

**IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA**

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

REBECCA WILLIE-KOONCE,

Appellant.

v.

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

Appellees.

**ANSWER BRIEF OF APPELLEES MIAMI SUNSHINE TRANSFER &
TOURS, CORP. and NOSLANDY L. GONZALEZ**

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

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TABLE OF CONTENTS

COVER PAGE	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE AND OF THE FACTS	1
SUMMARY OF ARGUMENT	6
ARGUMENT	7
Standard Of Review	7
I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING APPELLANT’S COMPLAINT FOR FRAUD ON THE COURT	9
A. Judge Rodriguez Set Forth Her Express Findings Warranting Dismissal Of Appellant’s Complaint For Fraud On The Court	24
B. The Trial Court Has The Inherent Authority To Dismiss An Action When A Plaintiff Has Perpetrated A Fraud On The Court	26
II. APPELLANT’S MISREPRESENTATIONS GO TO THE CORE OF APPELLANT’S DAMAGES	29
CONCLUSION	33
CERTIFICATE OF SERVICE	34
CERTIFICATE OF COMPLIANCE	36

TABLE OF AUTHORITIES

CASES

<i>Bass v. City of Pembroke Pines</i> , 991 So. 2d 1008 (Fla. 4 th DCA 2008)	8, 21
<i>Bertrand v. Belhomme</i> , 892 So.2d 1150 (Fla. 3d DCA 2005)	30
<i>Bologna v. Schlanger</i> , 995 So.2d 526 (Fla. 5 th DCA 2008)	28
<i>Cox v. Burke</i> , 706 So. 2d 43 (Fla. 5th DCA 1998)	8, 9, 21, 26
<i>Faddis v. City of Homestead</i> , 121 So. 3d 1134 (Fla. 3d DCA 2013)	30
<i>Hair v. Morton</i> , 36 So. 3d 766 (Fla. 3d DCA 2010)	29, 31, 32
<i>Ham v. Dunmire</i> , 891 So.2d 492 (Fla. 2004)	24
<i>Hanono v. Murphy</i> , 723 So.2d 892 (Fla. 3d DCA 1998)	7, 26
<i>Herman v. Intracoastal Cardiology Ctr.</i> , 121 So. 3d 583 (Fla. 4th DCA 2013)	6, 7, 8, 20, 21, 23, 30
<i>Ibarra v. Izaguirre</i> , 985 So. 2d 1117 (Fla. 3d DCA 2008)	32
<i>JVA Enters., I, L.L.C. v. Prentice</i> , 48 So. 3d 109 (Fla. 4th DCA 2010)	8, 21
<i>Leo's Gulf Liquors v. Lakhani</i> , 802 So. 2d 337 (Fla. 3d DCA 2001)	7, 20

CASES
(Continued)

<i>McKnight v. Evancheck</i> , 907 So. 2d 699 (Fla. 4th DCA 2005)	30
<i>Mendez v. Blanco</i> , 665 So. 2d 1149 (Fla. 3d DCA 1996)	10
<i>Metropolitan Dade County v. Martinsen</i> , 736 So.2d 794 (Fla. 3d DCA 1999)	7
<i>Middleton v. Hager</i> , 179 So. 3d 529 (Fla. 3d DCA 2015)	20, 24, 26
<i>O’Vahey v. Miller</i> , 644 So. 2d 550 (Fla. 3d DCA 1994)	10, 31
<i>Perrine v. Henderson</i> , 85 So. 3d 1210 (Fla. 5th DCA 2012)	21, 27, 28
<i>Piunno v. R.F. Concrete Constr., Inc.</i> , 904 So. 2d 658 (Fla. 4th DCA 2005)	20, 21, 23, 24, 25
<i>Savino v. Florida Drive-In Theatre Management, Inc.</i> , 697 So.2d 1011 (Fla. 4 th DCA 1997)	9, 10
<i>Suarez v. Benihana Nat’l of Fla. Corp.</i> , 88 So.3d 349 (Fla. 3d DCA 2012)	30
<i>Villasenor v. Martinez</i> , 991 So.2d 433 (Fla. 5 th DCA 2008)	32
<i>Wigley v. Hares</i> , 82 So.3d 932, 946 (Fla. 4 th DCA 2011)	8, 21
<i>Young v. Curgil</i> , 358 So. 2d 58 (Fla. 3d DCA 1978)	26, 27

RULES

Florida Rules of Appellate Procedure 9.210(a)(2)

36

STATEMENT OF THE CASE AND OF THE FACTS

1. On December 12, 2014, Appellant Rebecca Willie-Koonce (“Appellant”) filed suit against Appellees Miami Sunshine Transfer & Tours Corp., and Noslandy L. Gonzalez (collectively referred to as “Appellees”) to recover damages arising out of an automobile accident which occurred on September 20, 2014. R. Vol. 1, 12-17; R. Vol. 1, 127 at ¶ 1¹.

2. Appellant sustained a broken femur which was treated surgically and subsequently healed. R. Vol. 1, 127 at ¶ 1.

3. Although the fracture had completely healed, Appellant sought damages claiming certain physical limitations as a result of the injury that include, according to her sworn testimony, the following:

- Walking with a “permanent limp” (R. Vol. 1, 140 at ¶ 11; R. Vol. 3, 475 at lines 2-4);
- Use of a cane for walking (R. Vol. 3, 474 at lines 17-25);
- Inability to walk up or down steps without use of a handrail or cane (R. Vol. 3, 477 at lines 11-19);
- Inability to carry large boxes, bulky or heavy items, without use of a cane (R. Vol. 3, 476 at lines 19-25; R. Vol. 3, 477 at lines 1-2).

4. Appellant’s demand rests on the allegation that her initial injury is continuing and permanent. R. Vol. 1, 15 at ¶ 14; R. Vol. 1, 16 at ¶ 20.

5. On March 25, 2016, Appellant testified at an update deposition as follows on the central damage issues in this case:

¹ All citations to the Record on Appeal are denoted as follows: R. Vol. ____, ____; Initial Brief: I.B., ____.

