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*Education for the Less Common Trucking Cases*

# Putting the Drivers's Medical Condition Into Issue

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# CURLING STRATEGIES FOR PUTTING THE DEFENDANT DRIVER'S MEDICAL/PSYCHOLOGICAL CONDITION IN ISSUE FOR DISCOVERY

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*Judge: Mr. Gold, in seventeen years on the bench, I have never seen a motion like this. I have never heard of anything like you are suggesting. I understand that in a personal injury case, the Plaintiff waives her privilege as to health care records relevant to the claims she has made. I get that. But, are you telling me that all a Plaintiff must do is allege the Defendant has some medical/psychological condition and that entitles the Plaintiff to wander around in the Defendant's health care records? Is that what you are telling me?*

*Mr. Gold: Not exactly.*

## INTRODUCTION

The purpose of this paper is not only to more fully answer the above question for the bench and bar, but also to provide practical guidance in integrating this concept into discovery practice, particularly in a catastrophic trucking case. We have not undertaken a comprehensive survey of all the states' rules of evidence regarding patient-physician and patient-psychotherapist privilege. We will use a Federal case applying Texas privilege law as our model. Our assumption is that since Texas' rule is statutory, most other states have similar statutes and that this concept developed under Texas practice is transferable to and applicable in other jurisdictions.

## CASE STUDY

We will use a case that we prosecuted against a DOT company and driver in the Eastern District of Texas a few years ago.

The Plaintiff was traveling from Marshall, Texas to a flea market in Canton Texas along Interstate 20 early in the morning hours around 4:30 a.m. At the time of the collision, the Plaintiff was going below the speed limit because he had recently seen deer on the highway in this location and wanted to be cautious. He was traveling in the outside lane. A tractor-trailer, came up behind the Plaintiff and violently collided with the rear end of the Plaintiff's vehicle, causing serious injuries to the Plaintiff.

Plaintiff filed suit and placed the Defendant driver's medical/psychological condition in issue and sent out written discovery following Defendants' initial disclosure required by the Court's Scheduling Order. The Defendants took the position that the Defendant driver had a current DOT medical certification at the time of the incident which foreclosed any discovery into his medical/psychological history and condition.

Plaintiff filed a motion to compel, arguing that the Plaintiff's pleadings placed the Defendant driver's medical/psychological condition place in issue and it was a significant part of Plaintiff's claim. Plaintiff was claiming not only that the Defendant driver was negligent and his employer vicariously liable for his negligent behavior, but that the employer was independently negligent and grossly negligent in allowing the Defendant driver to be driving with the driver's impairments.

A hearing was conducted, and Plaintiff was granted a medical authorization to obtain the various relevant medical records of the Defendant driver. Those records ended up revealing the real story about the driver's health condition and his employer's knowledge about his lack of qualifications to be driving their truck.

## The Pleading

Plaintiff made the following allegations in his original complaint:

- Defendant driver had a clear and unobstructed view of the situation described above with more than enough time and distance to avoid colliding with the rear end of Plaintiff's vehicle.

- Defendant driver's actions in colliding with Plaintiff's vehicle clearly reveal that Defendant driver wrongfully was engaged in activities that distracted him from his responsibility to keep a proper lookout or in the alternative that he did not have or take advantage of the full use of his physical or mental faculties.

- It is believed that Defendant driver, at all times relevant to his operation of the Company Rig, and particularly on the date in question, was not physically, medically, or emotionally competent to operate the Company Rig upon the public highways of the State of Texas.

Over the course of time, and after a lot of trial and error, we have refined our allegation to the following, which we believe very effectively places the Defendant driver's medical/psychological condition into issue:

- It further is believed that at all times relevant to his operation of the truck, and particularly on the date in question, Defendant driver was not physically, medically, or emotionally competent or fit to operate the truck safely. It is believed he was not operating the truck with the full use of his mental and physical faculties. In particular, based upon the facts of the reported collision, particularly that he traveled a considerable distance without perceiving a potentially hazardous condition, he ran a red light at a high rate of speed without braking, and collided with Plaintiff's vehicle on a clear day without any obstruction of his view and without observing other drivers stopped at the red light as he approached the intersection, it is believed Defendant driver was affected by one or more of the following conditions at the time of the collision: distraction, drowsiness, fatigue, drugs, medications that impair the senses, and/or one or more medical conditions that made him unfit to operate a motor vehicle as he was doing at the time of the incident in question.

