

# NEWSLETTER

## FLORIDA LAW UPDATE

### WHAT DIFFERENCE DOES 120 DAYS MAKE?



**Jeff Kerley, Esq.**  
Vernis & Bowling of  
St. Petersburg, Florida

An employer/carrier is faced with a decision when a workers' compensation claim is reported in Florida. It can 1) pay benefits 2) deny the claim or 3) pay benefits while investigating and reserve its right to deny the claim within 120 days without prejudice and without admitting liability pursuant to Florida Statute 440.20(4). This article will focus on what triggers the 120-day period, how certain actions or inactions impact the employer/carriers' rights, and what to do if you make a mistake.

The first two options are pretty clear, an adjuster can commence payment of benefits when a claim is reported or deny the claim. However, not all cases present with a clear beacon as to how to proceed. When the claims handler is unclear about the claimant's entitlement to benefits, Florida Statute § 440.20(4) provides a road map.

#### The statute reads as follows:

If the carrier is uncertain of its obligation to provide all benefits or compensation, the carrier shall immediately and in good faith commence investigation of the employee's entitlement to benefits under this chapter and shall admit or deny compensability within 120 days after the initial provision of compensation or benefits as required under subsection (2) or § 440.192(8). Additionally, the carrier shall initiate payment and continue the provision of all benefits and compensation as if the claim had been accepted as compensable, without prejudice and without admitting liability. Upon commencement of payment as required under subsection (2) or § 440.192(8), the carrier shall provide written notice to the employee that it has elected to pay the claim pending further investigation, and that it will advise the employee of claim acceptance or denial within 120 days. A carrier that fails to deny compensability within 120 days after the initial provision of benefits or payment of compensation as required under subsection

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## ANNOUNCEMENTS

**Robert C. Bowling and G. Jeffrey Vernis**, Managing Partners, were selected as Top Insurance Defense Litigation Attorneys in the 2016 Edition of the South Florida Legal Guide.

**Vernis & Bowling was selected as a Top Law Firm** in the Tampa Bay Business Journal.

**At our annual firm meeting**, Vernis & Bowling attorneys packed over 200 "backpack" meals for children in need of food assistance.

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### GET TO KNOW JEFF KERLEY

#### Worker's Compensation Managing Attorney, St. Petersburg, FL

**Family:** Married with two children

**Favorite Place:** Any national park

**Favorite Hobby:** Triathlon

**Favorite Restaurant:** Capital Grille

**Favorite TV Show:** Arrested Development

**Best Thing About Being an Attorney:**  
Settling a case under authority

**Worst Thing About Being an Attorney:**  
An adverse outcome

**Favorite Sports Team:** The New England Patriots

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## ALABAMA LAW UPDATE

**DEFENSE VERDICT OBTAINED IN A BENCH TRIAL, DESPITE THE JUDGE'S EXPRESSED DESIRE TO RULE IN FAVOR OF THE DEFENDANT****Chelsey M. Edgerly, Esq.**Vernis & Bowling of Birmingham,  
Alabama LLC

Attorney Chelsey Edgerly from the Birmingham, Alabama office obtained a defense verdict in a personal injury case wherein the plaintiff suffered a trip and fall accident on the exterior premises of a retail establishment in Killen, Alabama. The plaintiff filed suit against the landlord of the subject premises, which was responsible for the maintenance of the “common areas” surrounding the establishment and the neighboring stores. She filed this lawsuit in Lauderdale County District Court, and chose to do so without the representation of a lawyer.

Although the Alabama Rules of Civil Procedure do not permit formal discovery in district court without leave of court, the defendant was able to obtain information regarding the plaintiff’s claims by informal means. The insured provided counsel with surveillance footage from the subject store, which showed the plaintiff’s fall. Although the cause of the fall was not easily discernible, she clearly lost her balance and fell to the concrete at or near the curb. She was seen standing up and holding her knee, then walking slowly into the store. The surveillance footage also showed the plaintiff’s departure from the store. She appeared to be tearful, holding tissues, as she was purchasing her merchandise at the register nearest to the door.

When we contacted the plaintiff by telephone for an interview, she provided a detailed description of the subject premises, including the potholes in the parking lot and the cracked curb which “drug [sic] her down”. She claimed injuries to her back, right shoulder, and right hip as a result of her fall. She described the excruciating pain she felt when she awoke the next morning and explained how these injuries have ruined her life.

The plaintiff then voluntarily produced medical and billing records for our review. Her treatment included MRI exams of her lumbar spine and right shoulder, physical therapy, four lumbar epidural injections, a nerve block, and trigger point injections. The records produced also included a letter from one of the plaintiff’s treating physicians, stating that, in his opinion, the plaintiff had been complaining of injuries related to her fall. Medicare records indicated that charges of approximately \$24,000 had been submitted for payment, and Medicare was asserting a lien of approximately \$4,600, the sum it paid on the plaintiff’s behalf, accordingly.

The defendant and its insurance carrier’s representative were informed of the unique nature of district court bench trials in Alabama, particularly those in small towns, such

as the county seat where this case was pending. The judges are elected and commonly plaintiff-friendly as a result. The Alabama Rules of Evidence are not applied stringently, and hearsay documents are regularly deemed admissible. In this instance, we advised that the judge may review the plaintiff’s medical bills and the correspondence from Medicare over our objections, and there was a good chance the judge would be sympathetic toward the pro se plaintiff. If the judge were to rule in the plaintiff’s favor, an expected verdict would be at or near the jurisdiction maximum of \$10,000, given that she would know the plaintiff would owe nearly half of that amount to Medicare. However, we also advised that the case was still defensible, and the client expressed a desire to proceed to trial.