As to her ability to walk without a cane:

Q. Now, your attorneys represented that you need a cane when you walk, is that correct?

A. Correct.

Q. Are you still using the cane when you walk?

A. Yes.

Q. Do you use the cane all the time when you walk?

A. Yes.

Q. Have you tried walking without a cane since May 4, 2015?

A. Yes.

Q. And when you walk without a cane do you walk with a limp?

A. Yes.

R. Vol. 3, 474 at lines 17-25; R. Vol. 3, 475 at lines 1-4.

- As to whether or not she has carried anything when she walks back and forth to her house without using a cane, and as to whether she requires the use of handrails and/or a cane when she goes up and down steps:

Q. Do you think you would be able to carry large boxes without a cane while walking?

A. No.

Q. Have you tried that, walking without a cane carrying large boxes?

A. No.

Q. Do you have difficulty carrying heavy items or bulky items?

A. I haven't tried.

Q. Have you tried walking up the steps in your home without a cane?

A. Yes.

Q. Do you have any difficulty performing that activity?

A. Yes.

...

Q. Do you have to utilize a handrail to walk up steps without a cane?

A. Yes.

...

Q. So you can walk up steps without a handrail or a cane, is that fair?

A. No.

Q. Okay. So I am to understand that if you are going to walk up steps you either need a cane or you need a handrail otherwise you are unable to do it, is that fair?

A. Yes.

R. Vol. 3, 476 at lines 19-25; R. Vol. 3, 476 at lines 1-8, lines 11-13, lines 20-22, line 25; R. Vol. 3, 477 at lines 1-3.

- As to her claimed permanent limp and any “impairment” she currently experiences while walking:

Q. Okay. Would you consider at this stage that you have a permanent limp?

A. Yes.

Q. What happens to your left leg when you walk, does it go straight or go to the side, how would you say you walk?

A. It goes outward to the side.

Q. What side?

A. To the left.

...

Q. Okay. Thank you. How long can you stand?

A. It depends. If I put my weight on the right side, the non-injured side, maybe five minutes.

Q. Okay. Can you stand on your left foot, your left leg?

A. Not without pain.

Q. Okay. Do you use any support?

A. Yes.

R. Vol. 3, 481 at lines 15-24; R. Vol. 3, 482 at lines 1-5, lines 9-17.

- Appellant further testified regarding her “limp”:

Q. Ms. Koonce, you mentioned that when you walk your left leg goes out, can you elaborate for me what you are talking about?

A. It doesn't - - I don't walk straight anymore. When I walk it automatically moves out to the left.

Q. And does it happen when you use the cane or just when you don't use the cane?

A. It happens all the time.

Q. Okay. Is that why you have to use the cane when you walk because otherwise you wouldn't be able to walk?

A. Yes.

R. Vol. 3, 486 at lines 15-25; R. Vol. 3, 487 at line 1.

6. On March 5, 2016 and March 6, 2016, Appellant moved to a two-story townhome in North Carolina. R. Vol. 1, 131 at ¶ 7.

7. Appellant was surveilled for over seven hours on March 5, 2016 and March 6, 2016 while moving herself into her townhome. *Id.*

8. During the move, Appellant performed the following activities:

- Walked continuously up and down steps without use of a handrail or a cane;
- walked continuously up and down steps while carrying various items and/or packages without utilizing a handrail or cane;
- walked up and down a series of steps while carrying large/bulky boxes without using a cane;
- Unloaded items from her car at various intervals and carried packages inside without using a can or limping. *Id.*

These activities are in direct contravention to the testimony provided by Appellant at the March 25, 2016 deposition and make clear that Appellant's March 25, 2016 testimony was not only false but was intentionally false.

9. Additionally, at no point during the seven hour surveillance is Appellant seen ambulating with any limp or can her left leg be seen "moving out to

the left” when she walked as she testified to at her March 25, 2016 deposition. R. Vol. 3, 403 at pg. 51, lines 3-19.

10. On April 1, 2016, Appellees’ filed a Motion to Dismiss for Fraud on the Court. R. Vol. 1, 127-142.

11. On August 22, 2016, Appellant filed her Response in Opposition to Appellees’ Motion to Dismiss for Fraud on the Court. R. Vol. 2, 355-372.

12. On September 8, 2016, an evidentiary hearing was conducted before Circuit Court Judge Rosa Rodriguez in the Trial Court. R. Vol. 1, 175-176; R. Vol. 3, 390-420.

13. On October 17, 2016, The Trial Court executed a Final Order of Dismissal Granting Appellees’ Motion to Dismiss for Fraud Upon the Court and made findings of fact and conclusions of law including, but not limited to, the following:

The Court finds that the record evidence establishes that Plaintiff repeatedly lied under oath, both in deposition and at the evidentiary hearing, regarding issues material to the prosecution of Plaintiff’s claims, to wit: her physical activities, abilities, and limitations, and that this deception was intended to interfere with the judicial system’s ability to impartially adjudicate the case by improperly influencing the trier of fact and unfairly hampering the Defendants’ ability to defend the case. Plaintiff’s untruthful and fraudulent testimony went to the heart of Plaintiff’s claimed damages. R. Vol. 3, 532.

14. On October 27, 2016, Appellant filed a Motion for Reconsideration and/or Rehearing and Supporting Memorandum of Law. R. Vol. 3, 380-437.

15. On November 3, 2016, the Trial Court denied same. R. Vol. 3, 534-535.

SUMMARY OF ARGUMENT

Appellant has misrepresented under oath her physical limitations, not once, but twice, thereby establishing Appellant's fabrication of her claim of continuing injury. Specifically, the surveillance proves false Appellant's claims that 1.) she cannot walk without the use of a cane; 2.) she cannot lift heavy, bulky or large items; 3.) she cannot walk up or down stairs without the use of a cane or handrail; and 4.) Appellant suffers from a permanent limp.

The surveillance footage coupled with Appellant's refusal to provide the Trial Court a straight answer in response to the Trial Court's opportunity allowing Appellant to explain her prior testimony in light of the surveillance footage supports the Trial Court's dismissal. Based upon Appellant's repeated misrepresentations and false testimony at her March 25, 2016 deposition coupled with the September 8, 2016 evidentiary hearing, the Trial Court's conclusions are well founded. Where, as here, an Appellant has repeatedly lied under oath on the primary issues in a case for her own pecuniary benefit, she has made a mockery of the judicial system and as such "a trial court has the inherent authority, in the exercise of its sound judicial discretion, to dismiss an action when the plaintiff has perpetrated a fraud on the court." *Herman v. Intracoastal Cardiology Ctr.*, 121

So.3d 583, 588 (Fla. 4th DCA 2013). It is a well settled principle, as stated and re-stated by this Court in *Hanono v. Murphy*, 723 So.2d 892, 895 (Fla. 3d DCA 1998), *Metropolitan Dade County v. Martinsen*, 736 So.2d 794, 795 (Fla. 3d DCA 1999) and *Leo's Gulf Liquores v. Lakhani*, 802 So.2d 337, 342 (Fla. 3d DCA 2001) “that a party who has been guilty of fraud or misconduct in the prosecution or defense of a civil proceeding should not be permitted to continue to employ the very institution it has subverted to achieve her ends.”

