BELL & ROPER LEGAL UPDATE

Survey of Insurance and Civil Rights Issues and Recent Court Decisions from Bell & Roper, P.A.

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DON'T TASE ME BRO!

By Michael J. Roper

The firm recently secured an important victory for our client, TASER International, Inc. (TASER), in a wrongful death, products-liability action which had been brought in federal court. See, *Oliver v. City of Orlando, et al*, No. 6:06-cv-1671-JA-DAB, 2011 WL 2174010 (M.D. Fla. May 31, 2011).

This suit arose out of an incident which occurred on May 31, 2004, when police officers employed by the City of Orlando attempted to Baker Act the decedent, Anthony Oliver (Oliver), who was acting in an irrational, delusional and agitated manner. Oliver resisted the officers' attempts to take him into custody and as a result, one of the officers utilized a TASER® M26™ Electronic Control Device ("ECD") to incapacitate him, so that he could be restrained. Following the successful use of the ECD, Oliver was handcuffed with the assistance of other officers who arrived on the scene. Even after he was handcuffed, Oliver continued to resist and struggle against his restraints. Paramedics subsequently arrived on the scene and provided medical attention to Oliver. During the approximately 30 minutes that he remained on the scene following the last ECD application, Oliver remained incoherent but was noted to be breathing without difficulty, had normal vital signs (pulse, BP and respirations) and a normal heart rhythm. As he was being loaded into the ambulance for transport to the hospital, he became unresponsive and exhibited an abnormal heart rhythm of pulseless electrical activity (PEA). Upon arrival at the hospital he had a core body temperature of 108 degrees Fahrenheit.

Toxicological studies revealed the presence of parent cocaine in his urine and high levels of cocaine metabolites in his ante mortem blood. The emergency room physician noted that he was in acute cocaine intoxication and suffering from severe hyperthermia, cardiopulmonary arrest, rhabdomyolysis and multi-organ failure. His situation was ultimately deemed hopeless and Oliver's life support was withdrawn the next day. Following an autopsy, the Medical Examiner concluded that the cause of death was cocaine induced excited delirium.

Despite the above facts, Oliver's estate & survivors elected to sue law enforcement for alleged civil rights violations and TASER under various products liability theories. Plaintiff

alleged that the ECD was defective in design and manufacture, and that TASER had failed to warn of known dangers associated with the use of the product. In support of this claim, Plaintiff, at great expense to her counsel, retained a board-certified forensic and anatomic pathologist from New York to opine that the ECD "contributed" to Oliver's death by inducing a fatal arrhythmia, in conjunction with rhabdomyolysis. During his deposition, it was demonstrated that this witness had absolutely no legitimate medical or scientific basis for offering that opinion. Specifically, he conceded that he had no familiarity with the product itself or its electrical principles; no expertise with respect to electricity and its effects upon the human body; had conducted no studies himself which would support his opinion; and could point to no studies, publications, etc by other researchers which would support his conclusions. He was unable to identify a single published, peer reviewed, medical or scientific article which had concluded that a TASER ECD, as applied in the field, could cause death to a human, by any means postulated. He was unable to describe in medical, scientific or mechanical terms the methodology which he utilized in order to arrive at his conclusion. He could not rule out other potential causes of death, such as cocaine, a diseased heart, or excited delirium. He agreed that cocaine use can often be fatal and could account for all of the symptoms exhibited by Oliver leading up to his demise, but claimed that said drug was not the cause of death in this case…in his opinion! Ultimately we were able to effectively demonstrate, through his own testimony, that the conclusion of this "expert" was based entirely on the logical fallacy that Oliver was tased before he died, therefore the tasing caused his death. Presumably this witness would also list Osama Bin Ladin's cause of death as "Emigration to Pakistan."

Following the close of discovery, we filed a *Daubert* motion on behalf of TASER to exclude this pathologist's opinion on the grounds that it was unreliable. We also filed a corresponding motion for summary judgment, asserting that without his opinion, there would be no proof of medical causation, which was an essential element of Plaintiff's case. U. S. District Court Judge Antoon granted our *Daubert* motion finding that while the witness, as a pathologist, was qualified to testify regarding causes of death in general, his opinion in this instance was not reliable because his methodology was flawed. The Court concluded that the opinions from Plaintiff's retained pathologist would not assist the jury and therefore could not be admitted. As a result, the Court noted that the record did not support a finding that the ECD was capable of causing Oliver's death and granted summary judgment in favor of TASER.

