melted. Obviously it is of no use to your investigation after that stage. It is important to immediately request either preservation of the automobile or, more realistically, demand that your accident reconstruction expert be afforded an opportunity to inspect and photograph the vehicle at the tow lot. Similarly, you will want to consider any issues regarding preservation of your own equipment. Most likely, the equipment will need to be repaired and returned to service; however, care should be taken to at least have photographic documentation of the equipment before such modifications are made in order to defend against future spoliation issues. In any event, do not

modify your equipment if you have received a letter demanding preservation of the evidence without offering an opportunity to inspect and/or photograph the equipment. Before allowing destructive inspections, however, it is important to consult with your own attorney and/or expert engineer. Such destructive inspections should be conducted with experts and counsel for both sides present and pursuant to video and audio recording.

5. Call in the Professionals – Although many motor carriers and insurers are reluctant to call in an attorney and/or an accident reconstruction expert immediately, doing so right away could eventually save the day. Retaining a seasoned trucking attorney to direct the immediate post-accident investigation can facilitate in preservation of the necessary evidence from the start. Most likely, a trucking attorney worth his or her salt will be able to immediately involve a knowledgeable, credible accident reconstruction engineer who can competently investigate the scene and reconstruct the accident. Obviously, the sooner the accident reconstruction expert has access to the scene, vehicles and witnesses, the better. Fresher evidence allows your expert to opine with more detail and more conclusively, leaving less room for guesswork. Getting your expert to the scene immediately following the accident and before the vehicles are moved, while realistically not always possible, is nonetheless the gold standard.

While we have offered but a few of the considerations important to an effective accident response plan, we hope that these will assist you in planning ahead for success. Remember, time is of the essence!

EIGHT STRATEGIES EMPLOYERS CAN UTILIZE TO REDUCE RISK AND COSTS IN WORKERS' COMPENSATION CLAIMS



By Nicole Tackett Managing WC Attorney, Vernis & Bowling of Charlotte, LLC

According to the U.S. Department of Labor, nearly 3 million non-fatal workplace injuries were reported by private industry employers in 2011, which results in an incident rate of 3.5 cases per 100 full-time workers.¹ These statistics result in significant costs for all employers, regardless of size. In North Carolina alone, over 61,000 workers' compensation claims were filed in 2011, with the average claim costing more than \$42,000.00.² While larger companies can finance safety programs and loss prevention strategies to minimize the number of claims each year as well as the cost per claim, small and mid-sized employers often lack the resources necessary to achieve the same results. The following strategies can be utilized by employers of all sizes to reduce both risk and cost in workers' compensation claims:

1. Treat Workers Compensation Like a Business Function

All too often, an employer's role in workers' compensation is to pay its insurance premium, report claims to the carrier and allow the adjuster to handle the rest. However, employers that have low workers' compensation costs understand that effective claims handling begins before the accident even occurs. Companies that handle workers' compensation like an essential business function, instituting company programs and policies with specific roles for business leaders, education for management and employees and accountability for everyone involved come out far ahead of their competitors in terms of reducing the number of claims and the costs of claims.

Associated Industries of Massachusetts, one of the leading employer organizations in that state, is a good example of a group of employers who treated workers compensation like a standard business function and turned around a would-be disaster.³ In Massachusetts in the early 1990's, workers' compensation was in a real crisis for employers, costing over 2 billion dollars annually. This employer organization took action, arranging regular seminars and meetings with all different types of business executives, HR and risk management professionals to figure out a plan to turn the tide for employers. These companies came to the realization that simply standing by and doing nothing was not enough. These employers needed to be educated in

their state's laws and processes and involved in their claims and medical expenses. Within a few short years, this group played a fundamental role in state enacted legislation, which overhauled Massachusetts' workers' compensation system, reducing annual costs to approximately 600 million dollars.

Fortunately, a crisis of this proportion isn't necessary to jump start this type of change for an employer. Insurance brokers, adjusters and attorneys are excellent sources of workers' compensation information for employers. The internet is also an invaluable tool. Each state's workers' compensation board typically has an informative website with specific sections for employers, and there are many workers' compensation blogs, chat rooms and groups that specifically address workers' compensation issues from an employer's perspective. The best move an employer can make to reduce workers' compensation risks and costs is to utilize these resources to design and implement standard business protocols to increase company involvement in the workers' compensation process.

