Special Report From

Ben Glass Law

"How Not Revealing a Complete Medical History Resulted in a Personal Injury Case Being Thrown Out of Court"

Report Provided by:

Benjamin Glass
BenGlassLaw
3915 Old Lee Highway 22B
Fairfax, VA 22030

703-591-9829

Interesting Notice:

This special report on

"How Not Revealing a Complete Medical History Resulted in a Personal Injury Case Being Thrown Out of Court"

is provided as a public service. The information is drawn from a reported legal case which we believe may be of value to personal injury claimants here in Virginia. No representation is made that Benjamin Glass was the attorney of record in this case. No representation is made that any result obtained in the case can be obtained in your case. Each case is different and even though everyone currently living on earth knows this, the regulators still make me say it because they think most people are dumb.

I know you aren't dumb.

Ben Glass is an attorney in Virginia. You can reach him via his website at www.BenGlassLaw.com.

Ben Glass is the author of

The Truth About Lawyer Advertising, a Consumer Guide to Finding the Right Lawyer for Your Case Every Time. Visit www.TheTruthAboutLawyerAdvertising.com for more information.

Why You Should Read this Free Report

In my book, Five Deadly Sins That Can Wreck your Virginia Accident Case (www.TheAccidentBook.com) I make the point that you have to be brutally honest with your attorney regarding your past medical history. In this free report we attach the excerpts from a case, Timothy Call v. Nathan Harrison, Jr. et. al. (5:12cv00008, Western District of Virginia) where a federal judge threw a case out of court when he found that the plaintiff who had been injured in an accident grossly misrepresented his medical history.

Accident Tip: make sure you fully disclose your full medical history to your attorney. A failure to do so can result in serious legal sanctions, including dismissal of your case.

S.E.2d 26, 30 (1948) (citing McGowan v. Tayman, 144 Va. 358, 368 (1926); Otey v. Blessing, 170 Va. 542, 552, 197 S.E. 409, 413 (1938); Bloxom v. McCoy, 178 Va. 343, 348, 17 S.E.2d 401, 403 (1941)). The circumstances of this case simply afford no suggestion of a breach of this standard. There is no evidence that Harrison was aware the drive shaft had fallen off his truck before Call ran over it. As such, no reasonable jury could find that he negligently failed to warn Call or otherwise acted unreasonably.[2] Summary judgment is therefore appropriate.

III.

Even had the facts of this case created a jury issue, it must be dismissed for an additional reason. It is clear to the court that during the discovery process, plaintiff Call did not disclose the full extent of his prior medical condition. Call's failure to disclose so tainted the discovery process that the court has no choice but to dismiss this case.

A.

Call claims that he injured his neck and left shoulder when his car ran over the drive shaft. When asked about pre-existing medical conditions in written interrogatories, Call's sworn response identified only GERD.[3] Def. Sanctions Br., Dkt. # 51, Ex. A, at ¶ 9. When asked to identify medical practitioners providing any treatment in the ten years prior to the accident, Call identified four: Julie Landrio, M.D., Internal Medicine Consultants (indicating that she was his

---

[2] There are no applicable statutes suggesting a contrary conclusion. Call cites a criminal statute, Virginia Code § 18.2-324, but it has no application here. As the Virginia Supreme Court noted in Kimberlin v. PM Transport, Inc., 264 Va. 261, 270-71, 563 S.E.2d 665, 670 (2002), that statute cannot provide a presumption of negligence in a civil case where, as here, there is no evidence that Harrison acted intentionally in dropping the drive shaft on the highway. Nor can any liability be predicated upon Virginia Code § 46.2-888, which generally prohibits stopping on a highway in such a manner as to impede or render dangerous its use. As the Kimberlin court noted "the statute, by its express terms, does not apply 'in case of an emergency, an accident, or a mechanical breakdown.'" 264 Va. at 270, 563 S.E.2d at 670.