On the morning of trial, the insurance carrier’s representative provided counsel with authority of up to \$6,000 to settle the case, but the plaintiff and her husband advised they would not be willing to accept anything less than \$7,500. Our case was called last on the judge’s extensive trial docket, and we watched the judge call each case, one at a time, looking for any amicable resolutions possible. She was kind and courteous to all parties present and particularly patient with the plaintiffs.

When our bench trial began, the plaintiff offered testimony regarding the poor condition of the subject premises and presented the judge with numerous photographs to support her description. The judge advised that she was familiar with the premises and made a few disapproving facial expressions as she sifted through the pictures. The plaintiff then described her fall at the store, the manner in which the curb caused her to fall, and her resulting injuries. She testified regarding her treatment and attempted to offer a stack of medical records, larger than that she had previously produced to us, for the Court’s review. Much to our surprise and satisfaction, the judge sustained our objection to the admission of the medical records and corresponding bills without expert testimony to establish that the treatment received was necessary and the corresponding charges were reasonable. She also sustained hearsay objections regarding statements allegedly made by the plaintiff’s medical providers.

The judge began to be visibly concerned and asked the plaintiff whether she had considered filing this case in circuit court instead, where she could obtain a higher verdict and where this case likely belonged. The plaintiff simply stated that she had been advised to file her case in district court. She then whispered to her husband, “Do you think it’s too late to take the \$6,000?” The trial proceeded forward.

On cross-examination, the plaintiff admitted that she had

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GEORGIA LAW UPDATE

## GEORGIA AUTOMOBILE ACCIDENT TRIALS: WHEN IS THE OFFICER'S TESTIMONY CONSIDERED TO BE PROPER "EXPERT OPINION"?



**Alisa Ellenburg, Esq.**  
Vernis & Bowling of Atlanta, Georgia LLC

When taking an automobile accident case to jury trial in Georgia, there is always the question about whether to use the testimony of the responding officer. When the defendant is cited in the accident, the presumption is usually that the officer's testimony will not be favorable for the defense. However, ensuring that the officer's testimony is put into the proper context should always be a consideration as there are times that Georgia courts, in fact, do not admit the officer's testimony as "expert opinion".

In Georgia, it has long been recognized that a police officer with investigative training and experience in automobile collisions can offer expert testimony in such cases. However, the credibility and weight to be given to this testimony is, of course, within the province of the jury. Even if not trained to reconstruct accidents, the responding or investigating officer can still be allowed to testify as to what he or she observed at the scene and to offer conclusions based on those observations about what happened in the accident. In fact, excluding such testimony has been found to constitute an abuse of discretion on appeal.

Nevertheless, when offered as expert testimony, officer testimony must still meet the requirement of all expert testimony in Georgia: that is to say, expert opinion testimony on issues to be decided by the jury, even the ultimate issue, is admissible where the conclusion of the expert is one which jurors would not ordinarily be able to draw for themselves; i.e. the conclusion is beyond the ken of the layman. So, practically speaking, what would this look like at trial? One very recent Georgia case is illustrative.

In a case decided just this summer, the Georgia Court of Appeals held that the trial court did not abuse its discretion in granting a motion in limine to exclude a state trooper's testimony opining about the underlying cause of a traffic collision, since his expert testimony was deemed unnecessary and improper because the jury was able to ascertain the cause of the accident on its own. In the case of *Brown v. Tucker*, 788 S.E.2d 810 (Ga. Ct. App. 2016), passenger Tucker was riding with pickup truck driver Brown when Brown struck a tractor-trailer rig parked by the road. Tucker was injured and brought a personal injury suit against Brown. Brown identified the driver of the tractor-trailer as a non-party against whom the jury should apportion fault.

At trial three eyewitnesses testified that the left rear of the tractor-trailer rig was protruding into the road anywhere from inches to a foot and a half. Brown also testified that before the collision the sun was in her eyes to the point that she could not see in front of her, however, she did nothing about it and kept driving without being able to see where she was going. She also admitted she first saw the tractor-trailer after she hit it and that she could have avoided it if she had seen it. The jury also made a site visit.

The jury returned a verdict apportioning 40 percent of the fault to the tractor-trailer driver and 60 percent of the fault to Brown. On

appeal, Brown argued that the trial court erred in excluding the testimony of the responding state trooper, who opined that the cause of the collision was the tractor-trailer's protrusion in the roadway rather than Brown's ability to see where she was going.

Specifically, the trial court ruled that the trooper was allowed to testify that the trailer was protruding some distance into the roadway and that the sun was in Brown's eyes. In essence, these were "contributing factors". However, the trial court found that the jury did not require an expert opinion to decide whether the trailer's location was the ultimate cause of the collision. In this case, the court found that such expert opinion was unnecessary and improper since the jury could make that determination on its own. It was not beyond the jury's ability to weigh the position of the truck versus the effect of the sun.

