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FLORIDA WORKERS' COMPENSATION LEGAL UPDATE: FIRST DCA STRIKES A PROVISION OF THE WC ACT ON CONSTITUTIONAL GROUNDS

Henry J. Roman
Managing Attorney, (Broward/Ft. Lauderdale) Workers' Compensation Department

On February 28, 2013, Florida's 1st District Court of Appeal, the court which hears all workers' compensation appeals in Florida, declared FS 440.15(2)(a) unconstitutional in Westphal v City of St. Petersburg. In its opinion, the Court found the 104 week statutory cap on temporary total disability ("TTD") benefits as applied to the Claimant, and others similarly situated, violates Florida's Constitution as adopted in 1968. The Court struck the 1994 and 2003 provisions limiting TTD benefits to 104 weeks and reinstated the 1990 statutory cap of 260 weeks.

What does it mean?

When an injured worker exhausts his/her eligibility for TTD benefits but has yet to reach actual MMI, the cap on those benefits is now 260 weeks and not 104 weeks.

Does this decision impact the cap on any other indemnity benefits?

No. The only affected provision of the statute is the TTD section, or FS 440.15(2)(a).

When does this decision take effect?

The opinion is not final until all motions for rehearing are filed and disposed. Further, since this decision struck a portion of the statute on constitutional grounds, the Florida Supreme Court will hear the case.

Assuming the Florida Supreme Court agrees with the 1st DCA, can closed/settled cases be reopened?

No. The 1st DCA limited the scope of its opinion to "prospective application only" and not to those cases that were otherwise final at the time of the decision.

What is next?

While it is difficult to predict how the 1st DCA will rule on future cases, in reading Westphal, it is anticipated that given the right set of facts the Court will likely entertain other constitutional challenges to the Act. The decision is seemingly an indictment of the current system of benefits delivery, and, more importantly, the amount of benefits available to injured workers. It is anticipated that the next constitutional challenges to be addressed by the Court will likely involve the provision of medical benefits.

Should you have any specific questions regarding Westphal, or any other workers' compensation matter, please contact Henry J. Roman at Hroman@Florida-Law.com or at 954-927-5330.

IMPORTANT RULING IN THIRD DISTRICT COURT OF APPEALS IN FLORIDA

Jeff Vernis
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On April 25, 2013, the Third District Court of Appeals in Florida issued an opinion holding that Florida Statute section 768.0755 (2010) can be applied retroactively.

Florida Statute 768.0755 (2010) entitled "Premises liability for transitory foreign substances in a business establishment" places the burden of proof on the Plaintiff to show that the business establishment had actual or constructive knowledge of the dangerous condition and should have taken action to remedy it. The statute became effective on July 10, 2010 but was silent as to whether the statute could be applied retroactively.

The Third DCA held that the statute is procedural/remedial in nature and therefore should receive retroactive application. The Court further stated that "actual or constructive knowledge is not a "new" required element of a prima facie case under section 768.0755; rather, it concerns evidence, the burden of producing which is upon the plaintiff, that the jury must consider in determining whether there has been a breach of duty."

Note that this is the first Florida appellate case that has addressed the issue of retroactive application of 768.0755. There has been a split as to this issue in the federal courts, with the district court for the Northern District of Florida holding that the statute is procedural and can be retroactively applied, and the Middle and Southern districts holding that the statute is substantive and as such there is no retroactive application.

DEFENSE VERDICT IN ACTION TO RESCIND GENERAL RELEASE

Steven Sundook and Stefanie Capps (Fort Myers/Southwest Florida) (Equity/Contracts) obtained a defense verdict in the case of Wilkerson v. Baldwin and Auto Owners. It involved a claim for reformation and recision of a general release executed by the plaintiff, Bruce Wilkerson, who was involved in motor vehicle accident.

The accident occurred when the insured Baldwin made a left turn in front of Wilkerson, who was towing a boat behind his truck. Wilkerson had refused treatment at the accident scene, but did go to the ER later that day, where he was treated for neck and back strain and released.

Wilkerson, a commercial fisherman, initially made a claim to Auto Owners for property damage to his boat, truck, and boat trailer. The truck and boat were a total loss, requiring that he sign total loss paperwork, but a property damage release was not required. He was paid in full with no controversy for his property damage claim.

