Legal Update

BELL & ROPER, P.A.

May/June 2018

A PUBLIC RECORDS EXEMPTION "W" FOR THE GOVERNMENT

2707 E. Jefferson Street
Orlando, FL 32803
www.bellroperlaw.com

Florida began its tradition of "openness" in 1909 with the adoption of the "Public Records Law," Florida Statutes, Chapter 119. The law essentially provides that records made or received by any public agency in the course of its official business are to be made available for inspection and copying, unless specifically exempted by the Florida Legislature. Over the years, a struggle has ensued between the

Cont'd 2

PUBLIC ENTITY WEBSITES—ADA COMPLIANCE

Florida's public entities should be aware of the potential liability exposure which is represented by a recent wave of federal lawsuits, challenging the legality of various governmental websites. A group of highly motivated disability activists and their counsel have been serial filing these suits, commencing in South Florida, but now rapidly expanding to other jurisdictions throughout the state.

In general, these suits are brought pursuant to Title II of the Americans with Disabilities Act (ADA) and allege that the named plaintiff has been subjected to discrimination because he has been

Cont'd 3

CONTACT A MEMBER OF THE FIRM

Michael M. Bell – mbell@bellroperlaw.com

Anna E. Engelman - aengelman@bellroperlaw.com

Michael J. Roper - mroper@bellroperlaw.com

Sherry G. Sutphen - ssutphen@bellroperlaw.com

Michael H. Bowling - mbowling@bellroperlaw.com

David B. Blessing - dblessing@bellroperlaw.com

Joseph D. Tessitore - jtessitore@bellroperlaw.com

Frank M. Mari - fmari@bellroperlaw.com

Dale A. Scott - dscott@bellroperlaw.com

Mai Le - mle@bellroperlaw.com

Christopher R. Fay - cfay@bellroperlaw.com

John M. Janousek - jjanousek@bellroperlaw.com

Cindy A. Townsend - ctownsend@bellroperlaw.com

Jennifer C. Barron - jbarron@bellroperlaw.com

public's right to know and the government's need to protect itself. Unfortunately, under the guise of "openness" and "transparency", the government has lost many of the protections that similarly situated private individuals or corporations otherwise enjoy. In a recent decision surrounding this struggle, the Third District gives the "W" to the government. *See City of Homestead v. McDonough*, 232 So. 3d 1069 (Fla. 3rd DCA 2017).

After submitting a Notice of Intent to File Claim against the City of Homestead (City), Dr. James E. McDonough (McDonough) propounded a public records request on the City. The City argued in part that the documents requested were exempt from production under Florida Statutes, section 768.28(16)(b), because the documents were included within the City's claims file related to the pending Notice of Intent. Following a hearing and *in camera* review of the documents, the trial court determined that certain of the requested records were exempt, not to be disclosed, and that production of certain other of the requested records would not harm the City and would not place the City at any disadvantage, thus, same must be disclosed. Cross-appeals were filed by the parties.

Florida Statutes, section 768.28(16)(b), provides that:

> **Claims files** maintained by any risk management program administered by the state, its agencies, and its subdivisions are confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution until termination of all litigation and settlement of all claims arising out of the same incident, although portions of the claims files may remain exempt, as otherwise provided by law.

In *McDonough*, the Third District emphasized that the trial court ignored the plain language of the statute which indicates that the **entire** claims file is exempt from disclosure until resolution of the claim or claims, and went on to hold that because Florida Statutes, section 768.28(16) does not contain such an exception to its privilege, the trial court erred by creating the "no harm" exception.

Where a statute is unambiguous, Florida courts are without power to construe same in a way which would extend, modify or limit the express terms or reasonable and obvious implications. *McDonough* at 1072 *citing Holly v. Auld,* 450 So.2d 217, 219 (Fla. 1984); *McLaughlin v. State,* 721 So.2d 1170, 1172 (Fla. 1998); *State v. McMahon,* 94 So.3d 468, 472–73 (Fla. 2012). While it seems clear that with the enactment of Florida Statutes, section 768.28 (16), the Legislature intended that a government should be able to maintain a claims file free of intrusion by its adversary or others until such time as the claim has been settled, advocates for absolute and unfettered "openness" will likely argue that the Third District awarded the "W" to the wrong side with this decision.

