IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CIRCUIT CIVIL DIVISION

KELVIN R. CREWS,
Plaintiff, **CASE NO: 16-CA-1066**
DIVISION: H

v.

TAMPA PORT AUTHORITY and
KINCART CONSTRUCTION COMPANY,
Defendants.
____/

ORDER GRANTING DEFENDANT, KINCART CONSTRUCTION COMPANY'S, MOTION TO DISMISS WITH PREJUDICE PLAINTIFF'S AMENDED COMPLAINT FOR FRAUD
AND
DISMISSING AMENDED COMPLAINT WITH PREJUDICE

THIS MATTER came before the Court for an evidentiary hearing on January 7, 2020, on Defendant, KINCART CONSTRUCTION COMPANY's ("Kincart") *Motion to Dismiss with Prejudice Plaintiff's Amended Complaint for Fraud*, filed August 20, 2019. On November 18, 2019, Plaintiff, KELVIN R. CREWS ("Plaintiff" or "Mr. Crews"), filed *Plaintiff's Response in Opposition to Kincart Constuction [sic] Company's Motion to Dismiss with Prejudice Plaintiff's Amended Complaint for Fraud*. On November 20, 2019, Defendant, TAMPA PORT AUTHORITY ("TPA"), filed *Defendant, Tampa Port Authority's, Notice of Joinder in Defendant, Kincart Construction Company's Motion to Dismiss with Prejudice Plaintiff's Amended Complaint for Fraud*. This matter was originally set for a non-evidentiary hearing on November 21, 2019. At the time of that hearing, the Court held that this matter required an evidentiary hearing.[1] As such, the parties reset this matter for an evidentiary hearing. On January 2, 2020, the parties submitted a Joint Stipulation, stipulating that all documents submitted in the joint evidence binders are authentic and admissible for the purpose of the evidentiary hearing on Kincart's Motion to Dismiss. Present at the January 7, 2020, evidentiary hearing were Stephen Stanley, counsel for Plaintiff; Melissa Isabel, counsel for Kincart; Ben Hilton, representative for Kincart; and Joheann Brooks, counsel for TPA. After thorough review of the Motion and Joinder, the Response, the evidence submitted via Joint Stipulation, and consideration of the applicable legal authority and argument of counsel at the hearing, the Court finds as follows:

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[1] *See Duarte v. Snap-On Inc.*, 216 So. 3d 77 (Fla. 2d DCA 2017) wherein the Second District Court of Appeal was constrained to reverse an order dismissing a personal injury suit as a sanction for fraud upon the court where an evidentiary hearing had not been held and the limited record was insufficient to support the dismissal. The Court stated further that where the trial court makes a decision without hearing evidence, that decision is given less deference than where an evidentiary hearing is held. *Id.* at 775.

Standard

A trial court has the inherent authority to dismiss an action as a sanction when the plaintiff has perpetuated a fraud on the court. *See Morgan v. Campbell*, 816 So. 2d 251, 253 (Fla. 2d DCA 2002) (citing *Tri Star Invs. v. Miele*, 407 So. 2d 292, 293 (Fla. 2d DCA 1981)). Because of the severity of this sanction, dismissal should be imposed only on a "clear showing of fraud, pretense, collusion, or similar wrongdoing." *Id.* at 253; *see also Howard v. Risch*, 959 So. 2d 308, 310 (Fla. 2d DCA 2007) ("Because dismissal is the most severe of all possible sanctions, however, it should be employed only in extreme circumstances."). The standard is described as follows:

> To obtain a dismissal for fraud on the court, the movant must prove his case by clear and convincing evidence. Substantively, he must show that his opponent "sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense." This standard requires that a trial court "balance two important public policies of this state: our much preferred policy of adjudicating disputed civil cases on the merits and the policy of maintaining the integrity of this state's judicial system." "Generally, unless it appears that the process of trial has itself been subverted, factual inconsistencies or even false statements are well managed through the use of impeachment at trial or other traditional discovery sanctions, not through dismissal of a possibly meritorious claim."

Duarte, 216 So. 3d at 775 (citations omitted).

