

Discovery violations prompt adverse inference order

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A doctor who lost his leg after emergency medical treatment in Mexico went badly will have his case heard by a jury that may be assisted by the consequences of what the court saw as serious discovery violations.

The plaintiff will have the benefit of several adverse inferences against defendant Assist America as a sanction for its refusal to provide the plaintiffs with the company's operations manual from the time when the accident occurred.

The defendant claimed it could not locate the manual.

"Dr. Tholen looks forward to having his day in court to seek justice and proving his case against Assist America. Assist America will now need to answer the allegations and evidence to a jury at trial," said his attorney, Patrick Arenz.

The attorney for Assist America could not be reached for comment.

Defendant's 'tactics'

When a zip-lining expedition went wrong and plaintiff Richard Tholen dislocated his knee, he asked Assist America to get him back home for medical care. Assist America, an organization of which Tholen is a member, provides global emergency medical services, including evacuation.

But not in this case. Assist America refused assistance, saying the treatment he was receiving was sufficient, forcing Tholen, himself a medical doctor, to get himself home on a commercial flight. A month later, his leg was amputated above the knee.

Tholen's lawsuit sounds in both negligence and breach of contract. U.S. District Court Judge Donovan Frank last week denied the defendant's motion for summary judgment and upheld the sanctions ordered by Magistrate Judge Steven Rau last April.

Moving for summary judgment, Assist America argued that it should not be held to a professional standard of care for negligence purposes. It also has maintained that Tholen cannot establish that any action or inaction on its part resulted in the



Judge Donovan Frank

amputation of his leg because it is impossible to pinpoint when the leg could no longer be saved and that punitive damages are not available without an independent tort.

It also argued that it did not have a duty outside of the contract, an argument Frank rejected because the existence of a contract does not preclude the existence of an independent duty.

Summary judgment is inappropriate as to foreseeability and duty, Frank said. He said that "it is clear that Tholen has alleged facts that could reasonably lead to the conclusion that Assist America owed the duty required of medical professionals, [and] the scope of the duty owed remains in question due to the expertise required to resolve the issues related to the standard of care." Frank noted that Assist America said it made no medical judgments but also required the medical records for its perusal.

Frank also said that the record at this stage supports a conclusion that Assist America caused Tholen's amputation and other damages.

An order granted the addition of a punitive damage claim in August 2018. Frank said the punitive damage claim could proceed, determining that the record provided evidence Assist America knew, or should have known, that Tholen faced serious negative health outcomes by delaying proper care. The company claims its obligation is limited to evacuation to the nearest appropriate facility but it never offered that assistance, Frank noted. The Tholens believed that they would not receive any assistance with transport from Assist America, meaning that their choices were to stay at the hospital where they believed Tholen was receiving subpar care or to take their chances with a commercial flight home, the judge said.

The evidence at the punitive damage stage of the trial should be interesting. Much

of the record is sealed. But public records include real estate documents verifying that Assist America founder and chairman George W. Howard III and his wife live in a condominium in Trump Tower in New York purchased in 2007 for \$11.5 million dollars.

Assist America refused to participate in punitive damage discovery "and dragged its feet every step of the way," Rau noted in April. "This Court warned Assist America that it would not tolerate its tactic of hijacking the discovery process as a means to mount a challenge to this Court's decision to permit pleading of a punitive damages claim," he wrote.

Nevertheless, Assist America failed to provide its operations manual that was in place at the time of the plaintiff's accident. The manual thus was not available during depositions and the failure to produce it was intentional, knowing and part of its litigation strategy, Rau said. "More damning is the fact that Assist America now admits its operations manual underwent changes in the months following Dr. Tholen's incident but failed to produce documents showing what the changes were or why," Rau said.

The court determined that adverse inference orders would best remedy the discovery obstruction and show that such a strategy is improper and unfitting for federal litigants. "This Court's remedy best addresses the improper conduct of Assist America as a litigant and the failures of its counsel to educate and guide Assist America's decision makers about the necessity of participating in an honest and fair discovery processes," Rau's order states.

The adverse inferences are that the operations manuals provided insufficient information to properly decide whether to evacuate an Assist America member or to decide whether a member was receiving appropriate care.

The inferences also are that the manual was not sufficiently disseminated to the employees to assist them in decisions about medical care and evacuation.

The final inference is that Assist America has now altered its operations manual as a result of Dr. Tholen's incident.