Wilkerson then made a claim for lost wages for the time he was unable to fish after the accident. He was paid for his lost wages claim, and in exchange, signed a general release.

On the day the general release was signed, Wilkerson arrived at the claims office to find that the adjuster assigned to his claim was out due to her child's illness. He instead spoke with the claims manager. After negotiating an agreed amount for his lost compensation, the claims manager instructed an adjuster in the office to issue a check and have the claimant sign a general release. The check was exchanged for a general release of all claims arising out of the accident.

Several days after he signed the general release, Wilkerson wrote a demand letter to Auto Owners, claiming to have significant injuries to his shoulder and knee which both required surgeries. He demanded an additional $500,000 to settle his claim. He contended he was tricked into signing a general release, when he thought he was signing a property damage receipt.

Wilkerson further continued to contact the adjuster who had been out the day he received payment for lost compensation. He told her that his wife told him he may have signed a general release. He claimed he was only given the last page of the two page release, that it was never explained to him that the document he signed was a general release, and that it was not explained to him that he was giving up rights to proceed with a personal injury claim. He said that he thought he was signing a receipt for payment for property damage.

In the lawsuit against the elderly woman's liability insurer, it was claimed that Wilkerson was either fraudulently induced into signing the general release or that the use of the general release was a mutual mistake. The Plaintiff's counsel pointed out that the payment was made under the liability policy's property coverage, with the word "property" appearing on the check stub. It was contended that the payment was for the Plaintiff's loss of use of his boat, that this was a property coverage payment and it was inappropriate to require a general release of all claims in exchange for it.

It was also claimed that the adjuster continued to speak with the Plaintiff, encouraged him to seek further medical treatment and agreed that the general release should not have been used when he was paid for his lost compensation.

Attorneys Sundook and Capps argued that the claim was for lost compensation and not loss of use because loss of use has a specific legal definition of the reasonable rental value of property damaged. They further argued that it was fully explained to the Plaintiff at the time he executed the general release that he was giving up all rights to make additional claims, including a claim for personal injury, and that the release the Plaintiff signed very clearly indicated on the document itself that it was in fact a general release, including a boldface capital lettered "WARNING".

After a non jury trial, the court took the disposition of the case under advisement. The court issued an order one week later determining that the "general release" signed by the Plaintiff is valid and enforceable. The court specifically found that — at the very least — the Plaintiff was advised as to the general consequences of the release prior to signing it; he was of sound mind and understanding; and he had the right and means to refuse the offer, yet he accepted it nonetheless. There was no competent credible evidence to substantiate Plaintiff's claims of mutual mistake or an excusable unilateral mistake. Further, there was absolutely no evidence of any fraud in the procurement of the signed release in question. Likewise, Plaintiff failed to produce any competent substantive evidence upon which the Court could find either procedural unconscionability or substantive unconscionability.

A Judgment was entered awarding costs to the defense and nothing to the Plaintiff.

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A LITTLE RELIEF FOR ALABAMA RETAILERS AGAINST PRODUCT LIABILITY LAWSUITS

Russell D. Johnson
Liability Attorney, Mobile/Southern Alabama

Until June of 2011, Alabama's small business owners and retailers lived with a constant nuisance and anxiety that they could be sued by an injured plaintiff for simply selling a prepackaged product. As most of us know, plaintiff attorneys inevitably assert claims against business owners, who have no other involvement with a product except for the sale, in order to avoid removal to federal court by a foreign business entity. Being that the business owners had little to no involvement with these products, the Plaintiffs would simply assert causes of action for breaches of implied warranties against the local businesses.

On June 9, 2011, Governor Robert Bentley took a significant step in protecting retail business owners of Alabama by signing "The Alabama Small Business Act" into law. The new law prohibits most product liability claims against retailers and distributors. Sponsored by two attorney legislators, the law codifies and revives the "sealed product doctrine" defense.