[3] GERD is gastroesophageal reflux disease, which is a chronic condition caused by stomach acid coming up from the stomach into the esophagus. It bears no relation to the musculoskeletal injuries Call claims he suffered in this accident.

primary care physician); Catherine S. Smith, M.D., Shenandoah Head & Neck Specialists, PLC (indicating that she treated him for GERD); James E. Gardiner, M.D., Winchester Gastroenterology Associates (indicating he performed a colonoscopy); and Richard Taliaferro, his dentist. Def. Sanctions Br., Dkt. # 51, Ex. A, at ¶ 13.

Call was deposed on June 14, 2012. At that deposition, defense counsel asked Call a more inclusive question about the physicians he had seen "for any reason whatsoever at any time from 1989 till [sic] today here in Winchester or anywhere else." Def. Sanctions Br., Dkt. # 51, Ex. B, at 54. Call replied, "I can't recall all their names, but I think I listed those in my interrogatories." Id. Restating Call's answer to the interrogatory referenced above, defense counsel asked:

> Q. I have Dr. Landrio, Catherine Smith and Shenandoah Head and Neck Specialist, James Gardner [sic] at Winchester Gastroenterology Associates, and Richard Tolliver [sic], your dentist. Is that right?
>
> A. Yes.
>
> Q. Can you think of any other physicians or medical professionals you had seen at any time between 1989 and February of 2010 for any reason other than those four that we have listed here in answer to interrogatory number 13?
>
> A. I think there was a dermatologist and I cannot remember her name.

Id. at 54-55.

Three months later, a different picture of Call's prior medical history began to emerge. During the deposition of Call's primary care physician, Dr. Landrio, on September 4, 2012, Call's counsel attempted to cross-examine Dr. Landrio with medical records from a practice group, Internal Medicine Specialists, that Call had not identified. Not only had Call not identified this practice group in his discovery responses, the medical records Call's counsel

sought to introduce at the deposition had not been produced in discovery.[4] Def. Sanctions Br., Dkt. # 51, Ex. E, at 56-59.

These medical records, produced for the first time at Dr. Landrio's deposition, were a revelation to the defendants. These records identified treatment of Call by numerous other doctors, including rheumatologist Gregory Kujala, M.D., for chronic bone and joint pain prior to the accident in this case. Defendants subpoenaed medical records from eleven previously undisclosed treating providers as a result of the disclosure of these records at Dr. Landrio's deposition. Responses to these subpoenas revealed an additional eight undisclosed providers. None of these providers were identified by Call in his deposition. Records from these providers documented Call's extensive treatment history for joint and bone pain. As noted previously, Call did not disclose this condition in his sworn interrogatory answers or any supplemental answers. Nor did he disclose this condition in his deposition testimony. Defense counsel asked:

> Q. Prior to February, 2010, did you have any medical conditions, diagnosed medical conditions for which you have been receiving treatment or testing or any kind of consultations from any healthcare provider?
>
> A. It seems there was something with Dr. Landrio. I believe she classified it as Fibromyalgia and with a change in habits and a better exercise program and that went away.
>
> Q. And that was sometime before February 2010?
>
> A. It was in the early 90s.
>
> Q. Early 90s. Any other medical conditions that you had been treated for or diagnosed with at any time prior to 2010?
>
> A. Not that I recall.

[4] These previously unproduced medical records from Dr. Landrio included records from within the last ten years, which defendants explicitly had requested in their Request for Production of Documents. See Def. Sanctions Br., Dkt. # 51, Ex. D, at ¶ 3.

Def. Sanctions Br., Dkt. # 51, Ex. B, at 57-58. In contrast to his deposition testimony, Call's medical records paint a rather different picture, that of long-term, ongoing complaints of joint and bone pain.

In a similar vein, Call was questioned exhaustively at his deposition about whether he had ever had any left shoulder pain in the past:

> Q. Okay. Had you ever had any left shoulder pain before the accident that occurred on February 16th, 2010?
>
> A. No.
>
> Q. Had you ever injured your left shoulder in any way before February 16th, 2010?
>
> A. Not that I can recall.
>
> Q. Did you complain to any medical professional about left shoulder pain at any time before the February 16th, 2010 accident?
>
> A. Not that I recall.
>
> Q. Had you ever experienced left shoulder weakness, tingling, pinching, anything like that at any time before the February 16th, 2010 accident?
>
> A. Not that I recall.
>
> Q. Is there anything that would affect your ability to remember whether or not you had left shoulder problems before this accident in February, 2010?
>
> A. Not that I'm aware of.