ARGUMENT

Standard of Review

An appellate court reviews orders dismissing complaints for fraud on the court under an abuse of discretion standard. *Herman v. Intracoastal Cardiology Ctr.*, 121 So.3d at 588. However, while the sanction of dismissal for fraud on the court is reviewed under abuse of discretion standard, the “trial court’s discretion is narrowed where dismissal is for fraudulent conduct such as that alleged here, in which a more stringent abuse of discretion standard is appropriate.” *Id.* at 588.

For a trial court to impose dismissal as a sanction for fraudulent conduct, the following standard must be met:

The requisite fraud on the court occurs where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial systems’ ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of

the opposing party's claims or defense. *Id.* (internal quotations omitted).

Furthermore, "the standard of review of a 'clear and convincing finding' is whether the finding is supported by competent, substantial evidence." *Id. quoting Wigley v. Hares*, 82 So.3d 932, 946 (Fla. 4th DCA 2011). However,

Even if one were to find the analysis a "close call," that would not justify overturning the trial court's factual findings and final determination. This court found in another case regarding a trial court's decision concerning a motion to dismiss for fraud on the court, that "[t]he ultimate question is 'whether reasonable minds could differ as to the propriety of that decision.'" *JVA Enters.*, 48 So. 3d 109, 113 (Fla. 4th DCA 2010) (quoting *Bass*, 991 So. 2d at 1011). We found "that reasonable minds could differ under the facts of th[at] case." *Id.* Similarly, under the facts of the present case, reasonable minds could differ as to the propriety of the trial court's decision. *See id.* (noting "the issue is not whether any member of this panel would make the same decision as the trial judge").

Although one conceivably may find a lesser sanction to be a more appropriate sanction, that is not our standard of appellate review. "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." *Cox v. Burke*, 706 So. 2d 43, 47 (Fla. 5th DCA 1998). 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.

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING APPELLANT'S COMPLAINT FOR FRAUD ON THE COURT

Appellant repeatedly lied under oath, both at deposition and at the evidentiary hearing, regarding her claimed permanent disabilities, the critical issue material to the prosecution of her Complaint. Her repeated fraudulent testimony went directly to the heart of Appellant's claimed permanent and continuing damages. To be clear, "where a party lies about matters pertinent to his own claim, or a portion of it, and perpetrates a fraud that permeates the entire proceeding, dismissal of the whole case is proper." *Cox v. Burke*, 706 So.2d 43, 47 (Fla. 5th DCA 1998) citing *Savino v. Florida Drive-In Theatre Management, Inc.*, 697 So.2d 1011 (Fla. 4th DCA 1997).

In *Savino v. Florida Drive In Theatre Management, Inc.*, the Fourth District Court of Appeal upheld the lower court's dismissal with prejudice because plaintiff had lied "about matters which went to the heart of his claim on damages," and as a result, such "repeated fabrications undermined the integrity of his entire action." *Id.* at 1012; see also *Cox v. Burke*, 706 So. 2d 43, 46 (Fla. 5th DCA 1998)(finding that when the plaintiff's misrepresentations went directly to the issue of damages, the trial court's dismissal of the case was not an abuse of discretion). In *Savino*, the Fourth District found the plaintiff's actions amounted to a scheme calculated to interfere with the court's ability to impartially adjudicate his claim

and the trial court's dismissal with prejudice was upheld. *See Id.* In the subject case, as discussed in full below, the Appellant's false testimony goes directly to her claim on damages and therefore impacts the very integrity of her damage claims and these entire proceedings, thereby warranting dismissal.

In *Mendez v. Blanco*, 665 So. 2d 1149 (Fla. 3rd DCA 1996), this Court found that dismissal by the Court was not an abuse of discretion where the plaintiff "had committed serious misconduct by repeatedly lying under oath during a deposition." *Mendez*, 665 S0. 2d at 1150. Furthermore, in *O'Vahey v. Miller*, 644 So. 2d 550 (Fla. 3rd DCA 1994), this Court also upheld a dismissal of the plaintiff's case when a personal injury plaintiff was found to have made "repeated lies under oath" which were only uncovered as a result of the "assiduous efforts of opposing counsel." *Miller*, 644 So. 2d at 551. As this Court discussed in *Miller*, the plaintiff's repeated lies "constituted such serious misconduct and such an obvious affront to the administration of justice," that the Third District Court of Appeal could only affirm the lower court's dismissal of the plaintiff's "action outright." *Id.* The instant proceedings are no different. Without the diligent work of defense counsel in having surveillance performed on Appellant, her fabrication of her damage claim would have gone undetected. Dismissal is the only appropriate course of action under the following circumstances.

Appellant alleges negligence against Appellees in two separate counts in her Complaint, the basis of which stems from an incident in December of 2014 where Appellant sustained injuries to her left lower extremity, specifically, a fractured femur. R. 14. Appellant's damage claim is based upon her contention that her "losses are permanent" and she will "continue to experience these losses and disabilities in the future." R. Vol. 1, 15 at ¶ 14 and R. Vol. 1, 16 at ¶20. With respect to the "permanent and continuing" disabilities that Appellant bases her damage claim against the Appellees on, Appellant testified on March 25, 2016 at a sworn deposition that she has a permanent limp which requires her to use a cane at all times when she walks and that she needs a cane or handrail to walk up or down stairs otherwise she was not able to use the stairs. R. Vol. 3, 474 at lines 17-23; R. Vol. 3, 475 at lines 2-4. Appellant also testified that she was unable to carry large boxes, heavy or bulky items, and that she cannot walk straight because her leg moves out to the left. R. Vol. 3, 476 at line 19 through R. Vol. 3, 477 at line 2; R. Vol. 3, 477 at line 25 through R. Vol. 3, 478 at line 3. The above allegedly permanent/continuing disabilities are the crux of Appellant's damage claims against Appellees.