2. Assess the Source of Accidents and Occupational Diseases in the Company and Take Action

Take an annual inventory of the company's workers' compensation claims and determine which jobs, activities and areas generate the most claims and which types of claims they generate. For example, a local retailer has inventory shipped to its shops on a daily basis. The inventory comes in dark colored totes. The lifting and unloading of the totes from the delivery truck causes a significant number of back injuries because the employees cannot see what items they are lifting, the weight of the items in the tote, whether there is shifting, etc.

Once the sources of injury are identified, make a plan to reduce or eliminate those injuries and monitor that plan on a regular basis. If there's no change in three months, alter the plan. Ask employees for their input before the plan is implemented—people who regularly perform a task most likely have the greatest insight on safety changes. ⁴ Also ask for employee feedback after changes are made.

In the example above, the company could easily switch to clear totes so employees can actually see what items they are moving. While regular safety meetings are important, this approach to the problem of totes causing back injuries is more proactive and effective than a meeting on safe lifting practices because the company is both taking action to prevent claims and making employees a part of that action.

An employer should also pay attention to the claimant population. For example, perhaps one task on an assembly line results in multiple carpal tunnel claims. The problem may not be the

machinery. Look to see if there is a pattern in the type of person either having an accident or contracting an occupational disease. In this example, if the carpal tunnel claimants are all 5 feet 3 inches or under in height, it could only take a slight change in height adjustment of the machinery (or a platform) for shorter individuals to resolve the problem. Often times, an easy fix can go a long way in injury prevention.

3. Educate Company Leaders and Employees on Workers' Compensation Laws and the Workers' Compensation Practices in your Company

Other articles on this topic confuse education on workers' compensation with safety education. The two, while related, are not the same thing.

Employee education on workers' compensation is really about educating employees on the claims process within the company. Employees should be educated on the company's "game plan" for workplace accidents. This way, employees know that people at the company are responsible for that protocol to be followed and that the employee has responsibilities as well. A systematic approach to claims reporting and claims handling leaves little room for reports of fake injury or malingering.

4. Don't Hire Employees

This tip probably sounds catty at first blush, however, it makes strategic sense to hire out jobs in high risk categories.⁵ For example, truck driving has one of the highest injury ratios of all occupations.⁶ Truck drivers also have a lot of back injuries which can be expensive and result in a significant amount of lost time.⁷ It may be more cost effective to contract out your trucking needs versus keeping them in house and running the risk of high workers' compensation costs. However, when contracting out these jobs, it is important to establish the employee/employer relationship and responsibility for workers' compensation claims in the contract.

5. Have a Relationship with the Professionals Handling Your Claims

When a claim occurs and the insurance company or TPA is involved, it is very important to have a strong relationship with the person handling your claims. Request that a dedicated adjuster be assigned to your claims. Meet that person and invite him/her to your facility. The more an adjuster knows about a business, the better an adjuster can handle a claim. For instance, the claimant's recorded statement taken by the adjuster at the onset of a claim can be a critical component of the claim investigation. The adjuster can ask the "right questions" about the accident, body positioning, task being completed, etc. if the adjuster is familiar with the company and understands the job task.

It is also a good idea to have a say in the selection of your defense counsel. Choose a defense attorney who is not afraid to go to court, but also has the negotiation skills to get a cost-effective and quick result for your company outside of the courtroom. Some claims are better closed than litigated. Make sure your attorney knows the difference.

The attorney, adjuster and employer should work together as a team to make sure claims are legitimate, costs are kept at a minimum for the employer and that the claim is given prompt and regular attention. The stronger relationship and accountability between these three entities, the better the outcome for everyone.

6. Manage Medical Treatment Wisely

All doctors are not the same and workers' compensation claimants have unique needs, especially when it comes to assigning restrictions and sending an injured worker back to work. In states where the employer is allowed to direct medical treatment, it is important to have medical providers that understand the workers' compensation system and the challenges it presents. This knowledge of how the provided medical treatment fits into the legal system is instrumental in getting injured workers treated properly and back to work in a timely manner. For example, a doctor who understands workers' compensation will not assign restrictions of "lift as tolerated" because that is not useful to the employee or the employer.

