Legal Update

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January/February 2024

# PROPER CAUSATION STANDARD IN FMLA AND WHISTLEBLOWER CLAIMS IS BUT-FOR CAUSATION

The Eleventh Circuit Court of Appeals recently ruled that the proper causation standard for Family and Medical Leave Act ("FMLA") and Florida's Private Sector Whistleblower Act ("FWA") retaliation claims is but-for causation.

In *Lapham v. Walgreen Co.* ("Walgreens"), the plaintiff had been employed with Walgreens in various roles and at multiple store locations for over a decade until she was fired for the stated reasons of insubordination and dishonesty. Lapham's version of events, however, is that she was unfairly fired because of her requests for FMLA leave so that she could provide care to her disabled son. Lapham alleges that Walgreens both interfered with her attempts to obtain leave in violation of the FMLA and retaliated against her for those attempts in violation of the FMLA and the FWA. The Middle District Court of Florida granted summary judgment in favor of Walgreens on all claims.

On appeal, Lapham asked the Eleventh Circuit to determine whether the district court erred in granting summary judgment to Walgreens and whether the proper causation standard was but-for causation.

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# THE BASICS OF UNDERSTANDING THE EXCLUSION OF EXPERT TESTIMONY

Under Florida's Rules of Evidence, §90.702 the trial judge serves as the gatekeeper who determines whether an expert's opinion is deemed reputable and relevant. In this endeavor, trial judges in Florida employ the *Daubert* standard to assess whether an expert opinion is based on scientifically valid reasoning and whether it has been properly applied to the facts at issue.

Generally, Florida law views exclusion of expert testimony as "a drastic remedy that should be invoked only under the most compelling circumstances." *Rojas v. Rodriguez*, 185 So 3d 710, 711 (Fla. 3d DCA 2016) (citing *Claire v. Perry*, 66 So. 3d 1078, 1080 (Fla. 4th DCA 2011). Under §90.702 persons that are qualified as experts based on knowledge, skill, experience, training, or education are permitted to offer expert opinion testimony if the following conditions have been met:

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In the proceeding below, the district court agreed with Walgreens that but-for causation is the proper causation standard for both FWA and FMLA retaliation claims in light of the Supreme Court's reasoning in *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013). Using the but-for causation standard, the district court concluded that Lapham had "fail [ed] to produce evidence that [Walgreens'] proffered reason for her termination . . . was merely a pretext to mask its real reason (*i.e.*, FMLA retaliation), and that but for the latter, [Walgreens] would not have fired her." Relatedly, the district court also concluded that Lapham had failed to establish any triable issues as to the interference claim. Based on these determinations, the district court instructed the clerk to enter judgment in favor of Walgreens on all three of Lapham's claims.

The Eleventh Circuit began its analysis by reviewing the language in the two statutes at issue. The retaliation provision of the FMLA provides that "[i]t shall be unlawful for any employer to discharge or in any other manner discriminate against any individual *for* opposing any practice made unlawful by this subchapter." 29 U.S.C. § 2615(a)(2) (emphasis added). Meanwhile, the retaliation provision of the FWA provides that "[a]n employer may not take any retaliatory personnel action against an employee *because* the employee has" engaged in a specified protected activity. Fla. Stat. § 448.102 (emphasis added). Thus, both provisions contain either "because [of]" language or equivalent language.

The Eleventh Circuit noted that "Although this kind of language does not, upon first glance, explicitly endorse one causation standard or the other, the Supreme Court's decision in *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013), indicates that this kind of language carries with it a but-for standard." The Court further noted that the retaliation provisions of both the FMLA and the FWA are sufficiently similar to the retaliation provision of Title VII for *Nassar* to be especially instructive. Critically, all three provisions use "because [of]" language or an equivalent. *See* 42 U.S.C. § 2000e-3(a); 29 U.S.C. § 2615(a)(2); Fla. Stat. § 448.102.

