IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

DR. AHMAD Z. CHAUDHRY,

Appellant/Cross-Appellee,

v. Case No. 5D18-2380

ADVENTIST HEALTH SYSTEM SUNBELT, INC., D/B/A FLORIDA HOSPITAL AND/OR FLORIDA HOSPITAL TRANSPLANT INSTITUTE,

Appellee/Cross-Appellant.

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Opinion filed October 30, 2020

Appeal from the Circuit Court
for Orange County,
Julie H. O'Kane, Judge.

Lincoln J. Connolly, of Lincoln J. Connolly Trials & Appeals, P.A., Miami, and Stuart N. Ratzan, and Stuart Weissman, of Ratzan Law Group, P.A., Miami, for Appellant/Cross-Appellee.

Rachael M. Crews, Charles T. Wells, and Mayanne Downs, of GrayRobinson, P.A., Orlando, for Appellee/Cross-Appellant.

EDWARDS, J.

This is an appeal and cross-appeal of a Florida Private Whistleblower Act ("Whistle Blower's Act") case based upon section 448.102, Florida Statutes (2014). Appellant/Cross-Appellee, Dr. Ahmad Z. Chaudhry, brought suit, claiming that he was

unlawfully terminated from his position as a heart-lung transplant surgeon by Appellee/Cross-Appellant, Adventist Health System Sunbelt, Inc., d/b/a Florida Hospital. The case proceeded to a jury trial with a verdict returned in favor of Dr. Chaudhry, awarding him damages for past lost earnings, future loss of earning capacity, and intangible damages. The trial court granted Florida Hospital's motion to set aside the jury's award of loss of earning capacity, but otherwise denied the balance of Florida Hospital's post-trial motions. The parties raised numerous issues by way of appeal and cross-appeal. We reverse and remand for a new trial on the issues related to liability because the trial court gave an improper jury instruction on the issue of causation. We affirm the trial court's order setting aside the jury's award of future loss of earning capacity on the basis that it lacked evidentiary support, and we affirm as to all other issues raised on appeal and cross-appeal.

BACKGROUND FACTS

In 2008, Florida Hospital set out to establish a heart-lung transplant institute to serve the Orlando area. It hired a very experienced transplant surgeon, Dr. Hartmuth B. Bittner, who had run such a program in Germany, to be the director of Florida Hospital's program. Florida Hospital hired several other physicians of varying specialties and experience levels to be members of the heart-lung transplant team. One of the team members was Dr. Chaudhry, who had recently completed a fellowship where he received training on heart and lung transplantation and additional training on the use of ventricular assist devices ("VAD") that sustained patients awaiting transplants. This was Dr. Chaudhry's first full-time job beyond the realm of residency and fellowship training programs.

The heart-lung transplant team did not coalesce as well as would be required for the new program to be successful. There were disagreements between Dr. Bittner and certain team members regarding which patients were appropriate candidates for transplantation, the geographical donor range, surgical techniques, and overall performance. Dr. Chaudhry repeatedly shared concerns he had regarding Dr. Bittner with Florida Hospital's administration. On more than one occasion, Dr. Chaudhry requested the administration initiate a review of Dr. Bittner's performance, practices, and techniques via the hospital's peer review system. At the same time, various concerns about Dr. Chaudhry were expressed by other team members and Florida Hospital's administration.

Because Dr. Chaudhry believed Florida Hospital's administration was not taking his concerns about Dr. Bittner seriously, he went straight to the chief of medical staff for the entire hospital with his complaints. That was seen by some as a breach of normal protocol and earned Dr. Chaudhry the labels "troublemaker" and "not a team player" among certain members of Florida Hospital's administration. Because Florida Hospital's heart-lung transplant institute was new, it needed to be inspected and approved by representatives of Medicare and Medicaid as well as reviewed by the United Network for Organ Sharing ("UNOS") in order to be financially successful.