Make sure that your TPA or insurance company has mechanisms in place to address the special needs of workers' compensation in the medical area. The utilization of medical networks that accept workers' compensation claimants and understand the workers' compensation process can be a cost-saving way to address these special needs. Other ways a TPA or insurance company can work with a company to manage medical costs is through the use of nurse case managers, bill review and utilization review.⁸

An increasing area of concern regarding costs in workers' compensation is prescription medication usage. According to Dr. Karin Mack of the Centers for Disease Control, in some states over 80% of injured workers receive opioids for pain relief.⁹ Statistics also show that opioids kill four times as many people than cocaine and heroin.¹⁰ Therefore, it is necessary to keep close tabs on an injured worker's prescription intake and, again, through careful selection of physicians, make sure a doctor's goal is to get the injured worker back to work, not just "dope him/her up" with pain medications. Many TPAs and insurance companies utilize a prescription review process either internally or with an outside vendor. This type of program combined with regular communication with a claimant's medical providers is the best way to ensure injured workers are not being unnecessarily medicated.

7. Establish a Successful Return to Work Program

Each state has very specific rules regarding return to work. In North Carolina, the return to work segment of a claim can often be the most difficult and expensive if the employer cannot accommodate the injured workers' permanent restrictions in a bona fide position. In some cases, if certain criteria are not met, it can open the door to lifetime benefits. It is imperative that employers have programs in place to address the light duty needs of injured workers, which, because of differences between the Americans with Disabilities Act and workers' compensation laws, can be unique and opposite of what an employer should do if the injured employee was injured outside of work.

Successful return to work programs have similar components: jobs are very clearly described; supervisors are educated on workers' compensation; there is communication between the employer and carrier; and most importantly, there is accountability.¹¹ The accommodation of restrictions should be closely followed, monitored and documented.

8. Treat Injured Workers with Respect and Genuine Care

Sometimes the best way to heal a person is through kindness. Following an injury, an injured worker may feel anger and resentment towards the employer. An employee can feel abandoned by the company once the insurance process takes over and there is little to no communication between the employer and the employee. In a recent case, the employee refused to settle his claim. The reason? Following his injury, the employer no longer invited him to the company Christmas party or gave him a turkey at Thanksgiving. The employee indicated he would "make the company pay" for treating him so poorly because he got hurt at work. The result? The claim eventually settled, but it took over two years to make it happen, costing the company approximately \$60,000.00 in payment of additional benefits. A party invitation and a turkey would have been a whole lot cheaper...

At the end of the day, a lot of workers' compensation is about money and minimizing cost to the employer. However, a workers' compensation claim is also about an injury to a human being, which can be a particularly frightening experience when it affects a person's income and ability to support his/her family. While some companies take a hard line approach to accidents, citing a "No Tolerance" policy, this approach can often backfire, resulting in more expensive claims and litigation. Workplace accidents happen, and when they do, employees should be treated fairly and with respect. Companies with the lowest workers' compensation costs are the companies that have a plan in place, take care of their employees and make sure they feel valuable and needed. When a company shows this type of attitude, it is mirrored back in the employee's loyalty and desire to return to work.

If your company would like additional advice, tips or training on effective workers' compensation strategies and programs, please contact Nicole Tackett at ntackett@ncarolina-law.com.

¹ "Workplace Injury and Illness Summary: OSHA NR 10/25/12 News Release: Workplace Injuries and Illnesses-2011," October 25, 2012, <http://www.bks.gov/news.release/osh.nr0.htm>.

² Tanii, David, "Bill Would Cap Benefits for Injured NC Workers," April 13, 2011, <http://www.carolinaindustrialagency.com/blog/?tag=workers-compensation-2>.

³ Lynch, Tom, "What's the Real Workers' Comp 'Secret Sauce'?", July 31, 2012, <http://www.workerscompinsider.com/best-practices>.

⁴ "Ten Tips for Effective Ergonomics," May 17, 2010, <http://www.ini.wa.org/Safety/Topics/Ergonomics/Services>

⁵ Dr. Richard A. Posthuma, "Workers' Compensation," n.d., <http://www.shrm.org>.

⁶ "Nonfatal Occupational Injuries and Illnesses Requiring Days Away from Work, 2011," November 8, 2012, <http://www.bls.gov/newsrelease>.

