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

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

On September 20, 2014, Appellant hired Appellees to transport her to the Carnival Cruise terminal in Miami, Florida. Upon arrival, after exiting the vehicle, Appellant was crushed and pinned underneath a luggage trailer that was hitched to Appellees' car. After being freed by several bystanders, Appellant was rushed to Jackson Memorial Hospital where she was admitted and treated over the course of ten days. These facts are not in dispute. They were admitted by Appellees in their answer to the complaint. (R. 13 at ¶¶5-6, 9-10, 16-17; R. 19 at ¶3.)

With liability hard to deny and Appellant's injuries plainly severe, Appellees sought an alternative means to avoid responsibility: moving to dismiss Appellant's action by claiming a fraud on the court. On April 1, 2016, Appellees filed such a motion arguing that Appellant misrepresented the state of her injuries during a deposition. (See R. 127.) On October 17, 2016, the trial court entered an order granting this motion and dismissing Appellant's action. (See R. 532.) In its decision, the trial court found that "Plaintiff repeatedly lied under oath in deposition and at the evidentiary hearing, regarding issues material to the prosecution of Plaintiff's claims, to wit: her physical activities, abilities, and limitation." (R. 532 at ¶ 1.) This order, however, was an abuse of discretion and should be reversed on multiple grounds. Not only did Appellees fail to provide clear and convincing evidence that Appellant perpetrated a fraud on the court—in

fact, Appellant provided reasonable explanations for each of these alleged misrepresentations—the issues Appellees raised are squarely within the providence of the jury, who should have been permitted to resolve the dispute. Finally, the trial court's remedy of dismissal is grossly disproportionate to Appellant's supposed misconduct, which did not go to the issue of liability or otherwise refute the existence of damages. If upheld, the dismissal of this action would provide Appellees with an enormous windfall, and Appellant would be left without any recovery for her severe physical injuries. For these reasons the trial court's decision was an abuse of discretion and should be reversed.

A. Factual Background

Appellee Miami Sunshine Transfer & Tours, Corp. ("Miami Sunshine") provides transportation services to customers of cruise lines, hotels, and other businesses. (R. 12-13 at ¶3; R. 19 at ¶3.) Appellee Noslandy L. Gonzalez ("Gonzalez") is the son of the owner of Miami Sunshine, and he was driving the vehicle in question on the day of the accident. (R. 13 at ¶¶5-6; R. 19 at ¶3.)

On September 20, 2014, Miami Sunshine was hired by Appellant to drive her with her luggage to a Carnival Cruise port. (R. 15-16 at ¶¶16-17; R. 13 at ¶3.) In her complaint, Appellant alleges that after they arrived at the cruise terminal, she attempted to retrieve her luggage from the back of a trailer being towed by Miami Sunshine's vehicle, a Honda Accord. (R. 13 at ¶¶6-7.) While she was

retrieving her luggage, Gonzalez began back-up his vehicle, running over Appellant in the process. (R. 13 at ¶8.)

After being struck by the trailer, Appellant was pinned under its axle until she was freed by several bystanders, a fact that is not disputed by Appellees. (R. 14 at ¶9; R. 19 at ¶3.) Appellant was then transported to Jackson Memorial Hospital, where she was admitted and treated over ten days. (R. 14 at ¶10; R. 19 at ¶3.) She underwent orthopedic surgery on her left leg, where doctors implanted a titanium rod and several screws. (R. 397 at lines 27:11-13.) She also underwent extensive physical therapy to regain as much of her mobility as possible. (See R. 395 at lines 21:21-22:1.)

B. Appellees' Motion to Dismiss

While there can be little doubt that Appellant's injuries affected her overall mobility, Appellees sought to challenge the extent of any such long term effects. To that end, Appellees hired a private investigator to record Appellant's physical activities. On March 5 and March 6, 2016, Appellant was surveilled by Appellees' investigator, who video recorded Appellant for over seven hours as she moved her residence from her previous home to her new one. (R. 131 at ¶7.)

On March 25, 2016, Appellees conducted an update deposition of the Appellant. During this deposition, Appellees' counsel extensively questioned Appellant as to her new living situation, her employment, her doctor's visits, and

her physical therapy. (See generally, R. 447-73.) Towards the end of his questioning, in an apparent attempt to trap Appellant in a misrepresentation, Appellees' counsel began asking Appellant generalized questions about her mobility, without notifying her of the existence of the video recordings or asking her, in good faith, for an explanation of any apparent discrepancy. (See R. 474-78 at lines 33:17-37:5.)