By: Sherry G. Sutphen

deprived of access to a "service, program or activity" of a particular governmental entity. The claim, generally, is that said entity's website cannot be properly utilized by individuals who are disabled due to vision or hearing impairments. The suits allege that the websites are not properly configured to allow them to access the information, utilizing the various "screen reader" programs available to them. The alleged deficiencies include, the manner in which web pages are coded, how documents on the website are "tagged", color contrast of web pages, borders, etc., whether .pdf documents are readable (OCR), closed captioning and a host of other highly technical issues.

Although there are no controlling federal or state regulations governing the specific format of these websites, the lawsuits seek to have the court compel the public entity to bring their websites into compliance with the WCAG 2.0 guidelines. These are guidelines which have been developed by a private consortium, with no regulatory authority, to promote web accessibility. In essence, therefore, these suits are really designed to have the courts (in our view, improperly) legislate on this very important public policy issue. These suits seek unspecified "damages" on behalf of the named plaintiff(s), attorneys fees & costs for their lawyers and injunctive relief requiring the entity to make its website WCAG compliant. The costs associated with bringing a website into compliance with these guidelines is a real concern, because it can be staggering in terms of both capital expenditures and staff time.

We would encourage public entities to review their existing websites with IT staff and/or website accessibility consultants in order to determine whether steps have been taken to address the accessibility of their website by the disabled. We would recommend that entities formulate and implement a plan to address and improve their website's accessibility, including posting a notice of accessibility and providing alternative avenues by which disabled individuals may obtain the same information which is posted on the website. Serious consideration may need to be given to the selection of the content to be posted on the website and the internal controls for adding content. This is a complex issue and cannot be fixed overnight, but if not addressed proactively, could represent a future significant liability exposure for our public (and private) entities within the state. We would recommend that you consult with legal counsel regarding this risk and strategies for mitigating liability.

By: Michael J. Roper

PROVING CAUSATION IN TOXIC TORTS LITIGATION - WILL IT ALSO SETTLE THE *DAUBERT-FRYE* DEBATE IN FLORIDA?

A “toxic tort” is an injury purportedly caused by exposure to a toxic substance. Exposure can arise through occupation, home, consumer products, or pharmaceutical drugs. Some of the most well-known and commonly litigated toxins include lead-based paint, asbestos, pesticides, electro-magnetic fields from utilities or appliances, mold, and pharmaceutical drugs.

In toxic tort cases generally, a plaintiff must prove both general and specific causation through admissible expert testimony. General causation requires proof that the toxin can in fact cause the harm the plaintiff alleges. However, when the medical community generally recognizes that a particular toxin causes the type of harm a plaintiff alleges, such as cigarette smoke causing cancer, an extensive analysis for general causation is not required. Specific causation is required in all cases, and focuses on plaintiff-specific questions, such as proof that the amount and method of exposure could cause the alleged injury (known as the dose-response relationship), and that alternative causes to plaintiff’s disease or injury are unlikely. *McClain v. Metabolife Int'l, Inc.,* 401 F.3d 1233 (11th Cir. 2005).

Dose-response is one of the most important aspects of proving an individual’s reaction to a substance, because a toxin generally will not cause disease in every individual exposed. Dose-response is the cause and effect, or as some courts note, the “hallmark of basic toxicology,” in which a change in amount, intensity, or duration of exposure is associated with either an increase or decrease in risk of disease. In other words, this evaluation determines whether an alleged exposure caused a specific adverse effect.

Recently, in *Williams v. Mosaic Fertiizer, LLC*, No. 17-10894, 2018 WL 2191426 (11th Cir. May 14, 2018), the court illustrated the importance of reliable expert methodology, for a plaintiff to prove general and specific causation in a toxic tort case. Williams sued in the Middle District of Florida, alleging toxins emitted from Mosaic’s fertilizer factory caused or contributed to various medical conditions. Under Federal Rule of Evidence 702 and the admissibility standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S. Ct. 2786 (1993), the court excluded the causation opinions of Williams’ toxicology expert. Specifically, the expert’s opinions failed to properly assess the dose-response relationship meaningfully rule out other potential causes of Williams’ medical conditions, and account for the background risk of the plaintiff’s conditions.