⁷ Id.

⁸ Rebecca Shafer, JD, Nov. 14, 2012. "Best Practices in TPA Medical Management," November 12, 2012, <http://www.blog.reduceyourworkerscomp.com>.

⁹ Coppelman, Jon, "Opioid Catastrophe: The Data Leads to Doctors," March 4, 2013, <http://www.workerscompinsider.com/best-practices>.

¹⁰ Id.

¹¹ Margaret Spence, "what are the Essential Components of a Successful Return-to-Work Program?", n.d., <http://www.margaretspence.com>.

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CLIENT FEEDBACK

"It appears that Bill may have to now take on the nickname of Mr. Magic." Barbara Sutherland, General Counsel of Argo Insurance, referring to Summary Judgment obtained by Bill Smith, Managing Attorney, Vernis & Bowling of Birmingham

"You really have a unique and dynamic group of people working for you. I can say without hesitation that in my 25 years working in Risk Management, I've never worked with a better law firm or group of people in general. You are a seamless arm of my organization/department and that is unheard of in this day and age. Our best interest is always the number one priority of your team and even though I expect nothing less, they never fail to fulfill and exceed our expectations. My hat is off to you two for the incredible firm you have built." Sherry Allnutt, Risk Manager, Einstein/NOAH Restaurant Group

"I attended a mediation on Saturday for an employment and workers' compensation matter in Miami. We had different counsel assigned for a few years. He was not making progress so the case was moved to Vernis and Bowling and Henry Roman took over as defense. At the end of the day, we were able to come to a global resolution that was well below our exposure. While I've worked with Vernis and Bowling for close to eight years now, I've not seen Henry in action before. Without his help, knowledge, experience and professionalism I don't think we would have settled this case. It's gone to mediation at least two other times since the date of loss in April, 2006, and we were finally able to resolve it. I wanted to make sure I told you how grateful I am to the firm and to Henry for all your help in settling this case, albeit on a Saturday and one of the hottest days in Miami. Thank you for all you do!" Dena Abdallah, Risk Manager, US Foods

VERDICTS & DISPOSITIONS

Terry D. Dixon, Esq. (Vernis & Bowling of DeLand) (Faulty Installation resulting in bodily injury)

Plaintiff alleged he was struck in the head by a falling shutter that was incorrectly installed by our insured, Contractor's Aluminum, Inc., ("CAI") under the direction of the general contractor, K. Hovnian. The Plaintiff claimed knee pain (which required 2 surgeries), deviated septum (which required surgery) and cervical and lumbar pain. At Arbitration, CAI denied liability and causation. While, the Arbitrator found that CAI did incorrectly install the shutter, she agreed that the Plaintiff failed to prove that his injuries requiring surgery were related to the subject incident, as opposed to being pre-existing conditions. Thus, she did not award the Plaintiff any monies for his claim and she found that CAI was the prevailing party in the litigation and ordered the Plaintiff to repay CAI's costs of \$6,861.10. The Co-Defendant, K. Hovnian settled with Plaintiff prior to the final hearing (mid five figures).

Christopher Blain, Esq. (Vernis & Bowling of Tampa) (Premises Liability)

This was a slip and fall matter wherein the Plaintiff was alleging to have slipped on water that was brought in from the rain outside and that the store failed to maintain its floors. As a result of the fall, Plaintiff was claiming damages that included surgery to the lower back and injections throughout the spine. Plaintiff incurred over 175k in medical expenses that they related to the slip and fall at the store.

The matter was tried before Judge Dunnigan at the Manatee County Courthouse in Bradenton, Fl. For three days. After hearing all the evidence, the jury was out for less than an hour before returning a defense verdict for my client Bed Bath and Beyond.

