

# NEWSLETTER

## MISSISSIPPI LAW UPDATE

### NEW PREMISES LIABILITY LEGISLATION IN MISSISSIPPI



**Scott Rogers**

Managing Attorney

Vernis & Bowling of Jackson and Gulfport, MS

Mississippi Senate Bill 2901, incorporating the “Landowners Protection Act” was signed into law by Governor Phil Bryant on March 29, 2019, and will be effective July 1, 2019. The Landowners Protection Act addresses the liability of landowners in Mississippi for the intentional torts of third parties on the landowners’ premises.

Prior to the change in law, in Mississippi, the duty a landowner owed to an individual on his or her property depended on the individual’s status on the property – either as a trespasser, an invitee, or a licensee. An invitee is a person who is present on the premises for a legitimate business purpose to benefit the premises owner (a business customer, for instance), and is therefore entitled to the highest duty of care in Mississippi. As set forth in *Kroger Co. v. Knox*, 98 So.3d 441, 444 (Miss. 2012), a landowner owes a “duty to exercise reasonable care to protect the invitee from reasonably foreseeable injuries at the hands of another,” which includes a duty to remedy

dangerous conditions on the property and to warn of dangerous conditions that cannot be eliminated. *Id.* This duty “presupposes what the defendant knows, or should know, of the dangerous condition.” *Id.* A reason a landowner should know of a dangerous condition – i.e. a threat of assault, robbery, homicide, etc. – “may arise from (1) actual or constructive knowledge of the assailant’s violent nature, or (2) actual or constructive knowledge that an atmosphere of violence exists on the premises.” *Id.* at 433. Under the old law in Mississippi, a person injured by a third-party assailant or shooter, could properly sue the landowner. The plaintiff was only required to show that he/she was a business invitee of the landowner and could prevail against the landowner for the conduct of an intentional actor. The interesting part of the old law is that the landowner was not allowed to apportion fault to the shooter or assailant.

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## ANNOUNCEMENTS

**Vernis & Bowling** has been selected as the Best Full-Service Law Firm 2019 – Southeast US by US Business News.

**Robert C. Bowling**, Managing Partner, was selected as one of South Florida’s Top Lawyers by the South Florida Legal Guide, January 2019 edition.

**G. Jeffrey Vernis**, Managing Partner in the firm’s North Palm Beach, FL office, has been selected to the 2019 Florida Super Lawyers list, an honor reserved for those lawyers who exhibit excellence in practice. Only 5% of attorneys in Florida receive this distinction.

**Vernis & Bowling of the Gulf Coast, P.A.** was named a Top Florida Law Firm by the Tampa Bay Business Journal.

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## MISSISSIPPI LAW UPDATE CONTINUED

The Landowner Protection Act now provides protection to any person (which also, by operation of law, includes corporations, LLC's and other business entities) who "owns, leases, operates, maintains, or manages commercial or other real property in the state of Mississippi" as well as their "director[s], officer[s], employee[s], agent[s] or independent contractor[s]" (hereinafter "landowner") from civil liability of any invitee who is injured on the property as a result of willful, wanton or intentional tortious conduct of a third party. The only exception to this protection is where the landowner "actively and affirmatively, with a degree of conscious decision-making, impelled (encouraged) the conduct of said third party."

Using the analogy from above, the new law allows a landowner, sued by a plaintiff for injuries suffered by a shooter or assailant, can now apportion fault to the intentional actor. This greatly reduces the exposure of the landowner as compared to the old law.

Section 1 (3) of the Landowners Protection Act provides a specific and concrete definition of what constitutes an "atmosphere of violence." Before the enactment of the Act, it was a question for the jury to determine whether an "atmosphere of violence" existed in the area in question. Such a determination could be based upon "the overall pattern of criminal activity prior to the event in question that occurred in the general vicinity of the defendant's business premises, as well as the frequency of criminal activity on the premises." *Kroger*, 98 So.3d at 444. In the *Kroger* case, the Mississippi Supreme Court found, as a matter of law – "in the context of Kroger's more than three million customer visits over the course of three years – four incidences of criminal activity (here, purse snatching) are wholly insufficient to establish an atmosphere of violence on Kroger's parking lot." *Id.* Interestingly, Section 1 (3) of the Landowners Protection Act provides a specific and concrete definition of what constitutes an "atmosphere of violence," which is defined as similar violent conduct that occurred three (3) or more times within three (3) years before the incident on the subject property. The three (3) separate events or incidents must result in three (3) or more arraignments of an individual for a felony involving an act of violence. Where four acts of criminal activity on the *Kroger* premises was not enough to find an atmosphere of violence in 2012, if the incident underpinning the *Kroger* case occurred post-July 1, 2019, it is likely the Court would reach a different conclusion under the Landowner Protection Act.

This is not to say the new Act is more liberal, but to finally define the number of incidences that equate to an atmosphere of violence. In the past, the jury was not instructed on any parameters that might create an atmosphere of violence so the

courts were seeing different interpretations of "an atmosphere of violence." The new Act gives us more precise parameters eliminating any guess work by a judge on summary judgment or jury in the jury room following a lengthy trial. The new Law also requires any previous acts of violence to (1) have occurred on the premise as opposed to neighboring businesses and (2) have resulted in an actual arraignment of the shooter or assailant as opposed to a frivolous accusation mostly commonly contained in Calls for Service. The new Act appears to have eliminated the need for plaintiff's experts to testify regarding calls for service now requiring testimony of actual arraignments of the shooter or assailant.