Analysis

Kincart's Presentation

Kincart contends that Plaintiff failed to disclose a relevant prior treating physician, medical records relevant to prior treatment, and a prior surgery recommendation. Specifically, Kincart alleges that Plaintiff did not disclose the following: (1) Dr. Stanton L. Longenecker, an orthopedic surgeon at Jacksonville Orthopaedic Institute; (2) medical records from Jacksonville Orthopaedic Institute; and (3) a January 2, 2014, surgery recommendation. The documentary evidence presented as part of the parties' Joint Stipulation revealed that prior to the July 16, 2014, fall at issue in this case ("Tampa fall"), in February 2012, Plaintiff slipped and fell in Houston, Texas ("Houston fall"). As a result of that fall, Plaintiff suffered injuries to his right shoulder. Plaintiff treated with Dr. Stanton Longenecker at Jacksonville Orthopaedic Institute.

The documents presented at the evidentiary hearing provide clear and convincing evidence that Plaintiff knew about the existence of Dr. Longenecker, and his treatment of Plaintiff in relation to the Houston fall. The documents reveal that Plaintiff was told numerous times about the recommendation for surgery for the tear to his right shoulder rotator cuff, and that Plaintiff later acknowledged his personal knowledge of the surgery recommendation by relaying that recommendation to other medical care providers. Medical records from Jacksonville Orthopaedic

Institute show that on December 13, 2013, Plaintiff had an initial visit with Dr. Longenecker. (*See* Ex. 4-C). Notes associated with that visit state that Mr. Crews complained of right shoulder pain associated with a fall about two to three weeks ago. The notes indicate a full thickness superior subscapularis tear and tears to the anterior supraspinatus and infraspinatus. Mr. Crews self-reported that his pain was a 10/10 at the time of the injury, and was an 8/10 at the time of this initial visit. On his second visit with Dr. Longenecker, on January 2, 2014, Mr. Crews was seen for re-evaluation of his right shoulder rotator cuff with a subscapularis tear. The notes indicate that Mr. Crews' wife was present at the visit. Most notably, the record shows that Dr. Longenecker provided his recommendation to repair the rotator and subsapularis tear, and that he did not feel comfortable trying to do that arthroscopically. (*See* Ex. 3-C).

To address his injuries from the Houston fall, Plaintiff elected to engage in physical therapy. Records from John Goetz Physical Therapy, Inc. documenting Mr. Crews' fourth visit on January 2, 2014, show that the "Reason for Referral" was "Pt states his shoulder is good and thinks its [sic] getting better but states he does not want to go into surgery." (*See* Ex. 3-D). The Referring Practitioner is listed as Stanton Longenecker, M.D. A document memorializing Mr. Crews' fifth visit on January 3, 2014, provides that with respect to patient status "Pt states his doctor told him shoulder would not get better and choice of surgery was up to him. Pt states he wants to avoid surgery and is not able to miss 6 months of work. Pt states over all shoulder is better than it was originally with injury." (*See* Ex. 3-D). Again, a document memorializing Mr. Crews' ninth visit on January 13, 2014, provides that "Pt would like to continue with therapy because he wants to avoid surgery. Pt states shoulder pain constant lately." (*See* Ex. 3-D). The documents from Jacksonville Orthopaedic Institute and John Goetz Physical Therapy show that on at least five separate occasions, Plaintiff was either told about Dr. Longenecker's surgery recommendation, or acknowledged his personal knowledge about the surgery recommendation by relaying that information to subsequent medical care providers.

The Tampa fall subsequently occurred on or about July 16, 2014. During an evaluation of his right shoulder on September 12, 2014, at Heekin Orthopedic Specialists, Mr. Crews denied previous right shoulder injury or medical treatment. (*See* Ex. 3-E). This is important because that evaluation was relied upon by Dr. Mirabello when conducting the compulsory medical examination. (*See* Ex. 4-E).

On April 25, 2016, Kincart served its *Notice of Serving Interrogatories to Plaintiff*. (*See* Ex. 3-A). Interrogatory 12 requested:

> Describe each injury for which you are claiming damages in and then specifying the part of your body that was injured; the extent of the injury; and, as to any injuries you contend are present, of effects on you that you claim are permanent.