Likewise, if the officer's "expert opinion" is based exclusively on witness statements, it should not be admitted. Such was the case in *Purcell v. Kelley* where the responding officer was qualified as an expert in accident investigation and reconstruction, but would testify as to which driver had the green light based solely on witness statements. The Court of Appeals examined not whether the expert opinion would invade the province of the jury, but whether the subject was a proper one for expert opinion testimony. The jury heard

**"The Court of Appeals examined not whether the expert opinion would invade the province of the jury..."**

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## VERDICTS &amp; DISPOSITIONS

**Alisa Ellenburg and Negin Portivent (Atlanta, GA) (Auto Liability)** recently obtained a verdict resulting in a \$0.00 award to a plaintiff. The case involved a two motor vehicle collision in which plaintiff and defendant had completely opposite accounts of how the accident occurred. Vernis & Bowling was able to use photographs of the property damage to the vehicles to disprove plaintiff's theory that the defendant "T-boned" plaintiff's vehicle. Vernis & Bowling also used plaintiff's prior inconsistent deposition testimony regarding her account of the accident to impeach her trial testimony. Additionally, Vernis & Bowling was able to bring out at trial that plaintiff had a prior history of similar conditions, including a fall three weeks prior to the accident for which she reported to a hospital for x-rays, CT scan and treatment for the same injuries which she reported as a result of the accident. Vernis & Bowling was also able to impeach plaintiff at trial by introducing into evidence her own deposition testimony that she retained a lawyer "immediately" after the accident; however, she waited three weeks before seeking any medical treatment. Her only medical treatment was with a chiropractor to whom her law firm, Morgan & Morgan, referred her. Vernis & Bowling was able to get into evidence the patient intake form for the chiropractor in which plaintiff indicated she had been referred by Morgan & Morgan.

**Larry Feinstein (Deland/FL) (Workers' Compensation)** obtained a defense ruling for the State of Florida following a Final Hearing regarding the issue of entitlement to medical benefits and temporary partial disability. Following the claimant's compensable slip and fall at work resulting in back and foot injuries, an MRI scan revealed the presence of an arachnoid cyst. While the orthopedist felt that the cyst bore no relation to the fall and suggested that the claimant seek treatment through her private insurance, he recommended an evaluation by a neurosurgeon, acknowledging that such

a specialist would have more knowledge than he about the origin, treatment plan, and cause of the condition. The claimant sought to have the evaluation covered by workers compensation, alleging that the condition might be compensable (the "rule out" doctrine) and that employer/carrier violated the 10-day rule in not responding to a request for authorization. Following the presentation of medical evidence and argument, the court held that the arachnoid cyst is not causally related to the claimant's accident and the evaluation by a neurosurgeon is not the responsibility of the employer/carrier.

The claimant also sought temporary partial disability benefits, alleging that her pain precluded her from working a 40-hour work week, despite the medical evidence reflecting that she could work a 40-hour work week with modifications. As the employer was able to accommodate her work restrictions, there was no evidence showing her physicians limited her work to less than 40 hours as a result of pain complaints.

**Carl Bober (Hollywood, FL/Broward) (Premises Liability)** successfully obtained a summary judgment ruling in favor of our homeowner clients in Broward County Circuit Court. The plaintiff, a U.S. Postal Service mail carrier, alleged our clients were negligent in failing to maintain the sidewalk in front of their home, which had become badly cracked and was not level due to the presence of tree roots coming from the adjacent swale which had displaced the slabs. While our clients were aware of the problem for a period of years and complained on one occasion to their municipality to have it fixed, no repairs were made. The plaintiff subsequently tripped and fell, and claimed injuries which included a facial orbital injury with surgery, as well as cervical and lumber spine injury, including multiple disc herniations. His medical expenses were over \$100K. Carl argued that our clients had no duty to maintain the public sidewalk, nor to warn the plaintiff of the allegedly dangerous condition, and that the responsibility for maintaining the public sidewalk rested with the city. The trial judge agreed and granted our motion for summary judgment. Our motion for attorney's fees and costs is pending, as the plaintiff failed to accept a Proposal for Settlement.

**Karen M. Nissen and Ashley N. Landrum (Palm Beach, FL) (Governmental Law)** received a reversal of a lower court decision denying defendant Harris' Motion to Dismiss based upon qualified immunity in the case of Lacheryl Harris, et al. v. G.K., a minor, etc., et al., in the Third District Court of Appeal. In the lower court, G.K. filed a § 1983 action against multiple individual DCF employees,

**ANNOUNCEMENT:**  
We are pleased to announce the opening of the firm's newest office in Jackson, Mississippi

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including defendant Harris, alleging that the employees failed to properly investigate and follow up on abuse reports relating to foster children in the home which subjected G.K., an adopted sibling, to years of abuse in his adoptive family's home. Defendant Harris filed a Motion to Dismiss based upon quailed immunity and the lack of duty to an adopted child in the home, which the lower court denied. The Court's denial was appealed to the 3rd DCA where Appellee G.K. claimed that qualified immunity cannot apply to the DCF employees because he was an adopted child involuntarily living in a foster home with his adoptive parents. The 3rd DCA clearly rejected G.K.'s argument stating that Florida Law had not imposed similar legal duties on state employees with respect to natural/adoptive children who live in a home with foster children when reports of abuse are received as to the foster children. DCF and its employees do not restrict the freedom of natural/adoptive children after adoption.