**The Motion**

Our motion to compel argued that Texas privilege law should apply because the case was a diversity action and that the Texas rule of evidence on patient-physician privilege has a litigation exception that was applicable. We relied heavily upon the seminal case in Texas discussing and applying the litigation exception, ***R.K.v. Ramirez***, 887 S.W. 3d 836, 843 (Tex. 1994).

## ANALYSIS AND DISCUSSION

1. There are several primary legal considerations for successfully implementing the strategy we discuss in this paper:

A. In Federal Court, as in Texas state court, there is a liberal, broad scope of discovery so long as the discovery has any possible relevancy to the claims and defenses pled. Generally speaking, "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party." Fed. R. Civ. P. 26(b)(1). This includes anything "reasonably calculated to lead to the discovery of

admissible evidence." ***Coughlin v. Lee***, 946 F.2d 1152, 1158 (5th Cir. 1991). The party resisting discovery must show specifically how each request is not relevant or otherwise objectionable. *See* ***McLeod, Alexander, Powel & Apffel, P.C. v. Quarles,*** 894 F.2d 1482, 1485 (5th Cir. 1990).

B. Pleadings largely define the scope of discovery. *See,* ***In re Morgan***, 2016 WL 6462200 (Tex. App. – Houston [14th] 2016) and ***Booth v. City of Dallas and Officer Ryan Lowman***, 2015 WL 9259060 (N. D. Tex. Dallas Div. 2015. Unless and until that claim is dismissed, it remains in the case and discovery of information relevant to that claim is permissible. ***Kaiser v. Ortiz,*** 2010 WL 3419432 at *1 (W.D. Tex. San Antonio Div. 2010). Similarly, unless there are viable pleadings dealing with the area for which discovery is sought, the discovery inherently cannot be relevant to a pled claim. The Plaintiff must do more than make a conclusory claim that the Defendant driver's medical/psychological condition is implicated. **The test is not merely relevance.** The pleading must demonstrate that the Defendant's medical/psychological condition **is 'part' of a claim**. The pleadings must indicate that the jury must make a factual determination concerning the condition itself." ***R.K. v. Ramirez***, 887 S.W. 3d 836, 843 (Tex. 1994). *See also,* ***Progressive Casualty Ins. Co. v. Mahan*****,** 2011 WL 201460 at *2 (S.D. Tex. Brownsville Div. 2011). Moreover, "in order to fall within the litigation exception to the privilege, the condition itself must be of legal consequence to a party's claim or defense." *Id.* What does this mean? The passage below does a pretty good job of explaining it.

> The test is not simply whether the condition is relevant "because any litigant could plead some claim or defense to which a patient's condition could arguably be relevant and the privilege would cease to exist." ***In re Union Pac. R.R. Co***., 459 S.W.3d 127, 130 (Tex. App.–El Paso 2015, orig. proceeding.). Nor is the test satisfied "if the patient's condition is merely an evidentiary or intermediate issue of fact, rather than an 'ultimate' issue for a claim or defense, or if the condition is merely tangential to a claim rather than 'central' to it." ***Ramirez***, 887 S.W.2d at 842. Instead, the condition must be so central as to require the jury, as part of its determination of the claim or defense, to "make a factual determination concerning the condition itself." *Id.* at 843.

Essentially, the medical/psychological condition explains "why" the Defendant acted in the manner that he/she did. In order to answer the ultimate issue of negligence and responsibility, the jury must decide that the condition existed and indeed was a factor in the Defendant driver's negligence. This is important strategically because it thwarts the Defendant's anticipated "s--- happens" defense. If there was a condition that caused the Defendant driver to behave negligently, then the next inquiry is what should the driver's employer have known and done, and what did it actually know and do. This frames the case as a system failure rather than careless conduct by the Defendant driver, which is the best way often to frame the case.

