THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO.: 3D16-2607
LOWER CASE NO: 14-CA-31429 CA 01

REBECCA WILLIE-KOONCE,

Appellant,

v.

MIAMI SUNSHINE TRANSFER & TOURS CORP., and NOSLANDY L. GONZALEZ,

Appellees.

On appeal from the Circuit Court of the
Eleventh Judicial Circuit in and for Miami-Dade County, Florida
The Honorable Rosa I. Rodriguez presiding

REPLY BRIEF OF APPELLANT

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I. Appellee Did Not Prove Appellant Intended to Perpetrate a Fraud On the Court.

A. The evidence does not support a finding that Appellant committed a fraud on the court.

For the trial court's dismissal to be valid there must be clear and convincing evidence that Appellant:

> sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability to impartially adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense.

Cox v. Burke, 706 So. 2d 43, 46 (Fla. 5th DCA 1998). In her Initial Brief, Appellant addressed each of the four supposedly fraudulent statements at issue and cited testimony and evidence demonstrating that there was either no inconsistency between her testimony and Appellees' video or at worst, there was a misunderstanding, not a fraud.

In response, Appellee has done little more than rely on approximately six consecutive pages of block quotes from the hearing on Appellees' motion to dismiss, with no discussion or refutation of the arguments Appellant raised in her Initial Brief. (See Ans. Br. at 13-19.) It is not enough, however, for Appellees to simply quote swaths of testimony and assert, in a wholly conclusory manner, that the video proves Appellant lied. At best, Appellees' video provides evidence of an

inconsistency (a point which is disputed), but whether that inconsistency was the product of a misunderstanding, a mistake, or an outright fraud is a separate question—one that is key to this dispute—that the video alone cannot answer.

It is telling, although hardly surprising, that Appellees are silent on each of the arguments Appellant raised with respect to the four statements at issue. Although Appellees seem to place most of their emphasis on Appellant's testimony as to her use of a cane, Appellees seek to shortcut any analysis by simply claiming that at the hearing Appellant admitted that she lied during her deposition. Ironically, Appellees' argument inadvertently confirms that a misunderstanding was almost certainly the source of any inconsistency. Indeed, in claiming that Appellant admitted to her wrongdoing, Appellees cite to a particular exchange during the hearing on their motion to dismiss—one of such importance that in all their extensive block quotes, it was the only testimony meriting bolded emphasis:

> **Q. So that was not a truthful statement; correct?**
> **A. Saying that I needed the cane?**
> **Q. Yes.**
> **A. No.**

(Ans. Br. at 16 (emphasis in original).) In making this argument, however, Appellees appear to have mis-counted the double negatives in trial counsel's question. When condensed, this exchange is more easily understood:

> Q. "So [saying that I need the cane] was ***not*** a truthful statement; correct?"

A. "No, [it was a truthful statement]."

The fact that Appellant's supposed confession rests on such a confusing question—one that even Appellees' undoubtedly competent appellate counsel accidentally misread—is hardly clear and convincing evidence of a fraud. Rather, the confusing nature of these questions only confirms that a mere mistake or misunderstanding is the more likely explanation. See also Bologna v. Schlanger, 995 So. 2d 526, 530 (Fla. 5th DCA 2008) (Griffin, J., concurring) ("We all know that the capacity to remember and the categories of what we remember varies widely among individuals and depends on a number of common factors, such as age, stress, fatigue, emotion. I am skeptical that all of the plaintiffs in the recent profusion of 'fraud on the court' cases are thieves and perjurers.").

As for Appellant's use of a handrail, Appellees' strategy is again to ignore rather than confront the testimony undermining their claim. In fact, despite extensive block quotations, Appellees' cited testimony stops immediately prior the key exchange on this issue:

Q. Never used a handrail carrying stuff into your new house, did you?

A. Well, there wasn't a handrail.

* * *

Q. But on March the 5th you didn't need a cane or handrail to walk up and down steps, did you?

A. Not to the front door. To the front door there's only two steps.

(R. 399 at lines 33:1-3, 15-18.) By ignoring this testimony and the implication it has on their argument, Appellees are only highlighting just how weak their argument truly is.

As for Appellant's limp, here Appellees not only ignore Appellant's contrary testimony, they ignore their own expert physician, Dr. Stephen S. Wender, who noted in his report that "[s]he ambulates with a cane in her right hand *with a mild left antalgic component of gait*" (i.e., she walks with a cane and a limp). (See R. 429.) Instead, without addressing this compelling evidence, Appellees argue the opposite, that Appellant's March 2015 medical records prove that she did not have a limp. ***There is absolutely no evidence in the record to support this claim.*** While Appellees include a purported citation in their Answer Brief, this citation is to Appellees' oral argument on the motion to dismiss—a statement made by counsel without offering any documentary support (despite have received Appellant's medical records) or other admissible evidence. (See R. 394 at lines 15:15-21). For Appellees to continue to advance this argument in the face of their own expert's medical report, and based on nothing more than the unsupported, lay opinion of trial counsel, is frivolous.

