

**IN THE CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT**

TROY SMITH

PLAINTIFF

*(severed from Charles Ruth, et al. v. Lincoln Electric Co., et al.;
Cause No. 251-01-960)*

v.

CAUSE NO.: 251-05-1082

LINCOLN ELECTRIC CO., et al.

DEFENDANTS

**DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S
COMPLAINT WITH PREJUDICE**

Defendants respectfully request that the Court dismiss Troy Smith's claims with prejudice as a sanction for feigning physical symptoms in an attempt to fool his own expert and ultimately to deceive the Court.

As set forth below, plaintiff claims to be disabled by a neurological impairment caused by welding fume exposure. At his deposition, plaintiff testified under oath that he cannot walk without losing his balance. (Dep. of Troy Smith 224:4-7, Apr. 10, 2006 ("Smith Dep.") (attached as Ex. 1) (Q. "You're able to walk around okay, aren't you?" A. "Well, not really. I lose my balance out there.")) In addition, plaintiff submitted to a videotaped neurological exam by his own medical expert less than two weeks before the original date set for his trial, in which he constantly falls, is unable to hold a cup in his right hand, and cannot fold a piece of paper because of an apparently severe tremor. However, defendants have now obtained surveillance videotape, taken over the course of several weeks,

in which Mr. Smith drives to the post office, exits his vehicle, walks without impairment, climbs stairs, uses his right hand to put mail in his pocket, tosses a glass bottle in his right hand and otherwise acts in a manner directly contrary to the apparent severe disabilities he displayed while being examined by his expert neurologist. Observing the two videos makes it clear that Mr. Smith misrepresented his alleged condition for purposes of his videotaped neurological exam, with full knowledge that the doctor conducting the exam would be testifying on his behalf at trial.

Accordingly, defendants respectfully move the Court to dismiss plaintiff Smith's claims with prejudice as a sanction for his dishonest conduct.

BACKGROUND

Plaintiff Troy Smith alleges that “[a]s a direct and proximate result of exposure to welding fumes, he has suffered permanent neurological and physical damage, *severe physical and mental pain*, loss of wages, loss of earning capacity, *disability*, medical expenses, and loss of enjoyment of life.” (Third Am. Compl. ¶ 15, *Smith v. Airgas-Gulf States, Inc.*, No. 251-05-1082, Mar. 24, 2006 (“Third Compl.”) (emphasis added).) Plaintiff's expert neurologist, Dr. Paul Nausieda, examined Smith and concluded that plaintiff was suffering from “manganese poisoning with central nervous system involvement.” (See Paul A. Nausieda, *Troy Smith Examination* at 2, July 14, 2006 (attached as Ex. 2).) Nausieda opined that Smith “has a rest tremor of the right hand that was continuous, along with a

moderately severe antigravity tremor bilaterally which was worse on the right.” (*Id.* at 1.) Nausieda also described Smith’s handwriting as “show[ing] a severe tremor artifact” that generates “a signature [that] is unreadable.” (*Id.*) According to Nausieda, Smith “is slow enough and has sufficient abnormalities in fine motor coordination that I think handyman services are justifiable.” (Dep. of Paul Nausieda, M.D. 16:7-10, Aug. 31, 2006 (“Nausieda Dep.”) (attached as Ex. 3).) Nausieda also testified that Smith has “got some trouble getting up from a seated position” (*id.* 19:11-12) due to his allegedly welding-related impairments.

At his April 10, 2006 deposition, Smith testified that he has had a “tremble” in his right arm since “around [19]88.” (Smith Dep. 17:17-20.) According to Smith, he first sought treatment for this condition “probably around [19]89, [19]90.” (*Id.* 115:13-22.) Smith stated that he never goes as much as an hour without experiencing a tremor in his right hand. (*See id.* 169:6-9.) In addition to the right hand tremor, Smith alleges that he suffers tremors in his left arm and in his face. (*See id.* 217:6-11.) Smith also testified under oath that he is unable to walk or drive his car anywhere other than “around home.” (*See id.* 222:20-22; 224:3-7.) Smith further testified that he falls down “a lot” and stated that he falls “at least two times a day if I go out.” (*See id.* 261:6-14.) In sum, Smith complains that he suffers from “tremors . . . depression . . . a hard time remembering things . . . a hard time getting around . . . [and] a hard time ID’ing stuff.” (*See id.* 245:25-246:3.)