Under the new Act, civil liability cannot be based upon the prior violent nature of the third party himself, unless the landowner has "actual, not constructive, knowledge of the prior violent nature of said third party."

Finally, Senate Bill 2901 also amends Mississippi Code Annotated §85-5-7 to revise the definition of "fault" in the context of joint & several liability. Miss. Code Annotated §85-5-7(2) provides that any civil action based upon "fault" for damages caused by two or more people shall be several only, with each tortfeasor liable for his or her portion of fault only. Subsection (1) of the statute specifically stated that "Fault" "shall not include any tort which results from an act or omission committed with a specific wrongful intent." Therefore, under the prior version of the statute, a jury was not allowed to apportion fault to a third party tortfeasor in a premises liability case.

*Continued on Page 3*

## GET TO KNOW SCOTT ROGERS

**Managing Attorney, Jackson and Gulfport, MS**

**Favorite Places:**

London, Paris and the beach

**Favorite Sports Team:**

Michael Jordan's Chicago Bulls

**Favorite Animal:**

Man's best friend

**Best thing about being an Attorney:**

Trials not in Hinds County, MS

**Favorite Hobby:**

Golf and Fantasy

Football (sadly)

**Favorite Restaurant:**

Mudbugs (Crawfish) in

Flowood, MS

**MISSISSIPPI LAW UPDATE CONTINUED FROM PAGE 2**

Senate Bill 2901 tacks the following at the end of subsection (1):

For any premises-liability action . . . alleging injury as a result of the willful, wanton or intentional tortious conduct of a third party on commercial or other real property in the State of Mississippi, ‘fault’ shall include any tort which results from an act or omission committed with a specific wrongful intent.

Now, juries will be allowed to apportion fault to the landowner AND/OR the third party tortfeasor, unless the landowner “actively and affirmatively, with a degree of conscious decision-making, impelled (encouraged) the conduct of said third party.” The previous version of the Act allowed Plaintiffs to infer constructive knowledge on the part of a landowner to someone who may have had a criminal past. The new Act requires more proof for the plaintiff to establish making it more difficult to prevail in these types of cases.

**FLORIDA LAW UPDATE**

**SUPREME COURT LIMITS EMPLOYERS’ DEFENSE ON JOB BIAS CLAIMS**



**Karen Nissen**  
Department Head  
Vernis & Bowling of Palm Beach, P.A.

The U.S. Supreme Court issued a ruling on June 3, 2019 which impacts the landscape of defending Title VII employment discrimination cases. In the case of *Fort Bend County v. Davis*, 2019 U.S. LEXIS 3891 the Supreme Court issued a ruling regarding the requirement in Title VII that employees must exhaust their administrative remedies by filing a Charge of Discrimination against their employer with the EEOC before filing a discrimination lawsuit against the employer. The Supreme Court in a unanimous opinion ruled that the charge filing requirement in Title VII is a procedural obligation, not a jurisdictional requirement. The Court found the Title VII presuit requirement of filing a Charge of Discrimination is a “claim-processing rule” not a jurisdictional requirement.

The Supreme Court ruled that the presuit filing of a Charge of Discrimination rule may be mandatory without being jurisdictional which rule can be enforced if it is properly raised but the benefit of the rule may be forfeited if the party waits to raise the rule as a defense.

Employers must be sure that when a Title VII suit is filed against them to immediately determine if the employee filed the mandatory presuit Charge of Discrimination in order to ensure the failure to do so is timely raised as an affirmative defense in a Title VII lawsuit. If the failure to file a presuit Charge of Discrimination is not raised at the beginning of the lawsuit, an employer may waive this affirmative defense. Employers should continue to file Motions to Dismiss if either a Charge was not filed pre suit or if the specific discrimination claim was not included in the properly filed Charge and include the lack of following Title VII’s mandatory pre-suit requirement as an affirmative defense.

For additional information, please contact Karen Nissen at [knissen@florida-law.com](mailto:knissen@florida-law.com).

**DIVERSITY & INCLUSION NEWS**



**DIVERSITY & INCLUSION**  
VERNIS & BOWLING

Vernis & Bowling is proud to be a Head Sponsor at the Broward County Hispanic Bar Association Gala. **Carl Bober**, Managing Attorney of the firm’s Broward/Hollywood, FL office will be recognized at the Gala as one of the Past Presidents of the Association.

**Vernis & Bowling** is proud to be a 2019 sponsor of the Honorable Matthew J. Perry, Jr. Chapter of the National Black Law Students Association (MJP NBLSA) at the University of South Carolina School of Law. The NBLSA has a rich history of responding to the need for continued educational enrichment, professional development, and community involvement for black law students.

Congratulations to **Joseph Bias**, Department Managing Attorney of the firm’s Columbia, SC office. Joseph was recognized by the South Carolina Bar as Young Lawyer of the Year.