In response, Plaintiff answered as follows:

> Head, neck, shoulder arm. Have had neck, arm and shoulder surgeries and expect more surgeries[.] Unable to work due to injuries.

Interrogatory 15 requested:

> List the names, business address and business telephone numbers of all medical doctors by whom, and all hospitals at which you have been examined and/or treated in the past five years.

In response, Plaintiff answered that "In addition to those named in paragraph 13, Dr. Texson, Macllinney, FL; St Vincent Riverside Hospital, Jacksonville, FL." Neither Dr. Longenecker nor Jacksonville Orthopaedic Institute, as well as the surgery recommendation, were disclosed in Plaintiff's Answers to Interrogatories. Plaintiff's treatment with respect to the Houston fall occurred within the five year timeframe requested in Interrogatory 15, and as such, should have been disclosed. Finally, Interrogatory 21 requested:

> Describe any and all accidents and/or personal injuries you suffered before and after this accident, together with the date, time and place of such accident or personal injury, and the names and addresses of all parties involved.

In response, Plaintiff answered "Slipped on a step at an equipment yard during an ice storm in Houston, Texas in approximately February 2012. Not seriously injured. Had X-rays five days later and therapy for about 6 months." Plaintiff's answer to Interrogatory 21 demonstrates his understanding that the Houston fall constituted an accident or personal injury worth disclosing; yet, Plaintiff failed to disclose Dr. Longenecker or Jacksonville Orthopaedic Institute, both of which were related to the treatment he received as a result of the Houston fall. Moreover, despite knowing about the surgery recommendation associated with his injuries from the Houston fall, Plaintiff choose not to disclose that information in his answer to this question. In light of the self-reported level of pain at the time of the Houston fall and during his initial visit with Dr. Longenecker, Plaintiff's characterization of his injury as "not serious" is also questionable. Plaintiff swore to the truth of those Answers to Interrogatories on June 21, 2016.

Plaintiff had another opportunity to fully disclose the information related to Dr. Longenecker, Jacksonville Orthopaedic Institute, and the surgery recommendation at his deposition on March 1, 2017. With respect to the Houston fall, Plaintiff was asked what body parts he injured due to that fall, and Plaintiff responded "Not really nothing. I caught myself with my right side, and I got up and went back to work." (*See* Ex. 3-B, 60:22-23). Plaintiff was asked whether he was diagnosed with any injury as a result of the Houston fall, and Plaintiff stated "[t]hey diagnosed that I had a bad sprain on my right arm." (*See id.* at 61:22-23). The following exchange also occurred:

> Q: So I want to stay focused on your neck right now. Before the fall you never had any neck pain or neck problems?
> A: No, ma'am.
> Q: Okay. Your fall in Houston. Who did you treat with for – did you say it was your primary-care doctor when you came home?
> A: Yes, ma'am.
> Q: Just making sure I have that correct.

> A: I went there. You have to get referred, but I went to the emergency room. I don't really remember all of what happened there.
> Q: Right. You did say that. I'm sorry.
> A: But I did go to my primary. I have to go to my primary on everything.
> Q: Okay. But you treated in Jacksonville or in Macclenny at that point. Is –
> A: I only treated for that right there at John Goetze. That's the only place I got treated.
> Q: Well, we know that you went to physical therapy after your fall in Houston. So you would have had – somebody diagnosed you. So it was not a physical therapist. I mean don't you usually get referred to physical therapy?
> A: Yeah. It was the doctor that sent me there in the emergency room.
> Q: Okay. And the emergency room you went to was Baptist Health?
> A: It was Baptist – I'm almost certain it was Baptist, but I'm not 100 percent sure.
> Q: But it would have been local to the Jacksonville, Macclenny area?
> A: Yes, ma'am.
> . . .
> Q: Okay. Does Dr. Stanton Longenecker ring a bell? That could be from the hospital.
> A: No, ma'am. Someone at John Goetze, but I don't recall the doctor.

(*See id.* at pp. 152-153). Once again, Plaintiff failed to acknowledge his treatment with Dr. Longenecker and failed to disclose the existence of medical records at Jacksonville Orthopaedic Institute or the surgery recommendation. The medical records presented as evidence demonstrate that Plaintiff lacked candor and completeness in his deposition testimony with respect to the Houston fall.