The ruling in this case demonstrates the importance of conducting a comprehensive examination of adverse experts regarding the methodology and basis for their opinions, and also of carefully preparing your expert to respond to such examination. The federal courts, in particular, are becoming much more stringent in disallowing expert testimony if a valid methodology cannot be demonstrated, as opposed to the "good old days" where such challenges merely went to the weight of the expert's proffered testimony. Accordingly, the effective use of *Daubert* or other motions in limine are becoming an increasingly important tool for the practitioner.

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DISCRIMINATION AND COMPARATORS-MARITAL STATUS DISCRIMINATION

By Michael H. Bowling

The Eleventh Circuit recently decided *Burke-Fowler v. Orange County*, No. 05-14899, 22 Fla. L. Weekly Fed. C1959 (11th Cir. March 27, 2011). The *Burke-Fowler* opinion is interesting insofar as it provides a good summary of the law on two distinct employment civil rights issues.

The Plaintiff was an African-American corrections officer with Orange County. She engaged in a relationship with an inmate at the jail and subsequently married the inmate after he had been sentenced to prison. The Plaintiff acknowledged that she was aware of the policy prohibiting corrections officers from fraternizing with inmates. She was terminated as a result.

The Plaintiff brought suit under Title VII alleging race discrimination. The Court recited the long standing prima facie standard which requires that a Plaintiff show that: (1) she is a member of a protected class; (2) she was subjected to an adverse employment action; (3) her employer treated similarly situated employees outside of her protected class more favorably than she was treated; and (4) she was qualified to do the job. The court framed the issue in this case as whether the Plaintiff satisfied the third requirement, that Orange County treated similarly situated non-African American employees more favorably than the Plaintiff. The Plaintiff cited a number of incidents involving fraternization between white employees and inmates. However, none of these employees engaged in the type or degree of fraternization as that of the Plaintiff. The Trial Court granted summary judgment and the Eleventh Circuit affirmed.

The Eleventh Circuit recited the rule that courts require that the employee show that the quantity and quality of the comparator's misconduct be "nearly identical" to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges. The Court explained that different types and degrees of misconduct may warrant different types and degrees of discipline. The Plaintiff failed to show a comparator's misconduct that was nearly identical to hers.

The Plaintiff also alleged that Orange County violated her Florida Civil Rights Act protection from marital status discrimination. The Plaintiff asserted that she was terminated because she was married to a former inmate. The Eleventh Circuit explained that the marital status protection applies to "the state of being married, single, divorced, widowed, or separated, and does not include the specific identity or actions of an individual spouse." In other words, there is no protection for being married to a specific person; the protection applies only to the state of being married.

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TIMING IS KEY IN OBTAINING ATTORNEY'S FEES UNDER §57.105

By Mary J. Walter

In *City of North Miami Beach v. Berrio*, 36 Fla. L. Weekly D1166a (Fla. 3d DCA 2011), the Third District reversed a final order awarding attorney's fees pursuant to section 57.105, Florida Statutes, for failure to comply with the Safe Harbor provision contained within the statute.

Michael Hurato, claimant, was arrested after an officer of the Miami Beach Police Department discovered marijuana in his vehicle during a routine traffic stop. Although the vehicle was initially seized by the City, the trial court ultimately ordered its immediate return by way of an order dated August 11, 2009. When the city failed to comply with the court's order, the claimant filed a Motion for attorney's fees under section 57.105, Florida Statutes, which authorizes such an award on a claim the losing party knew or should have known was not supported by law or fact. The vehicle was returned one week later. Still, the trial court granted the motion and awarded fees to the claimant's counsel. The city appealed.

Section 57.105, Florida Statutes, allows a trial court to award fees on its own initiative or on the motion of any party. "A motion by a party seeking sanctions under this section must be served but may not be filed with or presented to the court unless, within twenty-one days after service, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected."

In *Davidson v. Ramirez*, 970 So. 2d 855 (Fla. 3d DCA 2007), a claimant filed a motion for fees under section 57.105, Florida Statutes, at the conclusion of trial. Although the claimant failed to comply with the Safe Harbor provided by the statute, the trial awarded fees on its own initiative. The Third District disapproved. "This procedure is contrary to the intent of the statute. It would frustrate the legislative intent to avoid the twenty-one day notice by allowing the court to adopt the party-filed motion as the court's own." *Id*. at 856.