On March 5th and 6th of 2016, Appellant was surveilled moving into a townhome in North Carolina. During the move, Appellant can be seen:

- a. walking continuously up and down steps without using a handrail or a cane;
- b. walking continuously up and down steps while carrying various items and/or packages without utilizing the handrail;
- c. walking up and down a series of steps while carrying large/bulky boxes without using a cane;
- d. unloading her car at various intervals and carrying packages indoors without using a cane or limping.² R. Vol. 1, 131 at ¶ 7.

Appellant testified that the activities captures on the video surveillance were truthful and was accurate. R. Vol. 3, 398 at pg. 32, lines 6-12. Additionally, Appellant's claimed permanent limp and need for a cane to walk is also directly contradicted by her physical therapist, Dr. Kimball. In records from an appointment Appellant had with Dr. Kimball in March of 2015, Dr. Kimball makes note that Appellant did not have a limp and was not using any devices or aids such as a cane to walk. R. Vol. 3, 394 at pg. 15, lines 15-21.

It was not until Appellant was presented with the above described video surveillance that Appellant first claimed that she did not "understand" the

² The surveillance video spanned over seven (7) hours. The relevant excerpts depicting the above activities, including Appellant repeatedly going in and out of the new townhome, consisted of 24 minutes. R. Vol. 3, 393 at pg. 12, lines 1-17. The 24 minute excerpt as well as a four (4) minute video of relevant surveillance excerpts depicting the above listed activities split screened against excerpts of Appellant's false deposition testimony was presented to the Trial Court at the September 8, 2016 evidentiary hearing. R. Vol. 3, 392 at pg. 8, lines 9-15. The four (4) minute video with deposition excerpts were viewed by Judge Rodriguez in open court at the hearing. Additionally, the surveillance of the Appellant, Rebecca Willie-Koonce was provided to the Appellant's counsel prior to the filing of Appellees' Motion to Dismiss for Fraud Upon the Court.

questions asked of her at her March 25, 2016 deposition and first admitted that she can perform the physical activities that are captured on the video surveillance she previously denied she could, i.e. carrying large bulky items up and down stairs without a cane or holding a handrail and walk fine without a cane if she is on Tramadol. R. Vol. 3, 393 at pg.12, lines 18-25; R. Vol. 3, 394 at pg. 13, lines 1-11. However, Appellant again lied under oath, contradicting her above excuses for her false testimony when questioned by Judge Rodriguez at the September 8, 2016 evidentiary hearing:

Appellant Testified That She Did In Fact Understand The Questions Asked of Her At Her March 25, 2016 Deposition

- 1 THE COURT: Are you saying that you answered
- 2 questions without understanding the question?
- 3 THE WITNESS: Once I asked them to repeat them. I
- 4 did ask them to repeat the questions.
- 5 THE COURT: Okay.
- 6 THE WITNESS: Because I didn't hear them, because
- 7 it was kind of muffled. But yeah, I asked him to repeat so
- 8 I could make sure of what he's asking.
- 9 THE COURT: That's my question. When you finally
- 10 answered, did you understand and hear the question clearly?
- 11 THE WITNESS: Right after he repeated it, and I
- 12 asked, yes.
- 13 THE COURT: Right. So you weren't just giving
- 14 answers to questions that you're not sure what the question
- 15 was?
- 16 THE WITNESS: Right. Because I asked them to
- 17 repeat so I could make sure what I was answering.
- 18 THE COURT: So you understood before you answered,
- 19 you understood all the questions clearly, and you made sure
- 20 you understood by repeating it-

21 THE WITNESS: I had to ask him again, but yeah.
22 THE COURT: I just wanted to make sure. I wasn't
23 sure what side of the fence I'm at, and I just wanted to
24 make sure what you were saying.

R. Vol. 3, 396 at pg. 24, lines 1-24.

Appellant Admits That She Lied Under Oath Regarding Her Use of a Cane:

7 Q. Just so the record is clear, you understood just
8 like the first deposition when you gave the deposition on
9 March 25th, 2016 if you didn't hear, you didn't understand a
10 question you needed to say something; correct?

11 A. Yes, sir.

12 Q. And in fact, you did that; correct?

13 A. Yes.

14 Q. Let me just see if I understand it. So as of
15 March 25th, 2016 were you still using your cane to walk?

16 A. Yes.

17 Q. And were you using your cane all the time when you
18 walked?

19 A. No.

20 Q. So when you testified under oath on March 25th,
21 2016 on Page 33, Lines 22 do you use the cane all the time
22 when you walk?

23 And you answered, yes. That was not a truthful
24 answer; correct?

25 A. It was true at the time, yes.

R. Vol. 3, 398 at pg. 30, lines 7-25.

1 Q. So as of March 25th, 2016 you were using a cane
2 all the time when you walked?

3 A. As needed.

4 Q. So then the truthful answer would have been do you
5 use the cane all the time when you walk? The answer should
6 have been not "yes", but should have been as needed;
7 correct?

8 A. Correct.

9 Q. With also being as needed and unless I'm taking
10 Tramadol; correct?
11 A. Correct.
12 Q. Because I understand your position here when you
13 take Tramadol you don't need a cane, do you?
14 A. No. Because that's what it's for, to ease the
15 pain, yeah.
16 Q. When you take Tramadol, you don't have a limp, do
17 you?
18 A. Yes, I still have a limp.
19 Q. So you have a permanent limp?
20 A. Yes, sir.
21 Q. And in fact, it's because of that permanent limp
22 that you use the cane, is it not?
23 A. Yes. As needed, yes.
24 Q. Have you read your deposition before you got here?
25 A. Yes.

R. Vol. 3, 398 at pg. 31, lines 1-25.

1 Q. Can you show me anywhere in here where you
2 testified that you only used the cane as needed?
3 A. No.
4 Q. You never said that, did you?
5 A. No, not at the time.
6 Q. You have seen the surveillance; correct?
7 A. Yes.
8 Q. Watched all 24 minutes; correct?
9 A. Right.
10 Q. It's truthful and accurate, those activities;
11 correct?
12 A. Correct.
13 Q. You weren't using your cane on March 5th, 2016,
14 were you?
15 A. No.
16 Q. You were walking freely up and down the stairs of
17 the house you were moving out of; correct?
18 A. Right. It was only two steps to the front door.
19 Q. That is the house you were moving into?