Prior to its codification, Alabama retailers were prevented from asserting the "sealed product" defense against claims for breaches of implied warranties against a plaintiff. In the most recent case before the new law, a plaintiff brought an action against multiple defendants for injuries related to a dietary supplement. Sparks v. Total Body Essential Nutrition, Inc., et al, 27 So. 3d 489 (Ala. 2009). Amongst the asserted claims, the Plaintiff alleged breaches of implied warranties of merchantability and fitness for a particular purpose against the store who had sold the product. After being removed to Federal Court, the Plaintiff moved for the case to be remanded because the Defendants had not shown that the claims against the retailer could not be proven. The defendant retailer countered with the "sealed product" doctrine, and the case was sent to the Alabama Supreme Court for determination on whether the doctrine applied to the breach claims.

Since the breaches of implied warranties are based in the UCC, the Alabama Supreme Court reviewed whether the UCC imposes liability upon a retailer who purchases defective prepackaged goods from a manufacturer under theories of implied warranties. Finding no mention of the defense in the comments to the Alabama Code, the Court found that the "sealed product" doctrine was eliminated as a defense when the Alabama legislature adopted the UCC.

In Sparks, the Court stated that "the recognition of the sealed product doctrine to claims of implied warranty" is a matter best left to the legislature. Two years following the Sparks opinion, the Alabama legislature took those words to heart. The "Alabama Small Business Act" essentially amended the pre-existing code pertaining to product liability claims and inserted the "sealed package" doctrine.

The law retains the previous definition of a product liability claim defining such a claim as an action brought by a person for injury or death caused by the manufacture, construction, design, testing, marketing, warning, labeling, or packaging of a product. See Ala. Code § 6-5-521(a). The definition applies to product liability claims based upon theories of negligence, manufacturer's liability doctrine, misrepresentation, and breach of warranties, express or implied. Applying the definition, the law states that no product liability action may be asserted against a retailer, wholesaler, or dealer of a product. See Ala. Code § 6-5-521(b). The Legislature explains that this law is meant to protect business owners and reatilers who are "merely conduits" of a product.

As with any law, there are exceptions which still allow recourse against the small business owners. Alabama retailers can still be subject to product liability claims if they are the manufacturer of the final product, had control over the design or labeling, or if the retailer modifies the product and creates a defect. See Ala. Code § 6-5-521(b)(1)-(3). The committee also includes a catch all provision which states retailers will not be protected from their own independent acts unrelated to the manufacturing of the defective product. See Ala. Code § 6-5-521(b)(4).

Our office recently had the opportunity to test the new law against a Plaintiff who asserted implied warranty claims against our client, a local beauty supply store in Covington County, Alabama. The Plaintiff alleged burn injuries to her scalp after using a hair relaxing agent. The only interaction our client had with the Plaintiff was simply selling an unopened, pre-packaged product. Recognizing the opportunity, we quickly filed a motion to dismiss all claims asserted against the retailer based on the "Alabama Small Business Act." After filing the Motion to Dismiss, the Plaintiff voluntarily dismissed all claims against our client the day before the hearing.

Being a little over a year since its enactment, the "Alabama Small Business Act" has yet to be reviewed by or contested in the Alabama Supreme Court. While being untested to date, the codification of the "sealed product" doctrine is a significant step in protecting Alabama retailers. Although it does not provide a complete defense to all claims which may arise, the "Alabama Small Business Act" impedes and/or prevents plaintiffs from asserting frivolous claims and allows Alabama retailers a little relief.

Should you have any questions withregards to this article, please do not hesitate to contact Russell Johnson at Rjohnson@Law-Alabama.com or at (251) 432-0337.

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www.National-Law.com GEORGIA LAW UPDATE Spring 2013

TRAVELING EMPLOYEES AND CONTINUOUS EMPLOYMENT: WHERE ARE WE NOW?

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The Workers' Compensation Act creates a special duty between employers and employees in providing coverage for injuries that arise "out of and in the course of" employment. Gassaway v. Precon Corp., 280 Ga. App. 357 (2006). It is to be liberally construed to bring workers and employers within its coverage. § 34-9-23. The determination of whether an accident is "work-related" is given even broader scope in the case of "traveling" employees or those considered in "continuous employment." In the recently decided cases of The Med. Ctr. Inc. v. Hernandez and Hernandez v. Atlanta Drywall, Ga. App. (Cases No. A12A1292, A12A1315, decided September 21 and September 29, 2012), the Court restricted application of the continuous employment analysis in determining that traveling employees lose their continuous employment status once they cease work and return home. These cases (reviewed together and combined by the Court of Appeals) highlight the importance of a traveling employee's status at the time of accident in the determination of compensability.