The exclusion of expert testimony to the detriment of a party highlights *Daubert’s* requirement for sufficient data and reliable principles through each step of the toxic tort causation analysis. Any step found unreliable renders the entire testimony inadmissible. In *Williams*, the expert relied on academic studies measuring the concentration of pollutants

Cont’d 5

where Williams lived, in order to estimate the dose of toxic exposure. However, the same studies concluded that the plant's emission of pollutants was hundreds of times lower than levels that would risk public health, and the expert failed to explain this contradiction. The expert also improperly relied on EPA regulatory standards to correlate the exposure to pollutants at or above the regulatory threshold with Williams' medical conditions. Regulatory standards and dose-response calculations serve very different purposes. Regulatory standards are protective and overestimate potential toxicity levels to account for the public's most sensitive members. These standards err on the side of caution, setting the emission threshold at a level where the risk is not precisely identified for any one person, even a plaintiff who is more sensitive than the general public. Dose-response calculations predict the exact exposure levels that actually cause harm to a particular individual. In other words, regulatory standards are unreliable predictors of disease and are not a substitute for the individualized, scientific dose-response assessment required in a toxic tort case.

Expert testimony must also rule out potential alternative causes of an individual's conditions and symptoms. This includes environmental factors, lifestyle, allergies, possible genetic predisposition, and background risks. The background risk of a disease or condition is the risk everyone faces of suffering from that condition, without being exposed to the toxic substance. The plaintiff's expert is not required to rule out every possible alternative, but if the defendant points to a plausible alternative cause, plaintiff's expert must explain why this alternative is not the cause of the injury. The expert failed to eliminate or even address Williams' alternative factors, including obesity, exposure to secondhand smoke, and emissions by other facilities in the same geographical area. Ultimately, the unsoundness of the expert's opinions as to causation in *Williams* was detrimental, as the court granted summary judgment in favor of Mosaic.

Toxic tort cases succeed or fail on the strength of a party's experts and the applicable standard of admissibility of expert opinions. The *Frye* standard requires the trial court to determine the general acceptance of a methodology used in the relevant scientific community. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *Daubert* goes a step further, where the information must, by generally accepted, assist the trier of fact, and be based on reliable scientific theory. While *Daubert* is unquestionably the accepted standard for cases in Federal Court like *Williams,* Florida's courts are still unsettled. In 2013, the Florida Legislature adopted the *Daubert* standard, but the Florida Supreme Court declined to include *Daubert* into the Florida Evidence Code. The Court left open the question of whether the Legislature's adoption of *Daubert* was constitutional, while also leaving courts and litigants in limbo.

In March, Florida's Supreme Court heard oral arguments in *DeLisle v. Crane Co., et al.*, No. SC16-2182, regarding whether *Frye* or *Daubert* will govern in Florida state courts. DeLisle filed a products liability suit alleging exposure to asbestos caused mesothelioma. The Fourth District Court of Appeal reversed the $8 million jury verdict and

Cont'd 6

SOVEREIGN IMMUNITY/PUBLIC DUTY DOCTRINE

In *City of Dunedin v. Pirate's Treasure, Inc.*, 2018 WL 1769152 (Fla. 2nd DCA Apr. 13, 2018) the appellate court considered whether a governmental entity can be held liable in tort, for not providing accurate information to a landowner regarding compliance with the City's Land Development Code (LDC), which was available to the public.

The underlying plaintiff sought to renovate certain commercial property to include a refurbished marina and new restaurant, located in the City of Dunedin. Plaintiff contended that City staff misled him as to whether the development would be permitted under the LDC and caused him to expend money in reliance upon representations that the plan would be approved. The City ultimately approved the development of the marina but not the restaurant, because it did not comply with a revised development code. Plaintiff sued the City for damages based upon a theory of negligent misrepresentation.

The City asserted that the doctrine of sovereign immunity barred plaintiff's claim. In considering this defense, the Second District Court of Appeal first noted that the parties had conflated the concepts of the "public duty doctrine" and "sovereign immunity". Under Florida law, the duty of care analysis is conceptually distinct from the question of whether the governmental entity enjoys qualified immunity. If there is no duty of care then there is no governmental liability and one does not have to reach the consideration of sovereign immunity.

In this case, the court held that the City had no duty of care to convey accurate information concerning whether plaintiff's site plan complied with the City's LDC. This finding is consistent with those cases in which Florida courts have consistently declined to hold governmental entities liable for failing to accurately maintain public records or provide accurate information to citizens. The Second District held that because the City owed no common law or statutory duty of care to the plaintiff, it could not, as a matter of law, be held liable for damages to plaintiff based upon the tort of negligent misrepresentation.