Finally, with respect to Appellant's testimony on carrying large boxes, heavy items, bulky items, and "the large bulky items," Appellees have again

chosen to ignore the explanatory testimony that resolves any apparent inconsistency between Appellant's deposition testimony and Appellees' video.

> THE COURT: So the answer is you didn't consider them to be heavy?
>
> THE WITNESS: No, not for clothes. Clothing and shoes.
>
> THE COURT: You were carrying also a large plastic bin?
>
> THE WITNESS: Yes.
>
> THE COURT: You didn't think that was heavy–
>
> THE WITNESS: (Interposing) It has clothes in it.
>
> THE COURT: Okay. Thank you.

(R. 403 at 49:10-19.) Appellant testified that the bin she was carrying was not heavy. Appellees cannot simply waive this testimony away without some evidence to the contrary. Further, Appellees failed to address the overall context of the move, which as trial counsel argued:

> . . . if you watch the full surveillance tape you will see that Plaintiff's family members actually do come to her new house to move things like large boxes, heavy items, bulky items, appliances and furniture. So in the context of having recently moved, you know, it's pretty reasonable that she wouldn't consider those things — large boxes, heavy items, bulky items and large bulky items.

(R. 403 at 50:2-9.)

Regardless of whether Appellees wish to acknowledge it, the evidence in this case does not demonstrate, by clear and convincing evidence, intentional

false statements, let alone an unconscionable scheme calculated to subvert the trial process. The trial court's order of dismissal was therefore an abuse of discretion, and it should be reversed.

B. The relevant case law requires that the trial court's dismissal be reversed.

To justify the trial court's dismissal, Appellees cite to several Florida District Court opinions they claim support the trial court's decision. In doing so, however, Appellees have failed to include any analysis that shows such cases are analogous to the situation here. This is hardly surprising. The facts underlying these cases—presumably the most favorable that Appellees could find—are markedly different from the facts here. Indeed, when the underlying facts are considered, the trial court's abuse of discretion is undeniable.

Of all their cases, Appellees rely most heavily on Herman v. Intracoastal Cardiology Ctr., 121 So. 3d 583 (Fla. 4th DCA 2013), to define the trial court's authority to dismiss for a fraud on the court, to understand this Court's standard of review, and to justify dismissal in this case (See Ans. Br. at 6, 7-8, 20, 21, 23). While there is no dispute that Herman is valuable and controlling authority, when the underlying facts and the court's analysis are considered, Herman only demonstrates just how far Appellees' fall short of justifying a dismissal.

In Herman, the plaintiff had testified at trial that he and his wife were not informed of his wife's renal insufficiency prior to a surgery, resulting in her death.

Id. at 586. He also testified that her doctors did not discuss the risks of the surgery, and he testified as to their activity levels prior to surgery, that his wife rode bicycles, went for walks, and danced." Id. The plaintiff's daughter likewise testified as to her mother's physical activity and that her mother was a vibrant woman who loved dancing, but had to give it up after surgery. Id.

Following a hung jury, the plaintiff's daughter informed defense counsel that her father lied during the trial and that he had kept a diary on his wife's medical condition. Id. That diary expressly refuted the plaintiff's prior testimony, confirming that he and his wife were informed of her renal insufficiency and that they were told the risks involved with the surgery. Id. In support of a motion to dismiss for fraud on the court, the daughter testified that her father's prior testimony regarding his wife's physical activity was false and that he persuaded her to support this fiction with her own trial testimony. Id. at 587.

In what the Fourth District referred to as a "well-reasoned order," the trial court recounted in detail all of these facts, among others, in support of its decision for dismiss for the plaintiff's fraud on the court, noting the significance of a diary that chronicled his wife's medical treatment, which was never produced in discovery, and the fact that the plaintiff has persuaded his own daughter to support his false testimony. Id. at 587-88. Nevertheless, despite this strong evidence of fraud, the Fourth District upheld the dismissal with trepidation, holding:

> While this court might have imposed a lesser sanction, the question in this case is close enough that we cannot declare the lower court to have abused its discretion. Clearly, the trial court's determination that appellant's daughter and sister-in-law were credible witnesses, in conjunction with the trial court's reliance on a diary written by appellant himself would, at the least, constitute the type of evidence that is "close enough" for our court not to find the trial court to have abused its discretion.

Id. at 589. The court also held:

> Our decision that the trial court's ruling on the motion to dismiss should be sustained naturally takes into account the unusual facts of this case. After all, as a practical matter, how many times would one expect to see the appearance of a litigant's diary, whose authorship is undisputed by both sides, contradict the previous trial testimony of the very author of the diary on "several key respects"?

