Healthcare Records

The Admissibility of Fault-Related Statements in Medical Records in a Personal Injury Case

by Thomas J. Curcio

Oftentimes, the history contained in a medical record will contain statements by the patient that are relevant to the issue of fault, identity, or both. If such out-of-court statements are to be introduced in court for the truth of the matter asserted therein, they fall squarely within the definition of hearsay.[1] As such, the trial lawyer seeking to admit such hearsay statements must persuade the trial court that it falls into a recognized exception to the hearsay rule. This article will address the admissibility of fault-related statements contained in medical records and will discuss the rules, statutes, and case law that bear upon the admission of such hearsay.[2]

A common issue

In a recent personal injury case I handled, the primary care doctor's note contained the following entry:

> "HPI Patient here s/p MVA. Was on Main Street and a car cut in front of him and he hit the back of his drivers side. This Sunday afternoon. Both airbags deployed. Hood came up to the windshield which cracked. Drivers side door was dented in seat bent. Police came and issued him a warning and wrote a report and was told the driver was at fault. Has been having tenderness/numbness on back of head. Upper and lower back pain. Feels just really out of it. Feels lethargic. No vomiting. No appetite. Doesn't think hit his head but isn't really sure. Symptoms worse today. Head fuzzy."

Rules That Bear On Admissibility

The hearsay rule specifically controlling the admission of statements made to medical personnel is Rule 2:803(4) of the Virginia Rules of Evidence and Rule 803(4) of the Federal Rules of Evidence. Rule 2:803(4) provides as follows:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
> …
> *Statements for purposes of medical treatment*. — Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

FRE 804(4) is similar to Virginia's rule and provides for the admission of hearsay statements as follows:

- (4) *Statement Made for Medical Diagnosis or Treatment*. A statement that:
  - (A) is made for—and is reasonably pertinent to—medical diagnosis or treatment; and
  - (B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

Note that Virginia's rule, based on Virginia case law,[3] is broader than the federal rule. That is, the Virginia rule specifically allows for the admission of statements describing "pain" and the "general character…or external source…" of the cause.

As is true of all hearsay exceptions, the statements made for medical diagnosis or treatment exception is premised upon the belief that such statements are inherently reliable. The inherent reliability of such statements is twofold. First, the patient has a self-interested motive to provide accurate information to the medical provider to obtain a correct diagnosis. Second, a statement reli-

able enough for a medical professional to base a diagnosis or treatment upon is reliable enough to overcome the hearsay proscription.[4]

As discussed in detail below, much of the history in the sample medical record above falls within the hearsay exception for statements made for medical diagnosis or treatment exception. The focus of this article is whether the fault-related statements, i.e. that "a car cut in front of him" and that the police "…came and issued him a warning and wrote a report and was told the driver was at fault" are admissible.

The question of whether hearsay statements made to a medical professional which bear upon fault are admissible under VRE 2:803(4) was recently considered by the Virginia Court of Appeals but has not yet been addressed by the Virginia Supreme Court.[5]

Under the evidence law of the federal courts and many sister states they are not.[6] A review of the federal cases considering these issues under FRE 803(4) and the Virginia lower courts that have considered it reflect the analysis to be applied. First, as in most hearsay exceptions, reliability of the statement is the basis for its admissibility. "Applying the rationale of Virginia's precedent, reliability is the touchstone for determining admissibility of a patient's out-of-court statements that are made for diagnosis and treatment purposes."[7] This exception to the hearsay rule is premised on the notion that a declarant seeking treatment "has a selfish motive to be truthful" because "the effectiveness of medical treatment depends upon the accuracy of the information provided."[8]

In *Campos*, a criminal case involving hearsay statements made to a forensic nurse examiner by a minor describing sexual assaults and identifying her step-father as the perpetrator, the Court set forth the analysis to be applied when considering admissibility under VRE 2:804(4). The Court stated that the first clause of the rule requires that the statement be ". . . made for the purpose of medical diagnosis or treatment. . . ." As discussed above, such a purpose provides the statement with reliability. Next, the statement must fall into one of three categories stated in the rule. That is, the statement must relate to (1) "medical history," (2) "past or present sensations," or (3) "the inception or general cause of the condition." The final requirement is that the statement must be ". . . reasonably pertinent to diagnosis or treatment. . . ." Finally, the statement must have an overall indicium of reliability.[9]

Two cases, both of which preceded the adoption of the Virginia Rules of Evidence, were discussed by the *Campos* Court when considering whether fault-related hearsay statements were made for the purpose of medical diagnosis or treatment. In doing so, the *Campos* Court stated that the declarant's motive in making the statement must necessarily be considered. Those cases are *Jenkins v. Commonwealth*, 254 Va. 333, 492 S.E.2d 131 (1997) and *Lawlor v. Commonwealth*, 285 Va. 187, 738 S.E.2d 847 (2013).[10] In doing so, the *Campos* Court stated that the declarant's motive in making the statement must necessarily be considered.