By: Michael J. Roper

6

excluded the causation opinions of plaintiff's experts as unreliable under *Daubert* for many of the same reasons discussed in *Williams v. Mosaic Fertiizer, LLC*. DeLisle now challenges the Fourth DCA's application of *Daubert*, arguing the expert opinions were admissible under *Frye,* the proper standard.

The debate over the *Daubert* and *Frye* standards has been a contested issued in Florida for several years. The Court's decision will have widespread impact, particularly for toxic tort cases that require a complex causation analysis, and bring clarity to the proper standard of the admissibility of expert testimony in Florida cases.

By: Jennifer C. Barron

ADA ACCOMMODATIONS
REASONABLE AND UNREASONABLE REQUESTS

Possibly the most litigated area under the ADA is what are the obligations of an employer in accommodating an employee with a disability. Though everyone knows that the employer is required to provide a reasonable accommodation, what constitutes reasonable accommodation in the employment setting? Accommodations are evaluated by the Courts on a case-by-case basis. As such an accommodation deemed reasonable for one employer may be unreasonable for another.

However, there are a number of employment accommodations that employers are typically not required to provide. An employer need not: (1) create a new position for an employee with disability; (2) create a light duty position for a disabled employee; (3) promote a disabled employee to an open position; (4) remove a nondisabled employee from a position in order to accommodate a disabled employee; (5) demote or discharge a nondisabled employee to accommodate a disabled employee; (6) assign a disabled employee to a position in violation of the collective bargaining agreement or civil service rules; (7) allow the disabled employee to work exclusively from home; and (8) grant an employee with a disability an indefinite leave of absence.

The courts have required and employer to (1) reassign the employee with a disability to another position if it is vacant and the employee is otherwise qualified; (2) provide to the disabled employee alternative employment opportunities that are reasonably available under the employer's existing policies; (3) allow part-time work particularly if such positions currently exist; and (4) eliminate nonessential functions of the disabled employee's job.

By: Michael H. Bowling

FIRM NEWS

Michael M. Bell and Michael J. Roper were recently named to the Orlando Magazine's list of Orlando's Best Lawyers 2018. That list was compiled based upon an extensive peer-review survey, asking established local lawyers to name top practitioners in their particular fields. The lawyers surveyed were asked to identify the lawyer to whom they would refer a close friend or relative needing legal representation, if they could not handle the case themselves.

FIRM SUCCESS

Burgess v. The School Board of Brevard County, Case No. 6:16-cv-2052-Orl-31-DCI, United States District Court, Middle District of Florida, was a federal action involving claims of Title VII race discrimination and retaliation with regard to the termination/demotion of the Plaintiff. Mr. Burgess, a long-term employee HVAC Mechanic for the Defendant School Board, was terminated as result of issues related to his conduct and performance which arose after the Department came under different management. Mr. Burgess claimed that the disciplinary actions taken against him were a result of racial motivation of the new Department Director, and not due to his conduct.

Though initially terminated, the School Board's Human Resources Department reinstated Mr. Burgess to a demoted position, given his years of service and his approaching retirement age. Mr. Burgess continued to work for the School Board until his retirement three years later. One of the challenges presented in this action was caused by the significant delay between the filing of the lawsuit and the incidents upon which the Plaintiff's discipline was based. During that time period the Department Director died, and other important witnesses retired.

Mike Bowling successfully argued that the alleged racist comments attributed to the deceased Department Director (which were second hand hearsay) should not be considered by the Court and that the evidence otherwise established that the School Board's decision to initially terminate, then reinstate and demote, Mr. Burgess was based on legitimate nondiscriminatory grounds. The Court granted summary judgment on behalf of the School Board.

If you are interested in being added to our newsletter e-mail list, or if you wish to be taken off of this list, please contact Krysta Reed at kreed@bellroperlaw.com.

Questions, comments or suggestions regarding our newsletter, please let us know your thoughts by contacting John Janousek at jjanousek@bellroperlaw.com

THE INFORMATION PRINTED IN THIS NEWSLETTER IS FACT BASED, CASE SPECIFIC INFORMATION AND SHOULD NOT, UNDER ANY CIRCUMSTANCES, BE CONSIDERED SPECIFIC LEGAL ADVICE REGARDING A PARTICULAR MATTER OR SUBJECT. PLEASE CONSULT YOUR ATTORNEY OR CONTACT A MEMBER OF OUR FIRM IF YOU WOULD LIKE TO DISCUSS SPECIFIC CIRCUMSTANCES AND THE LAW RELATED TO SAME.