Moreover, a letter dated September 13, 2018, from Plaintiff's counsel to Jacksonville Orthopaedic Institute states as follows: "My client Kelvin Randolph Crews was a patient of Dr. Stanton L. Longenecker." (*See* Ex. 3-C). Counsel requested that medical records from January 2012 through July 16, 2014, be mailed to him as well as Robert Martinez, M.D. This letter demonstrates that by at least September 13, 2018, counsel was aware of Dr. Longenecker and the possibility that medical records with Jacksonville Orthopaedic Institute existed. Such information should have been immediately disclosed to opposing counsel. It was not.

One day after Kincart filed the instant Motion to Dismiss, counsel for Plaintiff filed *Plaintiff's Supplemental Response VIII to Tampa Port Authority's and Kincart' [sic] Construction Company's Requests for Production*, indicating that the medical records at issue here—the medical records from Jacksonville Orthopaedic Institute—would be electronically provided to defense counsel. (*See* Ex. 4-C).

Kincart also presented documentary evidence related to Plaintiff's nondisclosure of Dr. Longenecker, Jacksonville Orthopaedic Institute, and the surgery recommendation related to the Houston fall with respect to his application or renewal of his CDL license. (*See* Ex. 3-F, 3-G). With respect to the application and evaluations related to Plaintiff's CDL license, the Court finds

such evidence only tangentially related, and reliance upon such evidence as unnecessary to support its ultimate conclusion herein. While it does reveal another instance in which Plaintiff selectively withheld pertinent information to serve the favorable ends he sought, because it was not in the context of the present litigation, the Court does not rely on such information to support its conclusion.

Plaintiff's Rebuttal

The Court initially notes that despite clearly stating at the November 21, 2019, hearing that this Motion required an evidentiary hearing, Plaintiff choose not to appear at the January 7, 2020, evidentiary hearing.[2] The Court found such non-appearance curious given the allegations and argument presented in Plaintiff's Response in Opposition to the Motion to Dismiss. In the Court's assessment, many of those arguments required the supportive testimony of Plaintiff.[3] Needless to say, Plaintiff, through counsel, presented only documentary evidence to support his argument that Kincart had not met its burden to clearly and convincingly demonstrate a fraud had been perpetuated on the Court or the legal process.

In rebuttal, counsel for Plaintiff first contends that Kincart's Motion is procedurally deficient because it was not sworn to as required by Florida Rule of Civil Procedure 1.150. Rule 1.150 addresses motions to strike sham pleadings. That is not what Kincart has filed here. Rule 1.150 and its requirement for a verified motion is not applicable.

With respect to the substantive grounds, counsel repeatedly made the generalized contention that Defendants had "the records" thereby insinuating that Defendants already had the records at issue, which somehow relieved Plaintiff of any duty to disclose them. After belabored prodding for clarification about *which records* counsel was referring to and requests for evidentiary support, the Court finds that *evidence* was not presented to support the eluded-to contention that Plaintiff did in fact provide the records *at issue here*. Plaintiff argued that he provided to Defendants a CD containing the medical records of Mr. Crews as Exhibit A to Plaintiff's Response to Kincart's June 23, 206, Request to Produce.[4] Plaintiff contends that on that CD were the records from John Goetz Physical Therapy wherein Dr. Longenecker was noted as the referring

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[2] The Court additionally notes that it provided the parties over an additional extra hour of hearing time beyond the two hours that had been scheduled for the evidentiary hearing.

[3] Plaintiff had ample opportunity to rebut Kincart's evidence. One way he *could have* done so was with his own testimony about what he remembers, why he answered deposition questions the way in which he did, etcetera. For whatever reason, he choose not to testify. The fact that Plaintiff did not appear to offer rebuttal testimony only impeded his, or his counsel's, ability to refute the evidence presented by Kincart. However, Plaintiff's testimony was not required to create sufficient support for the Court's findings herein. Indeed, if that were the case—that the allegedly offending party must testify as to his or her recollections and reasons for disclosure or the lack thereof—such motion could rarely be granted.