In February 2014, Dr. Chaudhry came to management once again with complaints that Dr. Bittner's surgical techniques and practices had endangered patient safety and again requested/demanded that a peer review of Dr. Bittner's actions promptly be conducted. When he did not receive what he felt to be sufficient assurance of swift action, Dr. Chaudhry threatened to air his complaints about Dr. Bittner's supposed dangerous practices and the administration's inaction to the UNOS representatives who were

scheduled to visit within weeks to review Florida Hospital's heart-lung transplant program. There was testimony at trial that if Florida Hospital's program did not receive UNOS approval, it could potentially cost the program millions of dollars in revenue.

Florida Hospital fired Dr. Chaudhry within days of this threat to air the transplant team's dirty laundry to UNOS. To ensure that he would not be present when the UNOS representatives were at the hospital, Florida Hospital's administration required Dr. Chaudhry to immediately surrender his keys and access cards; they also ensured that his access to Florida Hospital's computer network was immediately revoked. Under his contract when he was terminated without cause by the hospital, as admittedly occurred here, Dr. Chaudhry was entitled to receive six months' salary, health insurance, and medical malpractice insurance coverage, all of which Florida Hospital provided and he accepted. For a period, Dr. Chaudhry was unable to obtain desirable, full-time employment; ultimately, he did finally obtain a position as a cardiothoracic surgeon at a Kentucky hospital, where his base pay was $200,000 more than the salary he earned at Florida Hospital.

PROVING A WHISTLE BLOWER'S ACT VIOLATION

Dr. Chaudhry's lawsuit initially included several counts and named multiple defendants; however, he went to trial only against Florida Hospital and on a single claim: that his firing violated section 448.102, Florida Statutes, Florida's Private Whistle Blower's Act. The Whistle Blower's Act provides in pertinent part that: "[a]n employer may not take any retaliatory personnel action against an employee because the employee has . . . [o]bjected to, or refused to participate in, any activity, policy, or practice of the employer which is in violation of a law, rule, or regulation." § 448.102(3), Fla. Stat.

Although the Whistle Blower's Act is a Florida statute, it is a member of a family of employment legislation that originated as or was patterned after federal enactments, viz, Title VII of the Civil Rights Act of 1964. When a Florida statute "is patterned after a federal law on the same subject, the Florida law will be accorded the same construction as given to the federal act in federal courts." *Vill. of Tequesta v. Luscavich*, 240 So. 3d 733, 745 (Fla. 4th DCA 2018). This Court has held that "[t]he purpose of the Whistle Blower's Act is to protect private employees who report or refuse to assist employers who violate laws enacted to protect the public," and as such, should be viewed as remedial in nature and construed liberally. *Jenkins v. Golf Channel*, 714 So. 2d 558, 563 (Fla. 5th DCA 1998).

"To establish a *prima facie* claim for retaliation under [the Whistle Blower's Act], . . . a plaintiff must demonstrate: (1) he engaged in protected activity; (2) he suffered an adverse employment action; and (3) there is a causal relation between the two events." *Griffin v. Deloach*, 259 So. 3d 929, 931–32 (Fla. 5th DCA 2018) (footnote omitted); *accord Aery v. Wallace Lincoln-Mercury, LLC*, 118 So. 3d 904, 913 (Fla. 4th DCA 2013) (noting that Eleventh Circuit had recognized that due to similarities between statutes, retaliation claims under Whistle Blower's Act are analyzed using same framework as Title VII retaliation claims); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (discussing plaintiff's burden to show prima facie case of discrimination under Title VII).