T. Daniel Webb, Esq. (Vernis & Bowling of Jacksonville) (Foodborne Illness)

Theodore J. Strom brought suit against Chick Fil-A on theories of Strict Liability, Breach of Express Warranty, Breach of Implied Warranty and Negligence, alleging he acquired food poisoning as a result of eating a chicken-strip combo on December 18, 2009. He suffered extensive nausea, vomiting and diarrhea, which necessitated hospital care. The emergency room doctor testified on behalf of the plaintiff, opining that, within a reasonable degree of medical probability, the plaintiff was suffering from food poisoning related to the food he ate at Chick Fil-A. Chick Fil-A denied the claims, alleging there was no evidence of liability and no direct evidence linking the bacterial infection with any food served at Chick Fil-A. Dr. Jay Schauben, toxicologist, testified on behalf of the Defendant, and observed that

there was no direct testing linking the subject food to Mr. Strom's illness and that a single-incident complaint does not meet the general pattern for restaurant-related food poisoning. The Jury deliberated for an hour before returning a verdict for the Defendant on all counts.

G. Jeffrey Vernis (Vernis & Bowling of N Palm Beach, FL) Premises Liability

Mr. Vernis tried the matter of Young v. ABC Restaurant, in Collier County, FL, in March, 2013. This case involved allegations where the Plaintiff claimed that she tripped and fell over a movable umbrella stand in the patio area of the restaurant. The Plaintiff claims that she injured her neck and her lower back, resulting in substantial treatment, however had no surgeries. The Plaintiff claimed that the umbrella stand created an unreasonably dangerous condition for patrons. Mr. Vernis presented evidence that the Plaintiff did not trip over the umbrella stand, but rather fainted onto the umbrella stand. Mr. Vernis further argued that the Plaintiff, a former employee of the restaurant, had knowledge of these umbrella stands and was very familiar with them. The Plaintiff sought to recover \$25,101 in past medical expenses, \$53,000 in lost past wages, together with an amount for pain-and-suffering in the past and in the future. After four days of trial, the jury returned a verdict for the Defendant finding no negligence. The Defendants had previously offered \$5,000 in the form of a proposal for settlement and are currently seeking attorney's fees and costs against the Plaintiff. The Plaintiff's motion for new trial was summarily denied.

G. Jeffrey Vernis (Vernis & Bowling of N Palm Beach, FL). Automobile Liability

Mr. Vernis tried the matter Rowling v. Safelite in St. Lucie County, FL, from June 11- June 14, 2013. This case involved a rear end automobile accident where the Safelite utility van struck the rear of the Plaintiff's Kia Sedona. Plaintiff contended that as a result of this accident, he underwent five separate surgeries, including bilateral carpal tunnel releases, ulnar nerve transposition surgery, and bilateral knee surgeries. The Plaintiff had over \$130,000 in past medical expenses and continues to have significant nerve pain throughout both his upper and lower extremities. Mr. Vernis argued that this was a minor impact accident that did not cause the Plaintiff's conditions. Although at trial, we admitted negligence and admitted that the Plaintiff had bilateral carpal tunnel syndrome, ulnar nerve neuropathy and bilateral internal derangement of the knees, we argued that the Plaintiff's conditions resulted from long-standing degenerative processes, rather than this single traumatic event, even though there was no record of these symptoms being pre-existing.

At trial, the Plaintiff's counsel asked the jury for over \$750,000 in damages, including pain-and-suffering. In closing, Mr. Vernis argued the lack of evidence establishing causation. After four days of trial, the jury returned a verdict for the Defendant, finding no causation. Plaintiff's Motion for new trial and Defendants motion to tax costs are pending.

Carl Bober, Esq. and Evan Zuckerman, Esq. (Vernis & Bowling of Broward) obtained a defense verdict in a jury trial that took place in Vero Beach, Florida, between June 19th through June 28th, 2013, in the case of Timothy Latimer v. Joseph Caccavale. Plaintiff sought damages at trial in excess of \$1.2 million dollars, claiming that he required multiple spinal surgeries as the result of a motor vehicle accident.

The case involved a motor vehicle accident at an intersection. Plaintiff was approaching a blinking yellow light at approximately 45 mph while the Defendant was at a stop sign with blinking red lights. The Defendant failed to see the Plaintiff's oncoming vehicle, and pulled forward from the stop sign striking the Plaintiff's pick-up truck in a T-Bone collision, causing his vehicle to spin out before coming to a stop next to a nearby fence. The Defendant admitted he failed to see the Plaintiff's truck, but claimed the Plaintiff – who failed to see the Defendant entering the intersection - could have done more to avoid the collision.