On April 1, 2016, Appellees filed a motion to dismiss Appellant's complaint alleging a fraud upon the court. (See R. 127-37.) This motion was based on supposed discrepancies between the March 25, 2016 deposition testimony and the surveillance video. Specifically, Appellees argued that Appellant made four misrepresentations in her deposition: (1) she always uses a cane to walk; (2) she needs to use a handrail or her cane to go up steps; (3) she walks with a limp; and (4) she had not attempted to walk while carrying large, bulky items.

On September 8, 2016, the trial court held a hearing on Appellees' motion. In support of their motion, Appellees played for the court a four-minute excerpt of Appellant's activities during the move. (See R. 392.) This excerpt and a longer, twenty-four minute video were moved into evidence as Exhibits 1 and 2, over Appellant's objection.[1] (R. 392 at lines 11:13-15.) Appellees then argued that the

[1] The trial court did not review the longer, twenty-four minute video during the hearing.

video conflicts with Appellant's deposition testimony, supposedly proving that she lied during her deposition.

In response, Appellant testified that while she is generally unable to walk without her cane, she can walk without it if she takes Tramadol, an opioid narcotic, and that she took Tramadol and Ibuprofen on the day of the move. (R. 395 at lines 20:20-22.) As for needing to use a handrail, Appellant testified that while she does need a handrail to go up steps, her porch is only two steps and has no handrail. (See R. 398-99 at 32:16-33:3.) Appellant also testified that she does, in fact, walk with a limp. (See R. 397 at lines 27:10-23.) Finally, with respect to carrying items during the move, Appellant testified that the items she carried were not heavy. (See R. 403 at lines 49:2-18.)

At the conclusion of the hearing, the trial court orally granted Appellees' motion to dismiss. (R. 404 at lines 54:11-20.) On October 17, 2016, the trial court entered a written order granting the motion. (R. 531-33.) In its written order, the trial court found, based on Appellant's "demeanor and lack of frankness," that Appellant's failure to testify truthfully was "more than a mistake, neglect, or inadvertence." (R. 531-33.) On October 27, 2016, Appellant filed a motion for reconsideration and/or rehearing. (See R. 380-437.) On November 3, 2016, the trial court denied the motion for reconsideration, and this appeal followed. (R. 534-35.)

SUMMARY OF ARGUMENT

The trial court's order of dismissal for fraud on the court should be reversed as an abuse of discretion for three reasons:

First, the evidence put forth at the hearing does not meet the standard required for dismissal: clear and convincing evidence that the plaintiff "sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense." See Cox v. Burke, 706 So. 2d 43, 46 (Fla 5th DCA 1998). Rather, the evidence shows Appellant attempted to truthfully answer the deposition questions, and the supposed discrepancies are nothing more than misunderstandings.

Second, the parties' dispute should have been determined by a jury at trial. This decision was not based on irrefutable, objective evidence. Rather, the trial court's determination required weighing the credibility of Appellant's testimony at the hearing so as to determine her intent when answering the prior deposition questions. Courts have regularly held that such determinations should be left for the jury, including in this very situation, where video surveillance conflicts with deposition testimony as to the extent of a plaintiff's injuries. See Guillen v. Vang, 138 So. 3d 1144, 1145 (Fla. 5th DCA 2014) (citing Perrine v. Henderson, 85 So.

3d 1210, 1212 (Fla. 5th DCA 2012), and holding that "any discrepancies between [the plaintiff's] testimony and the surveillance DVD are best resolved by a jury").

Third, 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 and they do not negate all of Appellant's damages. See Hair v. Morton, 36 So. 3d 766, 770 (Fla. 3d DCA 2010) (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").

For these reasons, the trial court's order for dismissal was an abuse of discretion and should be reversed by the Court.

ARGUMENT

I. Standard of Review

While Florida courts have long held that "a trial court has the inherent authority to dismiss an action when fraud has been perpetrated on the court," such power "should be exercised cautiously and sparingly, and only upon a clear showing of fraud, pretense, collusion, or similar wrongdoing." See Tri Star Invest. Inc. v. Miele, 407 So. 2d 292, 293 (Fla. 2d DCA 1981). Demonstrating such a fraud, however, requires more than a mere misstatement of fact:

> 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 system's ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense."

Cox, 706 So. 2d at 46 (quoting Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1118 (1st Cir. 1989)); accord Hair, 36 So. 3d at 769; Laurore v. Miami Auto Retail, Inc., 16 So. 3d 862, 864 (Fla. 3rd DCA 2009); Jacob v. Henderson, 840 So. 2d 1167, 1169 (Fla. 2d DCA 2003).