This Court has further held that "[t]he burden-shifting framework established in *McDonnell Douglas* applies to claims under the Whistle-blower's Act." *Griffin*, 259 So. 3d at 931.[1] "Once the prima facie case is established, the employer [has the burden to]

[1] While *Griffin* dealt with Florida's Public Whistle Blower's Act, Florida's Private Whistle Blower's Act follows a similar framework and analysis. *See, e.g.*, *Kearns v. Farmer Acquisition Co.*, 157 So. 3d 458, 462 (Fla. 2d DCA 2015).

proffer a legitimate, non-retaliatory reason for the adverse employment action." *Id.* at 932 (alteration in original) (quoting *Rice-Lamar v. City of Fort Lauderdale*, 853 So. 2d 1125, 1133 (Fla. 4th DCA 2003)). "The plaintiff [then] bears the ultimate burden of proving by a preponderance of the evidence that the reason provided by the employer is a pretext for the prohibited, retaliatory conduct." *Id.* (alteration in original) (quoting *Rice-Lamar*, 853 So. 2d at 1133).

Dr. Chaudhry asserted in his complaint, and offered evidence at trial, that the level of care provided by Dr. Bittner fell so far below what was acceptable and endangered or actually harmed patients, that Florida Hospital was required by law to: (1) ensure that specific incidents reported by Dr. Chaudhry involving Dr. Bittner were promptly subjected to peer review, (2) make reports to third-party agencies about alleged adverse incidents involving Dr. Bittner, and (3) notify patients or patients' families who had been the alleged victims of adverse incidents involving Dr. Bittner. Dr. Chaudhry asserted that Florida Hospital ignored these requirements, and he claimed the hospital's inaction was thus a violation of law. The case that Dr. Chaudhry presented to the jury was that his refusal to stay silent and specifically threatening to tell UNOS of Florida Hospital's alleged unlawful conduct were activities covered by section 448.102(3), which protects an employee who "[o]bjected to, or refused to participate in, any activity, policy, or practice of the employer which is in violation of a law, rule, or regulation." § 448.102(3), Fla. Stat. (2018). He claimed that his termination resulted from engaging in that protected activity and argued that Florida Hospital violated the Whistle Blower's Act, which entitled him to recover damages as one form of remedy.

Florida Hospital denied Dr. Chaudhry's allegations that he was fired because of any protected activity. First, it contested whether Florida Hospital had failed to take action required of it by law.[2] Second, it contended and offered testimony to the effect that Dr. Chaudhry was not working out as a member of the transplant team and that his continued employment would be disruptive and harmful to the program. Florida Hospital took the position and offered evidence that it simply terminated Dr. Chaudhry without cause as was clearly permitted by his employment agreement. While Florida Hospital maintained it did not need any cause to fire Dr. Chaudhry, it claimed his termination was because Dr. Chaudhry was lazy, as evidenced by the extremely low number of surgeries he participated in, negative feedback from transplant team members and other physicians, and his failure to develop relationships with physicians outside the transplant team that would lead to additional transplant patient referrals. Coincidentally, Dr. Chaudhry was fired just days after telling the administration that he had failed his board certification exams for the third time, which meant he could not become board certified for at least two more years. Thus, Florida Hospital certainly advanced non-retaliatory reasons for firing Dr. Chaudhry. However, Dr. Chaudhry presented evidence to the jury which suggested that Florida Hospital's supposedly permissible reasons for firing him were pretextual. Therefore, whether Dr. Chaudhry's termination violated the Whistle Blower's Act was an issue for the jury.

[2] The issue of whether an employee must prove the employer actually violated a law, rule, or regulation or prove that the employee had a good faith belief that the employer was violating the law is not properly before us, but has been the source of disagreement in cases decided by other district courts of appeal. *Compare Aery*, 118 So. 3d at 916 (applying "good faith, objectively reasonable belief" standard), *with Kearns*, 157 So. 3d at 465 (noting in dicta that an employee must prove actual violation of law and implicitly rejecting standard laid out in *Aery*).