As an initial matter, two independent criteria must be met for any injury to be compensable, regardless of whether the employee punches a clock, travels around the state, or is considered on-call: the injury must arise "out of" and "in the course of" employment. Mayor and Aldermen of the City of Savannah v. Stevens, 278 Ga. 166 (2004). The injury arises "out of" employment when there is a causal connection between the employment circumstances and the injury. On the other hand, "in the course of" refers to the time, place, and circumstances in which the injury occurs. It must have occurred within a period of employment and at a place where the employee may reasonably be in the performance of the job duties or activities incidental thereto.

The interpretation of these two prongs is broader for "traveling employees." A traveling employee is defined as one who is "required by employment to lodge and work within an area geographically limited by the necessity of being available for work on the employer's job site." Ray Bell Construction Co. et al. v. King, 281 Ga. 853 (2007). Note that this requirement is based on the geographical demands of employment. Whether the employer requires the employee to lodge away from home, reimburses or pays for lodging, or pays the employee per diem are merely evidence to be considered in determining whether the employee falls within this category. U.S. Fidelity & Guaranty Co. v. Navarre, 147 Ga. App. 302, 305 (1978).

If this requirement is met, the employee is considered to be in continuous employment, day and night, under the Act. See, Ray Bell, 281 Ga. at 855. As a result, injuries which occur during this period are "in the course of" the employment. Since the employee is required to lodge away from home, acts necessary to "health and comfort" are considered "incidents" of the employment and "acts of service." Thornton v. Hartford Accident, etc., Co., 198 Ga. 786, 790 (1945) (injury compensable when sustained while employee crossed road from café to hotel). Thus, if the cause of injury is related to the "dangers or perils arising from and incident to" the requirement to travel or lodge away from home, the injury is also considered to have arisen "out of" the employment and, thus, compensable. See Ry. Express Agency v. Shuttleworth, 61 Ga. App. 644 (1940)(death in hotel fire compensable).

Leisure activity will not necessarily break the continuity of the continuous employment period. McDonald v. State Hwy. Dept., 127 Ga. App. 171 (1972). In McDonald v. State Hwy. Dept., 127 Ga. App. 171 (1972), the employee went to another hotel room where he ate, drank alcoholic beverages, and played cards. On the way back to his room, he fell down the hotel steps and died. The Court held the claimant had not stepped outside the course of his employment simply by drinking alcohol and playing cards because there was no evidence that he had not conducted those activities in a normal and prudent manner or "wholly foreign" to employment. McDonald, 127 Ga. App. at 176. The Court also found "a clear causal connection between the steps…and his fall thereon." As a result, the Court determined the injury was caused by the normal, usual and customary hazards of the hotel stay and awarded compensation.

However, the employment period is broken, and the injury does not arise out of and in the course of employment where the traveling employee does not perform the activity in a reasonable and prudent manner. Williams v. Atlanta Family Restaurants, 204 Ga. App. 343 (1992)(accepting car ride from strangers not reasonable and prudent, so employee had left scope of employment and subsequent assault not compensable). The period of employment will also be broken when the employee embarks on a purely personal mission that is wholly foreign to the employment. When a traveling employee who is already in continuous employment embarks on such a mission, the employee is said to have said to have "deviated" from employment. Ray Bell, 281 Ga. at 856-857. An injury sustained during the period of deviation does not arise out of and in the course of employment.

A commonly cited example of this is U.S. Fed. & Guaranty Co. v. Skinner, 188 Ga. 823 (1939), although the term "deviation" was not yet in use. In that case, the employee was staying in Savannah for business. He was injured while driving from Savannah to Tybee Island for dinner and to see the ocean. The employer furnished his vehicle and permitted reimbursement of his expenses, but did not require the trip and the employee was not conducting business in the area. Skinner, 188 Ga. at 823. The Court determined the excursion was outside of the employment area and purely personal in nature, notwithstanding the employer's permission and provision of transportation and expenses. As such, it denied compensability finding the injury did not arise "in the course of employment."