20 A. Correct.
21 Q. The house you were moving out of-
22 A. (Interposing) It had three steps.
23 Q. It had three steps. You never used the handrail
24 when you were carrying stuff in and out, did you?
25 A. No.

R. Vol. 3, 398 at pg. 32, lines 1-25.

18 Q. The March of this year deposition you were asked,
19 now your attorneys represented that you needed a cane when
20 you walk; is that correct?
21 Answer; correct?
22 A. Yes.
23 Q. Was that a truthful answer?
24 A. Yes.
25 Q. Now at the end of the deposition -- but now you're

(R. Vol. 3, 401 at pg. 44, lines 18-25)

1 telling us you don't need a cane to walk; correct?
2 A. No, because I rehabbed off the cane and I take the
3 Tramadol along with the Ibuprofen.
4 Q. So as of March did you need the cane to walk?
5 A. No. March of what year?
6 Q. This year?
7 A. No.
8 **Q. So that was not a truthful statement; correct?**
9 **A. Saying that I needed the cane?**
10 **Q. Yes.**
11 **A. No.**
12 Q. Basically, Ma'am, you lied when you testified
13 under oath when you testified that you used a cane all the
14 time, didn't you?
15 A. Yes. Because I needed it. I use it as needed.
16 Q. But you never -- you would agree, Ma'am, that if
17 you testified -- you know what taking an oath is just like

18 here today; right? Whole truth, nothing but the truth;
19 correct? Yes?

R. Vol. 3, 402 at pg. 46, lines 1-19 (emphasis added).

**Appellant's Continues Her Scheme Of Fraud With Her Testimony Regarding
Her Ability To Carry Bulky Items**

18 Q. When they asked you do you have any difficulty
19 carrying heavy items or bulky items and you answered, I
20 haven't tried, was that a truthful answer?

21 A. I don't recall.

22 Q. You saw the videotape? Like for example you're
23 carrying a big plastic container on one occasion; correct?

24 A. Yeah.

25 THE COURT: I'm sorry. I'm a little confused. We

(R. Vol. 3, 400 at pg. 39, lines 18-25)

1 just saw a video that looked like you were carrying things.

2 THE WITNESS: Yeah.

3 THE COURT: And I think you were here, and I think
4 you saw it.

5 THE WITNESS: Yeah, I was carrying things.

6 THE COURT: So how is it that you don't recall
7 that you were carrying things when we all just looked at a
8 video?

9 THE WITNESS: He said a different date, though.
10 He didn't say that date.

11 THE COURT: Did you give a date?

12 MR. RICHARDS: I said on the videotape. That
13 is --

14 BY MR. RICHARDS:

15 Q. The videotape shows you carrying things on March
16 5th, 2016; correct?

17 A. But you didn't mention the date -- that date.

18 THE COURT: Well, then if it didn't mention a
19 date, wouldn't it be any date in the universe? Let's start
20 with that.

(R. Vol. 3, 400 at pg. 40, lines 1-20)

Appellant was further questioned by Judge Rodriguez as to why when asked directly if she had tried to carry anything at her March 25, 2016 deposition, Appellant testified that she had not when, in fact, she had carried many items during the March 5-6, 2016 move, Appellant testified:

1 THE COURT: I have a question. I understand that
2 you're stating that you weren't asked about the medications
3 and whatnot, so as far as walking with a cane or without a
4 cane or up the stairs or no stairs. But you were also asked
5 about carrying objects, and you made the statement that you
6 never tried to carry anything. Now we saw the video-
7 THE WITNESS: (Interposing) Not before the movie.
8 I didn't ask when -- he didn't ask a specific date.
9 THE COURT: So you just assumed it was -- you
10 didn't ask for clarification?
11 THE WITNESS: Well, they didn't ask a date.
12 THE COURT: So how did you just decide what your
13 answer was going to be if you didn't know the date?
14 THE WITNESS: As far as moving items?
15 THE COURT: Carrying any items, yes. You were
16 specifically asked about that and about carrying items
17 during your move, I believe?
18 THE WITNESS: No.
19 MR. RICHARDS: Yes. Not about the move-
20 THE COURT: (Interposing) I believe it was during
21 the move or just carrying items.
22 THE WITNESS: Just in general.
23 THE COURT: Okay. And so you chose to answer "no"
24 when-
25 THE WITNESS: (Interposing) And you see I didn't

R. Vol. 3, 402 at pg. 48, lines 1-25.

1 carry the items until the day I did move-

2 THE COURT: (Interposing) But the day you moved
3 was prior to the day you gave the sworn testimony is my
4 point. The testimony was on March 25th. On March 5th
5 you're carrying heavy items. That was three weeks before
6 the deposition. Why did you say "no" instead of "yes"?

7 THE WITNESS: I mean, those were clothes. They
8 were prepared items. I mean, they weren't major -- heavy,
9 heavy items.

10 THE COURT: So the answer is you didn't consider
11 them to be heavy?

12 THE WITNESS: No, not for clothes. Clothing and
13 shoes.

14 THE COURT: You were carrying also a large plastic
15 bin?

16 THE WITNESS: Yes.

17 THE COURT: You didn't think that was heavy-

18 THE WITNESS: (Interposing) It has cloths in it.

19 THE COURT: Okay. Thank you.

R. Vol. 3, 403 at pg. 49, lines 1-19.

Appellant contends in her Initial Brief that her false statements was mere inconsistencies not fraud on the court. I.B., 9. Appellant further argues that she did not mention that she could walk freely without a cane when she was on Tramadol because she was not asked. . I.B., 11; R. Vol. 2. 393 at pg. 12, line 25 through R. Vol. 2, 394 at pg. 13, line 23. Appellant also argues that the “purported misstatement” as to her use of Tramadol cannot justify dismissal of her Complaint. I.B., 11.