Plaintiff was removed from his truck on a stretcher and taken by rescue personnel to the hospital. Plaintiff suffered from immediate onset of back pain, and an MRI taken shortly after the accident revealed the Plaintiff had herniated discs at three levels in back (T7-8, T8-9, T9-10). He initially underwent physical therapy and further conservative treatment with an orthopedist followed by an interventional neuro-radiologist who performed multiple epidural injections over a seven month period which provided only temporary relief. An additional MRI revealed that the Plaintiff had another disc herniation at L5-S1 and protrusion at L4-5. After Plaintiff did not obtain lasting relief, he began treating with Dr. Richard Hynes, an orthopedic surgeon, who determined Plaintiff was a surgical candidate but initially recommended pain management and modified activity. Plaintiff continued to undergo additional series of epidural injections which did not resolve his continued back pain. At trial, as Plaintiff testified he had never had any complications with his back previously, four treating doctors and a chiropractor testified that the Plaintiff sustained a permanent injury as the result of the motor vehicle accident, and Drs. Beirne and Hynes testified that since conservative care had failed, the only realistic option for the Plaintiff was thoracic and lumbar fusion surgeries. Plaintiff's Life Care Planning expert, Dr. Russell, who had prepared a Life Care Plan, testified that the anticipated costs of these surgeries, along with follow-up care, therapy, MRIs, injections and medication in the future would be in the range of \$933K to \$1.2 million. In his closing argument, Plaintiff's counsel asked the jury to award this amount, plus plaintiff's past medical expenses of \$50K and an unspecified amount of pain and suffering.

For the defense, it was argued that the Plaintiff was not permanently injured as the result of the accident and that he had longstanding degenerative conditions in his spine which pre-dated the accident. Plaintiff admitted that he promptly resumed work in a physical job as a cabinet maker following the accident and never missed any work. The defense presented the testimony of Dr. Robert Kagan, who testified that the Plaintiff's MRIs over time failed to reveal any objective evidence of an injury to his spine, and orthopedic surgeon Dr. Lambe, who based upon his physical examination and review of records, determined that the Plaintiff complaints were inconsistent with the reported diagnosis. Both doctors testified that the Plaintiff did not sustain a permanent injury as the result of the motor vehicle accident.

The jury found Plaintiff did not sustain a permanent injury as the result of the accident, and awarded no damages for future medical care. They did award past medical expenses only of \$40,431 (which was reduced by 10% due to Plaintiff's percentage of fault), however, the Defendant had served before trial a Proposal for Settlement before trial in the amount of \$100K, for which his Motion for Entitlement to Attorney's Fees and Costs is pending. Plaintiff's Motion for New Trial, Motion for Additur, and Motion for Juror Interview were denied. Plaintiff's Demand at Trial: In excess of 1.2 million dollars
Verdict: \$36,388.45

Terry Dixon, Esq. (Vernis & Bowling of Deland) (Premises Liability)

Plaintiff was the father of a 5 year old child who was injured on the playground at Chick-fil-A. On the day of the incident, the child climbed up on a slide in the playground and jumped to grab a bar that was hanging above his head causing him to fall and sustain a fracture of the humerus which was subsequently operated on. The Plaintiff argued during trial that Chick-fil-A was negligent by (1) failing to maintain the premises (the bar the child jumped to had a tear in the foam covering it) and (2) failing to supervise the children while they played on the playground. Defendant argued that this was nothing more than just an accident and that if there was anyone negligent, it was the Plaintiff who failed to adhere to Chick-fil-A's playground policy which states that Children in the playground area to be accompanied and supervised by an adult at all times. (The parent admitted that he sat on the other side of the restaurant, where he could barely see his children while they were playing.) The jury agreed with Chick-fil-A and handed down a defense verdict.

T. Daniel Webb, Esq. (Vernis & Bowling of Jacksonville) (Foodborne Illness)

Theodore J. Strom brought suit against Chick fil-A on theories of Strict Liability, Breach of Express Warranty, Breach of Implied Warranty and Negligence, alleging he acquired food poisoning as a result of eating a chicken-strip combo on December 18, 2009. He suffered extensive nausea, vomiting and diarrhea, which necessitated hospital care. The emergency room doctor testified on behalf of the plaintiff,

opining that, within a reasonable degree of medical probability, the plaintiff was suffering from food poisoning related to the food he ate at Chick fil-A. Chick fil-A denied the claims, alleging there was no evidence of liability and no direct evidence linking the bacterial infection with any food served at Chick fil-A. Dr. Jay Schauben, toxicologist, testified on behalf of the Defendant, and observed that there was no direct testing linking the subject food to Mr. Strom's illness and that a single-incident complaint does not meet the general pattern for restaurant-related food poisoning. The Jury deliberated for an hour before returning a verdict for the Defendant on all counts.