After the personal mission is completed and the employee turns back toward employment, continuous employment coverage is generally considered to resume. See London Guarantee, etc., Co. v. Herndon, 81 Ga. App. 178, 181 (1950). At times, departure from the employer's business may be so great that merely "concluding the personal errand and turning back" will not recommence the period

of continuous employment. Such is the case when the employee leaves the geographic area of employment. In that case, continuous employment resumes only when the employee is again in the general proximity of the place where he is employed to be and at a time where he is employed to be there. Ray Bell Construction Co. et al. v. King, 281 Ga. 853 (2007). Whether the "place" and "time" elements are met is largely a factual determination for the State Board. Ray Bell Construction Co. et al. v. King, 277 Ga. App. 144, 147-148 (2006).

In Ray Bell, an employee in continuous employment made a personal deviation when he left the area of employment (Fayetteville/Jackson) to take his mother's furniture to his storage facility in Alamo, Georgia. He was fatally injured after he had delivered the furniture and was driving back toward the Fayetteville/Jackson area. Ray Bell, 277 Ga. App. at 145, 148. Since the Board had determined that the employee was back in the geographic place where he was employed to be, and at a time he was employed to be there, continuous employment had resumed and injury was found compensable. On appeal, the Supreme Court reviewed whether both prongs of compensability were properly addressed and whether the employee's destination was determinative of compensability (either the jobsite or lodging). Since evidence showed the employee was injured while in the general proximity of the place where he was employed to be at a time when he was employed to be there, continuous employment had resumed. The injury was compensable regardless of whether he was heading toward his lodging or the worksite at the time of injury. Ray Bell Construction Co. et al. v. King, 281 Ga. 853 (2007).

In Hernandez, the Court of Appeals determined the employee's activity can be so unrelated to the employment that it ends the period of continuous employment. In that case, Celvin Hernandez and Juan Alvarez-Hilario were construction workers from Savannah whose employer undertook a contract on a project in Columbus. During the week, the men were required by their employment to lodge in the Columbus area. However, at the end of the week, they ceased all work duties, returned to their homes in Savannah, and were not paid. They were injured while en route to begin work on a Monday morning when the co-worker's personal vehicle in which they were riding was involved in a collision only five minutes from the jobsite.

The Court determined that a period of continuous employment ends when the employee ceases work, is no longer being paid, and leaves the employment area to return to his home. A new period begins when the employee is back in the general proximity of the employment and is being paid to be there or otherwise resumes performance of the employment duties. If the injury occurs prior to commencement of the new period, the injury is not compensable. Applying this analysis, the Court determined the men's continuous employment ended at the end of each work week when they left Columbus to return to their homes in Savannah, ceased the performance of employment duties and were not paid by the employer. In effect, it found that the weekly Columbus employment constituted a series of discrete periods of continuous employment, as opposed to considering the Columbus construction project as one long period of continuous employment interrupted by personal deviations. As a result, the Court hearkened back to a "going to and from work" analysis and found the claimants' injuries did not arise out of and in the course of employment.

The "going to and from" rule states that injuries sustained while traveling to and from work do not arise out of or in the course of employment. (Citing Stevenson v. Ray, 282 Ga. App. 652, 654 (2006)). The Hernandez employees' injuries did not arise out of their employment because travel was not found to be part of their job duties. The Court determined they were not in the course of employment at the time of injury because they were only paid to perform construction work and had not yet arrived on the construction site. The Hernandez court points out that, in past cases analyzed under the continuous employment doctrine, compensability was found where the employees were "already in the midst of their employment duties" at the time of injury. It cites to U.S. Fid. &c. Co. v. Navarre, 147 Ga. App. 302 (1978); McDonald v. State Hwy Dept., 127 Ga. App. 171 (1972); and Ray Bell Construction Co. et al. v. King, 281 Ga. 853 (2007). In those cases, at the time of injury: (1) the employees had already received payment for their work related to the employment that required their lodging in the geographical area of the worksite and (2) they had not returned home since the pay period began.