**Len Hackett and Candace Padgett (Jacksonville, FL) (Employment Law)** were successful in obtaining summary judgment in the Northern District for an employment discrimination case styled Glenda Wilson vs. Dale Earnhardt, Jr. Chevrolet. The Plaintiff, a 57-year-old old African-American woman, alleged she was passed over for promotion four times by less-qualified and younger Caucasian females, due to her race and age, in violation of the Florida Civil Rights Act, §1981, Title VII, and the ADEA. The Florida Commission on Human Relations investigated the Plaintiff's claims and found cause to believe discrimination took place. However, during litigation Len and Candace were able to establish that the plaintiff's allegations had no merit, and that the four women chosen for the management position were more qualified than the plaintiff. The court granted the defendant's motion for summary judgment and awarded costs in favor of Dale Earnhardt, Jr. Chevrolet as the prevailing party.

**Carl Bober and Evan Zuckerman (Hollywood, FL/ Broward) (Auto Liability)** obtained a defense verdict after an eight-day jury trial in an Underinsured Motorist Coverage action filed against New Jersey Manufacturers Insurance Company in West Palm Beach, Florida. Plaintiff, a 56-year-old single mother of two, brought a UIM claim seeking damages in excess of \$1.5 million dollars alleging that she had a two level lumbar fusion and laminectomy as the result of two rear-end car accidents. Plaintiff also alleged that she sustained multiple herniated discs in her neck which would require surgery in the future. The defense admitted negligence and the trial proceeded on the issues of causation and damages. Plaintiff presented the testimony of an orthopedic spinal surgeon Dr. Daniel Husted, physiatrist Dr. Craig Lichtblau, and a chiropractor, as well as her family and

friends. Her economic damages claim for the past and future expenses totaled over \$745K. For the defense, Carl and Evan presented the testimony of a board certified neurosurgeon, Dr. Robert Brodner, and a board certified nuclear medicine physician, Dr. Robert Kagan. The jury deliberated a little over an hour and a half before rendering a defense verdict. Our motion for attorney's fees and costs is pending, as plaintiff failed to accept a pretrial Proposal for Settlement.

**Matthew S. Francis (Florida Keys) (Premises Liability)** obtained a summary judgment in the case styled Ramirez v. Albertson's, LLC et al. Plaintiff alleged injuries stemming from an alleged assault and battery by an Albertson's employee at an Albertson's grocery store, and further alleged spoliation of evidence stemming from alleged missing portions of a store surveillance video. At the close of discovery, defendants moved for summary judgment on the basis that defendants' conduct did not create a foreseeable zone of risk and therefore defendants owed no legal duty to plaintiff, that plaintiff's alleged injuries were not proximately caused by any conduct of defendants, and that no evidence existed that the named employee was involved in the alleged assault and battery incident.

**"The plaintiff subsequently tripped and fell, and claimed injuries which included a facial orbital injury..."**

**David W. Willis (Atlanta, GA) (Workers' Compensation)** Jamal Shavers v. Randstad North America and Indemnity Insurance Company c/o ESIS is a claim which began when the claimant was performing temp work and a 4,500 pound server fell on his right ankle. He also purportedly injured his left shoulder. The claim was accepted as compensable and he was authorized to undergo medical treatment. He was also placed on work restrictions. Over the ensuing months Randstad was able to accommodate light duty at times, while at other times they could not accommodate light duty so that weekly TTD benefits were paid. Ultimately, a new physician, not of our choosing, took over care and quickly placed the claimant on sedentary duty restrictions. This continued for the next 15 months. Most of his treatment focused on the foot/ankle, though later the claimant sought a resumption of treatment for his shoulder. In response, we sent the claimant for an IME on the shoulder. Our IME

**Verdicts & Dispositions, Continued**

physician concluded nothing was wrong, the claimant could work full-duty, and he needed no further medical treatment. We also sent the claimant for a separate IME for his ankle. This doctor likewise concluded the claimant was at MMI, needed no further treatment, and could perform regular duty work. Thus, the issues for hearing were: (1) compensability of the shoulder and (2) whether the claimant had undergone a “change in condition for the better” for his right ankle. Judge Elizabeth Lammers ruled in our favor on both issues. She put more stock in our IME opinions than the combination of the claimant’s testimony and the medical opinions of the treating doctor. She concluded the claimant’s work injuries are resolved and he has no further disability or need for medical treatment due to his accident. Barring an appeal, the claim exposure just dropped to minimal/nuisance value.

**David W. Willis (Atlanta, GA) (Workers’ Compensation)**

*Raoul Jones v. Pinnacle Workforce Logistics and XL Specialty Insurance Company c/o Gallagher Bassett Services.* We obtained a fully favorable Award denying the claimant’s request for indemnity and medical benefits despite timely notice of an alleged on-the-job injury and subsequent medical care evidencing an injury and disability. The claimant was a new hire and employed as an order picker in a Home Depot Distribution warehouse when he alleged a left upper extremity injury from lifting automobile floor jacks. At that time, he had been counselled, both verbally and in writing, about his slow pace and lack of attention to detail when performing his job. His lack of attention to detail was ultimately his un-doing as his on-site supervisor testified that the warehouse did not stock automobile floor jacks but rather “jacks”—a slang term to describe a long handled single edge axe weighing 5 to 10 pounds. Also, there were striking discrepancies in the claimant’s description of his accident and the sequence of his symptoms in statements to the ER physician, to his subsequent treating physician, and to the employer/insurer’s IME physician. In sum, the claimant was exposed as a liar and ultimately, he failed to prove that his left upper extremity occurred at work.