## VERDICTS &amp; DISPOSITIONS

**Jerry Hayden (Miami, FL) (Workers' Compensation)** *Stacey Kubik v. Party City and Travelers Insurance Company*. The issues addressed at Final Hearing included a Petition for Benefits filed on 8/2/17, seeking PTD benefits and supplemental benefits retroactive to 3/1/17 to date and continuing, plus penalties and interest. The E/SA argued that the Claimant was not eligible for PTD benefits, or, alternatively, that she had not performed a bona fide and exhaustive job search. There was a difference of opinion between the vocational experts regarding the quality of the Claimant's job search and the existence of suitable jobs within a 50-mile radius of her place of residence. There was also a difference of opinion between the medical experts regarding the date of MMI and work restrictions, leading to the appointment of an EMA. The EMA was asked to render opinions regarding the Claimant's restrictions and the date of MMI. Following the examination, the EMA opined that Claimant was likely suffering from Complex Regional Pain Syndrome despite the lack of such diagnosis from any prior medical expert. It was the EMA's opinion that the Claimant was not MMI unless and until she was evaluated, and treated if necessary, by an RSD specialist. Finding that there was no clear and convincing evidence to contrary, the JCC afforded the EMA's opinion the presumption of correctness and found that the Claimant was not MMI. The JCC further noted that even if such opinions were not within of the scope of the questions presented to the EMA, that he nonetheless accepted the EMA's opinions over those of the other medical experts. The JCC denied the claim for PTD benefits, penalties, interest attorney's fees and costs.

**Ashley Landrum (Palm Beach, FL) (D&O)** obtained a Defense Verdict in the case of *GRC Landscaping II LLC d/b/a GRC Landscaping v. Georgen Arms, Inc.* Plaintiff alleged that it provided landscaping services to the Association in June of 2017 and the Association failed to pay for the services rendered. During trial, Plaintiff attempted to introduce an invoice for services rendered in June of 2017, which included a mailing address to an office the business moved to in March of 2018. Further, Plaintiff attempted to claim that tree-

trimming services were performed through a landscaper who could not remember the Association, its location, or even what date the work would have been performed. The Association countered by displaying that its Property Manager performed weekly inspections of the property, along with Board Members, and did not see the claimed tree trimming work performed or the results of same. Further, Board Members indicated that they resided in the Association in June of 2017 and did not see the claimed tree trimming work performed or the results of same. The previous landscaper also countered that he did not see any trees trimmed until after the hurricanes in August of 2017. After hearing all of the evidence, the Judge rendered a Defense Verdict.

**Ken Amos and William Gula (St. Petersburg, FL) (UM/UIM)** tried an uninsured/underinsured motorist claim in Pinellas County before Judge Linda Allan. Our firm represented GEICO General Insurance Company. This case involved a rear end collision. The Plaintiff was robbed at the accident scene from which the perpetrator/tortfeasor fled the scene with her cell phone. She was able to testify that she was terrified and shocked by the experience. The perpetrator/tortfeasor was caught about a half mile down the road, where his vehicle came to rest in a small ditch near some bushes. The Plaintiff's vehicle had a few scratches on the bumper but no damage to the structure. The actual parts replaced for the Plaintiff's vehicle totaled \$35.00. The Plaintiff testified that there was a loud bang and then she exited her vehicle and witnessed the property damage to the tort vehicle.

Shortly after the accident the Plaintiff began to experience "bee like stinging" sensations to the left side of her neck radiating into the left upper extremity down her arm into her wrist. She had \$48,000 in past medical bills. She presented evidence that she needed future care in the amount of \$184,000 and wanted past and future pain and suffering ranging from \$400,000-\$500,000. Her total damages presented to the jury were \$634,000-\$734,000. After two hours and 45 minutes of deliberations, the jury returned a verdict in favor of GEICO in the amount of \$5,000 for past medical bills with no future medicals, no permanency and no pain and suffering.

**"...no permanency and no pain and no suffering..."**

**Tom Paradise (Hollywood, FL) (Governmental Law)** obtained a Summary Judgment ruling in favor of the Defendant in a case involving the alleged sexual abuse of a minor female student by her school coach, over a two-year

period. The student brought a lawsuit alleging negligent hiring, negligent retention, negligent supervision and negligent infliction of emotional distress. The student's mother made a corresponding claim for loss of filial consortium. Upon deposing the Plaintiff, defense counsel confirmed that the alleged abuse had ended more than four years prior to the Plaintiff bringing the lawsuit. As such, defense counsel argued that because the Plaintiff had brought the lawsuit when the four-year statute of limitation had expired, Summary Judgment was proper as to all claims related to the alleged abuse. In response thereto, the Plaintiffs argued that while the sexual contact had ended over four years before the Complaint was filed, under the continuing torts doctrine the 'improper relationship' (which was not limited to the sexual contact) continued beyond the final sexual encounter. Plaintiffs also attempted to argue that based upon their negligent retention claim, and the fact that the coach was not terminated until a year after the relationship had been known, that the statute of limitations had not run out at the time of the filing of he lawsuit.

Prior to the Court's ruling on the Defendant's Motion for Summary Judgment, Plaintiffs demanded \$1,000,000 to settle the instant claim. The Court thereafter granted the Defendant's Motion for Final Summary Judgment as to all claims. The Plaintiffs have since filed an Appeal which is currently pending before the Fourth District Court of Appeal.

**Jerry Hayden (Miami, FL) (Workers' Compensation)**

*Gertrudis Santaella v. Sky Chefs, Inc. and Liberty Mutual Insurance Company.* An evidentiary hearing was held with respect to the Claimant's third request for a \$2,000.00 advance. The Claimant sought the advance on the basis of financial distress. After cross-examining the Claimant, the E/C established that her affidavits filed in support of the motion were not reliable or credible. The E/C also presented evidence that the Claimant was previously provided two advances, with a balance due of \$3,779.19. Testimony from the authorized spine surgeon established that the Claimant was at MMI at the time of the request. The E/C argued that awarding another \$2,000.00 advance was prejudicial to the E/C. The JCC rejected the Claimant's financial affidavit, finding that it was inaccurate. It also contained significant inconsistencies and omissions, such that it was not reliable evidence of her financial income and expenses on which the court could rely. The JCC also found that the combination of the outstanding advance balance together with the limited anticipated future benefits from which repayment could be

made would result in prejudice to the E/C. The JCC denied the Claimant's request for a \$2,000.00 advance.