The point of this discussion is that for a party to meet its burden of establishing relevancy for a discovery request, first and foremost, there must be a pleading as to which the requested discovery is relevant. Without such pleading, it will be difficult, if not highly unlikely, to meet the requisite burden.

C. Pleadings must have factual plausibility to withstand a 12(b)(6) motion to dismiss. ***Bell Atlantic Corp. v. Twombly,*** 550 U.S.544 (2007); ***Ashcroft v. Iqbal,*** 129 S.Ct. 1937 (2009).

> The factual allegations in the complaint need only "be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* (footnote and citations omitted). "[D]etailed factual allegations" are not required, but the pleading must present "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." ***Wooten v. McDonald Transit Associates, Inc.,*** 788 F.3d 490, 498 (5th Cir. 2015) citing ***Ashcroft v. Iqbal,*** 556 U.S. 662, 678, 129 S.Ct.1937, 173 L.Ed. 2d 868 (2009).

D. In a diversity action, a Federal court typically applies the privilege law of the state with the most significant contacts, more particularly the state giving rise to the claim. The "rule of decision, the privilege of a witness, person, government, State, or political subdivision" applies. Fed. R. Evid. 501 (2010). Texas has a patient/physician privilege, but there is a litigation exception Tex. R. Evid 509(e)(6): If any party relies on the patient's physical, mental, or emotional condition as a part of the party's claim or defense and the communication or record is relevant to that condition. ***Carr v. State Farm Mutual Automobile Insurance Company,*** 312 F.R.D. 459 (N.D. Tex. 2015).

E. F.R.E. 501.Under Federal law, privileges are disfavored, including the patient/physician privilege. The U.S. Supreme Court has recognized a patient/psychotherapist privilege. Therefore, in Federal court, even if the state with the most significant interest in a diversity action does not have a litigation exception, it is still quite likely the Plaintiff may obtain the Defendant driver's medical records (if not the Defendant driver's psychotherapist records, if any) relevant to a claim that the Defendant driver failed to operate his vehicle with the full use of his normal physical and mental faculties because of a medical/psychological condition. For an understanding about how the United States Supreme Court views testimonial privilege, read Justice Scalia's dissent in ***Jaffee v. Redmond*** 116 SCt. 1923 (USSC 1996) (the public is entitled to every man's evidence).

2. The Defendant driver's medical/psychological condition typically will only be placed in issue when the circumstances of the collision imply that the occurrence resulted from the Defendant driver not having the full use of his/her mental and physical faculties. Such circumstances exist when the evidence reveals that the Defendant driver did not perceive the conditions or did not react to the conditions in conformance with an individual having normal mental and physical faculties. **This is very important.** As stated above, merely pleading that the Defendant driver may have had a medical or psychological

condition at the time of the occurrence is probably not going to pass muster. The conditions of the occurrence must reasonably (plausibly) raise the inference that the Defendant must have had some condition that prevented him/her from timely perceiving and reacting to the existing circumstances with ordinary care.

3. Once the Plaintiff has persuaded the Court that there likely was a medical/psychological basis for why the Defendant driver negligently reacted the way he did relevant to the occurrence, the task expands to persuading the judge about the scope of the relevant discovery. In this regard, the Plaintiff needs to be prepared with legal or expert authorities to substantiate the breadth of discovery that Plaintiff is seeking. For example, the discovery requests need to be limited to those medical conditions and the treatment of same that in reasonable likelihood could cause or contribute to the Defendant driver not having the full use of his mental or physical faculties at the time of the occurrence. Just as with expert testimony, the argument cannot be simply theoretical or speculative. There must be a plausible nexus between the request and what it is that Plaintiff anticipates proving at trial. To be successful in this approach, the Plaintiff's attorney has to be well versed in the medicine and the medical literature.