In both *Jenkins* and *Lawlor*, the Court declined to apply the medical treatment exception because their respective facts suggested inherent unreliability: the two-year-old child in *Jenkins* was too young to "appreciate the need for furnishing reliable information;" [11] the incarcerated defendant in Lawlor would not be as honest in his potentially punishment-reducing conversation with a drug treatment counselor as he would be in seeking medical treatment from a physician.[12] As suggested by the analysis in these cases, the rule's emphasis on reliability requires a court to focus on the declarant's motive rather than that of the care provider. As the Court in *Jenkins* and *Lawlor* recognized, the reason statements made for the purpose of medical diagnosis or treatment are admissible, despite their nature as hearsay, is that patients making such statements recognize that they must provide accurate information to the physician in order to receive effective treatment.[13]

While most of the cases discussing fault contained within a hearsay statement made to a medical professional involve allegations of sexual assault, the case of *Ramrattan v. Burger King Corp.*, is a personal injury case in which the medical record, similar to the example above, contained statements regarding fault. While not identifying the verbatim language, the Court described the medical records as containing references to which vehicle failed to yield the right of way, which vehicle ran the red light, and which vehicle caused the collision. In granting the defendant's motion *in limine* that all such references be redacted, the Court stated:

> Rule 803(4), Fed. R. Evid., provides that statements made for purposes of medical diagnosis or treatment are not excluded by the hearsay rule. Such statements include those "describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Statements in the plaintiffs' medical records concerning what caused the injuries are admissible, but statements concerning who ran the red light or the fault of the parties are not pertinent to diagnosis or treatment. Accordingly, they are inadmissible and must be redacted prior to introducing the records at trial.[15]

The Court in *Doali-Miller v. SuperValu, Inc.*[16] also addressed the question of whether hearsay

statements contained in a medical record were admissible under FRE 803(4) in a personal injury case. In *Doali*, a trip and fall case, the defense moved *in limine*, to exclude the following entry in plaintiff's medical records:

> …Ana D. Doali-Miller . . . states she was injured when she bumped into a protruding guardrail which she states had been cut at the Safeway Food Store at Northwood Plaza in Baltimore City on 04/02/2010. She states she then fell onto the shopping cart she was reaching for.[17]

In ruling that all but that part of the statement regarding the identity and location of the store fell within the exception, the Court stated as follows:

> Plaintiff's statement that "she was injured when she bumped into a protruding guardrail . . . on 04/02/12 . . . [and] fell onto the shopping cart she was reaching for," …describes the "inception" or "general cause" of her symptoms; it identifies the objects with which she came into contact, the speed or force of her contact with those objects, and the date on which she sustained her injuries. *See* Fed. R. Evid. 803(4). There is no evidence that Plaintiff made this statement to Dr. Johnston for a purpose other than "promoting treatment" or diagnoses, and the statement was consistent with that purpose. *See id*.; *Willingham*, 412 F.3d at 562. Additionally, her statement is reasonably pertinent to diagnosis or treatment, and likely to be relied on by a physician for that purpose. Fed. R. Evid. 803(4); *see Willingham*, 412 F.3d at 562 ("A patient's statement describing how an injury occurred is pertinent to a physician's diagnosis and treatment.") (quoting *United States v. Gabe*, 237 F.3d 954, 957-58 (8th Cir. 2001)); *see also* 4 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 8:75 (3d ed. 2007) ("In connection with physical injury, statements saying when the injury occurred, and describing its general nature . . . and objects involved in causing injury . . . are clearly pertinent."). Thus, because Plaintiff's statement "related . . . to the cause of her present condition, [and was] relevant in diagnosing that condition," *Willingham*, 412 F.3d at 562 (alteration in original) (quoting *United States v. Iron Thunder*, 714 F.2d 765, 773 (8th Cir. 1983)), it is admissible subject to the redaction below.[18]

