

Plaintiff Caught, PLAINTIFF PUNISHED

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A Federal judge granted our motion and dismissed with prejudice a plaintiff's personal injury claim upon finding that she misstated her pre-accident medical history. The judge then awarded to the defendants the attorney fees they incurred during the course of the litigation.

This ruling on our motion transforms what has far too frequently become a game of "catch me if you can" into a situation in which the plaintiff has a significant downside. This case provides precedent for punishing the "caught" plaintiff and making him pay for his transgressions.

This decision was noted in the state legal publications. More importantly, it sent rumblings through the plaintiffs' bar, putting them on notice of the consequences of full and accurate disclosure of prior medical conditions.

Facts of the Case

The basic facts of *Sprester v. Jones Motor Company and Larry K. Bell*, 2006 U.S. Dist. LEXIS 16427 (W.D.Va. 2006) are not unusual. Plaintiff's vehicle came in contact with Defendants' tractor trailer while both were traveling down an interstate highway. Plaintiff brought an action, claiming that she was injured in the accident

Plaintiff received numerous treatments and examinations. Significant medical expenses were attributed to this accident.

She admitted to a prior accident in which she suffered injuries to the same area of the body. However, during her deposition she testified under oath that she had not had any complaints to that area of the body for five years prior to the accident at issue. She

further denied, under oath, any treatment within the last nine years.

Earlier on the day of her deposition, Plaintiff was examined by Defendants' medical expert. In response to that doctor's inquiry, Plaintiff gave the history of having been involved in a motor vehicle accident a number of years prior to this accident. She admitted to the examining doctor that she suffered an injury in that earlier accident.

However, the plaintiff told the examining doctor that the symptoms of that prior accident had completely resolved years prior to the accident at issue. She again denied any medical treatment for that condition for a number of years prior to the accident in this suit.

Defendants' medical expert prepared his expert report based upon the information and history provided by the Plaintiff. This included her representations about the prior accident and her condition since that accident.

Plaintiff subsequently served responses to Defendants' interrogatories. In response to one interrogatory, Plaintiff again admitted being involved in an automobile accident 10 years ago, but denied "suffering from any symptoms involving those parts of her body immediately prior to the subject occurrence."

In response to another interrogatory seeking the names of Plaintiff's medical providers for the 10 years prior to the accident, Plaintiff referenced certain pages of her deposition. Nowhere in her answers to interrogatories did Plaintiff disclose the ongoing treatment for complaints to the area of the body claimed injured in the more recent accident.

Plaintiff then began to prepare her case for trial. She proceeded to take the depositions of her medical experts without having corrected her statements regarding her medical history. The videotaped depositions of her three medical experts were taken for use at trial. The testimony of these experts was based upon an inaccurate medical history provided by Plaintiff.

One of her treating physicians testified that Plaintiff did not indicate any previous complaints or treatment. The physician noted that records indicated she had an injury from way back when that left no sequelae.

That same evening, Plaintiff took the deposition of another treating doctor, again without having corrected her medical history. This doctor testified that he was not told of any chronic problems by the Plaintiff or any prior symptoms similar to those claimed in this case. He further admitted that the medical history for her first visit did not contain any notation of prior problems to this part of the body despite including numerous other maladies and procedures.

Plaintiff then took the deposition of her third medical expert who had examined her at the request of Plaintiff's counsel. This medical expert was provided with the records of her treatment after the accident that was at issue, but not with the records of her prior treatments. This third medical expert did note that she gave a history of being involved in an accident ten years prior.

After the taking of these depositions for trial, Defendants eventually obtained medical records from a prior treating physician. This physician was located across the country from where Plaintiff resided at the time of the

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accident. She had relocated less than one year prior to the accident.

These records revealed that Plaintiff sought treatment from this doctor over a significant period of time for complaints to the part of the body she claimed was injured in the accident. Those treatments continued until just ten months before the accident at issue.

Her complaints to that doctor at her last visit were virtually identical to her post accident complaints. Further, these pre-accident complaints were the same as her complaints when examined by Defendants' medical expert.

Motion to Dismiss for False Information

Upon receipt of these records contradicting her pre-accident medical history, we filed a Motion to Dismiss Plaintiff's action with prejudice.¹ We contended that the opinions of her experts which Plaintiff intends to present to the jury were based on this false information.

We also asserted that we were denied the ability to cross-examine her trial experts because of her failure to provide accurate information. We further argued that we were denied the opportunity to perform follow-up discovery on other providers identified in these records.

We requested that the Court dismiss Plaintiff's action based upon the inherent power of federal courts to sanction a party which abuses the judicial process and Fed.R.Civ.P. 37(b). We supported our position with a line of authority that provides a foundation for the dismissal of actions by plaintiffs who seek to benefit by withholding information or providing false information.