**William K. Thames (Pensacola, FL) (Workers’**

**Compensation Immunity)** obtained a Summary Judgment in the case styled *Brens v. Haines City HMA*. Mr. Brens injured his back on-the-job at Heart of Florida Hospital in a compensable accident. He was provided with workers compensation medical benefits until his authorized physician issued an opinion that the on the job injury was no longer the “major contributing cause” of his back complaints. Mr. Brens initially sought additional workers’ compensation benefits through workers’ compensation, but decided to

dismiss his workers’ compensation claim and instead filed suit in circuit court seeking tort damages. The circuit court granted summary judgment based on workers’ compensation immunity. The court initially noted that workers’ compensation immunity is not available to an employer who denies that an employee’s injury arose out of the course and scope of employment and an injured employee is entitled to file a lawsuit for tort damages in such a case. However, the court held that “at no time did the hospital deny workers’ compensation benefits on the ground that the injury did not arise out of Mr. Brens’ employment” and, on the contrary, the hospital accepted that the injury was work related and paid benefits until it learned from the authorized physician that the major contributing cause was not 51% related to the injury. Under these circumstances, workers’ compensation immunity barred the injured employee’s tort lawsuit.

**“The three employer witnesses testified that she did not initially report an injury, only that she felt she was treated rudely...”**

**James T. Patterson (Mobile, AL) (Premises Liability)**

tried an unusual negligence case to a defense verdict. The claims arose from an incident on a beach front construction site that occurred on June 26, 2008. There, the Plaintiff claimed he was working as a subcontractor repairing a beach house after a Hurricane, and that he slipped and fell badly injuring his left knee due to debris on the job site. He claimed he was trying to get away from a board dropped by workers above him, who were building a deck. The plaintiff was extremely obese, and when he fell, his left leg bent backwards to where his foot hit him in the mouth.

The defendant general contractor, via the only employee other than the plaintiff who actually witnessed the man fall, said the plaintiff was not working on the beach house project, but instead had stopped by on his way up Island and while visiting, stood leaning against a house piling with his legs crossed as he was ogling some bikini-clad girls who were walking down the beach. The general contractor’s employee stated that while the plaintiff was tracking these girls with his eyes as they walked past, the man literally rolled off the piling while his legs were crossed—tripping himself to where

his knee bent backward, and horribly injuring himself.

Medical specials were in excess of \$65,000 dollars, so any settlement that would have paid, even for just the medicals, would have been expensive. Thus, because the stories from the eyewitnesses were so far apart, the carrier allowed the case to go to trial.

We argued that the plaintiff had gotten his story straight after seven years of litigation, and was able to tell the court a "whopper." To prove that he was not being truthful, we presented medical records from the first five weeks after his fall where in histories, the plaintiff told at least four different stories about how he fell. One story in medical records from the date of the accident is that he was helping an old lady down the steps; another story in medical records 10 days post-accident was that he stepped backwards and tripped on a wire (at trial, plaintiff made it clear he was moving forward when he was injured); another story in medical records three weeks post-accident was that he missed a step; another story in records five weeks post-accident was that he had fallen off a porch.

Presumably because of the inconsistent stories given to medical providers in the five weeks post-accident, as highlighted by the defense during impeachment at trial, the court granted a defense verdict. Jackie Milan v. LTS Development Group, LLC, et al., In the Circuit Court of Mobile County, Alabama, Civil Action No.: CV-09-901842.

**David W. Willis (Atlanta, GA) (Workers' Compensation)**

Darla Williams v. Coweta County School System and PMA Management. We obtained a fully favorable Award denying the claimant indemnity and medical benefits despite a cervical fusion. The critical question was compensability. Our position was that any medical/cervical issues were not work related, and this was supported by three credible employer witnesses. The claimant was a cafeteria worker for the school system and alleged a neck injury from unloading supplies. The three employer witnesses testified that she did not initially report an injury, only that she felt that she was treated rudely by her co-workers (this was her first day on the job at this particular school). While she subsequently reported an alleged "accident" and had some medical evidence to support this, the Administrated Law Judge denied her claim, based largely on the testimony of the employer witnesses who were all long term employees of the county and had no reason to lie. Given her subsequent cervical fusion and post-surgery complaints there was significant exposure in the case if it were to be found compensable, and perhaps even the potential for "catastrophic designation" which would carry the possibility of lifetime weekly benefits. The claimant is considering an appeal, but in this type of fact intensive case she will have a difficult challenge. In sum, this was a significant Award from a longtime and well-respected Judge. ❖

**GEORGIA AUTOMOBILE ACCIDENT TRIALS: WHEN IS THE OFFICER'S TESTIMONY CONSIDERED TO BE PROPER "EXPERT OPINION"?**

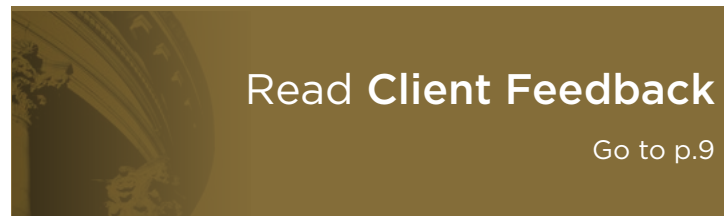
**Georgia Law Update**, Continued from p.3

testimony from all eye witnesses regarding which driver had the green light. Additionally, the responding officer testified that based on the witness statements alone, he concluded that the plaintiff had the green light. The officer's opinion was not based on examination of the physical evidence, such as skid marks or distances and positions of the vehicles. Further, his opinion was not based to any extent on diagramming the scene, nor was it based on analysis of the traffic signals to ensure they were working properly or to discover their timing. In essence, the officer's opinion was not based on any independent analysis at all. Rather, his opinion was based solely on the testimony of the eye witnesses who also testified for the jury at trial. Therefore, the Court of Appeals held that it could not conclude that the admission of the officer's opinion did not contribute to the verdict and did not require a reversal. Indeed, it found that

since the color of the traffic light was the determining factor in assessing fault, the officer's "expert opinion" on the issue likely influenced the jury's verdict. The verdict was reversed and the case remanded for a new trial.