Id. at 590. Despite such language, this decision was subject to a lengthy dissent. Id. at 590 (Taylor, J., dissenting).

While Appellees cite Herman for support, Herman is, in fact, illustrative of just how difficult it is to justify a dismissal based on a fraud on the court. Here, Appellees do not come close. Whereas in Herman, the defendants presented the trial court with direct evidence of the plaintiff's state of mind—that his testimony was knowingly and purposefully false—here, Appellees are seeking dismissal based on a mere inference of wrongdoing with no evidence that Appellant's

testimony was not simply the product of confusion resulting from her cross-examination.

Appellees' reliance on Cox v. Burke, 706 So. 2d 43 (Fla. 5th DCA 1998), is similarly misguided. In Cox, the defendants presented extensive evidence showing that the plaintiff had lied about her identity and marital status. Cox, 706 So. 2d at 45. Further, while the plaintiff in Cox testified that she had not sustained any fractures or other injuries prior to accident at issue, the defendants presented evidence that she had in fact been treated mere months earlier for a fractured wrist and ribs resulting from a fall off a ladder. Id. She had also previously suffered a compound fracture of her right elbow and had sought treatment from an orthopedist for pain resulting from injuries she sustained from a previous accident when she was pinned under a car tire. Id. at 45-46. Based on this evidence, the trial court dismissed the plaintiff's case, which the Fifth District affirmed. Id. at 47.

Following Cox, however, subsequent Fifth District decisions have sought to limit the effect of this holding, noting:

> Cox presented an extremely unusual fact pattern, wholly unlike the more conventional impeachment issues that have shown up in some more recent decisions, including this case. In Cox, there was a significant amount of evidence suggesting that the court could not even be confident of who the plaintiff was, much less what had happened to her. In that case, the false information given was pervasive, repeated and under oath.

Ruiz v. City of Orlando, 859 So. 2d 574, 576 (Fla. 5th DCA 2003). Indeed, the Fifth District acknowledged that in Cox it had "apparently underestimated" the "seductive power" of the remedy of dismissal. Id. at 575. "Therefore, subsequent cases 'have tried very, very hard to explain, and to emphasize, that this power to dismiss a lawsuit for fraud is an extraordinary remedy found only in cases where a deliberate scheme to subvert the judicial process has been clearly and convincingly proved.'" Herman, 121 So. 3d at 591 (Taylor, J., dissenting).

As in Herman, the defendant in Cox presented clear evidence—not a mere inference—that the plaintiff intentionally mislead the court. This factor is also present in Savino v. Florida Dr. In Theatre Mgt., 697 So 2d 1011 (Fla. 4th DCA 1997), where the plaintiff sought damages for alleged brain damage and lost wages due to injuries sustained while on the defendant's premises, and the defendant presented evidence that the plaintiff lied about obtaining a master's degree in engineering from New York University, created a fake master's degree diploma, and lied to his treating physician about his educational background and above-average level of intelligence causing the physician to improperly relate his average level of intelligence to the damages he sustained during the accident. Savino, 697 So. 2d at 1012.

The cases Appellees rely on reflect the circumstances where dismissal *may* be appropriate: situations where the plaintiff's state of mind is not in dispute.

Nevertheless, even where surveillance video shows a plaintiff performing actions that he specifically claimed he could not perform (compared to a misstatement, here), dismissal of the complaint has been reversed as an abuse of discretion. See Guillenv. Vang, 138 So. 3d 1145 (Fla. 5th DCA 2014). To that end, courts have regularly held that even false statements are not enough, unless the "process of trial has itself been subverted." See Hair v. Morton, 36 So. 3d 766, 769 (Fla. 3d DCA 2010); see also Suarez v. Benihana Natl. of Florida Corp., 88 So. 3d 349, 353 (Fla. 3d DCA 2012) (holding that a dismissal "sanction is reserved only for those cases involving the most blatant showing of fraud, pretense, collusion or other similar wrongdoing" (internal quotations omitted)). Based on these holdings, and the high bar for dismissal required by cases such as Helman, the trial court's order of dismissal was an abuse of discretion, and it should be reversed.