The redaction referenced in the above quote involved the part of the medical record which stated that plaintiff's injury occurred at the "Safeway Food Store at Northwood Plaza in Baltimore City" and that the guardrail "…had been cut." In ruling that such was not admissible under FRE 803(4), the Court stated:

> The portion of Plaintiff's statement noting that the injury occurred "at the Safeway Food Store at Northwood Plaza in Baltimore City," however, is not "reasonably pertinent to medical diagnosis or treatment." *See* Fed. R. Evid. 803(4). In general, statements that identify the individual or entity responsible for the injury are "seldom, if ever, . . . sufficiently related" to diagnosis or treatment, and are therefore inadmissible. *See Gabe*, 237 F.3d at 957-58 (quoting *United States v. Iron Shell*, 633 F.2d 77, 84 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001, 101 S. Ct. 1709, 68 L. Ed. 2d 203 (1981)). Such statements also tend to impermissibly attribute fault. *Graham*, *supra*, §7045 ("Under Rule 803(4), the admissibility of statements as to causation is specifically limited to those of inception or general character of the cause or external source of the past or present symptoms or sensations insofar as reasonably pertinent to medical diagnosis or treatment. Statements of fault would not qualify."). Thus, because Plaintiff's statement describing the location at which the alleged incident occurred is not relevant to treatment or diagnosis, is not likely to be relied upon by a physician for that purpose, and tends to attribute fault, it is not admissible and must be redacted.[19]

The facts contained within the challenged statement and the basis of the *Doali-Miller* Court's ruling is instructive on the types of information relayed to a medical professional that fall within the exception. Referring back to the sample medical record above, plaintiff's statement that he was involved in a motor vehicle accident is relevant as to the cause or inception and is admissible. Similarly, the statements that "…he hit the back of his driver's side. This Sunday afternoon. Both airbags deployed. Hood came up to the windshield which cracked. Driver's side door was dented in seat bent" would also be admissible as where his vehicle struck the vehicle ahead provides the doctor with information that bears upon the physical forces and angle thereof to which the patient was subjected, as does the statements regarding the hood, the driver's door, and the seat. Note that the statement that the accident happened "This Sunday afternoon" adds to its reliability as the events are fresh in the patient's memory. Following the cases discussed above, the statement that the "Police came and issued him a warning and wrote a report and was told the driver was at fault" would not satisfy the exception as it was not made for the purposes of medical diagnosis nor does

it relate to the "inception or general cause of the condition." The statement that "a car cut in front of him," which arguably relates to the inception or general cause of the condition, is not however pertinent to diagnosis or treatment, and as such, would be excluded.

Practice Pointer: In arguing for the admission of statements made to a medical provider bearing upon the circumstances of the collision, argue that the statement was given for the purpose of medical diagnosis and that it relates to the cause and origin of the injury. For example, statements regarding speed, which bear upon the forces involved, would arguably be related to the cause and origin of the injury, as well as to treatment and a diagnosis. That is, one can argue that a doctor is more likely to order a CT scan to rule out internal injuries if the crash was a high-speed impact collision versus a low-speed impact collision. Additionally, speak with your testifying expert to determine which facts in the history were considered in deciding what diagnostic tests to order and/or in reaching a diagnosis.

Fault statements bearing on treatment

As reflected above, several of the cases reviewed for this article involve record entries by health professionals in cases involving allegations of sexual abuse involving minors that contain references to fault and, sometimes, to the identity of the perpetrator. This particular line of cases reflects that when the issue of fault bears upon treatment, such statements are admissible provided the elements of the VRE 2:803 (4) hearsay exception are met, i.e. the statement is reliable, is given for medical treatment and diagnosis, and relates to medical history, past or present sensations, or the inception of general cause of the condition.[20]

Campos involved a young girl who was sexually assaulted by her stepfather. She was initially examined by a forensic nurse examiner when she was 12 and then again when she was 13. During both examinations, she identified her stepfather as having sexually assaulted her. At trial, the forensic examiner testified over objection to the statements made during the second interview which identified the stepfather as the perpetrator. In affirming the admission of the statements, the *Campos* Court first considered whether the statements were made for the purpose of medical diagnosis and treatment. Concluding that they were, the Court noted that the young girl's testimony reflected that she understood the exam was for a medical purpose and that she was unaware that her statements could be used for a later prosecution. In so doing, the Court stated:

> Here, Kling testified that she asks victims for "a clear history" of what brought them to her in order to identify specific symptoms that may not be apparent from the physical examination, then collaborates with physicians to order appropriate treatment. She noted her decision on what tests or medications to order often depends on a victim's description of what occurred.[21]

The Court next determined the statements related to medical history and the inception or general cause of the condition. Regarding the statements bearing on medical history, the Court stated:

> Although an adult victim's statements assigning blame in cases of merely somatic injury may not be reasonably pertinent to diagnosis or treatment, child sexual abuse presents a more nuanced situation in which care providers would reasonably rely on a victim's narrative that identified the abuser in determining appropriate treatment. Accordingly, this Court holds that C.F.'s statements were reasonably pertinent to diagnosis or treatment, thereby satisfying the second element of Rule 2:803(4).[22]

Finally, the Court determined that the statements were reliable as there was nothing about them to indicate that the declarant knew that they would be used for a later prosecution of the stepfather.[23]

Campos lends support to argue for the admission of fault-related statements to medical providers in personal injury cases involving claims for emotional injuries such as post-traumatic stress syndrome or anxiety disorder if the condition relates to the fault- related facts. Specifically, by stating that "…an adult victim's statements assigning blame in cases of **merely somatic injury** may not be reasonably pertinent to diagnosis or treatment…"(emphasis added), the *Campos* Court recognizes a distinction between the relevance of fault-related statements to the diagnosis or treatment of somatic (physical) injury versus emotional injury. The relevance of fault-based statements to the diagnosis or treatment of an emotional injury was recognized by the Court in *Willingham v. Crooke*, 412 F.3d 553, 562 (4th Cir. 2005). In *Willingham*, the plaintiff brought a claim alleging violation of her federal civil rights in connection with an arrest by the local police during which she claimed that an officer pointed a gun at her. The trial court sustained an objection to the admission of medical notes of two of Willingham's providers which referenced the fact that a gun was pointed at her. On appeal, the 4th Circuit, discussing FRE 803 (4), reversed, stating as follows:

> Contrary to the district court, we believe that most of Willingham's statements to her doctors "related . . . to the cause of her present condition, [and] were relevant in diagnosing that condition." *United States v. Iron Thunder*, 714 F.2d 765, 773 (8th Cir. 1983). While the district court was correct that Willingham's statements about a firearm being pointed at her were

> not relevant to her physical injuries, it is clear from the physicians' notes that Willingham was also seeking treatment for emotional trauma. Willingham's statements to her doctors indicate that her emotional trauma stemmed, in part, from having a firearm pointed at her; therefore, these statements were relevant to her diagnosis and treatment.[24]

The relevance of fault-based statements to the diagnosis and treatment to an emotional injury is evident in a case I am currently handling in which the defendant, who was driving drunk, rear-ended my client at high speed on a highway and fled the scene. The client had previously been diagnosed with an anxiety disorder which she managed with medications and the crash severely aggravated her anxiety. In speaking with the client, it is clear the fact that the defendant was drunk and fled the scene to escape responsibility play a significant part in her increased anxiety. Entries in the medical records reflect that as well. Applying the *Campos* analysis discussed above, it appears clear that the statements were made for the purpose of medical diagnosis or treatment. In this regard, that position would be bolstered by an expert testifying that such facts bear upon his/her diagnosis and/or treatment. It also appears clear that those facts relate to the inception or general cause of the condition. As *Campos* and its predecessors *Jenkins* and *Lawlor* instruct, the statements must be reliable and inquiry must consider my client's motive in making them. To overcome a likely challenge that the statements were made to bolster a litigation claim, how soon after the incident the statements were made and when a claim for injury was made in relation to the statement would have bearing on that determination.

Limiting instruction

Regarding a court's authority to admit into evidence only a portion of a patient's statements to a health-care professional, Virginia Supreme Court Rule 2:105 reads as follows:

> When evidence is admissible as to one party or for one purpose but not admissible as to another party or for another purpose, the court upon motion shall restrict such evidence to its proper scope and instruct the jury accordingly. The court may give such limiting instructions *sua sponte*, to which any party may object.

The above-quoted rule may be describing a slightly different situation, in which the same evidence is admissible for one purpose but not another. However, it is analogous to a court having the discretion to allow the introduction into evidence of only those parts of statements made by a patient to a health-care professional which fall within one or more of the hearsay exceptions, including the exception for statements made to receive medical treatment. This is what occurred in *Willingham* and *Ramrattan*, as described above.