DISPUTED JURY INSTRUCTION

"Trial courts are generally accorded broad discretion in formulating jury instructions." *Barbour v. Brinker Fla., Inc.*, 801 So. 2d 953, 959 (Fla. 5th DCA 2001) (citations omitted). "The standard of review to be applied to a decision to give or withhold a jury instruction is an abuse of discretion." *Id.* "The trial court's decision to give a particular instruction will not be reversed 'unless the error complained of resulted in a miscarriage of justice or the instruction was reasonably calculated to confuse or mislead the jury.'" *Id.* (quoting *Barton Protective Servs., Inc. v. Faber*, 745 So. 2d 968, 974 (Fla. 4th DCA 1999)).

Florida Hospital relied primarily upon, what was at the time of trial, a relatively recent United States Supreme Court case when it requested the trial court instruct the jury that it could return a verdict in favor of Dr. Chaudhry only if it found that his termination would not have occurred but for Florida Hospital retaliating against his protected activity. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013). Dr. Chaudhry convinced the trial court to use the relevant standard jury instruction on causation, which allowed the jury to return a verdict in favor of Dr. Chaudhry if it found that Florida Hospital's intent to punish him for engaging in protected activity was a "motivating factor," even if it was not the only reason, for terminating him.[3] *See In re Standard Jury Instructions in Civil Cases—Report No. 2011-01 (Unlawful Retaliation)*, 95 So. 3d 106, 110 (Fla. 2012).

In *Nassar*, the Supreme Court held that "Title VII retaliations claims must be proved according to traditional principles of but-for causation." 570 U.S. at 360. This is in

[3] Contrary to Dr. Chaudhry's assertions, we find that Florida Hospital properly preserved its request for its proposed "but for" instruction and objected to Dr. Chaudhry's "motivating factor" instruction that was ultimately given by the trial court.

contrast with the current standard jury instructions in Florida—promulgated prior to *Nassar*—which use the relaxed standard that "[p]rotected activity is a legal cause of [an adverse employment action] if the protected activity was a motivating factor that made a difference in [the employer's] decision. The protected activity need not be the only factor motivating [the employer's] decision." *In re Standard Jury Instructions*, 95 So. 3d at 110.[4]

The Fourth District has adopted the *Nassar* standard for claims brought under Florida's Civil Rights Act ("FCRA"). *See Palm Beach Cnty. Sch. Bd. v. Wright*, 217 So. 3d 163, 163 (Fla. 4th DCA 2017) (en banc) (reversing adverse judgment entered against employer in a FCRA retaliation claim and writing that "this require[d] [it] to adopt a new standard on causation in line with [*Nassar*]"). While no Florida court has directly addressed the role *Nassar* plays in analyzing Whistle Blower's Act claims, federal courts sitting in diversity and applying Florida law have. In *Ramirez v. Bausch & Lomb, Inc.*, the Eleventh Circuit noted the Supreme Court's then-recent *Nassar* decision and wrote that, on remand in a Florida Whistle Blower's Act case, the district court "may need to consider whether [the plaintiff] ha[d] sufficiently satisfied 'but for' causation in [the] case." 546 F. App'x 829, 833 n.2 (11th Cir. 2013). On remand, the Middle District wrote that pursuant

[4] Until recently, standard jury instructions were submitted to and approved by the Florida Supreme Court, which consistently stated that it was "express[ing] no opinion on the correctness of the instructions and remind[ing] all interested parties that [its] authorization foreclose[d] neither requesting an additional or alternative instruction *nor contesting the legal correctness of the instructions*." *In re Standard Jury Instructions*, 95 So. 3d at 108 (emphasis added). Even with that caveat, the supreme court found trial judges are sometimes reluctant to modify standard jury instructions or to give other instructions requested by a party that may be more appropriate. *In re Amendments to Fla. Rules of Judicial Admin.*, 45 Fla. L. Weekly S121 (Fla. Mar. 5, 2020). Accordingly, this past spring, our supreme court completely distanced itself from approving standard jury instructions, allowing the relevant supreme court committees on standard jury instructions to develop and publish new or amended standard jury instruction without further input or specific authorization from the court. *Id.*