Def. Sanctions Br., Dkt. # 51, Ex. B, at 90-91. Medical records obtained by subpoena after the Dr. Landrio deposition indicate the contrary:

- "He has had a left-sided injury in the past and this may be musculoskeletal pain,"

  Def. Sanctions Br., Dkt. # 51, Ex. I;

- "[F]or six months now a history of myalgias with some morning stiffness, generalized muscle tenderness and pain, most prominent today on the left side," Def. Sanctions Br., Dkt. # 51, Ex. Q;
- "Intense episodic" shoulder pain which Call described "like a pry bar in there," Def. Sanctions Br., Dkt. # 51, Ex. R;
- Call complained of "stiffness in his lower back and some mild back pain and a headache," Def. Sanctions Br., Dkt. # 51, Ex. S, following a February 20, 2001 rear end car collision;
- "Slipped and wrenched shoulder" while using sledge hammer to repair mailbox, Def. Sanctions Br., Dkt. # 51, Ex. T.

It is difficult to reconcile Call's deposition testimony with the length and breadth of his medical history reflected in his medical records.

Even if the previously referenced inconsistencies could be chalked up to a failed recollection, Call's discovery failures prove inexcusable given the significant impact his health condition has had on his career. In the 1990s, Call worked as an air traffic controller with the Federal Aviation Administration ("FAA"). When questioned about any work-related injuries Call had experienced from 1980 to 2012 that required him to seek medical treatment, Call testified only that:

> I had a muscle spasm in my neck or upper shoulder from leaning over a radar scope somewhere in the 90s and the muscle just locked up and I had to seek treatment for that, but I have never had any other issues as far as that.

Def. Sanctions Br., Dkt. # 51, Ex. B, at 33. Call testified that he only treated with Dr. Landrio one time for this condition, and that "[s]he possibly wrote [him] a scrip," but noted that the fact he could not remember "would mean that [he] didn't even fill it." Id. at 34-35.

Contrary to this testimony, Call in fact was disqualified as an air traffic controller due to his medical condition and the medications he took for that condition. Dr. Kujala's office notes from October 18, 1996 paint a rather different picture of the impact Call's medical condition had on his work:

> 10/18/96 Mr. Call called to ask we disqualify him for current position as Air Traffic Controller in order to get another job in the agency. He said: 1) His pain causes distraction & forgetfulness. 2) That he cannot sit in front of radar screen for long periods. 3) That he does not appear to be getting better. I agree.

Def. Sanctions Br., Dkt. # 51, Ex. V. In a letter to the FAA's Regional Flight Surgeon dated October 22, 1996, Dr. Kujala repeated these references to Call's continuing symptoms from his notes. His letter continued as follows:

> I agree with these statements and have demonstrated his continuing to have tender points on exam. He still complains of being extremely stiff and that simple activities such as stretching his legs cause pain. He still has pain in multiple areas of his body and is waking up 3 to 4 times a night despite fairly aggressive medications . . . each evening.
>
> On September 26th when I last saw him . . . I felt that his sleep was still disordered and he still had Fibromyalgia based on his exam which demonstrated multiple tender sites with a normal joint exam and normal strength. It is my opinion that he is unlikely to improve in the near future and there is no guarantee that he will ever improve completely. I have been concerned throughout the time that I have known him that his symptoms have been distracting him and decreasing his ability to perform his duties which are understandably quite stressful where attentiveness is critical.

Def. Sanctions Br., Dkt. # 51, Ex. W.