Therefore, when approaching a jury trial in an automobile accident case, it is worthwhile to carefully consider whether the "expert opinions" of the responding officer should be admitted or not based on prevailing Georgia law.

For more information, please contact Alisa Ellenburg at [aellenburg@georgia-law.com](mailto:aellenburg@georgia-law.com). ❖



**Read Client Feedback**

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## DEFENSE VERDICT OBTAINED IN A BENCH TRIAL, DESPITE THE JUDGE'S EXPRESSED DESIRE TO RULE IN FAVOR OF THE DEFENDANT

### Alabama Law Update, Continued from p.2

been to this store hundreds of times before. She described her familiarity with the store's exterior, including the allegedly hazardous curb. She further admitted that she was not looking down at the curb immediately before she tripped, and she could not recall when she had last seen it before her fall. At this point, her husband objected to the questioning on the basis that it was only intended to confuse the plaintiff. The judge politely explained that the questions and the manner in which they were being asked were appropriate. The plaintiff then reviewed the surveillance footage but, realizing there were several inconsistencies between her story and the footage, she stated that she was not sure the woman in the video was her.

The judge then paused the trial and asked the plaintiff if she had consulted an attorney. When the plaintiff mentioned one particular attorney who had declined to take her case, the judge commented that she knew plenty of plaintiff attorneys who would take the case. She then asked defense

counsel if she would mind a recess of the trial while she assisted the plaintiff in hiring an attorney. Defense counsel respectfully replied that she must insist that the trial proceed, as doing so was in her client's best interest. The judge voiced understanding and the trial concluded after the testimony of the defendant's witness, the owner of the landlord company.

Following closing arguments, the judge dismissed the parties but asked that defense counsel remain. She advised that she would be entering a defense verdict because the law required her to do so in this instance. She freely offered that this was a difficult decision because she wanted to rule in the plaintiff's favor; she felt sorry for her. The judge then indicated that she had not yet ruled in favor of the defendant in a personal injury case and asked that defense counsel draft a detailed Order on her behalf, explaining her ruling in layman's terms for the plaintiff's benefit.

For more information, please contact Chelsey Edgerly at [cedgerly@law-alabama.com](mailto:cedgerly@law-alabama.com). ❖

## WHAT DIFFERENCE DOES 120 DAYS MAKE?

### Florida Law Update, Continued from p.1

(2) or § 440.192(8) waives the right to deny compensability, unless the carrier can establish material facts relevant to the issue of compensability that it could not have discovered through reasonable investigation within the 120-day period. The initial provision of compensation or benefits, for purposes of this subsection, means the first installment of compensation or benefits to be paid by the carrier under subsection (2) or pursuant to a petition for benefits under § 440.192(8).

#### When does the 120-day period start?

The statute seems clear that the 120-day period starts with the initial payment of benefits. Case law supports this reading. The seminal case on the topic is *Checkers Restaurant and Specialty Risk Services, Inc. v. Wiethoff*, 925 So.2d 348 (Fla. 1st DCA 2006). It is the initial provision of benefits that triggers the commencement of the period. Payment of indemnity benefits to the claimant is an easily calculable date; however, the statute references "payment" of benefits which leads to the question of what date applies when a medical appointment occurs? Is it the date of the visit or the date of the payment? This question is not directly answered by case law in the context of the 120-day provision. There is case law that addresses it in the context of the Statute of Limitations running. In that context, the Court has held that the date of payment is the date that starts the limitations period. In that context the payment date is more favorable to the claimant. Therefore, it seems wise, without specific guidance from the Court, to use the date of the office visit as the start of the 120-day period. This date would be more favorable to the claimant and would more likely be interpreted as the initial "provision of benefits." Furthermore, the statute references the

provision of benefits "to be paid" as the triggering event.

#### Notice to the claimant regarding the "120-day pay and investigate" period

The statute requires that "the carrier shall provide written notice to the employee that it has elected to pay the claim pending further investigation, and that it will advise the employee of claim acceptance or denial within 120 days." However, there are four potential scenarios that could arise: 1) no letter is sent and no benefits are provided; 2) no letter is sent and benefits are provided; 3) a letter is sent and no benefits are provided; and 4) a letter is sent and benefits are provided. All of these scenarios will be considered in the context of a timely denial which is would be issued within 120 days of the provision of the initial benefit.

If no letter is sent and no benefits are provided the case is deemed denied. There is no possible argument the claimant can make that the employer/carrier is estopped from denying the case based on § 440.20(4). Case law exists that holds that doing nothing is considered a denial in the context of litigation.

There is no case law that holds that a carrier is prejudiced by not sending the "120-day letter." If a carrier opts to pay benefits and then denies compensability within 120 days of the provision of benefits the denial should not be successfully challenged based upon § 440.20(4).