Ultimately, the Court held that the proper causation standard for FMLA and FWA retaliation claims is but-for causation. It also stated that but-for causation "is established whenever a particular outcome would not have happened 'but for' the purported cause." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1739 (2020). Thus, the but-for test "directs us to change one thing at a time and see if the outcome changes." *Id.* If it does, the isolated factor is a but-for cause. And if it does not, the isolated factor is not a but-for cause, and all of the other factors, taken together, are sufficient. *See id.*; *see also Burrage*, 571 U.S. at 211 (describing a but-for cause as a "straw that broke the camel's back"). To be clear, single events often "have multiple but-for causes," so the but-for standard can be quite "sweeping," depending on the circumstances. *Bostock*, 140 S. Ct. at 1739. For purposes of *McDonnell Douglas*, this but-for standard demarcates the causation component of the employee's initial, prima facie showing requirement and also shapes the subsequent burdens of both the employer (i.e., to proffer a legitimate reason sufficient to justify the termination) and the employee (i.e., to show that the reason proffered by the employer is pretextual).

Using the but-for causation standard to the facts at hand, the appellate court agreed with the district court that Lapham had failed to produce sufficient evidence showing that Walgreens' proffered reasons for her termination were merely pretext for retaliation and that, but for the retaliation, Walgreens would not have fired her. Moreover, it determined that Lapham failed to "meet [Walgreens' justifications] head on" and meaningfully rebut them.

*By: Cindy A. Townsend*

The testimony is based upon sufficient facts or data;
The testimony is the product of reliable principles and methods; and,
The witness has applied the principles and methods reliably to the facts of the case.

Thus, in forming opinions, an expert is entitled to rely on any view of the disputed facts the evidence will support. *Baan v. Columbia Cty.*, 180 So. 3d 1127, 1132 (Fla. 1st DCA 2015).

A principle of *Daubert* is that the gatekeeping function "is not intended to supplant the adversary system or the role of the jury: rigorous cross examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596.

In conducting its examination of the admissibility of expert opinion, the court must examine the methods of the expert, not the conclusions. "The proponent of expert opinion does not have an obligation to show the opinion is correct, but only that more likely than not the opinion is reliable." See*, Allison v. McGhan Medical Corp.,* 184 F. 3D 1300, 1312 (11th Cir. 2003). More specifically, when the attack on the expert challenges the accuracy of the results, but not the validity of the methods used, the opinion goes to the weight of the evidence not admissibility. *Quiet Technology DC-8, Inc. v. Hurl-Dubois UK, Ltd.*, 326 F. 3d 1333, 1345 (11th Cir. 2003).

An expert witness may rely upon information normally used within the field of specialty. This is because an expert is not tasked with confirming the accuracy of the underlying facts. The expert "is not a private investigator hired to investigate the accuracy of each report or document he uses in creating his report. Instead, the documents or data an expert witness utilizes must only be of the type reasonably relied upon by experts in the particular field, informing opinions or inferences upon the subject." *Platypus Wear, Inc. v. Clark Modet & Co.,* Case No. 06- 200976 - CIV, 2008 WL 453914, at 5 (S.D. Fla. October 7, 2008) (quoting Fed. R. Evid. 703).

In *Booker v. Sumter County Sheriff's Office/North America Risks Services,* 166 So. 3d 189 (Fla. 1st DCA 2015), the First District explained proper opinion testimony. The predicate demonstrated the expert's familiarity with the appellant's medical history and condition. The expert also considered medical studies that were accepted within the medical community. The expert then used the studies of the medical condition to reach an opinion on causation. *Booker*, 166 So 3d at 195. Thus, the District Court held the trial court did not abuse its discretion in admitting the expert's pure opinion testimony based upon reliable factors for experts of that type. *Id*.

The Florida statutory standard excludes an expert's testimony based upon pure opinion. However, this does not mean that experts are precluded from testifying based upon knowledge, skill, experience, training, or education with a proper predicate. The committee notes to Fed. R. Evid 702 from which the Florida rule is based are informative. The notes state, "Nothing in this amendment is intended to suggest that experience alone - or experience in conjunction with other knowledge, . . . may not provide a sufficient foundation for expert

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# ELEVENTH CIRCUIT AFFIRMS DISMISSAL OF 42 U.S.C. § 1983 VIOLATION OF CIVIL RIGHTS CLAIMS PURSUANT TO BODYCAM VIDEO

The use of videos has proliferated in our modern society to a point where courts routinely utilize video-recordings in reaching their decisions. In *Scott v. Harris*, 550 U.S. 372 (2007), the Supreme Court of the United States, affirmed a summary judgment based on video evidence, in spite of the plaintiff's factual version of the incident. In that regard the Supreme Court held that: "The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape." *Id*. at 380-81. Based on the *Scott* opinion, courts across the country have relied on video evidence to grant summary judgments, when the facts are clear and the law favors a defendant regarding those undisputed facts.