However, Appellant continually lied not just about her use of the cane, but about whether she had tried to carry large boxes at any point prior to her March 25,

2016 deposition. R. Vol. 3, 476 at lines 19-24. Appellant flat out stated “No.” *Id.* When questioned as to whether Appellant has “difficulty carrying heavy or bulky items” Appellant testified “I haven’t tried.” R. Vol. 3, 476 at line 25 through R. Vol. 3, 477 at line 2. The video surveillance makes clear that Appellant’s testimony regarding carrying large, heavy or bulky items were lies because 20 days earlier Appellant moved residences carrying large boxes in and out multiple times without issue. The bottom line is that it is *not* just about the Tramadol that Appellant uses as her excuse for repeatedly providing false testimony regarding her use of a cane because Appellant lied on multiple topics. This Court has noted, “Witnesses who give sworn testimony . . . at depositions, pretrial hearings and trial, swear or affirm to tell the truth, *the whole truth*, and nothing but the truth. We expect and will settle for nothing less.” *Leo’s Gulf Liqueores v. Lakhani*, 802 So.2d 337, 343 (Fla. 3d DCA 2001)(affirming dismissal with prejudice for fraud on the court).

Through Appellant’s “collective falsehoods,” Appellant “sentiently set in motion an unconscionable scheme calculated to interfere with the judicial system’s ability to adjudicate the matter impartially,” which is exactly the scenario where dismissal of a complaint in its entirety is well within the Trial Court’s discretion. *Herman v. Intracoastal Cardiology Ctr.*, 121 So.3d 583, 588-89 (Fla. 4th DCA 2013); *See also Middleton v. Hager*, 179 So.3d 529 (Fla. 3d DCA 2015); *Piunno v.*

R.F. Concrete Constr., Inc., 904 So.2d 658 (Fla. 4th DCA 2005); *Cox v. Burke*, 706 So.2d 43 (Fla. 5th DCA 1998); *Perrine v. Henderson*, 85 So.3d 1210 (Fla. 5th DCA 2012). And Appellant did not make a voluntary admission of her falsehoods, she did so only upon being confronted with the video and being asked for explanations by the Trial Court.

While it is Appellees' argument that the facts of this case fail to support dismissal, even if this Court concluded the Trial Court's decision was a close call, that is not a basis for reversal. *See JVA Enters.*, 48 So. 3d at 113 (quoting *Bass*, 991 So. 2d at 1011). While a narrowed abuse of discretion standard applies, the discretion of the Trial Court remains paramount as the Trial Court is in the best position to make such determinations-especially here where the Trial Court gave Appellant every opportunity to explain her answers. The Trial Court directly questioned Appellant in an attempt to determine whether the false answers resulted from confusion or a misunderstanding of the initial questions.

Appellant made clear there was no confusion or misunderstanding at her deposition and that she asked for any question of concern to be repeated. Appellees' provided "competent, substantial evidence" to the Trial Court that Appellant had committed a fraud on the Trial Court. *Herman v. Intracoastal Cardiology Ctr.*, 121 So.3d at 588 *citing Wigley v. Hares*, 82 So.3d 932, 946 (Fla. 4th DCA 2011). To be clear, Appellant litigated this case on the false claim

that Appellant has permanent and continuing disabilities now and in the future that require use of a cane to walk, limit her life activities in that she cannot carry bulky or heavy items and cannot use steps without some form of assistance whether it be a handrail or cane. Appellees' presented clear and convincing evidence that Appellant's claimed permanent disabilities, that form the basis for Appellant's damage award, have been fabricated. It would be difficult to get any clearer or more convincing than watching Appellant walk freely without a cane, up and down stairs, carrying bulky items, all without use of any assistance, handrail, etc. and with no visible limp twenty (20) days prior to Appellant testifying that she could not walk without use of a cane, could not walk up and down stairs without a cane or handrail, could not carry and had in fact never tried to carry bulky items, and walk with a permanent limp with her leg ambulating out to the left.

Finally, any inconsistencies that Appellant now claims should preclude this Court from affirmance of the Trial Court's dismissal of Appellant's Complaint for committing a fraud on the court could have been resolved by Appellant at the September 8, 2016 evidentiary hearing before Judge Rodriguez, but she did not. However, that was not the case. Appellant continued her fraud at the evidentiary hearing. At that point, on September 8, 2016 at the evidentiary hearing, whatever "inconsistencies" Appellant references were solidified as lies intended solely to "obfuscate the truth and hamper the defendant's ability to defend" and mock the

integrity of the judicial system. *Piunno v. R.F. Concrete Constr., Inc.*, 904 So.2d 658, 658-659 (Fla. 4th DCA 2005). Finally, while Appellant's counsel attempted to shrug off Appellant's false testimony as misunderstanding and confusion (R. Vol. 3, 403 at pg. 52, lines 1-7) Appellant had the opportunity to clear this up at the evidentiary hearing if such was truly the case. However, the evidentiary hearing instead became the critical moment that arguably tipped the scales against Appellant and clearly established that this was not about any alleged confusion or misunderstanding but in fact was a calculated and unconscionable scheme meant only to interfere with the Trial Court's ability to adjudicate the matter impartially. See *Herman v. Intracoastal Cardiology Ctr.*, 121 So.3d 583 (Fla. 4th DCA 2013). It was at the evidentiary hearing that Judge Rodriguez was able to have the opportunity to interact with Appellant and see for herself Appellants demeanor, conduct and weigh her veracity in responding to questions surrounding Appellant's false testimony. Judge Rodriguez found as follows:

I'm going to grant the motion. I believe that Defendant has introduced clear and convincing evidence to support the motion. And even on all of the relevant issues here the Plaintiff continues to contradict herself and give no adequate—even close to adequate explanation even as she sat here in Court today. It was basically a continuation of what was seen on the video and the depo and those types of contradictions even when given the opportunity here in Court. It wasn't done. R. Vol. 3, 404 at pg. 54, lines 11-20.

A similar scenario played out in *Middleton v. Hager*, where Middleton lied several times under oath about her prior and recent treatment for injuries sustained in an automobile accident and the trial court found that Middleton's testimony at the evidentiary hearing was not credible, "including her testimony that these prior lies were the result of poor memory or confusion." *Middleton v. Hager*, 179 So.3d 529, 534 (Fla. 3d DCA 2015).

In the present case Dismissal of Appellant's Complaint was warranted, justified, well within the Trial Court's inherent authority and was not an abuse of discretion even under the more narrowed scope applied to dismissals for fraud on the court.