to *Nassar*, the plaintiff had "the ultimate burden of proving that 'but for' his protected activity he would not have been terminated." *Ramirez v. Bausch & Lomb, Inc.*, No. 8:10-cv-2003-T-35TGW, 2015 WL 12805166, at *5 (M.D. Fla. Apr. 2, 2015). This makes sense given that retaliation claims under both the Whistle Blower's Act and FCRA "are analyzed in the same familiar manner as retaliation claims under Title VII." *Gleason v. Roche Labs., Inc.*, 745 F. Supp. 2d 1262, 1270 (M.D. Fla. 2010); *cf. Slater v. Energy Servs. Grp. Int'l, Inc.*, 634 F.3d 1326, 1331 (11th Cir. 2011) (affirming district court's judgment of dismissal and concluding that plaintiff's Title VII, Whistle Blower's Act, and FCRA claims were all subject to her employment agreement's forum selection clause).

While the Supreme Court in *Nassar* found that the "motivating factor" test was appropriate for status-based employment discrimination, it held that the more stringent "but for" test had to be applied in cases involving employer retaliation against employees who had engaged in protected activities. 570 U.S. at 343, 360. "It is thus textbook tort law that an action 'is not regarded as a cause of an event if the particular event would have occurred without it.'" *Id.* at 347 (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* 265 (5th ed. 1984)). The anti-retaliation statute under consideration in *Nassar*, Title VII of the Civil Rights Act of 1964, as codified by 42 U.S.C. § 2000e *et seq.*, just like the Whistle Blower's Act here, in relevant part forbids retaliatory employment action taken "because" an employee engaged in specified protected conduct. *See* 42 U.S.C. § 2000e–3(a) (2012); *Nassar*, 570 U.S. at 351–52 ("[T]he proper conclusion . . . is that Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action."). After considering several factors, including dictionary definitions, the Supreme Court concluded

that the word "because," when referring to anti-retaliation statutes, meant the employer's punishment of the employee for engaging in protected activity was the sole, or "but for," reason for the retaliatory employment action. *See Nassar*, 570 U.S. at 352. "The text, structure, and history of Title VII demonstrate that a plaintiff making a retaliation claim under § 2000e–3(a) must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer." *Id.* at 362.

Accordingly, we agree with the Fourth District's conclusion in *Wright* and find that *Nassar* requires the use of a "but for" rather than a "motivating factor" causation standard when analyzing claims under Florida's Whistle Blower's Act. Thus, we hold that the trial court abused its discretion by refusing to give the *Nassar*-based "but for" causation jury instruction requested by Florida Hospital. Under the circumstances and given the evidence presented, a new trial on liability and causation is required using an appropriate "but for" jury instruction.

DAMAGE ISSUES

The jury returned its verdict in favor of Dr. Chaudhry, awarding him $1.25 million for lost earnings in the past, $1.5 million for loss of future earning capacity, and $100,000 for intangible damages. Although Florida Hospital denies that it violated the Whistle Blower's Act and thus contends that Dr. Chaudhry was not entitled to any damages, it does not contest the amount of the past lost earnings or intangible damages. However, the trial court granted Florida Hospital's post-trial motion to set aside the future loss of earning capacity, agreeing with Florida Hospital's argument that only speculative opinion testimony, rather than competent substantial evidence, was presented to the jury. We agree.

Here, the jury heard testimony from lay and expert witnesses regarding Dr. Chaudhry's possible damages which could include past lost earnings, future loss of earning capacity, and intangible damages. After he was fired, Dr. Chaudhry attempted to, but did not secure a position as a heart-lung transplant surgeon. Shortly before trial, he obtained a position as a cardiothoracic surgeon at a Kentucky hospital where his base annual salary was $500,000, compared to his $300,000 salary at Florida Hospital. The possible past lost earnings were not that difficult to ascertain and were arrived at through simple accounting and mathematics, with each side's expert arriving at similar figures.