A comparison with Ray Bell may be instructive for determining why the Hernandez court declined to apply a deviation analysis, and instead found a series of continuous employment periods broken by periods of no employment. In both cases the employees were construction workers; they made a personal trip that took them significantly outside the geographic area of employment; they were injured while returning to the area of employment; and they were found to be in the general proximity of employment at the time of injury. The key distinction is that, in Ray Bell, the employee's continuous employment status did not end. Despite being on "medical leave" there was no evidence that he did not continue to work in some capacity or be paid and also no evidence that he was not required to lodge near the jobsite during that time. Ray Bell, 281 Ga. 853 (2007). The employees in Hernandez, by contrast, were only paid while at the job site. The evidence showed that when they left for the weekend, they ceased work, stopped being paid and returned home. Once they headed home, they ended their business in Columbus. Since they were not paid again until they returned to the Columbus jobsite, the Court was constrained to evaluate their injuries under the "going to and from" rule.

Quite possibly a few changes to the facts of the case may have changed the outcome in Hernandez. For example, although transportation was not furnished and there was no evidence it was reimbursed, their injuries might have been compensable if the employer had considered transportation to be a type of remuneration. Than v. Maryland Cas. Co., 99 Ga. App. 758 (1959)(finding no compensability where transportation by co-employee in personal vehicle not considered remuneration or required by employer). The injuries might also have been compensable if the Board had found that men's work week began in Savannah, rather than Columbus, or if the men were paid on a daily basis instead of hourly. Cooper v. Lumbermens Mut Cas. Co., 179 Ga. 256 (1934)(the injured employee routinely came to the employer's location to catch a ride with a third party to the worksite with the employer's knowledge, approval and expectation of same and workday found to begin at the employer's location). In addition, if the men had been charged with a special task or with performing some act beneficial to the employer during their commute, such as the safekeeping or transportation of tools to be used on the jobsite, this might have weighed in favor of compensability. See Travelers Ins. Co. v. Moore, 115 Ga. App. 295 (1967)(upholding compensability where employee killed while traveling to employer's office while carrying employer's money that he had been required to take home with him the previous night). Ultimately, however, none of these facts were present.

In conclusion, the rules for analyzing compensability remain the same for employees in "continuous employment" and for those who face a "standard" work day. Although certiorari has been applied for in Hernandez case, a ruling by the Supreme Court is unlikely to change the basic parameters of determining whether an employee is in a continuous employment situation. It is hoped, however, that if certiorari is granted the Court would articulate the rule more clearly. As it stands, equal effort must be made towards proving (or disproving) facts relevant to both an employee's "continuous employment" status and the "in the course of employment" prong of compensability.

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VERDICTS & DISPOSITIONS

Jim Patterson (Mobile/Southern Alabama, LLC) (Liability/water intrusion) obtained a defense verdict from the Circuit Court of Baldwin County, Judge James Reid, on December 10, 2012 in a water intrusion/runoff case involving a Farmers Insurance Agent who was personally sued by one of his neighbors due to alleged water intrusion. The agent had purchased 5 acres of undeveloped property between two older subdivided neighborhoods. The 5 acres the agent bought was supposed to have been developed, but never was. The plaintiff lived topographically below and immediately adjacent to this 5 acres, and across the street from her was a detention pond for her own subdivision. Topographic maps showed that water naturally flowed from the agent's higher property through the neighbor's lower property and toward this detention pond. However, after the agent built his home in year 2008, the neighbor claimed that the agent had altered the velocity and flow of storm water runoff thereby causing damage to her home. At trial, the plaintiff demanded $120,000 in lost value.

By virtue of photographs obtained in discovery going back to year 2003, the defense was able to show that the neighbor's property had always flooded when it rained hard. Through testimony of city building inspectors and the city, assistant public works director, the defense was able to show that the plaintiff had complained to city officials about her flooding as early as year 2005. The defense was even able to show that at the request of city officials, the Farmers agent built a swale and berm at his own expense to turn runoff away from his neighbor in an effort to help her. In return for this conciliatory gesture, the man was sued.