II. This Dispute Should Have Been Left to the Jury.

In their Answer Brief, Appellees do not dispute the validity of the Third District's holding in Young v. Curgil, 358 So. 2d 58 (Fla. 3d DCA 1978), that even if a trial court's factual inferences about the genuineness of a plaintiff's injuries are "fair," removing that issue from the jury is reversible error when the trial court's inference is not an "overwhelming or compelling" one. See Young, 358 So. 2d at 59-60. Rather, Appellees merely declare that their video proves Appellant repeatedly lied during her deposition and thus dismissal is appropriate. Such a

video, however, is not enough. See Guillen, 138 So. 3d at 1145 (holding that "any discrepancies between [the plaintiff's] testimony and the surveillance DVD are best resolved by a jury"); see also Young, 358 So. 2d at 60 (holding that although the trial court found that the plaintiff's claimed injuries were feigned and subsequent medical expenses fraudulent, "[i]n our view, the matter is fairly debatable and should have been decided by the trier of fact, here a jury, as our law generally contemplates"); Perrine v. Henderson, 85 So. 3d 1210, 1212 (Fla. 5th DCA 2012) (holding that "inconsistency, nondisclosure, poor recollection, dissemblance and even lying, is insufficient to support a dismissal for fraud, and, in many cases, may be well-managed and best resolved by bringing the issue to the jury's attention through cross-examination"). For all these reasons, the trial court should have denied Appellees' motion to dismiss, leaving the conflict at issue for the jury at trial.

III. Dismissal of Appellant's Complaint is a Disproportionate Remedy.

Appellees argue that the trial court's order should be affirmed because the testimony at issue is "sufficiently central" to the case to warrant dismissal. (Ans. Br. at 29-30.) As support, Appellees cite to several cases including O'Vahey v. Miller, 644 So. 2d 550 (Fla. 3d DCA 1994). Although the court's opinion in O'Vahey was literally one sentence long, Appellees have somehow overlooked the

opinion's single critical footnote, which eviscerates its argument as to the appropriateness of dismissal as a remedy:

> While the appellant's established perjury did not directly concern the cause of action itself, our decision is not uninfluenced by the fact that both the circumstances of the accident—in which he was supposedly run over by a car driven by a 'personal friend'—and the extent of his alleged injuries are not least seriously open to question. ***If, to the contrary, he had sustained an objectively serious injury, like the loss of a limb, it might well constitute an abuse of discretion to overpenalize his fabrications by depriving him of an otherwise substantial and meritorious claim.***

O'Vahey, 644 So. 2d 550, n.1 (emphasis added).

Here, there is no dispute that Appellant was crushed underneath Appellees' trailer. There is also no dispute that Appellant was severely injured, admitted to a hospital for ten-days, underwent reconstructive orthopedic surgery, and to this day, lives with rods and screws in her leg. To the extent that Appellees cite McKnight v. Evancheck, 907 So. 2d 699, 701 (Fla. 4th DCA 2005), for support, McKnight is inapposite as the fraud at issue concerned the entirety of the alleged damages.[1] See McKnight, 907 So. 2d at 701 ("Evidence that these injuries existed prior to the accident would create an issue as to [the plaintiff's] claim that the injuries resulted

[1] Appellees also cite Faddis v. City of Homestead, 121 So. 3d 1134 (Fla. 3d DCA 2013). The court's decision in Faddis, however, did not include any factual background or provide any indication as to the nature of the fraudulent conduct at issue.

from the accident."); see also Cox, 706 So. 2d at 46, n.1 ("The court [in O'Vahey] noted that objective proof of serious injuries might be a factor in evaluating whether such serious sanctions would be within the court's discretion."). Finally, while Appellees argue that Herman only requires that the alleged falsehoods be "sufficiently central" to the case to satisfy the standard for dismissal, Herman does not address the situation discussed in O'Vahey and Cox, where dismissal would "overpenalize" where there is objective evidence of a serious injury and an otherwise meritorious claim. See Herman v. Intracoastal Cardiology Ctr., 121 So. 3d 583, 589 (Fla. 4th DCA 2013).

Finally, while Appellees attempt to distinguish Hair v. Morton, 36 So. 3d 766 (Fla. 3d DCA 2010), the lack of an evidentiary hearing, while noted in the decision, was not the basis of the court's reversal. See Hair, 36 So. 3d at 770. Rather, the Third District reversed holding that "[w]hile [the plaintiff's] discovery responses might preclude some of her claimed damages regarding her lower back, they do not address the issue of liability, nor address all of [her] claimed damages so as to justify dismissal of her action," and in such circumstances, the "inconsistencies, non-disclosure or even falseness are more appropriately dealt with through cross-examination or impeachment before a jury—not through dismissal of [the] action." See Hair, 36 So. 3d at 770. While Appellees may wish

otherwise, Florida courts do not allow a tortfeasor to avoid genuine liability for objectively serious injuries where alternative, lessor sanctions are available.

CONCLUSION

For all of the above reasons, Appellant respectfully requests that the Court reverse the trial court's Order of Dismissal dated October 17, 2016 and remand the case to the trial court for further proceedings in accordance with this Court's decision.

Dated: September 5, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 5, 2017, a true and correct copy of the foregoing was served via E-Mail on:

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Reply Brief complies with the font and point size requirements set forth in Fla. R. App. P. 9.210.

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