R. Gregory Lewis (Vernis & Bowling of Charlotte) (Insurance defense – Automobile Liability) obtained a defense verdict in the case styled Robert McLean v. Monica Terpenning

Plaintiff brought suit against Defendant for injuries resulting from a rear-end impact car accident. Plaintiff was driving a vehicle that was rear-ended by Defendant's vehicle on Interstate 77 South near Charlotte, NC. Property damage was estimated at approximately \$900 to Plaintiff's vehicle, and over \$3,000 to Defendant's vehicle. Neither party reported injury at the scene. Plaintiff (71 years old) first sought treatment 10 days post-accident with his primary care provider, complaining of a chest contusion, neck pain, and right shoulder pain. Diagnostic testing was positive for degenerative changes in the neck and right shoulder. Plaintiff treated consistently over the next 4 months with his PCP and a chiropractor for neck and right shoulder pain, and then treated intermittently until he saw an orthopedist over two years post-accident, who prescribed physical therapy and steroid injections. Plaintiff was still treating at the time of trial, which was 5 years post-accident. All 3 care providers testified on direct examination that Plaintiff's complaints were caused by the accident. On cross-examination, the PCP and orthopedist admitted Plaintiff had a past medical history of intermittent neck and right shoulder pain, and they each revised their testimony to state that the accident substantially aggravated Plaintiff's past neck and right shoulder pain and degenerative changes. Plaintiff alleged medical expenses of approximately \$17,000, as well as pain and suffering and permanent injury. Prior to trial, Defendant offered \$4468 toward settlement. Plaintiff's counsel suggested to the jury a verdict range of \$35,000 to \$45,000. Defense counsel admitted to negligence on the part of the Defendant, and argued Plaintiff didn't meet his burden of proof establishing injury resulting from the car accident. The jury deliberated approximately 20 minutes before returning a verdict in favor of the Defendant, finding that Plaintiff did not prove he was injured in the accident.

T. Nicole Tackett (Vernis & Bowling of Charlotte) (Workers' Compensation)

Steven Meyers v. Saxapahaw General Store- Plaintiff alleged a back injury due to slip and fall accident. Defendants denied the claim on credibility issues. The Industrial Commission approved Defendants' motion to dismiss the claim with prejudice.

T. Nicole Tackett (Vernis & Bowling of Charlotte) (Workers' Compensation) Jason Glance v. Prestige Building Co.

Defendants successfully obtained an order compelling Plaintiff to comply with medical treatment. When Plaintiff failed to abide by the order, Defendants' request to terminate benefits was approved. Shortly after Plaintiff's benefits were terminated, he applied for reinstatement. Defendants' request to deny this application was approved. Plaintiff filed a motion to reconsider, which was denied.

R. Gregory Lewis (Vernis & Bowling of Charlotte) (Insurance Defense – Automobile Liability) obtained a defense verdict in the case styled Michael Kaufman v. Tammy & Alberto Flores.

Plaintiff brought suit against Defendant driver and vehicle owner for injuries resulting from a sideswipe accident. Plaintiff was driving a motorcycle, and alleged he was overtaken in his lane of travel and sideswiped by Defendant Tammy Flores, who alleged that Plaintiff merged from another lane into the side of her vehicle. Defendant Tammy Flores, 17 years old at the time, left the scene, and subsequently pleaded guilty to felony hit-and-run. She alleged that she was young and scared, and went home to tell her parents. Plaintiff alleged damages to include leg and ankle contusions, left forearm scarring and disfigurement, and soft tissue spine injuries that aggravated and accelerated a pre-existing condition (degenerative disc disease) of the spine. Plaintiff's medical care included accident date treatment with the local emergency room, and follow-up care with the local Veterans' Administration healthcare facility. Medical bills totaled \$5,500.75. Plaintiff did not present a lost wage claim, due to a prior determination of disability and associated discharge from the U.S. Marine Corp. Plaintiff further alleged willful/wanton conduct on the part of the Defendant Tammy Flores in praying for punitive damages, and offered an independent witness who testified that she saw the Defendant driver using a mobile phone at the time of the collision in violation of a NC safety statute prohibiting use of such electronic devices by the operator of a vehicle in motion who is under the age of 18. Defense counsel successfully argued and obtained a directed verdict dismissing the punitive damages claim. Prior to trial, Defendant's carrier offered \$7200 toward settlement. Plaintiff demanded \$35,000.00 at mediation. Plaintiff's counsel forecast in opening that \$25,000 would be reasonable