After hearing all the evidence in a bench trial, and considering post-trial briefs, the judge returned a defense verdict. Shanks v. Malone, In the Circuit Court of Baldwin County, Alabama, CV-2010-901094.

Ryan Northrup (Mobile/Southern Alabama) (Construction Defect) obtained a Defense verdict on November 12, 2012 in a jury trial lasting 3 days in Baldwin County, Alabama.

In 2004, at the height of the real estate market in South Alabama, Craig Dyas, a local real estate developer, acquired 2 parcels of property located in a highly affluent area of Fairhope, Alabama. Along with a business partner, Dyas designed a three-townhouse development for the property. Dyas formed a construction company called Dyas Construction Management who served as the general contractor for the construction. The plans for construction called for each unit to have a low sloped, roll-down bitumen roof, a smaller shingled roof and several decorative copper roofs and copings.

Dyas Construction Managment sub-contracted with Pat Bankester d/b/a Bankester Roofing and Siding to install all three roofs on each of the units. Pat Bankester is a local, Baldwin County roofer with over 40 years of experience in this area.

Prior to turning the units over to the owners, Dyas Construction Management noticed water intrusions on the second floor and first floor above the kitchen in all three of the units. Bankester was called back out to the units to inspect the roofs for potential leaks. It was determined that all three units were leaking in exactly the same area. After some testing, Bankester determined that the water was not penetrating through any of the roofs, but instead was penetrating behind the brick veneer and stucco walls. This was allowing water to enter the building at points where waterproofing elements were missing.

Dyas Construction Management disagreed with Bankester's findings and retained an additional roofer to come out and re-roof one of the units, with the idea that all three units would be re-roofed. After the roof was replaced on the center unit, the water intrusion issues continued and the purchasers demanded that Dyas Construction Management pay for the repairs. Ultimately, Dyas Construction Management reached a settlement with each of the individual purchasers allowing each purchaser to repair the units and to come up with a solution for the water intrusion. The total settlement paid by Dyas Construction Management to all three of the purchasers exceeded $150,000.

In 2006, Dyas Construction Management sued Bankester asserting several construction defects as the fault. Dyas Construction Management demanded that Bankester pay the $150,000 settlements as well as some other construction related damages.

At trial, Plaintiff was unable to present sufficient evidence linking the water intrusion to any specific roofing failure. The case was tried over the course of three days. **The Baldwin County Jury took less than 10 minutes to return a verdict in favor of Pat Bankester, going so far as to submit the following question to the judge after 5 minutes, *"Can we make Plaintiff pay Defendant's lawyer/court costs?"*** Dyas Construction Management v. Bankester, In the Circuit Court of Baldwin County, Alabama CV-2006-00366.

Jim Patterson (Mobile/Southern Alabama) (General Liability) obtained a favorable opinion from the Alabama Court of Civil Appeals on December 21, 2012. The case involved an assault and battery perpetrated against his client, and counterclaims later made by the assailant against the victim which we were assigned to defend. The case was tried in Butler County, Alabama on September 12, 2012 and resulted in a verdict in favor of the insured and against the assailant in the amount of $35,000. That verdict was appealed because of an erroneous jury instruction requested by the insured's personal counsel having to do with the duty to retreat. Alabama has passed a "stand your ground" law, which came into play and resulted in a remand for a new trial. However, the defense prevailed against the majority of the counterclaim causes of action asserted as these were upheld on appeal. Based on the evidence presented in the original trial, we fully expect to prevail again. Skinner v. Bevans, In the Alabama Court of Civil Appeals, CV-2110147.