A carrier is likewise okay if it sends a 120 day letter but does not provide any benefits. In this case, the carrier is deemed to be in the same position as if it had done nothing. See, *Begley's Cleaning Service and Nationwide Insurance Company*, 913 So.2d 1244 (Fla. 1st DCA 2005). The failure to provide any benefits



also fails to trigger the “pay and investigate” period so the claimant cannot successfully argue that the carrier is estopped from denying benefits. Under this scenario, the carrier’s denial can still fall beyond 120 days from the date the letter was sent because no benefits have been provided.

Finally, when the carrier sends the 120-day letter and provides benefits as outlined in the statute, the carrier must deny compensability within 120 days of the provision of the first benefit or it is estopped from denying compensability.

### **Mistakes happen...**

In *Cole v. Fairfield Communities and RSKCO*, 908 So.2d 1105 (Fla. 1st DCA 2005), the carrier made one payment to a chiropractor that was treating the claimant both before and after the industrial accident for an unrelated condition. The evidence presented established that the carrier never intended to accept the body part the chiropractor was treating as compensable. Furthermore, the adjuster testified that payment of the bill was a mistake and that he called the chiropractor’s office to convey that they were not authorized to treat the claimant for the workers’ compensation accident. The chiropractor’s records reflected that the claimant was the only party that told the chiropractor he was authorized. The Court held that facts of the case supported the JCC’s finding that the employer/carrier was not estopped from denying the case based on § 440.20(4).

Invariably the claimant will bring up a “new” body part that was not reported initially. Examples include the altered gait, back pain, the opposite extremity problems from “over use” and the shoulder complaints from using a cane or crutch. When does the clock start on these injuries? The Court held in *Bynum Transport, Inc. and Liberty Mutual Insurance Company v. Snyder*, 765 So.2d 752 (Fla. 1st DCA 2000), that the clock starts

to run when the employer/carrier discovered, or should have discovered the alleged connection between the new injury or condition and the industrial accident. In *Bynum* the claimant was diagnosed with hepatitis C. The condition was brought to the attention of the employer/carrier approximately 6 weeks after the industrial accident by the treating physician who indicated that he could not determine if the condition was caused by the claimant’s tattoos, prior contact with hepatitis C or open wounds from the accident coming in contact with mud at the accident scene. The carrier failed to deny the condition within 120 days of the physicians report and was therefore estopped from denying compensability. The Court held that “when an E/C becomes aware that a claimant has medical needs, it should either pay for them, pay and investigate under section 440.20(4), or deny compensability.” The carrier could not escape its duty to deny compensability by simply not paying the bills. It needed to take the affirmative step of issuing a denial within 120 days of notice of the condition.

### **Conclusion**

The 120-day provision requires action by the carrier if benefits are provided. The carrier should issue a denial within 120 days of the first benefit provided or it will be estopped from denying compensability of a condition. Fortunately, other defenses to providing benefits still exist, such as the accident is not the major contributing cause of the condition or that there was a subsequent intervening event that caused the condition. However, it is certainly an unenviable position to be estopped from denying a condition that is otherwise unrelated to the industrial accident because of an untimely denial.

For more information, please contact Jeff Kerley at [jkerley@florida-law.com](mailto:jkerley@florida-law.com) ❖

## **CLIENT FEEDBACK**

“Greg has been outstanding in responding to me and even anticipating my requests and needs. Greg is truly a gem and I am ecstatic he is our retained counsel on this lawsuit.

— Brian Massey, Allstate, referring to Greg Lewis (Charlotte, NC)

“Chris and Ryan were a dynamic values driven pair. They represented us as if we were family, which of course over time we will be. They requested input and feedback from me which made it feel and appear to all to be a total team effort. Great win today!

- WaWa representative, referring to Chris Blain and Ryan Sainz (Tampa, FL) after obtaining a defense verdict at trial.

“All of the folks from Vernis & Bowling were kind to me, willing to patiently listen to my concerns and explain the process to me in a way that I could understand. During mediation both Mr. Lewis and Ms. Bruce were very professional. They let my husband and I know what to expect. They also were warm and funny. I don’t think I can express how much this helped ease the stress of an incredibly stressful experience.”

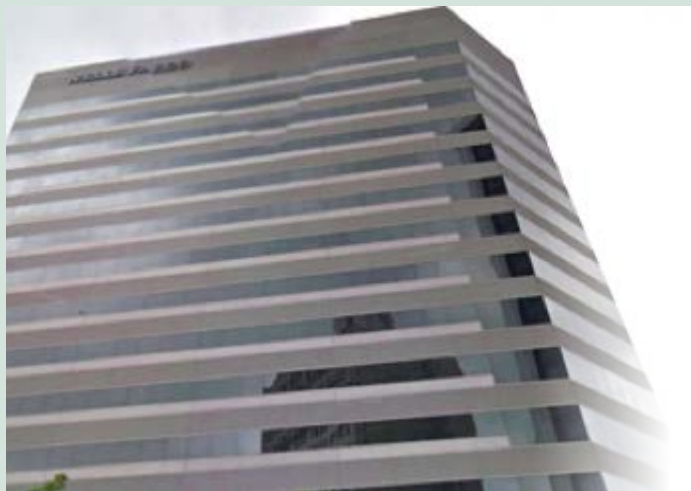
— Michelle McCoy, Allstate insured, in an email to Allstate regarding Greg Lewis (Charlotte, NC)

“Amazing results. A summary of the history was sent to our executive team so that they are aware of the type of defense team we have on board! Kudos to V&B

- Belinda Ochoa, Capstone Logistics, referring to David Willis (Atlanta, GA)

## ANNOUNCEMENT

## WE ARE PLEASED TO ANNOUNCE THE OPENING OF THE FIRM'S NEWEST OFFICE IN JACKSON, MISSISSIPPI



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#### J. Scott Rogers, Managing Attorney

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**Vernis & Bowling** offers local and regional, full service legal representation to businesses, insurance companies, self-insured's, governmental entities and individuals in all counties and Judicial Circuits throughout MISSISSIPPI, ALABAMA, FLORIDA, GEORGIA, NORTH CAROLINA and SOUTH CAROLINA.