However, whether Dr. Chaudhry suffered a loss of future earning capacity and, if so, what the amount of that loss was, led to the proverbial battle of the experts. "The purpose of [a loss of future earning capacity] award is to 'compensate a plaintiff for loss of capacity to earn income as opposed to actual loss of future earnings.'" *Volusia Cnty. v. Joynt*, 179 So. 3d 448, 450 (Fla. 5th DCA 2015) (quoting *W.R. Grace & Co.-Conn. v. Pyke*, 661 So. 2d 1301, 1302 (Fla. 3d DCA 1995)); *see also Auto Club Ins. of Fla. v. Babin*, 204 So. 3d 561, 564 (Fla. 5th DCA 2016) ("The amount of an award for loss of future earning capacity should be measured by the plaintiff's diminished ability to earn income in the future, rather than the plaintiff's actual loss of future earnings."). "The Florida Supreme Court has cautioned that a plaintiff may recover damages for loss of earning capacity only 'when such damages are established with reasonable certainty.'" *Rasinski v. McCoy*, 227 So. 3d 201, 204 (Fla. 5th DCA 2017) (quoting *Auto-Owners Ins. v. Tompkins*, 651 So. 2d 89, 91 (Fla. 1995)). While the fact that a plaintiff is making as much or more than he was making prior to an injury does not preclude him from asking for an instruction on loss of future earning capacity, "it certainly makes it more difficult" to

show economic loss. *Joynt*, 179 So. 3d at 451–52 (first citing *W.R. Grace & Co.-Conn.*, 661 So. 2d at 1303; and then citing *Long v. Publix Super Mkts., Inc.*, 458 So. 2d 393, 394 (Fla. 1st DCA 1984)).

Dr. Chaudhry's expert, Dr. Joseph Crouse, considered a variety of sources for surgeons' salaries. One data set was for transplant surgeons; however, that category did not distinguish between relatively lower salaries earned by kidney or liver transplant surgeons and the higher salaries earned by surgeons who performed heart, lung, or both heart and lung transplants. Thus, Dr. Crouse said that data set yielded an unrealistically low figure for somebody like Dr. Chaudhry who was a fellowship-trained surgeon who could perform heart and lung transplants as well as VAD procedures. Dr. Crouse considered another data set that reported the compensation of cardiovascular surgeons, which he explained would include surgeons performing heart-lung transplants like Dr. Chaudhry had been during his time at Florida Hospital. Finally, Dr. Crouse considered anecdotal data regarding the $1.5 million salary earned by Dr. Chaudhry's mentor at UCLA, a renowned physician who had thirty years surgical experience and was the chief of that institute's transplant program, together with the $800,000 salary of another surgeon at UCLA. Dr. Chaudhry, Dr. Crouse, and a member of Florida Hospital's administration all testified that given his termination from Florida Hospital and the passage of time when he was not doing transplant surgery, it was unlikely that Dr. Chaudhry would find future employment as a heart-lung transplant surgeon.

Dr. Crouse compared what Dr. Chaudhry was earning at his current Kentucky job with hypothetical salaries he might have earned as a heart-lung transplant surgeon. In order to prove a loss of future earning capacity, Dr. Crouse had to assume that but for his

termination, Dr. Chaudhry would have been compensated at the same rate as surgeons who were in the top ten percent earning strata of their specialties or who had obtained positions as director or chief of a heart-lung transplant program or institute. There was no competent substantial evidence to support Dr. Crouse's assumptions because Dr. Chaudhry had no such earnings history, no such demonstrated competency, he had never held any such leadership positions, and those few very high paying positions went to more senior surgeons.