[4] To ensure no misunderstanding with respect to the CD, Kincart clarified that it was not alleging that the CD was not disclosed. Rather, Kincart argued that Dr. Longenecker and the surgery recommendation, as well as the records from Jacksonville Orthopaedic Institute were not provided on the CD, or otherwise properly disclosed to counsel prior to Plaintiff's Supplemental Response filed the day after the instant Motion.

practitioner. Counsel argued that based on these documents, Kincart "can't say he was never disclosed because he was." Essentially, counsel's contention is that because the name of Stanton Longenecker was buried among likely thousands of documents, if not more, Plaintiff did not withhold such information. The Court wholly rejects this argument.

An opposing party should not be, and is not, required to go on a wild goose chase to discover and collect information that is readily known to the other party. Indeed, the obligation is not for a defendant to uncover the full panoply of undisclosed information by using only the kernels of information the plaintiff chooses to provide. "A system that depends on an adversary's ability to uncover falsehoods is doomed to failure, which is why this kind of conduct must be discouraged in the strongest possible way." *Cox v. Burke*, 706 So.2d 43, 47 (Fla. 5th DCA 1998) (also stating that "[t]he integrity of the civil litigation process depends on truthful disclosure of facts."); *see also Baker v. Myers Tractor Services, Inc.*, 765 So. 2d 149, 150 (Fla. 1st DCA 2000) (citing trial court order that stated "Honesty is not a luxury to be invoked at the convenience of a litigant. Instead, complete candor must be demanded in order to preserve the ability of this court to effectively administer justice."). Rather, it is *Plaintiff* that has an *obligation* to fully and completely disclose all pertinent information. By that same token, the fact that through its own tenacity Defendants uncovered Dr. Longenecker's name, and discovered the records from Jacksonville Orthopaedic Institute and the surgery recommendation, does not excuse Plaintiff's failure to disclose.

Just as in *Morgan*, counsel for Plaintiff argued, or at least eluded to the argument, that because Plaintiff was truthful about *some* matters relating to his prior injuries and he admitted to *some* prior treatment, his failure to reveal the full extent of both cannot constitute a willful intent to deceive. Like the *Morgan* Court, this Court finds that revealing only some of the facts does not constitute "truthful disclosure." *See Morgan*, 816 So. 2d at 254 (*citing Metro. Dade County v. Martinsen*, 736 So. 2d 794 (Fla. 3d DCA 1999) (remanding for dismissal where plaintiff failed to reveal full and complete information to clear and unambiguous questions during discovery despite having provided some truthful information)); *see also Baker v. Myers Tractor Servs., Inc.*, 765 So. 2d 149 (Fla. 1st DCA 2000) (affirming dismissal based on plaintiff's false statements at deposition despite filing a belated errata sheet attempting to correct false statements). A plaintiff cannot cherry-pick the facts he wishes to reveal while secreting away other, less favorable facts. Nor does telling half-truths, or revealing only some of the facts, constitute truthful disclosure. *See Morgan*, 816 So. 2d at 254 ("Based on half-truths Kelly Morgan told during discovery, the Morgans have not shown that the trial court abused its discretion by imposing an unreasonable sanction."). The Court finds that Plaintiff purposefully left out key information critical to the central issues in this case.

With respect to the surgery recommendation, counsel argued "I would think you [referring to Kincart] would look up the reason for referral." With respect to Plaintiff's characterization in his answers to interrogatories and in his deposition testimony of his injury resulting from the Houston fall, counsel argued that Plaintiff believed he was not seriously injured. As to the medical records from Jacksonville Orthopaedic Institute, counsel unsuccessfully attempted to demonstrate that Defendants had the records at issue by stacking inferences upon assumptions that he somehow gleaned from the experts' reports. Lacking any evidentiary support, counsel then contended that documents from a "Jacksonville Clinic" were the same as those from "Jacksonville Orthopaedic

Institute," as if two business names cannot both contain the city in which they operate but be separate and distinct entities. Counsel pointed to Exhibit 4-E which is a letter to Dr. Mirabello listing the medical records being provided to him for his compulsory medical examination. Jacksonville Clinic was listed as one of the healthcare facilities from which medical records were obtained; Jacksonville Orthopaedic Institute was not. (*See* Ex. 4-E).