**Keith Franklin (Mobile, AL) (Auto Liability)**

The Plaintiff filed suit against our insured defendant regarding an automobile accident that occurred in Millbrook, Alabama. Plaintiff was traveling south on Main Street, in the outside lane of traffic, and our insured was traveling in the outside lane heading north. Main Street has four lanes, with two traveling north and two traveling south. Traffic was backed up in both inside lanes. As Plaintiff approached Woodland Avenue, she decided to turn left onto Woodland. This meant that she would have to cross the inside lane of traffic traveling south on Main Street and both lanes of traffic traveling North. Someone in the inside Southbound lane allowed her to turn in front of them, and another person waived her across. Through requests for admissions, we were able to get Plaintiff to admit that our insured driver had the right of way, and that she did not see our defendant driver until the point of impact. In her statement to the insurance company, the Plaintiff stated that she had crossed both inside lanes of traffic, reaching the outside lane traveling north and looked both ways before attempting to cross onto Woodland Avenue.

**“...denied claimants request for a \$2,000.00 advance.”**

We filed a Summary Judgment motion on behalf of Defendant arguing that Defendant had the right of way, and that Plaintiff had been waived through traffic by another motorist, but that she still had the duty to make sure that traffic was clear for her to turn. The Plaintiff responded arguing that her recorded statement indicated that she had looked both ways and that the only explanation for Defendant being in the right outside lane was that she was either speeding or had changed from the inside lane to the outside lane at the last minute. After moving to strike the response regarding the recorded statement and pointing out that Plaintiff's argument did not amount to substantial evidence to defeat the motion, the judge granted defendant's motion for Summary Judgment dismissing all claims.

## Verdicts &amp; Dispositions, Continued

**Jerry Sanders (Pensacola/NW FL) (Personal Injury/ UIM)** obtained a jury verdict after a four-day trial in the case of *Vignes v. Allstate Prop. & Cas. Ins. Co.*, Santa Rosa Circuit Court, on Jan. 11, 2019.

The Plaintiffs, an older husband and wife, claimed their bulging discs and numerous other injuries were caused by a rear end collision. They were the driver and passenger in a Lincoln Town Car that was struck from behind by a much smaller Nissan. They had already accepted a tender of policy limits of \$25,000 each from the tortfeasor's liability carrier which covered the striking Nissan. The Nissan caught fire upon impact with the Plaintiffs' vehicle, which Plaintiffs' counsel used to describe the accident as a "serious collision." Each Plaintiff had in excess of \$100,000 in "boardable" medical expenses. The Plaintiffs' personal physician, pain care physician, and neurosurgeon (who operated on both Plaintiffs) were all Board Certified in their specialties. These providers, and the Plaintiffs' chiropractor, all testified that, in their opinion, the Plaintiffs' injuries, including the bulging discs, were caused by the motor vehicle collision. The defense had a physiatrist testify to the contrary. We also had a bio-mechanical engineer who presented scientific evidence regarding the Delta-V forces to which their bodies were subjected, and that the bulging discs could not have been caused by this collision. The verdict was \$0.00 for future medical expenses and \$0.00 for future pain and suffering. The jury did award each plaintiff \$30,000 for past pain and

suffering, which was reduced by \$25,000 per Plaintiff for the tortfeasor's liability policy payments. All past medical expenses awarded were paid by collateral sources. The Plaintiffs are due to receive no more than \$5,000 each. The pre-trial demand was \$150,000 (net) per Plaintiff and the jury was asked by Plaintiffs' counsel to award each "a minimum" of \$250,000

future pain and suffering, plus other damages totaling over \$375,000. Defense had offered the Husband \$50,000 and the Wife \$60,000 (net) up until the day of the verdict.

**"...\$0.00 for medical expenses and \$0.000 for future pain and suffering."**

**Tom Paradise & Belinda Scott (Hollywood, FL) (Premises Liability)** obtained Summary Judgment in Federal Court, Southern District, in the premises liability matter of *Victorene Barronette v. Target* wherein the Plaintiff slipped on a puddle of clear water in the checkout lane. The incident was captured by Target's cameras but no explicit source of the spill was depicted in the video footage. Plaintiff testified that there were marks from a shopping cart and the mark from her own shoe in the water. She later underwent three surgeries and amassed medical bills of \$380,000, with a fourth surgical recommendation. Plaintiff claimed that the water was on the floor for a long time (as evidenced by the cart marks) and was missed by Target employees who walked through the checkout lane in the minutes preceding the incident. Because the video does not depict any of the employees explicitly looking down on the floor, Plaintiff's counsel argued that the employees walking through the subject area did not represent an adequate/reasonable inspection. Defense counsel emphasized Plaintiff's description of the water (marks from only one cart and only her own footprint), the absence of the footprints of the TMs who had walked through the aisle, and the footage of the moments beforehand. The video shows that immediately before Plaintiff entered the aisle (and after the Target employees had walked through), a guest had a shopping cart containing a (1) liter jug of water. That cart rested for two minutes over the location where Plaintiff would later fall, before that guest left and the Plaintiff approached: conceivably the moment that the spill was created. As such the Defendant argued that the spill was created after the employees walked through and Target was unaware of and not liable for same. The Court agreed with defense counsel and granted the Defendant's MSJ and the published opinion is available at *Barronette v. Target Corp.*, 2018 U.S. Dist. LEXIS 161006 (S.D. Fla. 2018).