Jim Patterson (Mobile/Southern Alabama) (General Liability) obtained a complete "by consent" dismissal of a case on behalf of the insured, Luxottica. The claims asserted involved alleged defective eyeglasses. Luxottica is the largest eyeglass maker in the world. It was sued when the plaintiff alleged that she got dizzy and fell because of a problem with prescription lenses she obtained through a Sears store over four months earlier. The plaintiff provided what she contended was the faulty prescription, which when read by her expert did not match the glasses she was provided by the Sears store. However, by good detective work, we were able to locate the actual prescription the woman took to the Sears store from a medical provider she never named, which was a complete match for the glasses she was provided, and was not the prescription her lawyers gave their expert. We also learned that the woman had been cooking with her husband the day of this accident, and that they had been enjoying a lot of wine together. We pointed all this out to the plaintiffs attorney, he asked us to make a settlement offer, which was refused. Instead, we reminded them of Alabama's Litigation Accountability Act and pressed hard for dismissal, which was ultimately given by consent. Jensen v. Sears and Luxottica, In the Circuit Court of Mobile County, Alabama, CV-2010-902307.

Russell Johnson (Mobile/Southern Alabama) (General Liability/Fire Loss) obtained a summary judgment in a fire loss case involving a motor home and a refrigerator. An insurance carrier took over the claim as subrogee based on their investigator's report that the fire was caused by a defective refrigerator inside the motor home. After the investigators's initial inspection, the motor home was placed in a storage yard for safe keeping. Client Bay City Paint & Body was later named as a defendant based on the claim of the motor home's owner that he had taken it to them for maintenance to the refrigerator.

The subrogation case was filed almost two years after the fire and loss and barely avoided the statute of limitations. Over the next year and a half after the case was assigned to us to defend, Vernis & Bowling attempted to schedule inspections and obtain discovery. It was not until a year and a half into the defense that the insurance carrier/plaintiff in subrogation finally admitted that it had actually "lost" the motor home at issue, and thus could not produce items reportedly kept for expert inspection when the defendants demanded an inspection. The right to summary judgment was asserted via this spoliation of evidence, and it was granted. **** Mut. Ins. Co., v. Bay City Paint and Body, Inc., et al, In the Circuit Court of Mobile County Alabama, CV-2010-900947.

Gregory Lewis (Charlotte, North Carolina, PLLC) (Motor Vehicle Negligence) obtained a defense jury verdict from the Superior Court, Buncombe County, NC, Judge Eric Levinson, on October 3, 2012. Plaintiff brought suit for injuries sustained as a result of a motorcycle accident, wherein the Defendant lost control of his motorcycle, and his ejected guest passenger (Plaintiff) sustained personal injuries, to include: bilateral tibia fractures at the wrists, both requiring open reduction/internal fixation with plates and screws, 3 fractured ribs, a fractured scapula, a T-11 compression fracture, a collapsed lung, as well as permanent impairment and scarring at the wrists. Plaintiff's injuries required a 1 week hospitalization, followed by 3 weeks in-patient rehabilitation, followed by in-home care. Liability was admitted. Medical expenses totaled $68,000.00. Plaintiff was unemployed at the time of the accident, as disabled from pre-existing fibromyalgia.

Plaintiff's demand at mediation was $250,000.00. Defendant's carrier offered $100,000.00 to settle the claim, which was rejected. The jury returned a verdict in favor of Plaintiff in the amount of $78,000.00. Harris v. Quinn, Buncombe County Superior Court, NC, 10 CVS 1307.

Gregory Lewis (Charlotte, North Carolina, PLLC) (Motor Vehicle Negligence) obtained a defense jury verdict from the Superior Court, Rowan County, NC, Judge Erwin Spainhour, on October 17, 2012. Plaintiff brought suit for injuries sustained in a single car collision, as the guest passenger of Defendant. The evidence showed that after leaving a bar, Defendant's vehicle left the roadway and collided with a tree. Plaintiff alleged personal injuries to include 5 fractured ribs and a soft tissue back injury. Medical expenses totaled approximately $16,000.00. The defense argued that per Defendant's testimony, the Plaintiff and the Defendant had been consuming alcohol for the better part of a day, and that the alcohol was purchased by the Plaintiff. The defense admitted negligence, and argued contributory negligence on the part of the Plaintiff. Plaintiff's demand at mediation was policy limits of $50,000.00. Defendant's carrier offered nothing. After deliberating for 15 minutes, the jury returned a defense verdict, finding contributory negligence on the part of the Plaintiff. Plaintiff has appealed to the North Carolina Court of Appeals. Garmon v. Hagans, Rowan County Superior Court, NC, 11 CVS 2287.