James Scott Rogers was born and raised in Petal, Mississippi, a small suburb of Hattiesburg, MS, then a bustling metropolis in southcentral Mississippi. The two cities have since changed positions. Scott graduated from Petal High School, with honors, in 1987, and spent several years honorably serving in the Mississippi Army National Guard. He graduated from William Carey College in Hattiesburg, Mississippi in 1997 before obtaining his J.D. degree from Mississippi College School of Law in Jackson, Mississippi in 2000.

Scott began his legal career, clerking for a defense firm in their Jackson office. Scott received notification that he passed the bar exam in September of 2000. Rather than waiting for the formal bar swearing in ceremony several weeks later, Scott rushed to the local Chancery Court's office to be sworn in the very next day. Later that afternoon, Scott was sitting solo in a deposition representing a local insured. Weeks later he was in trial, sitting first chair. It was small claims court matter, but Scott's love for defense litigation and trial was set. This aggressive approach to practicing law would serve Scott well over the next 16 years. Scott prefers "proactive" to "reactive", and is ready to be first in line to try those cases which should be tried.

Scott spent 18 years as a law clerk, associate, and partner with the same firm in Jackson. During those years, Scott handled dozens of jury and bench trials. He also defended and deposed hundreds of parties, witnesses, and experts and drafted and argued countless motions. Scott has successfully argued at the appellate level, and has successfully argued before an en banc

panel of the Mississippi Supreme Court. Following Hurricane Katrina in 2005, Scott was retained by the Mississippi Insurance Department to take part in a Market Conduct examination of the industry. The focus of the examination was the handling of wind/water claims. This invaluable experience helped Scott develop an honest, aggressive, but fair approach to practicing law.

Scott has joined Vernis & Bowling as the Managing Attorney of the Jackson and Gulfport offices. Scott will continue to handle the defense of general liability, premises liability, automobile liability, bad faith/extra-contractual liability, condominium and homeowners' association liability, commercial vehicle and trucking liability, coverage litigation, SIU/fraud matters (including first party arson/property claims and medical provider fraud), uninsured/underinsured motorist liability, and professional liability/E&O.

Scott has been married to Melissa Rogers for the last nine years. They have one daughter, Sadie Grace, with their second child expected to arrive in early December. Sadie Grace wants a little sister because "little brothers can be annoying" but she admits she really just wants a healthy sibling.

The hiring of a lawyer is an important decision that should not be solely based upon advertisements. Before you decide, ask us to send you written information about qualifications and experience. No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers.

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The Atlanta, GA office of Vernis & Bowling participated in the Georgia 2016 Legal Food Frenzy. Vernis & Bowling of Atlanta raised \$455 and donated 137 pounds of food. This equates to 1,957 pounds of food which will be distributed to families in need.

The Palm Beach office of Vernis & Bowling participated in the 2016 Legal Hunger Games for Feeding South Florida. The food sorting and donations provided 13,481 meals to those in need of food assistance.

At our annual firm meeting, Vernis & Bowling attorneys packed over 200 “backpack” meals for children in need of food assistance.

Robert C. Bowling and G. Jeffrey Vernis, Managing Partners, were selected to the South Florida Business Journal’s 2016 Power Leaders in Law.

Robert C. Bowling and G. Jeffrey Vernis, Managing Partners, were selected as Top Insurance Defense Litigation Attorneys in the 2016 Edition of the South Florida Legal Guide.

Vernis & Bowling was selected as a Top Law Firm in the Tampa Bay Business Journal.

We are proud to announce that Jim Patterson, Managing Attorney of Vernis & Bowling of Southern Alabama, LLC, has recently won election to the bench in Mobile County, Alabama. He will become the newest Mobile County Circuit Judge in January of 2017.

Eric Knuth (Miami, FL) received an **AV- Preeminent Martindale-Hubbell®** Peer Review Rating. This rating is for a select group of lawyers recognized for their legal ability and professional ethical standards.

Michael Barratt (Birmingham, AL) received an **AV- Preeminent Martindale-Hubbell®** Peer Review Rating. This rating is for a select group of lawyers recognized for their legal ability and professional ethical standards.

Ian Matthes (Atlanta, GA) received an **AV- Preeminent Martindale-Hubbell®** Peer Review Rating. This rating is for a select group of lawyers recognized for their legal ability and professional ethical standards.

Jeffrey Raasch (Atlanta, GA) received an **AV- Preeminent Martindale-Hubbell®** Peer Review Rating. This rating is for a select group of lawyers recognized for their legal ability and professional ethical standards.

David Willis (Atlanta, GA) was selected as a Martindale-Hubbell Top Rated Lawyer in Georgia.



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