4. In addition to properly identifying the various conditions that might be relevant to Plaintiff's claim, the Plaintiff needs to be prepared to identify and support a time period of relevant discovery. In other words, how far back in the Defendant's medical history is relevant to the Plaintiff's claims. Many times, the attorneys and the courts are arbitrary in choosing a time period. ***See, Reinhard Dreschsel v. Liberty Mutual Ins. Co.,*** 2015 WL 6865965 at *3 (N.D. Tex. Dallas Div. 2015):

> Discovery of information both before and after the liability period may be relevant, and courts commonly extend the scope of discovery to a reasonable number of years both prior to and following such period. *See* ***Beasley v. First Am. Real Estate Info. Svcs. Inc.*** No. 3-04-1059-B, 2005 WL 1017818 at *1 (N.D. Tex. Apr. 27, 2005). And courts have held that two to five years is an appropriate limitation for information regarding other employees in employment discrimination cases. *See Beasley, 2005 WL 1017818 at *1(two years);* ***Ellison v. Patterson-UTI Drilling Co.,*** No. V-08-67, 2009 WL 32471193, at 4 (S.D. Tex. Sep. 23, 2009) (five years).

In ***Progressive Casualty Ins. Co. v. Mahan*****,** 2011 WL 201460 at *2 (S.D. Tex. Brownsville Div. 2011) ten years was held to be too broad. Frequently, however, a lot more thought and strategy needs to be involved, so that you are not faced with an arbitrary time period that may or may not be helpful. Ideally what you are attempting to implicate and prove is that the Defendant driver's employer should have had processes in place during or before the Defendant driver's employment to identify potential "risk" conditions and to take appropriate action to effectively reduce or eliminate the risk or not put the driver behind the wheel of a commercial vehicle. So, oftentimes the relevant time period will at a minimum be the length of time the Defendant driver has been employed by the Defendant employer.

5. If you are successful in putting the Defendant driver's medical/psychological condition into issue, there is also the potential to have the driver undergo an adverse medical/psychological examination. The same rules apply to a request for a Defendant to undergo an adverse examination that apply to a request for a plaintiff to undergo such an examination.

6. Once you have obtained the complete relevant medical history of the Defendant driver, then qualified testifying experts can make the causal connections to the occurrence and can provide the needed testimony linking how if the employer had acted properly and with ordinary care in formulating and implementing appropriate systems that the conditions would have been timely identified and mitigated or the employer simply could have declined allowing the Defendant driver to operate a commercial vehicle at the time of the occurrence.

7. A recent Texas case has reviewed the argument that a current DOT medical certificate precludes further discovery into the Defendant driver's medical history and found the argument invalid. ***In re Kristensen***, Not Reported in S.W.3d, 2014 WL 3778903 (Tex. App. Houston [14th Dist.] 2014 arose out of a rear end truck collision. Plaintiff alleged that the Defendant driver was not qualified to operate a tractor-trailer under applicable federal regulations as part of Plaintiff's claim of negligence against the Defendants. Plaintiff sent a request for production to the Defendant driver seeking a medical records release authorization for a five-year period in order to obtain Kristensen's medical records pertaining to alcohol abuse, diabetes, and hypertension. Defendant objected merely that this request was outside the scope of permissible discovery. The Trial Court Ordered the production of the authorization. Defendants sought a petition for writ of mandamus arguing that Plaintiff had not put the Defendant driver's medical condition in issue and further that the Defendant had produced a medical certification for the Defendant driver which showed that he was qualified to drive. Defendant's petition was denied. While Defendant failed to sustain its burden as to whether the requested medical records were protected under the physician/patient privilege, the Court went on to discuss why the records were discoverable, the privilege notwithstanding. The Appellate Court found that the requested medical information formed a part of Plaintiff's alleged claims.

8. The Defendant's failure to specifically plead and prove an applicable privilege or otherwise demonstrate an articulated harm, should result in discovery of the Defendant driver's medical/psychological healthcare information relevant to the Plaintiff's claims for a period of time that Plaintiff can demonstrate is relevant to Plaintiff's claims. *See* ***Mumfrey v. CVS Pharmacy, Inc.***, 2011 WL 13196326 (E.D. Tex. Beaumont Div. 2011).