**Jerry Hayden (Miami, FL) (Workers' Compensation)** *Gertrudis Santaella v. Sky Chefs, Inc. and Liberty Mutual Insurance Corporation*. The issue addressed at Final Hearing included the Claimant's request for compensability of a right ankle fracture and authorization of a primary care provider for this condition. The Claimant contended that her compensable back injury resulted in her legs giving way on February 17, 2018, causing her to fall and fracture her right ankle. At Final Hearing, the Employer presented medical records from Coral Gables Hospital on February 17, 2018, which reflected that the Claimant reported twisting her ankle and falling. The E/C also presented medical records from the authorized spine surgeon reflecting that three days after the ankle

fracture, the Claimant failed to report that her legs gave way. The JCC found that while the authorized orthopedist did present testimony that the Claimant's complaints of her legs giving way was consistent with her electro-diagnostic studies completed several months after the fall, there was no medical documentation of any history of her legs giving way at or near the time of her February fall. The JCC found that the Claimant was a poor historian and rejected her testimony stating that she reported her legs gave way to Coral Gables Hospital and her authorized spine surgeon, as this was inconsistent with the contemporaneous medical records. The JCC also found that the authorized orthopedic physician did not opine that the back injury was the major contributing cause of the February fall. Therefore, the JCC found that the Claimant failed to meet her burden of proving a causal connection between the compensable back condition and the ankle injury. The JCC denied all claims related to the right ankle and the claim for attorney's fees and costs.

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**Carl Bober and Donna Romero (Hollywood, FL)**

**(Property)** obtained a defense verdict following a jury trial in Fort Lauderdale in the case of *Carolyn Blue and Ashley Skipper v. Citizens Property Insurance Corporation*. The case involved a first party property insurance water loss allegedly causing tile floor damage, with the Plaintiffs seeking the replacement of all the tile in their home following a denial of their claim. Opposing counsel had been demanding \$150K until just before trial against our expired \$50K Proposal for Settlement. Plaintiff Carolyn Blue claimed at trial that she first noticed cracked floor tile in her master bedroom following a bathroom leak. Plaintiff's expert general contractor testified that the cause of the Plaintiff's damaged tile was due to water. For the defense, Citizens' expert engineer testified that the damage to the floor tile was instead the result of improper installation and showed the jury that a number of the claimed cracks in the floor tile pre-existed the reported date of loss. The jury found in favor of Citizens, finding that the Plaintiffs failed to prove that they sustained a physical loss to their property during the policy period. Our motion to seek the recovery of Citizens' attorney's fees and costs is pending.

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**William G. Hyland Jr. (Central FL/Deland) (Defective Product/Product Liability)** obtained a Dismissal with Prejudice in State Court, Volusia County, in the products liability matter of *Richard Langlois v. Lowes*. The Plaintiff alleged that Lowes installed a defective dishwasher in 2012 (with service in 2015) that caused extensive property damage to his kitchen and house in excess of \$7,000. The Defense filed

a Motion to Dismiss based on the statute of Limitations FS 95.11, as the cause of action had run over four years in negligence and had also run under any breach of contract action, with a five-year statute of limitations. The defense cited the case of *Medical Jet, S.A. v. Signature Flight Support-Palm Beach, Inc.*, 941 So.2d 576 (2006), which held that for a breach of contract action, it is well established that a statute of limitations "runs from the time of the breach, although no damage occurs until later." 18 Richard A. Lord, *Williston on Contracts* § 2021A (3d ed. 1978). Florida has followed this general rule that a cause of action for breach of contract accrues at the time of the breach, "not from the time when consequential damages result or become ascertained." *Fradley v. County of Dade*, 187 So.2d 48, 49 (Fla. 3d DCA 1966); see *Meyer v. Roth*, 189 So.2d 515 (Fla. 3d DCA 1966). This court cited *Fradley and Meyer* with approval in *Dovenmuehle, Inc. v. Lawyers Title Ins. Corp.*, 478 So.2d 423, 424 (Fla. 4th DCA 1985). The Court agreed with defense counsel and granted the Defendant's Motion to Dismiss with prejudice, and reserved ruling on attorney fees and costs.

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**Terrence L. Lavy (Fort Myers, FL) (First Party Property)**

forced a voluntary dismissal of a Hurricane Irma suit in Lee County Florida following early mediation. The plaintiff owned rural property in Alva, Florida and asserted a claim for damage to the home as a result of Hurricane Irma, September 10, 2017. The claim was reported September 26, 2017 and prompt inspection by the insurer revealed damage consistent with the insured's claim that a large tree had been blown into the home causing "gaping holes" in the roof and exterior wall. The insured claimed \$391,433.03 for coverage A, plus damaged contents and loss of use. When that was not paid in full, they filed suit. In researching the matter for mediation, we obtained photographs from Eagle View that showed, as of September 16, 2017 the tree that purportedly blew over in the storm was still standing and the "gaping holes" did not exist. The insured's vehicles were also observed on the property, eliminating any possible argument that they were unaware of the conditions. Following the defense presentation at mediation, counsel for the insureds (previously exceptionally confident in the merits of their case) fled without comment and filed immediate motions to withdraw. With court ordered non-binding arbitration pending, we kept the pressure on by filing a motion to assert a counterclaim to recoup presuit payments including a demand for punitive damages. Plaintiffs filed a notice of voluntary dismissal rather than attend arbitration. The matter may be referred to the state attorney for prosecution.