A. Judge Rodriguez Set Forth Her Express Findings Warranting Dismissal Of Appellant's Complaint For Fraud On The Court

When reviewing a cause for dismissal with prejudice based on the perpetration of a fraud on the court, it is of critical importance for the trial court to balance the equities and set forth a discussion of the facts and the court's reasoning in the order of dismissal. *Piunno v. R.F. Concrete Constr., Inc.*, 904 So.2d 658, 659 (Fla. 4th DCA 2005); *see also Ham v. Dunmire*, 891 So.2d 492 (Fla. 2004)("Express findings are required to ensure that the trial judge has consciously determined that the failure was more than a mistake, neglect, or inadvertence, and to assist the

reviewing court to the extent the record is susceptible to more than one interpretation.”)

Judge Rodriguez laid out her express findings supporting dismissal in detail establishing that Appellant’s failure was more than a “mistake, neglect, or inadvertence.” *Piunno v. R.F. Concrete Constr., Inc.*, 904 So.2d at 659. In fact, what was even more egregious and was specifically noted by Judge Rodriguez was not only did Appellant fabricate testimony during her prior deposition, but continued the deceit in a very cavalier manner before Judge Rodriguez at the hearing on the Motion to Dismiss. While lying under oath during deposition on the key issues is perjury and sufficient evidence of a fraud on the court sufficient to warrant dismissal, lying in court evidences a total disregard for the legal process and provided Judge Rodriguez a live demonstration of Appellant’s fraud on the court.

Judge Rodriguez found that during Appellant’s live testimony at the September 8, 2016 evidentiary hearing, Appellant “continued to contradict the video surveillance evidence” and Appellant “was unable to give this Court any adequate or believable explanations for the contradictions.” R. Vol. 3, 531. Judge Rodriguez further found that “after considering all the evidence including assessing Appellant’s demeanor at the evidentiary hearing and “lack of frankness

at the September 8, 2016 evidentiary hearing” Appellant’s “failure to testify truthfully was more than a mistake, neglect or inadvertence.” *Id.*

Judge Rodriguez explained her reasoning for finding that Appellant’s untruthful testimony was more than just mistake, neglect or inadvertence:

The Court finds that the record evidence establishes that Plaintiff repeatedly lied under oath, both in deposition and at the evidentiary hearing, regarding issues material to the prosecution of Plaintiff’s claims, to wit: her physical activities, abilities, and limitations, and that this deception was intended to interfere with the judicial system’s ability to impartially adjudicate the case by improperly influencing the trier of fact and unfairly hampering Defendants’ ability to defend the case. R. Vol. 3, 532.

B. The Trial Court Has The Inherent Authority To Dismiss An Action When A Plaintiff Has Perpetrated A Fraud On The Court

Appellant argues that “this dispute should have been left to the jury.” I.B.,

20. However, this Court has made clear:

Our courts have often recognized and enforced the principle that a party who has been guilty of fraud or misconduct in the prosecution or defense of a civil proceeding should not be continued to employ the very institution it has subverted to achieve her ends. Importantly, the trial court has the inherent authority, within the exercise of sound judicial discretion, to dismiss an action when a plaintiff has perpetrated a fraud on the court. *Middleton v. Hager*, 179 So.3d 529, 532-533 (Fla. 3d DCA 2015) *quoting Hanono v. Murphy*, 723 So.2d 892, 895 (Fla. 3d DCA 1998); *Cox v. Burke*, 706 So.2d 43, 46 (Fla. 5th DCA 1998)(internal quotations omitted).

Appellant cites to *Young v. Curgil* in support of her argument that Appellant’s dispute should have been taken to a jury. However, *Young v. Curgil* is distinguishable in that the facts set forth in the trial court’s order, which are laid

out in footnote 1, do not provide clear evidence of fraud and collusion. *Young v. Curgil*, 358 So.2d 58, 59 footnote 1 (Fla. 3d DCA 1978). While the facts when taken together could lead to an inference of collusion, there is no obvious fact evidencing collusion. *Id.* Two of the plaintiffs in *Young* saw the same osteopath doctor at the same office at the same time, twenty-one days after an auto accident wherein they were the only two in a car of six that claimed any injuries whatsoever. *Id.* Then suddenly after seeing this random osteopath doctor, both plaintiffs are admitted by said osteopath doctor for the same injuries. *Id.* Put differently, the facts are slightly too convenient to be coincidental but there is no direct evidence of collusion. Unlike the *Young* case, in the case at bar there is direct evidence via live video footage of Appellant, that Appellant agreed was accurate, directly contradicts Appellant's sworn testimony as to her alleged permanent injuries, which form the heart of her damage claim in this litigation.

Additionally, Appellant cites to *Perrine v. Henderson*, wherein the Fifth District Court of Appeal affirmed the trial court's dismissal with prejudice for fraud on the court. *Perrine v. Henderson*, 85 So.3d 1210 (Fla 5th DCA 2012). *Perrine* involves a plaintiff, Mr. Perrine, who made "numerous material misrepresentations about his medical history and current injuries, all of which were core issues in the case." *Perrine v. Henderson*, 85 So.3d at 1211. Appellant relies on one line where the Court in *Perrine* was actually discussing its decision in

Bologna v. Schlanger which laid out “misconduct” that falls short of clear and convincing evidence that a party has set into motion a scheme to interfere with the judicial system’s impartiality and the Perrine Court makes clear in those instances a case “may be well-managed and best resolved by bringing the issue to the jury”. *Id.* at 1212 *citing Bologna v. Schlanger*, 995 So.2d 526, 528 (Fla. 5th DCA 2008)(emphasis added). The Court in *Perrine* goes on to hold that the present case before it was more than just misconduct involving “non-disclosure, poor recollection, dissemblance...” that may be better suited for presentation to a jury through cross-examination, but, rather, a situation where there was evidence of “significant and repeated misrepresentations” and the trial court did not abuse its discretion in dismissing the case for fraud on the court. *Id.* The take away from *Perrine* is on point with the facts of the case currently before this Court, namely, where a plaintiff makes 1.) significant i.e. related to core issues in the case and 2.) repeated misrepresentations a trial court does not abuse its discretion in dismissing the matter in its entirety for fraud on the court. *Id.* In the case at bar, Appellant made 1.) significant i.e. misrepresentations that went the core issue of her case, which based on Appellant’s own allegation rests on damages stemming from “permanent” “disabilities” (R. Vol. 1, 15 at ¶ 14) and 2.) repeated misrepresentations both at deposition and to Judge Rodriguez at the evidentiary hearing on Appellees’ Motion to Dismiss for Fraud Upon the Court. Furthermore,

as discussed above, there is no question whatsoever that the untruthful testimony was a misrepresentation because there is video surveillance proving Appellant's sworn testimony as to her permanent limp, her use of a cane, and her ability to carry bulky items was not true. Appellant lied as to all elements of her alleged permanent disabilities. It was well within the Trial Court's discretion to dismiss her claims against Appellees for fraud on the court.