Smith testified that he can barely leave his home because of his allegedly welding-related injuries. (*See id.* 242:24-243:1 (Q. “How do you spend your time during the day now?” A. “Most of the time, just in my room.”).) He also testified that he avoids interacting with people because of his alleged condition, and that he is so disabled that he could not even go for a daily walk if he needed to. (*See id.* 243:3-11 (“[I]t’s embarrassing for people to see me in the shape I am in . . . like you are in a showcase somewhere”); *id.* 277:25-278:3 (emphasis added) (Q. “Have you asked [your doctors] whether [taking a daily walk] would be a good idea?” A. “No sir, I never asked them because I couldn’t go for a daily walk *if I had to.*”).) Based on these claims, Smith claims future anticipated medical expenses for his allegedly welding-related conditions totaling \$665,000. (*See Life Care Plan at 9 (attached as Ex. 4).*)

Dr. William Truly, a treating physician whom Smith identified as one of his testifying expert medical witnesses, conducted a videotaped examination of the plaintiff just weeks before the scheduled trial date. In that videotaped examination (attached as Ex. 5), Mr. Smith:

- Is apparently unable to fold a piece of paper due to a visible tremor in his right hand (Truly Video Clip 1);
- Appears unable to draw a pentagon on a piece of paper (Truly Video Clip 2);
- Repeatedly falls over when asked to put one foot in front of the other and walk down the hall (Truly Video Clip 3); and
- Shakes violently and uncontrollably when asked to hold a cup in his right hand (Truly Video Clip 4).

Defendants have now obtained surveillance video of Mr. Smith that refutes his claims of disability, indicates that his behavior during the neurological exam was fraudulent, and calls into question much of his testimony at his deposition. In that surveillance video, taken over the course of several weeks (also attached as Ex. 5), Mr. Smith can be seen:

- Crossing busy streets, traversing street curbs, and going up and down stairs, while running errands, without any apparent difficulty (Surveillance Video Clips 4, 6, 7, 8, 10, 11);
- Getting in and out of his truck (Surveillance Video Clips 7, 9);
- Tossing a glass bottle in his right hand (Surveillance Video Clip 2);
- Carrying his mail in his right hand (Surveillance Video Clips 4, 8);
- Putting papers into his pocket with his right hand (Surveillance Video Clip 5);
- Eating with his right hand while walking (Surveillance Video Clips 3, 5);
- Walking with others (Surveillance Video Clips 1, 7, 8, 10); and
- Opening and holding a door with his right hand (Surveillance Video Clip 4).

In short, the surveillance video of Smith's everyday life obtained by defendants is completely at odds with his behavior in Dr. Truly's office and his sworn deposition testimony, strongly indicating that the alleged symptoms presented in the videotaped neurological exam were feigned and intended to

influence the testimony of his medical experts.¹

ARGUMENT

Under Rule 37(b)(2)(C) of the Mississippi Rules of Civil Procedure, trial courts may impose sanctions “dismissing the action or proceeding or any part thereof” for false and/or misleading discovery responses. *Pierce v. Heritage Properties, Inc.*, 688 So.2d 1385 (Miss. 1997). In *Pierce*, the Supreme Court set forth four criteria for evaluating a motion to dismiss under Rule 37:

First, dismissal is authorized only when the failure to comply with the court’s order results from willfulness or bad faith, and not from inability to comply. Dismissal is proper only in [a] situation where the deterrent value of Rule 37 cannot be substantially achieved by the use of less drastic sanctions. Another consideration is whether the party’s preparation for trial was substantially prejudiced. Finally, dismissal may be inappropriate when neglect is plainly attributable to an attorney rather than a blameless client, or when a party’s simple negligence is grounded in confusion or sincere misunderstanding of the court’s orders.

Id. at 1398, citing *Baston v. Neal Spelce Assocs.*, 765 F.2d 511, 514 (5th Cir. 1985).

¹ Unfortunately, this is not the first time in this litigation that a plaintiff grossly exaggerated his alleged symptoms, apparently deceiving the very same plaintiffs’ counsel and neurologist. In the federal multidistrict litigation (“MDL”) welding fume proceeding, plaintiff Dewey Morgan was filmed driving his tractor and carrying groceries without a walker or any other assistance after claiming that he was completely disabled and required round-the-clock nursing care. There, as here, Dr. Nausieda examined the plaintiff, did not recognize that he was feigning his symptoms, and opined that Mr. Morgan had “an extrapyramidal movement disorder of severe proportions.” Ex. A to Rule 26(a)(2) Report of Dr. Paul Nausieda Regarding Dewey Morgan at 3, May 31, 2005 (attached as Ex. 6). Mr. Morgan subsequently dismissed his claims with prejudice.