Having considered the documentary evidence presented, the Court finds that clear and convincing evidence has been presented to support the conclusion that Plaintiff knowingly and intentionally concealed and withheld Dr. Longenecker, Jacksonville Orthopaedic Institute, and the surgery recommendation in an attempt to gain an unfair advantage in this litigation. Of the information he did reveal, Plaintiff mischaracterized the nature and severity of his injury related to the Houston fall, despite medical records revealing that he did in fact understand both. Moreover, such limited disclosure was inconsistent and sporadic among the many opportunities presented to fully disclose. Because the injuries related to the Houston fall impacted the same area of the body for which damages are claimed in this case, there can be no dispute that the information and records are relevant to disputed issues in this case. Plaintiff had an obligation to disclose through discovery his treatment with Dr. Longenecker at Jacksonville Orthopaedic Institute and the surgery recommendation that resulted.

The documents contradict any assertion that Plaintiff somehow forgot about his treatment with Dr. Longenecker at Jacksonville Orthopaedic Institute or the surgery recommendation. The documents show that Plaintiff selectively revealed such information that could have harmed his claims in this action. Indeed, he reveals and discusses the surgery recommendation on multiple occasions during his treatment with John Goetz Physical Therapy, prior to the institution of this action. Yet, he fails to do so during medical evaluations subsequent to the Tampa fall and the institution of this lawsuit. Plaintiff knew about and disclosed the Houston fall, albeit in a significantly minimized way. He knew that as a result of the Houston fall he suffered an injury to one of the *same body parts* for which he claimed damages as a result of the Tampa fall.

Even under a more generous interpretation of the facts, wherein the Court considers that perhaps Plaintiff simply did not think the Houston fall and the associated injuries were all that bad,[5] case law is clear, and any practitioner should know, that a plaintiff does not get to pick and choose what facts or relevant information he will disclose based on his personal assessment about the importance of the information. Plaintiff was clearly and unequivocally asked on multiple occasions to disclose *all* treating physicians from the past five years, a category into which Dr. Longenecker would fall. The interrogatories and questions during deposition required the disclosure of Jacksonville Orthopaedic Institute as a repository for additional relevant medical records as well as the surgery recommendation.

During the hearing, counsel eluded to, although did not clearly present any *evidence* to support, the contention that Plaintiff suffers from memory loss, and this somehow contributed to the failure to disclose. The Court rejects this argument and finds that no evidence supports an argument that Plaintiff forgot or was confused about his treatment with Dr. Longenecker and the surgery recommendation. Instead, the documents show that Plaintiff revealed such information

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[5] But again, even this generous interpretation is a stretch given Plaintiff's self-reported level of pain at the time of the incident and then at the time of his initial visit with Dr. Longenecker on December 13, 2013.

prior to this lawsuit, but withheld the information thereafter. *See Austin v. Liquid Distrib., Inc.*, 928 So. 2d 521, 521 (Fla. 3d DCA 2006) ("When the extensive nature of the plaintiff's past medical history belies her claim that she had forgotten or was confused, she thereby forfeits her right to proceed with her personal injury action.") (citing *Metro. Dade Cnty v. Martinsen*, 736 So. 2d 794 (Fla. 3d DCA 1999)). The records from Jacksonville Orthopaedic Institute and John Goetz Physical Therapy both reveal that Plaintiff knew he had a *tear* of his right rotator cuff, not a minor sprain as he states after this lawsuit was filed. He knew surgery was recommended for that injury, even stating during treatment with John Goetz Physical Therapy that he did not want surgery. Through discovery, Plaintiff disclosed at least nine doctors and hospitals with whom he treated. Yet, the only doctor and medical facility not disclosed were the ones that had information most damaging to his claims. Plaintiff remembers that he fell in Houston and that he went to physical therapy as a result, but somehow does not remember at the time of litigation that surgery was recommended to the same right shoulder for which he claims damages here and that was the whole reason he went to physical therapy—in an attempt to avoid the recommended surgery. This is very important, and potentially damaging, information; the motivation to withhold the information is apparent.