II. APPELLANT'S MISREPRESENTATIONS GO TO THE CORE OF APPELLANT'S DAMAGES

Appellant argues that "even if the evidence could justify a finding of intentional fraud on Appellant's behalf, the sanction imposed is disproportionate given that the supposed misstatements do not go to the issue of liability." I.B., 7, 23. Appellant relies on *Hair v. Morton* to support this position; however, her argument on this point is incorrect and flawed. *Hair v. Morton* does not support Appellant's argument. *Hair v. Morton*, 36 So.3d 766 (Fla. 3d DCA 2010). Appellant incorrectly asserts the proposition that since the false testimony in this case did not go towards liability, dismissal for fraud on the court was disproportionate. However, Appellant's analysis is incorrect. It is not a black and white determination where a court simply asks whether the false testimony goes towards liability or not and, if not, the motion to dismiss for fraud on the court is denied. The proper question to look at is whether the false testimony was

“sufficiently central” to the case, whether it be towards liability or damages. *Herman v. Intracoastal Cardiology Ctr.*, 121 So.3d at 589. In *Herman*, the trial court focused specifically on Herman’s false testimony on damages and found that the false testimony went “to the very issues presented to the jury in this case” and that providing repeated false testimony on damages could only be motivated by pecuniary gain. *Id.* at 588. Additionally, in *McKnight v. Evancheck*, 907 So. 2d 699, 700-01 (Fla. 4th DCA 2005), the appellate court affirmed the order of dismissal for fraud on the court where the trial court “found that appellant *lied about his extensive medical history, which had a direct bearing on his claim for damages*” (emphasis added). The medical records presented to the trial court in *McKnight* “were **directly contrary to his sworn testimony**” (emphasis added). *Id.*

In *Faddis v. City of Homestead*, 121 So.3d 1134 (Fla. 3d DCA 2013), this Court affirmed the trial court’s decision striking Faddis’s pleadings, stating:

The record contains competent substantial evidence to support the trial court's determination, by clear and convincing evidence, that Faddis's misconduct, *including intentional acts of perjury on a central and material issue*, was undertaken with intent to deceive, constituted a deliberate scheme to subvert the judicial process, and amounted to a fraud upon the court. *See generally* *Suarez v. Benihana Nat'l of Fla. Corp.*, 88 So.3d 349 (Fla. 3d DCA 2012); *Bertrand v. Belhomme*, 892 So.2d 1150 (Fla. 3d DCA 2005).

Id. at 1135.

This Court has also affirmed a trial court's dismissal of the case where the plaintiff made "repeated lies under oath concerning his personal background and education" even though the plaintiff's "perjury did not directly concern the cause of action itself." *O'Vahey v. Miller*, 644 So.2d 550, 551 (Fla. 3d DCA 1994).

Dismissal for fraud on the court requires the lower court to perform a balancing analysis and carefully weigh the evidence before it, which the Trial Court in the instant litigation did. Again, Judge Rodriguez herself questioned Appellant, she listened in person to Appellant's testimony at the September 8, 2016 hearing, she watched Appellant, and she alone was in the best position to make a determination as to the truthfulness of Appellant's testimony or lack thereof. After the nearly hour and a half evidentiary hearing, Judge Rodriguez concluded that "even on all of the relevant issues –the two or three relevant issues here the Plaintiff continues to contradict herself and give no adequate—even close to adequate explanation even as she sat here in Court today." R. Vol. 3, 404 at pg.54, lines 11-20.

Furthermore, a key distinguishing fact between *Hair v. Morton* and the case at bar is that there was no evidentiary hearing in *Hair v. Morton*. See *Hair v. Morton*, 36 So.3d 766 (Fla. 3d DCA 2010). This Court makes clear in *Hair v. Morton* that meeting the burden of presenting evidence of fraud that is clear and convincing enough to warrant dismissal "almost always requires an evidentiary

hearing.” *Hair v. Morton*, 36 So.3d at 770 (Fla. 3d DCA 2010) *citing Villasenor v. Martinez*, 991 So.2d 433, 435-36 (Fla. 5th DCA 2008); *Ibarra v. Izaguirre*, 985 So.2d 1117, 1119 (Fla. 3d DCA 2008). The presentation of evidence at an evidentiary hearing where the trial court can see the plaintiff and hear the plaintiff’s testimony one on one, gives a perspective that simply submitting interrogatory responses and depositions in a non-evidentiary setting simply cannot provide. When it comes to a sanction as severe as dismissal of a complaint in its entirety, an evidentiary hearing is critical. There was an evidentiary hearing in the case at bar where Appellant testified before Judge Rodriguez and Judge Rodriguez was able to ask Appellant various questions before making her ruling on Appellees’ Motion to Dismiss for Fraud Upon the Court. Judge Rodriguez found that Appellant continued to contradict the video surveillance and was unable to give the Court adequate or believable responses to the Court’s questions. R. Vol. 3, 531. Furthermore, Judge Rodriguez was able to view Appellant and found she lacked credible demeanor and frankness which is further support for the Trial Court’s finding that Appellant implemented a deliberate scheme calculated to subvert the judicial process, warranting dismissal. Under the totality of the circumstances Judge Rodriguez justifiably exercised her judicial discretion by granting the Motion to Dismiss for Fraud on the Court.

CONCLUSION

For the foregoing reasons, Appellee respectfully requests that this Court affirm the Trial Court's October 17, 2016 Final Order of Dismissal Granting Defendant's Motion to Dismiss for Fraud Upon the Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 8, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I ALSO CERTIFY that the foregoing documents are being served this day on all counsel of record identified on the below Service List in the manner specified, either via transmission of Notice of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this computer-generated Answer Brief is in compliance with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure as submitted in Time New Roman 14 point.

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