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**Verdicts & Dispositions, Continued**

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**Carl Bober (Hollywood, FL) (Premises Liability)**

obtained Summary Judgment on behalf of our client, Target Corporation, in the Broward County Circuit Court case of *Maryse Sterlin v. Target*. Plaintiff alleged that she slipped and fell due to the negligent presence of a plastic item on the floor, and claimed that she had to undergo surgery to her knee as a result. In support of the Plaintiff's claim, opposing counsel also filed a motion requesting a *Valcin* jury instruction, specifically seeking that the Court instruct the jury that it should presume negligence in this case, based upon the alleged spoliation of evidence related to the failure to preserve all surveillance video taken at the store on the date of the incident. Through discovery, we were able to establish that Target had no actual or constructive notice of the object on the floor. We were also able to prove to the Court that the Plaintiff's claim of spoliation was legally insufficient, since Target had no legal duty to preserve the surveillance as the request to save it was not received until after the normal retention period of the video, and also because the Plaintiff's arguments relied on an impermissible stacking of inferences which Florida law does not permit. The trial judge denied the Plaintiff's Motion for the *Valcin* spoliation instruction, and granted our Final Motion for Summary Judgment. Our Motion to Tax Costs is pending.

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**Jerry Hayden (Miami, FL) (Workers' Compensation)**

*Keston O. Smith v. US Food Services, Inc. and Sedgwick CMS*. The issue addressed at the Final Hearing included the Claimant's request for a one-time change of provider. On June 5, 2017, the Claimant submitted a fax containing an initial written request for a one-time change of PCP/treating physician. It also contained a lengthy narrative that requested authorization of medical treatment from an alternate specialist, not a clinic, and specifically sought authorization of a physician to replace Dr. Alan Silbert in the specialty of ophthalmology. At the time of the written request, the Claimant had failed or refused to attend the initial appointment with Dr. Silbert. As such, the E/SA denied the request for alternate ophthalmologist. The Claimant ultimately abandoned his request for an alternate ophthalmologist. Thereafter, the Claimant filed several Petition for Benefits seeking authorization of alternate care. The E/SA argued that the language of each of the requests was ambiguous. In response to the last Petition for Benefits filed on January 9, 2018, the E/SA authorized alternate care with Concentra Medical Center. At Final Hearing, the Claimant argued that Claimant was entitled to a physician of his choice because the E/SA had authorized an alternate occupational clinic rather than identifying a physician by name. The JCC found no legal support for the Claimant's arguments and noted there was no evidence that the authorized clinic

doctors were not of the same specialty as the original clinic doctors. The JCC denied the Claimant's choice of one-time change providers, along with the claim for attorney's fees and costs. The Claimant filed a Notice of Appeal.

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**Christopher Blain and Courtney Lucke (Tampa, FL) (Premises Liability)**

obtained a Directed Verdict before the Honorable Judge Byrd in Pasco County, Florida. This matter concerned an alleged slip and fall incident that took place at the WaWa store in New Port Richey, Florida. Plaintiff was claiming to have suffered a number of medical conditions as a result of the fall including neck, low back, and knee pain. Furthermore, Plaintiff was claiming to have struck his head as a result of the fall, resulting in him suffering ringing in his ear. At trial, Plaintiff argued that WaWa caused a dangerous condition, specifically that the floor near the entrance was slippery resulting in his fall. It was our position that WaWa maintained their store reasonably, including having wet floor cones out warning customers of a possible wet floor. After Plaintiff presented his case, we moved for Directed Verdict on the grounds that Plaintiff failed to establish a prima facie case that WaWa was negligent and failed to maintain their store reasonably thereby not meeting his liability burden. We also argued that Plaintiff failed to establish damages as related to the subject incident. After arguments, the court granted our Directed Verdict.

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**Titania Haynes (North Palm Beach, FL) (Personal Injury Protection)**

obtained Summary Judgment on behalf of our client, Direct General Insurance Company, in the Martin County Court case of *B. Greenwald Medical Center a/a/o Nancy Morrow v. Direct General*. Plaintiff, a chiropractic services provider, filed suit for breach of contract for our client's alleged failure to pay benefits for the services rendered by Plaintiff on the insured, Nancy Morrow who was injured in an automobile accident. The insured took out an automobile insurance policy with Direct and elected to have a \$1,000.00 deductible apply to her PIP benefits. The insured sought treatment with the provider, and the provider thereafter filed a claim with Direct for the treatment and submitted bills that only totaled \$705.00. As the total amount of the bills was less than the deductible, Direct issued no payment for the PIP benefits to the provider. In accordance with the then-controlling law of the 4th DCA (*State Farm v. Care Wellness Center*, 240 So. 3d 22 (2018)), Direct reduced the bills to fee schedule before applying the \$1,000.00 deductible, which resulted in zero payment to the provider for any PIP benefits.



During the course of litigation, the Florida Supreme Court addressed the hotly-contested issue of the deductible methodology and ruled that the deductible must first be applied to 100% of the bills before same is reduced per the fee schedule. As a result, Plaintiff filed a Motion for Partial Summary Judgment as to Liability for the Deductible Issue and alleged that Direct's "unilateral choice to apply the fee schedule limitations was wrong as a matter of law." In our Response in Opposition and Cross-Motion for Final Summary Judgment, we included our client's Affidavit which attested to the fact that Plaintiff's bills were the first bills received by Direct. Furthermore, we supplemented our discovery responses on the issue of the deductible wherein we supplied two (2) reconsidered Explanations of Benefits provided by Direct wherein it re-evaluated the application of the deductible and applied it to 100% of the Plaintiff's bills, in accordance with the Supreme Court's ruling. In fact, Direct fully re-evaluated how it applied the deductible to all providers affected and made the proper adjustments to reflect the deductible being applied to 100% of the providers' bills (EOR's of same were also produced in supplemental discovery.) We also supplemented our Affidavit to rebut Plaintiff's position by producing the Explanations of Benefits of all providers of whom the deductible was re-evaluated against, showing that even with the corrected application of the deductible Plaintiff still gets nothing.