In addition to Rule 37, Mississippi recognizes that the “power to dismiss is inherent in any court of law or equity being a means necessary to orderly expedition of justice and the court’s control of its own docket.” *Pierce*, 688 So.2d at 1398. According to the Supreme Court, this power to dismiss may be used, in the court’s discretion, “to impose sanctions for discovery abuse.” *Id.* (citing *White v. White*, 509 So. 2d 205, 207 (Miss. 1987)).

In circumstances analogous to this case, several Mississippi courts – including the Supreme Court – have determined that dishonest conduct on the part of a plaintiff warrants outright dismissal of his or her case. For example, in *Pierce*, the plaintiff claimed that she was injured by a ceiling fan that fell on her when she was in bed. She sued her apartment’s owner, the building’s management company, and the fan manufacturer. The plaintiff testified during trial and at her deposition, as well as in sworn interrogatory responses, that she was alone in the apartment when the accident occurred. It was subsequently discovered that a male companion was in the bed with her at the time of the accident. The trial court rejected plaintiff’s excuse that she did not intend to deceive the court, but instead, did not want her parents to know she had a male companion in her apartment at night, and found that the false testimony warranted dismissal with prejudice and assessment of costs as sanctions. The Mississippi Supreme Court affirmed, finding that the district court had properly exercised “its inherent power to protect the integrity of the judicial process” by dismissing the case. *Id.* at 1388. According to the court, this was because: (1) the plaintiff

willfully failed to comply with the discovery process by providing false answers constituting bad faith; (2) other lesser sanctions would not achieve the deterrent value of dismissal in that plaintiff would be allowed to “get away with lying under oath without meaningful penalty”; (3) “there is no requirement that the defendant be substantially prejudiced”; and (4) it “is most troublesome . . . that the neglect is plainly attributable to the [plaintiff].” *Id.* at 1391.

Two years later, the Mississippi Supreme Court again upheld dismissal with prejudice as a sanction for dishonest conduct in *Scoggins v. Ellzey Beverages, Inc.*, 743 So.2d 990 (Miss. 1990). The plaintiff in *Scoggins* was a 70-year old woman who sued a beverage company after she was injured in a grocery store when one of the company’s employees ran into her with a loaded dolly. The plaintiff claimed injuries to her foot, leg, and back. In her interrogatory responses and deposition, plaintiff denied ever having previously injured her foot, leg, or back. But plaintiff’s medical records revealed that she had seen doctors on 35 different occasions for problems with her leg, back, hip, and spine before her alleged injury. As a result, the trial court dismissed plaintiff’s case, rejecting her excuse that she was “an old woman who has been through a lot” and “did the best she could to remember everything.” *Id.* at 992.

Applying the factors set forth in *Pierce*, the Mississippi Supreme Court once again affirmed dismissal with prejudice, finding that: (1) the plaintiff willfully failed to comply with discovery requests by submitting false answers to interrogatories and deposition questions; (2) the trial court recognized its duty to

impose the least severe sanction available, but found no other available sanction that would accomplish the appropriate deterrence; (3) “although there is no requirement that the defendant be substantially prejudiced . . . by the plaintiff’s discovery violation . . . the trial court did consider [the] ‘major inconvenience in time, attorney fees and general frustration [of the defendant]’”; and (4) there was no evidence to suggest that plaintiff’s attorney was responsible for any neglect, and plaintiff’s claim of memory loss was not credible. *Id.* at 997. In so holding, the court made clear that “[a] trial is a proceeding designed to be a search for the truth.” *Id.* 994-95. Thus, when a party attempts to thwart such a search, the courts are obligated to ensure that such efforts are not only cut short, but that the penalty will be sufficiently severe to dissuade others from following suit.” *Id.* See also *Allen v. National R.R. Passenger Corp.*, 934 So.2d 1006 (Miss. 2006) (applying *Pierce* and *Scoggins* and holding that plaintiff’s failure to disclose his previous injuries and workers’ compensation claims during discovery and deposition established a pattern of untrustworthiness worthy of dismissal); *Gilbert v. Ireland*, 949 So.2d 784 (Miss. App. 2006) (finding dismissal the appropriate sanction under Rule 37 in a personal injury action where, *inter alia*, plaintiff claimed she lost her sex drive, yet medical records showed that she had sexual relations on the very day she testified).