Counsel in the subject case attempted to distinguish *Davidson* by arguing that the court in the subject case used its own authority to properly award attorney's fees. The district court was not persuaded. Although the order did not expressly adopt the claimant's motion, the record clearly showed that the award of fees was in response to the claimant's motion and the subsequent hearing. The order was reversed for failure to comply with the safe harbor provision provided by law.

In essence, *Berrio* serves to stress the importance of the Safe Harbor provision contained within section 57.105, for both the parties seeking attorney's fees as a sanction and those seeking to defend such a motion.

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U.S. SUPREME COURT TO REVIEW POSSIBLE BIVENS EXPANSION

By Gail C. Bradford

On May 16, 2011, the United States Supreme Court Granted certiorari in the matter of *Minneci v. Pollard*, No. 10-1104. The question at issue is whether the Court should expand the *Bivens* doctrine that allows for a federal cause of action for constitutional rights violations against federal officials. Since the Court's opinion in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* in 1971, *Bivens* has been strictly and narrowly construed. However, with this Petition, the Court has the opportunity to dramatically expand *Bivens*.

Richard Lee Pollard was an inmate at a federal correctional institution operated under contract by GEO Group. While incarcerated, Mr. Pollard slipped and fell, fracturing his elbows. He required treatment at a clinic outside the prison. During transport to and from the clinic, he was required to wear a jumpsuit and certain restraint devices on his arms, which caused him severe pain. Mr. Pollard was not given the recommended treatment, was required to participate in work assignments despite his injuries, and was unable to feed or bathe himself because of his injuries. GEO Group correctional staff did not make any accommodations for Mr. Pollard. Mr. Pollard filed a *Bivens* claim against GEO Group and eight GEO employees in the Eastern District of California alleging Eighth Amendment violations. GEO Group was eventually dismissed. At the initial screening performed for all prisoner lawsuits, the trial court dismissed the Complaint because, under *Bivens*, state law provided Mr. Pollard with the opportunity for both negligence and medical malpractice claims and because the GEO Group employees were not considered federal actors.

Mr. Pollard appealed to the Ninth Circuit Court of Appeals, Case No. 07-16112. The Ninth Circuit reversed the trial court, holding that GEO Group employees could be considered federal agents acting under color of federal law. *Pollard v. GEO Group, Inc*., 629 F. 3d 843 (9th Cir. 2010). The appellate court noted that Mr. Pollard was incarcerated and could only obtain care from those providers selected by the federal government. Thus, those providers should be as liable as any federal actor. *Id.* at 856. The appellate court also determined that the requirement that a plaintiff pursue an existing remedy, such as a negligence or medical malpractice claim, would result in confusing and varied causes of action depending on the state rules in which each claim was brought. To the contrary, under *Bivens*, claims such as this would proceed under a uniform set of rules, resulting in a consistent and orderly process and a more predictable scope of results. *Id.* at 862-863. Finally, the appellate court determined that there were no "special factors counseling hesitation for authorizing a new kind of federal litigation" outside of *Bivens*.

Five of the GEO Group employees filed a petition for Writ of Certiorari, requesting that the Supreme Court determine whether a *Bivens* claim was appropriate under the facts at bar. The Petitioners noted that, not only is there a conflict among the federal circuit courts of appeal as to whether or not a *Bivens* claims would be appropriate, there is conflict within the Ninth Circuit itself. In addition, the Petitioners urge review to resolve a continually recurring question,

particularly in the area of prisoner litigation, and quash a significant rise in claims in the event the Ninth Circuit Opinion is allowed to stand.

In response, Mr. Pollard replied that the Petitioners' Writ of Certiorari should not be granted because the Ninth Circuit's Opinion in his favor was consistent with the opinions of other circuit courts, and with Supreme Court precedent. Mr. Pollard cited to a line of cases and distinguished those cases cited by the Petitioners. More importantly, he pointed out that since this case was initially dismissed early in its inception, there was an insufficient record. The Defendants had not answered the Complaint. There were no depositions or written discovery. Therefore, there was no concrete information in the record about available alternative remedies. To do otherwise would be an exercise in guesswork and the law should not be based on such speculation.

Minneci v. Pollard is set for argument during the Court's October 2011 term.

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