Call failed to disclose Dr. Kujala and more than a dozen other treating physicians in deposition testimony. Even if there was a plausible explanation for that failure, it is inconceivable that Call simply forgot about a medical condition that was significant enough to cause him to seek a medical disqualification from his position as an air traffic controller. Given these facts, the court reaches the inescapable conclusion that Call failed to disclose the full extent of his prior medical condition and treatment in discovery in this case.

B.

"[W]hen a party deceives a court or abuses the process at a level that is utterly inconsistent with the orderly administration of justice or undermines the integrity of the process, the court has the inherent power to dismiss the action." United States v. Shaffer Equip. Co., 11 F.3d 450, 462 (4th Cir. 1993). The rule in Shaffer was applied in a similar context in Sprester v. Jones Motor Co., No. 5:05cv00021, 2006 U.S. Dist. LEXIS 16427 (W.D. Va. Apr. 4, 2006). In Sprester, plaintiff claimed injuries to her back resulting from a motor vehicle accident. Similar to Call's testimony in this case, Sprester testified in deposition that she had not received any medical attention for her back for the nine years preceding the accident. Following her deposition, however, defense counsel obtained medical records detailing Sprester's years of treatment for her previous back injury. Finding that Sprester's misrepresentations as to her medical history tainted the deposition testimony of medical experts and profoundly stymied defendant's ability to prepare for trial, the court found that Sprester committed a fraud on the court and dismissed the action. See also Holmes v. Wal-Mart, No. 1:10cv75, 2011 U.S. Dist. LEXIS 46020 (E.D. Va. Apr. 27, 2011) (plaintiff's claim for compensatory damages stricken where plaintiff provided false testimony concerning her medical condition).

While a federal court's inherent power to sanction includes the power to dismiss a case in its entirety, the Fourth Circuit has emphasized that courts must exercise this authority with restraint. See Shaffer, 11 F.3d at 462. Thus, in the Fourth Circuit, before a court can dismiss a case for "fraud on the court" or abuse of the litigation process, the following six factors must be considered: (1) the degree of the wrongdoer's culpability; (2) the extent of the client's blameworthiness if the wrongful conduct is committed by its attorney; (3) the prejudice to the judicial process and the administration of justice; (4) the prejudice to the victim; (5) the availability of other sanctions to rectify the wrong by punishing culpable persons, compensating harmed persons, and deterring similar conduct in the future; and (6) the public interest. Id. at 462-63.

Application of these factors to this case compels the conclusion that dismissal is not only warranted, but necessary. First, Call's failure to disclose his prior medical condition is plain. Second, Call cannot blame this failure on his counsel as it stems from his own deposition testimony. Third, Call was asked under oath to detail his prior medical providers and medical condition. He did not do so. Our system of justice cannot work unless that oath is enforced and parties are held accountable when it is violated. Fourth, until the end of the discovery period, defendants operated under the assumption that Call had no prior shoulder or musculoskeletal issues. Only after the depositions of Call, his spouse, Dr. Landrio and Dr. Schuler were taken did defendants become aware of the full extent of Call's prior problems. Defendants' expert, Dr. O'Brien, likewise was not aware of Call's prior medical history. Given the fact that the true nature of Call's medical condition was not revealed until the end of the discovery period, the depositions that were taken would have to be repeated at great time and expense. Fifth, given the peculiar circumstances of this case, the court cannot fashion a remedy short of dismissal that is

appropriate. In short, Call cannot expect to ask this court to enter a judgment awarding him damages for personal injuries after failing to reveal the nature and extent of his relevant prior medical history. The public interest is not served by allowing this case to go forward under these circumstances.

IV.

In sum, the court concludes that this case must be dismissed with prejudice. Plaintiff has no evidence to suggest that the failure of the u-joint and dislodging of the drive shaft were due to any negligence on the part of defendants, nor could any reasonable jury conclude that Harrison knew the drive shaft had fallen off his truck and was on the highway before Call's car ran over it. Finally, Call's failure to disclose the full extent of his prior medical condition under oath also warrants dismissal. A separate Order will be entered to that effect.

Entered: November 30, 2012

/s/ Michael F. Urbanski

Michael F. Urbanski
United States District Judge