Conclusion

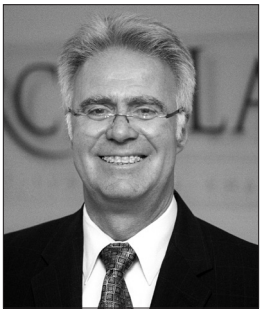
In summary, the courts and commentators agree that fault-related statements contained in medical records are not admissible in a personal injury case over a hearsay objection. However, that precise issue has not yet been addressed by the Virginia Supreme Court. While the analysis to be applied by a court and the concerns underlying that analysis logically and practically support excluding fault-related statements in cases involving physical injuries, that same analysis logically and practically supports admitting such statements in personal injury cases involving diagnoses of emotional or psychological harms, such as post-traumatic stress disorder or anxiety disorder. To increase the likelihood of having such statements admitted, have the treating medical professionals testify that the fault-based statements were relevant to the diagnosis and/or treatment decisions and that such statements are relied upon by the expert and others in the expert's field in making a diagnosis and/or treatment plan.

Endnotes

1. See Rule 2:801 (c) of the Virginia Rules of Evidence.
2. The issue of identity of the perpetrator of a crime, most often discussed in sexual assault cases involving minors, is beyond the scope of this article.
3. *See* VRE 2:102 and *Campos v. Commonwealth*, 67 Va. App. 690, 706-07, 800 S.E.2d 174, 182-83 (2017).
4. *See United States v. Renville*, 779 F.2d 430, 436 (8th Cir. 1985) (discussing FRE 804(4)).
5. *Campos*, 67 Va. App. at 707-08, 800 S.E.2d at 183.
6. *See*, *e.g.*, *United States v. Iron Shell*, 633 F.2d 77, 84 (8th Cir. 1980) (stating the general principle that statements of fault are not reasonably pertinent to diagnosis or treatment under Federal Rule of Evidence 803(4)).
7. *Campos*, 67 Va. App. at 711-12, 800 S.E.2d at 185.
8. *Willingham v. Crooke*, 412 F.3d 553, 561-62 (4th Cir. 2005); 67 Fed. R. Evid. Serv. (Callaghan) 676, citing 5 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* §803.06 [1] (Joseph M. McLaughlin, ed., 2d ed. 2004); *see also Morgan v. Foretich*, 846 F.2d 941, 949 (4th Cir. 1988)).
9. *Campos*, 67 Va. App. at 712, 800 S.E.2d at 185.
10. A third Virginia Supreme Court case to consider the admissibility of statements made to medical personnel discussed by the *Campos* court is *Cartera v. Commonwealth*, 219 Va. 516, 248 S.E.2d 784 (1987). The *Cartera* Court, considering the fault-related statements under the exception for statements of the declarant's then existing state of mind, emotion, sensation, or physical condition ruled the exception

was not met and the statements were inadmissible. The exception for statements of then existing state of mind, emotion, etc. is now codified at VRE 2:803 (3). The admissibility of fault-related statements under this rule appears unlikely but a thorough analysis of it is beyond the scope of this article.

11. *Jenkins*, 254 Va. at 339, 492 S.E.2d at 135.
12. *Lawlor*, 285 Va. at 243, 738 S.E.2d at 879.
13. *Campos*, 67 Va. App. at 712, 800 S.E.2d at 185. (Citations omitted) .
14. *Ramrattan v. Burger King Corp.*, 656 F. Supp. 522, 530 (D. Md., 1987).
15. *Id*..
16. *Doali-Miller v. SuperValu, Inc.* 855 F. Supp. 2d 510, 512, (D. Md. 2012).
17. *Id*. at 512.
18. *Id*. at 514-15.
19. *Id*. at 515.
20. *See e.g*. *Campos v. Commonwealth*, 67 Va. App. 690, 800 S.E.2d 174 (2017) (and cases cited therein) and *United States v. Renville*, 779 F.2d 430 (8th Cir. 1985).
21. *Campos v. Commonwealth*, 67 Va. App. at 715, 800 S.E.2d at 187.
22. *Id*.
23. *Id*.
24. *Willingham v. Crooke*, 412 F.3d at 562; appealed on other grounds *Willingham v. Buck*, 2006 U.S. App. Lexis 18370 (4th Cir. Va. 2006).



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