It has long been the law in Florida that "the conclusion or opinion of an expert witness based on facts or inferences not supported by the evidence . . . has no evidential value." *Arkin Constr. Co. v. Simpkins*, 99 So. 2d 557, 561 (Fla. 1957). "It is equally well settled that the basis for a conclusion cannot be deduced or inferred from the conclusion itself. The opinion of the expert cannot constitute proof of the existence of the facts necessary to the support of the opinion." *Id.* Rather, "an expert's opinion must be based on facts or inferences supported by the record." *Chavez v. McDonald's Rest. of Fla., Inc.*, 108 So. 3d 1124, 1126 (Fla. 5th DCA 2013) (citing *Arkin Constr. Co.*, 99 So. 2d at 561). Expert opinion testimony not supported by the facts, evidence, and/or the record has no evidentiary value. *Friendly Frost Used Appliances v. Reiser*, 152 So. 2d 721, 723 (Fla. 1963). Furthermore, the suggestion that previously unachieved levels of performance and earnings may have been possible for the plaintiff but for the defendant's action, is no substitute for competent substantial evidence, when it is a mere, unproven possibility. *See Gonzalez v. Price,* 783 So. 2d 301, 301 (Fla. 5th DCA 2001) (finding "no evidence in the record" to support argument by plaintiff, a singer and dancer that continued to perform after her accident, that her accident "diminishe[d] her chance to become a star on

Broadway or in the movies" and that, "even assuming [this] extraordinarily speculative prospect," there was no evidence "on the amount of damages attributable to the accident").

Florida Hospital's financial expert, Paul Baumann, testified that Dr. Chaudhry at the time of trial was earning more at his job in Kentucky than he had at Florida Hospital. According to Mr. Bauman, Dr. Chaudhry was earning as much if not more than most transplant surgeons. All of this led Mr. Bauman to opine that Dr. Chaudhry suffered no loss of present or future earning capacity. Mr. Baumann relied on data from some of the same sources Dr. Crouse had consulted; however, he was forced to admit on cross-examination that he had no way of knowing if any heart or lung transplant surgeons were included in one group and that somebody with Dr. Chaudhry's background and training who was able to perform heart and lung transplants as well as VAD procedures would likely earn more than a kidney or liver transplant surgeon. Mr. Baumann also testified that he had not considered any anecdotal salary data even though there was a true scarcity of data concerning the compensation paid to surgeons engaged in heart, lung, heart and lung, and VAD procedures.[5]

Accordingly, we find no error in the trial court's post-trial order setting aside the jury's award of $1.5 million for future loss of earning capacity.

ISSUES FOR RETRIAL

[5] Dr. Chaudhry argues on appeal that the trial court abused its discretion in denying his request to Florida Hospital to produce Dr. Bittner's entire personnel file and all contracts between Dr. Bittner and the hospital. On the information available prior to trial, we find no abuse of discretion. However, we note that neither the trial court nor we were asked to consider whether Dr. Chaudhry would have been entitled to compel Florida Hospital to provide only Dr. Bittner's compensation figures.

The issues for retrial will be limited to whether Florida Hospital terminated Dr. Chaudhry in violation of the Whistle Blower's Act, and if it did, the amount of his past lost earnings, and his intangible damages.[6] Having failed during the first trial to introduce competent substantial evidence that he suffered a loss of future earning capacity, Dr. Chaudhry will not be given another opportunity to prove that aspect of his case on retrial, as to do so would be to permit the impermissible second bite at the apple. *See Van Der Noord v. Katz*, 481 So. 2d 1228, 1230 (Fla. 5th DCA 1985).

MOTIONS FOR ATTORNEY'S FEES

Both parties also move for attorney's fees. However, given that we are remanding this cause for retrial, neither party is at present entitled to attorney's fees. We therefore deny both motions.

AFFIRMED IN PART, REVERSED IN PART, REMANDED FOR NEW TRIAL WITH INSTRUCTIONS.

COHEN and WALLIS, JJ., concur.

[6] Although the amounts of Dr. Chaudhry's past lost earnings and intangible damages were not contested on appeal, whether or not they continued to accrue beyond the date of the last trial must be either agreed upon or litigated.