The Court also notes a compelling temporal issue present here. The Houston and Tampa falls occurred approximately two years apart. In fact, only six months prior to the Tampa fall, Plaintiff was still treating with John Goetz Physical Therapy for his injuries associated with the Houston fall. Records from his January 3, 2014, visit provide that Mr. Crews stated at that time that he wanted to avoid surgery. Given the close proximity of the two falls and the resultant medical treatment, this Court cannot believe that the surgery recommendation, Dr. Longenecker's name, or treatment at Jacksonville Orthopaedic Institute were all forgotten. Rather, the more compelling argument, and the one that this Court finds to be supported by the evidence, is that Plaintiff intentionally withheld information that he knew would harm his claims in this litigation.

Finally, counsel's eventual disclosure of the Jacksonville Orthopaedic Institute records does not cure the previous nondisclosures. Those records were curiously disclosed *the day after* the filing of the present Motion to Dismiss. Just as the offending party in *Baker* could not cure his failure to disclose a prior knee injury through an untimely errata sheet, the fact that counsel produced these medical records after Kincart filed the instant Motion to Dismiss does not save Plaintiff here. *See Baker*, 765 So. 2d at 151 (finding that subsequent disclosure of prior injuries to knee through an errata sheet did not cure the fraud in that case). Moreover, while the records from Jacksonville Orthopaedic Institute were eventually untimely disclosed, neither Dr. Longenecker nor the surgery recommendation were *ever* properly disclosed to the defense.

<u>Conclusion</u>

The Court finds that clear and convincing evidence has been presented which establishes that Plaintiff engaged in an intentional scheme to evade or stymie discovery of facts central to the case. Plaintiff intentionally concealed or withheld information directly related to his injuries, a core issue in this litigation. Plaintiff's failure to disclose critical facts about prior injuries, pain, and treatment, as well as prior healthcare providers and medical records, can only be interpreted as an intentional attempt to thwart Defendant's discovery of all essential facts. Given the foregoing, the Court finds that dismissal of this action is a reasonable sanction under the

circumstances. Therefore, the Court rings the death knell for this case and hereby imposes the ultimate sanction of dismissal with prejudice.

It is therefore **ORDERED AND ADJUDGED** that

1. Defendant, KINCART CONSTRUCTION COMPANY's, *Motion to Dismiss with Prejudice Plaintiff's Amended Complaint for Fraud* and Defendant, TAMPA PORT AUTHORITY's, *Notice of Joinder in Defendant, Kincart Construction Company's Motion to Dismiss with Prejudice Plaintiff's Amended Complaint for Fraud* are hereby **GRANTED**.

2. The Amended Complaint in this matter is hereby **DISMISSED WITH PREJUDICE** as to all parties.[6]

3. The Court reserves jurisdiction to determine entitlement to and amount, if any, of attorneys' fees and costs, and to enter any other or additional orders that may be necessary or appropriate.

DONE AND ORDERED, in Chambers in Tampa, Hillsborough County, Florida, this _____ day of January, 2020.

Electronically Conformed 1/10/2020
Emmett L. Battles

E. LAMAR BATTLES,
Circuit Court Judge

Electronic Copies Provided Through JAWS

[6] The Court notes that the Amended Complaint filed March 9, 2016, lists the following Defendants: Tampa Port Authority; Kincart Construction Company; TB Landmark Construction, Inc.; Neff Rental LLC; Efficiency Shoring & Supply; Ferguson Enterprises, Inc. d/b/a Ferguson Waterworks; and Raulerson & Son, Inc. On April 15, 2016, Plaintiff filed notices of dismissal as to Raulerson & Son, Inc. and Efficiency Shoring & Supply. On May 10, 2016, Plaintiff filed a notice of dismissal as to Neff Rental LLC. On June 21, 2016, Plaintiff filed a notice of dismissal as to Ferguson Enterprises, Inc. d/b/a Ferguson Waterworks. Finally, with respect to TB Landmark Construction, Inc., a Notice of Acceptance of TB Landmark Construction, Inc.'s Proposal for Settlement was filed on April 27, 2017. Given the foregoing, the only remaining Defendants in this action were Tampa Port Authority and Kincart Construction Company.