The trial judge denied Plaintiff's Motion for Partial Summary Judgment and granted our Motion for Final Summary Judgment. Our Motion to Tax Costs is pending.

**Jerry Hayden (Miami, FL) (Workers' Compensation)**

*Steven Bertlshofer v. Davita Inc. and Broadspire.* The issues addressed at Final Hearing included a Petition for Benefits filed on 3/23/18 seeking TTD and/or TPD benefits retroactive to the industrial accident of 7/13/11, plus penalties, interest, attorney's fees and costs. The E/SA argued that it paid appropriate indemnity benefits except for a gap in payment which it argued was unrelated to the subject industrial accident. The E/SA further established documentation that the Claimant had reached MMI for his work-related injuries and that he was not eligible for TTD and/or TPD benefits beyond that date. The E/SA presented payroll demonstrating that the Claimant had returned to work post-accident and was receiving his regular earnings prior to the gap period in issue. The payroll also showed that the Claimant had received some paid time off. The E/SA was able to establish that the Claimant had taken time off during this gap period to care for a sick family member. Based on the evidence, the JCC found the adjuster's testimony, which

premiered on claim notes taken at or near events in issue, was more reliable than the Claimant's testimony. The JCC determined that the Claimant elected to take personal time off during the gap in issue, which supported the E/C's voluntary limitation of income defense. The JCC found that the Claimant had reached MMI for his work-related injuries without any permanent restrictions. The JCC denied the claim for TTD and/or TPD benefits, attorney's fees and costs.

**Jerry Hayden (Miami, FL) (Workers' Compensation)**

*Joseph Cristin v. Everglades Correctional Institution and Division of Risk Management.* The issues addressed at Final Hearing included compensability of an unexplained syncopal fall that occurred while the Claimant was working as a correctional officer, as well as multiple claims for medical benefits and reimbursement of approximately \$400,000.00 in associated medical bills. The Employer argued that the major contributing cause of the Claimant's syncopal fall was a pre-existing prostate cancer and associated Gerson Therapy regimen consisting of a vegan diet and multiple daily coffee enemas. The Claimant argued that the Employer did not establish a pre-existing condition which contributed to the syncopal fall, or, in the alternative, that the work-place created an increased hazard that contributed to the injuries resulting from the fall. The Claimant provided multiple theories of increased hazard, including stress/freight due verbal reprimands from higher-ranking officers, the hardness of the construction materials used in the walls and floor at the scene of the fall, and that a co-worker came in contact with the Claimant as he fell allegedly increasing his impact force. Due to a conflict of medical opinion between each party's IME physician, the Court ordered the appointment of an Expert Medical Advisor to address the issue of causation. The EMA opined that the major contributing cause of the syncopal fall was a vasovagal event that occurred in the context of malnutrition related to a Gerson regimen intended to treat pre-existing prostate cancer, which was followed for more than two years prior to the fall. The EMA based his findings on differential diagnosis and a review of records obtained from the Claimant's primary care provider reflecting continued complaints of low energy and weakness while on the Gerson regimen. Moreover, the EMA specifically rejected the notion that the Claimant's syncopal fall was the result of freight, nervousness or anxiety. Finding that there was no clear and convincing evidence to the contrary, the Court afforded the EMA's opinion regarding major contributing cause a presumption of correctness and found that the major contributing cause of the syncopal fall was the Claimant's pre-existing prostate cancer and associated Gerson regimen. At Final Hearing, the Employer presented evidence from multiple co-workers establishing that on the

**Verdicts & Dispositions, Continued**

date of the accident the Claimant had not been reprimanded. The Employer also provided evidence that the accident site contained concrete masonry unit block walls and ceramic tile over a concrete floor. The Employer argued that the materials found at the accident site are similar to what the Claimant was exposed to during non-employment life, including ceramic tiles and a concrete wall exterior in the Claimant's home, and concrete flooring and walls at locations frequented by the Claimant. The Employer presented testimony from an expert forensic structural engineer who testified that whether the Claimant had fallen at work or other locations outside of the work-place, the impact force would be the same, all other things being equal. The Court accepted the testimony from the Employer's expert and found that the building materials at the workplace did not create an increased hazard contributing to the injuries resulting from the syncopal fall, and accepted the EMA's opinion that stress/freight did not contribute to the fall. The Court also found that no evidence to support the Claimant theory that his co-worker coming into contact with his body as he fell resulted in any increased impact force. Accepting the EMA's opinion regarding major contributing cause, and rejecting all of the Claimant's theories of increased hazard, the Court denied compensability of the syncopal fall and resulting injuries, as well as all collateral benefits. The Claimant filed a Notice of Appeal.