Legal Authority for Dismissal for False Information

The Supreme Court has recognized that federal courts have the

inherent power to sanction a party for conduct that abuses the judicial process. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46, 115 L.Ed. 2d 27, 111 S.Ct. 2123 (1991). It has further recognized that the sanction of dismissal is available to a district court not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to engage in such conduct in the absence of a deterrent. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 49 L.Ed. 2d 747, 96 S.Ct. 2778 (1976)(per curiam).

Courts have recognized that the sanction of dismissal is particularly warranted where a party's misconduct involves evidence and information that is central to the case. See *Penthouse International, Ltd. v. Playboy Enterprises, Inc.*, 663 F.2d 371 (2nd Cir. 1981). As the Supreme Court stated in *Chambers*:

[I]f a court finds 'that fraud has been practiced upon it, or that the very temple of justice has been defiled,' it may assess attorney's fees against the responsible party [citation omitted] as it may when a party 'shows bad faith by delaying or disrupting the litigation or by hampering enforcement of a court order.

501 U.S. at 46. A party's misconduct that involves the discovery process is within the penumbra of the court's authority and adversely effects the judicial system and militates towards dismissal. *Skywark v. Isaacson*, 1999 U.S. Dist. LEXIS 23184 (S.D.N.Y. 1999), *aff'd*, 2000 U.S. Dist. LEXIS 1171 (S.D.N.Y. 2000).

In *Skywark*, the magistrate reviewed the facts, finding that plaintiff was not truthful in his deposition testimony or truthful to experts retained by either party. She further found that the plaintiff failed to produce medical records and carefully searched through records and withheld medical records which were unfavorable to his

claim for damages and which would have exposed his misstatements. In doing so and through the submission of his settlement brochure and expert report, "plaintiff concealed his true medical and vocational history to both defendants and the Court at the July settlement conference." *Skywark*, 1999 U.S. Dist. LEXIS 21184 at 22 (note omitted). The magistrate recommended the dismissal for fraud be granted by the court.

The court affirmed the dismissal of the action. *Skywark*, 2000 U.S. Dist. LEXIS 1171 (S.D. N.Y.). However, the court in that case declined to impose additional sanctions.

The cumulative authority authorizes and warrants the dismissal of a party's action where there have been abuses of the discovery process. It was this authority that was the basis of our motion.

Court's Decision

A hearing was held on the Motion to Dismiss. We established a factual record with the submission of the depositions of Plaintiff and her doctors, as well as the report and deposition of defendants' expert, and the records that undermined the medical history she represented. The record contained the Plaintiff's representations, the reliance by the medical witnesses, and the documentation of the prior history

The Court was presented with a trial scheduled to occur in several days in which all of the medical testimony was based upon an erroneous factual basis. The Judge noted that a trial under such circumstances and based upon such evidence would be a "charade."

Plaintiff was not in attendance, but was represented by counsel. The Court issued an order to show within thirty days why the court should not dismiss her action and impose sanctions. Plaintiff's counsel filed a response on the last day that he had notified her of the Court's order but that she failed to communicate with him regarding the response.

The Court dismissed Plaintiff's case with prejudice. It stated that "[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." Sprester, 2006 U.S. Dist LEXIS 16427 at 3 (quoting *U.S. v. Shaffer Equipment Co.*, 11 F.3d 450, 462 (4th Cir. 1993)). It further noted, "Under the circumstance, the court also possesses the 'inherent power' to shift attorney fees and costs to the offending party." Sprester, at 2006 U.S. Dist. LEXIS at 3 (quoting *Chambers*, 501 U.S. at 44-51).

The Court then commented on its review of the factual record submitted at the hearing. "The court has reviewed [Plaintiff's] deposition testimony and the relevant medical evidence and can arrive at only one conclusion—[Plaintiff] has committed a fraud on this court." Sprester, 2006 U.S. Dist LEXIS 16427 at 3. (note omitted).

The Court then dismissed Plaintiff's action. "Because of the nature and seriousness of [Plaintiff's] misrepresentations and the prejudice they caused the defendants, the court finds that dismissal with prejudice is warranted." *Id.*

Defendants were "directed" to submit affidavits as to their attorney fees and costs. This was done. The court ultimately assessed these fees and costs against the Plaintiff.

Conclusion

The holding in *Sprester v. Jones Motor Company* provides precedent for seeking serious sanctions against plaintiffs who are less than forthcoming about their pre-accident medical condition. This provides a basis for transforming such conduct from "catch-me-if-you-can" to a fatal finding with financial consequences. 

Endnotes

1. Doug Marcello of Marcello & Kivisto, LLC acted as lead counsel with the assistance of Jay O Millman of Brenner, Evans & Millman, P.C., Richmond, Va. as local counsel in this matter.