compensation, and argued in closing that a higher figure was warranted by the evidence. Defense counsel argued no negligence on the part of Defendant driver, and contributory negligence on the part of Plaintiff, as well as lack of proximate cause on permanent injury by acceleration of pre-existing problems. The jury deliberated 1 ½ hours on Defendant's negligence, and an additional hour on Plaintiff's contributory negligence and damages, before returning a verdict in favor of Plaintiff for the medical bills of \$5500.75. As the defense served an Offer of Judgment with the Answer in the amount of \$7200.00, costs incurred subsequent to that Offer, including Defendants' costs, were taxed to Plaintiff.

Juliet Fleming Stage (Vernis & Bowling of Deland) (Premises Liability) Suit was filed by Melisa Dodge in February 2013 against Global and AEG Services, Inc. for a slip and fall in the restrooms of the UCF Arena during a Kid Rock Concert. AEG Services, Inc. held a licensing agreement with the UCF Arena (Global Enterprises). Pursuant to that contract, Global agreed to provide janitorial and maintenance personnel during the Kid Rock concert and hired and paid the janitorial staff to maintain the restrooms. AEG and Global were served in May 2013. The case was defended by Juliet Fleming Stage in our Deland office.

Ms. Stage, strategically filed a nominal Proposal for Settlement to the Plaintiff on 8/26/13 and also conferred with Plaintiff's counsel prior to the expiration of the PFS. Attorney Stage also provided Plaintiff counsel (prior to the expiration of the PFS)with copies of responses from Global reflecting that Global acknowledged hiring the janitorial staff. Juliet also provided Plaintiff with a copy of the contract between AEG and Global, again prior to the expiration of the PFS.

When the time for acceptance of the PFS expired and Plaintiff took no further action, Juliet conferred with AEG counsel about further strategy for the dismissal of AEG and then filed a 57.105 Motion on October 14, 2013. Within days of filing the Motion, Plaintiff counsel agreed to dismiss AEG Services, Inc. from the litigation and AEG was dismissed shortly thereafter.

Firm Announcements

Jim Patterson, Esq. (Mobile) Has Been Selected To The CLM Construction Committee.

Jack Janecky, Esq. (Mobile) Has Been Selected To The 20th Edition Of The Best Lawyers In America In The Practice Area Of Workers' Compensation Law.

Jim Patterson, Esq. (Mobile) Has Earned The Highest Possible Martindale-Hubbell® Peer Review Rating™ AV® Preeminent™.

Attorneys And Staff In The Firm's Broward Office Volunteered With Habitat For Humanity To Help Build A Home For A Deserving Family. Employees Spent A Recent Saturday Helping To Build A Roof And Install Stucco On The Home In Sunrise.



Chioma R. Deere, Esq. (Palm Beach) Was A Panel Speaker At The Business Litigation CLE Committee Of The Palm Beach County Bar Association. The Topic Presented Was "A Panel Discussion On E-Discovery For Commercial Litigators."

Ramy Elmasri, Esq. (Miami) Has Been Selected To The CLM Professional Liability Committee.

Michelle Hendrix, Esq. (Pensacola) Has Earned The Highest Possible Martindale-Hubbell® Peer Review Rating™ AV® Preeminent™.

Kenneth Amos, Esq. (Clearwater), Was Selected As A Top Attorney In Florida's Rising Stars By The Wall Street Journal And Miami Magazine.

Nicole Tackett, Esq. (Charlotte) Has Been Selected To The CLM Workers' Compensation Committee.

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