However, thus far, the issue has not been so clear at the motion to dismiss stage where courts have been reluctant to grant a dismissal, even when a plaintiff's factual version is blatantly contradicted by video evidence. Generally, when a party presents evidence outside of the pleadings, a motion to dismiss is either denied or converted into a motion for summary judgment. Should the latter occur, then the non-moving party might have some procedural protections, such as additional time to conduct discovery.

In *Baker v. City of Madison, Alabama,* 67 F.4th 1268 (11th Cir. 2023) the plaintiff brought a §1983 action against the City of Madison, Alabama, and two police officers, alleging excessive force and failure to intervene arising from an incident in which one officer used a stun gun on him, on the side of the road, after he refused to get on gurney for transport to a hospital following a car accident. The incident was captured on bodycam video. The underlying Complaint alleged that "[u]pon information and belief, it is averred that the video recording is a display of what happened."

Based on that allegation, the defendant officers filed the body camera footage along with a motion to dismiss. The trial court granted the defendants' motion. The plaintiff argued that the district court erred in considering the video footage and granting the officer's motion to dismiss, without first converting the motion into a motion for summary judgment.

The Eleventh Circuit Court of Appeals reiterated the well-known exceptions under which a trial court may consider materials outside a complaint at the motion-to-dismiss stage, without converting motion into one for summary judgment, to wit: the incorporation-by-reference doctrine, and the judicial-notice doctrine. The Court found that the requirements of the incorporation-by-reference doctrine were easily satisfied since the plaintiff referenced the body camera footage in his complaint several times. It also noted that the body camera footage depicted the events that were central to the plaintiff's claims. The footage showed all the relevant conduct and was particularly clear because: (1) the incident took place in broad daylight, so the area depicted in the footage was well-lit, (2) the footage presented both visual and audio depictions of the events that transpired, and (3) for the most part, the viewer had a

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# MIAMI-DADE JURY AWARDS SCHOOL STUDENT PAIN AND SUFFERING DAMAGES TWENTY-SIX TIMES GREATER THAN MEDICAL EXPENSES FOR BROKEN ARM

The Florida Third District Court of Appeal reviewed whether a trial court acted within its discretion in denying remittitur of award of $105,000.00 for pain and suffering, when the injured child was only awarded $3,954.84 in compensatory damages for past medical expenses.

In *Miami-Dade Cnty. v. Berastain*, No. 3D22-1769, 2023 WL 8609234, at *1 (Fla. 3rd DCA Dec. 13, 2023), a seven-year-old girl was under the supervision of a Miami-Dade County School Board employee when she began to run alongside a friend, but then fell into a wall and broke her arm. The testimony established that running was against the rules of the after-school program. Despite the child violating the no running rule, the Plaintiff argued that the School Board was negligent by not properly supervising the child. The children's own testimony suggested that she was not properly supervised because the children were permitted to run around freely despite the policy. The jury returned a verdict in favor of the Plaintiff, allocating fault for the School Board at 95%, while the child was only determined to be 5% at fault for her own injuries. The jury then awarded damages in the amounts of $3,954.84 in compensatory damages for past medical expenses and $105,000.00 for pain and suffering.

The School Board filed a Motion for Remittitur seeking to reduce the jury's award of pain and suffering damages as excessive and disproportionate. The trial court denied the School Board's Remittitur Motion. On appeal, the County argued that the jury's verdict was excessive and against the manifest weight of the evidence because the pain and suffering award is shocking to the conscience and unsupported by the evidence. The School Board argued on appeal that the Plaintiff's injury was to her nondominant arm and that she suffered mostly a "ruined summer seven years ago when she was seven years old." *Id*. at 2. The School Board argued that the award of pain and suffering damages was driven by passion and sympathy for the child, but was not based on significant pain and suffering. However, according to the Third DCA's review of the trial transcript, the testimony from the child established:

> the intensity of the pain she suffered over a period of many months; the fact that [the child's] arm was cast three times, and required surgery because she broke the radius and ulna bones in her arm; that [she] had a "wire with the metal thing" sticking out of her arm, and has suffered bad memories from the surgery because her hand was swollen and bleeding, and it was a scary time; [she] has scarring from the pins that were inserted into her arm; and that [she] testified that it took about a year before she could begin to engage in activities she used to do, and that "[t]o this day, I'm still nervous to do a slight movement that could like easily break the bone again."