Under the standard set forth in *Pierce* and *Scroggins*, this Court recently found dismissal appropriate pursuant to Rule 37 in *Blackwell v. St. Dominic Hosp.*, No. 251-05-889CIV (Cir. Ct. Miss. 1st Dist. May 23, 2007). Plaintiffs in

Blackwell filed suit against defendants (a doctor and a medical clinic), claiming that they were injured during surgery performed by the doctor. One of the injuries claimed was Mr. Blackwell's erectile dysfunction, which served as the basis for Mrs. Blackwell's loss of consortium claim. In sworn interrogatory responses, depositions and affidavits, plaintiffs alleged that Mr. Blackwell sustained "permanent impotence or erectile dysfunction" as a result of the surgery and that he had no erectile dysfunction before the surgery. However, Mr. Blackwell's medical records conclusively established that he had a long-standing history of impotence and erectile dysfunction prior to the surgery in question. Applying the four-factor test set forth in *Pierce*, the Court ordered dismissal of plaintiffs' entire claim. *Id.* at *5. In so doing, the Court rejected plaintiffs' contention that they were simply confused and did not try to mislead, finding that "to not even *mention* a decades-long history of prior impotency is at best only a half-truthful response, which are often times more deceptive than an outright falsehood." *Id.* The Court further noted that plaintiffs' offer to drop their claim of damages for erectile dysfunction was unpersuasive, as the evidence itself already barred such a claim, "such that plaintiffs will have been subject to no punishment for their deceptive responses if they are allowed to proceed with this action." *Id.*

Similar circumstances warrant dismissal of this case as well. Plaintiff Smith has claimed extensive injuries due to welding fume exposure, but defendants' investigation has proven that those claims are baseless. In his complaint, Mr. Smith has alleged that "[a]s a direct and proximate result of

exposure to welding fumes, the Plaintiff suffered permanent neurological and physical damage, *severe physical and mental pain*, loss of wages, loss of earning capacity, *disability*, medical expenses, and loss of enjoyment of life.” (Third Compl. ¶ 15 (emphasis added).) At his deposition, plaintiff testified under oath that he cannot walk without losing his balance. (See Smith Dep. 224:4-7.) (Q. “You’re able to walk around okay, aren’t you?” A. “Well, not really. I lose my balance out there.”) And during a videotaped neurological examination conducted by one of his medical experts, Mr. Smith repeatedly fell and was apparently unable to hold a cup or fold a piece of paper with his right hand. All of these claims and behaviors have now been revealed as fraudulent in surveillance videotapes obtained by defendants. In those tapes, plaintiff walks and drives with no difficulty, uses his right hand for a variety of fine motor activities and displays none of the disabilities that were so severely manifested in his videotaped neurological exam. Thus, under the four-part standard for dismissal set forth by the Mississippi Supreme Court, it is clear that Mr. Smith’s case should be dismissed as a result of his deceptive behavior.

First, Mr. Smith’s false portrayal of his injuries in the videotaped examination was clearly a bad-faith attempt to defraud the Court. Moreover, the surveillance video directly contradicts Mr. Smith’s testimony in his deposition that he could not go for a daily walk and was virtually confined to his house.

Second, a lesser sanction would not sufficiently deter plaintiffs from falsifying evidence. To the contrary, allowing Mr. Smith to go forward with his

claim would encourage other plaintiffs to feign symptoms in the hopes of obtaining large jury recoveries as a result of their supposedly severe injuries.

Third, Mr. Smith's conduct has materially prejudiced the defendants by forcing them to incur substantial expense investigating Mr. Smith's claims and conducting fact and expert discovery, all based on Mr. Smith's now-debunked claim of severe disability.

Finally, Mr. Smith's conduct is certainly not attributable to confusion or misunderstanding – the dramatic difference in his behavior in the two videos shows that he deliberately feigned neurological symptoms in the hopes of securing a favorable jury verdict.

In short, Mr. Smith appears to have fooled both his lawyers and at least two of his doctors into believing that he has a severe disability caused by exposure to welding fumes. And were it not for defendants' diligent investigation, he could well have fooled a jury as well.

CONCLUSION

Plaintiff has attempted to deceive defendants and the Court through his deposition testimony and by pretending to be severely disabled during a video that was created for purposes of his case. This Court should not tolerate or encourage such dishonest and opportunistic behavior. For the reasons set forth above,

plaintiff Troy Smith's case should be dismissed with prejudice.

Dated: October 25, 2007

Respectfully submitted,

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