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**Jerry Hayden (Miami, FL) (Workers' Compensation)** obtained a Dismissal in the case of *Keston O. Smith v. US Food Services, Inc. and Sedgwick CMS*. On 8/10/18, the JCC entered a Final Compensation Order denying the Claimant's request for a one-time change to a provider of his choice. In the Final Compensation Order, the JCC found that the Claimant failed to provide any legal support for the position that he was entitled to a physician of his choice because the E/SA had authorized an alternate occupational clinic in response to a written request for one-time change of providers instead of identifying a physician by name. The Claimant appealed this decision to the First DCA, but the First DCA dismissed the appeal when the Claimant failed to file a docketing statement after being ordered to do so.

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**Jerry Hayden (Miami, FL) (Workers' Compensation)** *Guillermo Medrano v. Sky Chefs, Inc. and Liberty Mutual Insurance Company*. The issues addressed at Final Hearing included a claim for authorization of a follow-up appointment with the authorized treating provider, along with payment of temporary indemnity benefits. On 8/12/15, the Claimant

filed a Petition for Benefits asserting the incorrect date of accident, which sought compensability of a right foot cellulitis/bone infection and payment of approximately \$80,000.00 in associated medical bills. In response the E/C asserted that the Claimant listed the incorrect date of accident and that the compensable injury was limited to a right foot contusion as the cellulitis was the result of the Claimant's uncontrolled diabetes. The Claimant worked the above issues up for trial on two separate occasions, ultimately taking voluntary dismissal prior to each respective Final Hearing.

On 3/28/17, the Claimant filed a new separate action, this time asserting the correct date of accident. The Claimant filed multiple Petition for Benefits in this new action seeking medical treatment and indemnity benefits related to a right foot cellulitis/bone infection. In response to the most recent Petition for Benefits, the E/C denied all requests for benefits on grounds that the industrial accident is not or is no longer the major contributing cause of all medical and indemnity benefits requested. Less than thirty days prior to trial, the Claimant's counsel was given leave to withdraw as counsel due to "irreconcilable differences." The parties proceeded to Final Hearing, with the Claimant appearing pro se. At Final Hearing, the E/C presented medical records from the authorized treating primary care provider and from its IME expert establishing that the industrial accident resulted in a right foot contusion which had resolved and also establishing that the industrial accident was not the major contributing cause of the right foot cellulitis/bone infection. The Claimant did not present any medical evidence. The Court found that the medical evidence establishes that the Claimant reached MMI for his work-related injury with a 0% impairment and full duty work release and that the industrial accident is not the major contributing cause of the need for any further medical treatment. The Court also found that the Claimant failed to carry his burden of establishing any work restrictions in support of his claims for temporary indemnity benefits. The Court denied all benefits requested.

## SAVE THE DATE

## SAVE THE DATE FOR VERNIS &amp; BOWLING'S 2019 LEGAL SEMINARS:

**September 19, 2019** - Amalie Arena, Tampa, FL    **December 6, 2019** - Gaylord Texan, Dallas, TX

For more information, or to register online, please visit our events page at [www.national-law.com/events-seminars](http://www.national-law.com/events-seminars)

## STAY UP TO DATE

## STAY UP-TO-DATE WITH ALL THINGS VERNIS &amp; BOWLING

**Daniel Davis** of the firm's Miami, FL office was appointed as the Vice Chair of the Clients' Security Fund section of the Florida Bar. The Clients' Security Fund was created by The Florida Bar to help compensate persons who have suffered a loss of money or property due to misappropriation or embezzlement by an attorney.

**Tom Paradise and John McClurkin** were presenters at the Cemex/Gallagher Bassett partnership meeting in Houston, TX in February 2019.

**Andrew Bray and Joseph Bias** were presenters at the CLM Restaurant and Retail Conference, which was held in February 2019 in Dallas, TX.

**Vernis & Bowling** is proud to sponsor the 2019 CLM Workers' Compensation Conference. The event was held May 21-23, 2019 in Chicago, IL.

**Vernis & Bowling** is proud to sponsor the 2019 Florida Bar Workers' Compensation Forum. The event was held April 11-12, 2019 in Orlando, FL.

**Evelyn Greenstone Kammet**, Department Head in the firm's Miami, FL office, will be a featured speaker at the Florida RIMS conference. Evelyn's topic will be: Shielding Your Company from Liability in the #MeToo Era. The conference will be held July 30-August 2, 2019 in Naples, FL.

**Jeff Kerley**, Department Head in the firm's St. Petersburg, FL office, will be a featured speaker at the Florida RIMS conference. Jeff's topic will be: Trending Legal Topics in Florida Worker's Compensation. The conference will be held July 30-August 2, 2019 in Naples, FL.

**Evelyn Greenstone Kammet**, Department Head in the firm's Miami, FL office, was a featured panelist at the D&O Insurance ExecuSummit. Evelyn presented a Directors & Officers Law Update at the conference, which was held May 7-8, 2019.

Attorneys and staff from the firm's **Tampa, FL office** volunteered at Metropolitan Ministries to help provide a holiday experience that is out of reach for so many struggling families in the Tampa Bay area.

Attorneys and staff from the firm's **North Palm Beach, FL office** volunteered as shopper's assistants at Urban Youth Impact, which assists families in need with selecting holiday gifts for their children.

Attorneys and staff from the firm's **Pensacola, FL office** volunteered to serve Christmas dinner to the homeless in conjunction with the First Baptist Church of Pensacola.

Attorneys and staff from the firm's **Broward/Hollywood, FL office** volunteered with Habitat for Humanity of Broward to help build a home for a deserving family. Employees of the firm spent a recent Saturday helping to paint a home in Pompano. "We are very proud of the continued commitment our team has to giving back to the community and helping those less fortunate," said Carl Bober, the office's managing attorney. "More Habitat projects like this one are planned for the future."



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