*Id*. In affirming the trial court's denial of the School Board's Motion for Remittitur, the Third DCA quoted the Florida Supreme Court in explaining that "the jury is in the best position to make this assessment, which 'is not one of mathematical calculation but involves an exercise

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good angle of the events with no visual obstructions. Additionally, the plaintiff did not challenge the authenticity of the footage, there were no allegations or indications that the footage had been altered in any way, nor any contention that what the footage depicted differed from what actually happened. Accordingly, the requirement of the incorporation-by-reference doctrine were met, and the district court properly considered the body camera footage when granting the motions to dismiss, a ruling that was affirmed.

We are currently litigating a case where we moved for an early dismissal of a §1983 action based on the officer's bodycam footage, but where the Complaint does not explicitly allege that there is bodycam footage of the incident – which depicts the incident in its entirety. We argue that the bodycam video and the plaintiff's plea agreement, although not mentioned or attached within the four corners of the Complaint, should be considered at this early stage, pursuant to *Baker*, because they are central to the plaintiff's claims, and are undisputed in terms of their authenticity, as well as matters of public record. It is our position that there is no requirement that a plaintiff refer to the documents in the complaint if the documents are not in dispute.

While we understand that the case can be dismissed on a motion for summary judgment, we argue that the plaintiff's request to deny our motion is an attempt to delay the inevitable, and the court should not wait in dismissing the case because *Baker* allows the early dismissal based on the irrefutable video of the incident. A denial will only delay the dismissal, resulting in unnecessary time, effort, fees and costs. We are waiting for the court's ruling and interpretation of *Baker's* reach.

*By: Ramon Vazquez*

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testimony." The Florida courts agree. Thus, as set forth in *Booker* an expert must show his or her work, explain what was in the records and how the opinion was reached based upon his or her experience, the facts, tests, analysis, and/or literature.

This article is not meant to provide a complete guide to the complexities of §90.702. This is only meant to provide a basic understanding of the court's considerations. Due to the enormous consequences a *Daubert* challenge can have, a basic understanding of these principles is important when deciding how to execute a Daubert challenge, when to do so and strategies relating to the execution of such a challenge.

*By: Jeffrey A. Carter*

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of their sound judgment of what is fair and right' under the circumstances." *Id*. (citing *Odom v. R.J. Reynolds Tobacco Co.*, 254 So. 3d 268 (Fla. 2018).

The jury's verdict is the *Berastain* case is a cautionary tale that we are at the mercy of the jury when it comes to an award of pain and suffering damages, and that courts will be reluctant to disturb a jury's award of pain and suffering damages even if they exceed medical expenses twenty-six times over.

*By: Chris Prusinowski*

# *FIRM SUCCESS*

## 11TH Circuit Court of Appeals Affirms Summary Judgment in Section 1983 Race Discrimination and Retaliation Claims

The Eleventh Circuit Court of Appeals affirmed the Middle District Court of Florida's order granting summary judgment to the Seminole County School Board in a wrongful termination claim. The firm's employment attorney, Cindy Townsend, successfully obtained summary judgment based on the plaintiff's failure to establish municipal liability or any evidence of a retaliation.

On appeal, the appellate court agreed with the district court that the plaintiff failed to establish that the decisionmaker who recommended her termination possessed the final policymaking authority necessary to establish municipal liability against the school district. It further agrees that the plaintiff failed to establish a causal connection between her alleged protected activity and adverse employment actions.

## Judge Dismisses Negligence Claim against School Board

Attorneys, Cindy Townsend and Chris Prusinowski, recently obtained summary judgment on behalf of the Brevard County School Board where Plaintiff failed to provide the requisite Section 768.28 statutory notice. The Court also ruled that the School Board did not owe any duty to the Plaintiff since the alleged incident occurred during non-school hours and off school premises.

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