Indeed, "[d]ismissal of a case is an extraordinary sanction and is appropriate only where a party's misconduct is 'correspondingly egregious.'" Suarez v. Benihana Nat'l of Fla. Corp., 88 So. 3d 349, 353 (Fla. 3d DCA 2012) (quoting Cox, 706 So. 2d at 46). Because of this heightened standard, for appellate review of the trial court's order, while under an abuse of discretion standard, the discretion is "'somewhat narrowed,' as this Court must take into account the heightened standard of 'clear and convincing evidence' upon which an order of dismissal for fraud on the court must be based." Suarez, 88 So. 3d at 352.

II. Appellees Did Not Prove Appellant Intended to Perpetrate a Fraud On the Court

As supposed proof of Appellant's intent to perpetrate a fraud on the court, Appellees cite to apparent inconsistencies between Appellant's deposition testimony and the recorded video. Mere inconsistencies, however, are insufficient

to establish a fraud on the court. See Suarez, 88 So. 3d at 353 (reversing the trial court's dismissal despite agreeing that "there are certainly inconsistencies and contradictions in the deposition testimony" because such inconsistencies and contradictions do not "demonstrate clearly and convincingly that [the appellants] collusively engaged in a scheme designed to prevent the trier from impartially adjudicating this matter through lies, misrepresentations, contradictory statements and otherwise hiding the truth." (internal quotations omitted)). Here, the evidence shows that Appellant's alleged misrepresentations are nothing more than misunderstandings between the witness and the questioner—misunderstandings that could have been easily clarified with follow-up questions had Appellees' counsel genuinely sought to understand the nature of Appellant's injuries. As shown below, because the evidence does not support a scheme on the part of Appellant to defraud the court, Appellees' alleged inconsistencies cannot support a motion to dismiss.

1. Testimony that Appellant needs to use a cane to walk

In support of their motion, Appellees cited the following deposition testimony as being in conflict with the video of Appellant walking in and out of her house 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.

(See R. 128; R. 474-75 at lines 33:17-34:4 (emphasis added).) This single bolded question is the extent of the conflict, and it is hardly representative of an "unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate [this] matter." Rather, it is far more likely to be a misunderstanding, as Appellant's cross-examination testimony at the hearing makes clear:

Q. Okay. March 25th, 2016 when you testified under oath, question; do you use the cane all the time when you walk and answered "yes", was that a truthful answer or not?

A. Yes.

Q. So then as of March 25th 2016 when you used the cane all the time when you walked; correct?

A. Yes.

Q. Any caveat? Any explanation? When wouldn't you use the cane?

A. When I did rehab and I took the Tramadol.

Q. So reality the truthful answer should have been do you use the cane all the time when you walk? Yes, unless I take Tramadol?

A. Yes. Because I take the medication all the time.

(R. 400 at 38:12-25.)

Q. Well, when is the first time you told anyone that if you took the Tramadol you didn't need to use your cane?

A. ***Whoever asked. I mean, no one asked me*** about — unless I was at the deposition — I mean, what do you mean?

(R. 401 at 44:9-12 (emphasis added).)

In testifying about her use of a cane, Appellant did not commit a fraud on the court. According to Appellant, the reason she did not mention the Tramadol is because nobody asked, and she thought she was answering the question as directed. (R. 370 at ¶¶13,17.) By rejecting her testimony and presuming an intent to defraud, the trial court effectively shifted the burden on Appellant to prove her innocence, rather than require Appellees to prove a fraud by clear and convincing evidence. Consequently, this purported misstatement cannot justify an order dismissing Appellant's complaint.

2. <u>Testimony that Appellant needs to use a handrail on the stairs</u>

With respect to Appellant's use of a handrail for going up steps, Appellees cite to the following deposition testimony, claiming it conflicts with video of Appellant walking up her front porch steps without using a handrail:

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. What type of difficulty do you have?

A. Knee pain.

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

A. Yes.

* * *

Q. Are you unable to walk up steps without a cane if you are not using a handrail?

A. No.

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. 477-78 at lines 36:3-37:3.)

When Appellant was questioned at the hearing about this deposition testimony, however, it became clear that she was not misrepresenting her condition. Appellant lives in a two-story house, and at her deposition she was asked about walking "up the steps ***in*** her home." (R. 477 at lines 36:3-4 (emphasis added).) In the video, Appellant was shown walking up the two steps to her porch

and front door. The difference here should be obvious: two steps and a flight of stairs are not the same thing. As Appellant testified during the hearing:

> Q. Never used a handrail carrying stuff into your new house, did you?
>
> A. ***Well, there wasn't a handrail.***
>
> Q. In fact, where you're living now is two stories; right?
>
> A. Yes.
>
> Q. And your bedroom is upstairs?
>
> A. Correct.
>
> Q. So when you testified under oath on March 25th, 2016 question; so am I to understand that if you're going to walk up steps you either need a cane or you need a handrail otherwise you're unable to do it; is that fair? You answered, yes. Was that a truthful answer?
>
> A. Yes.
>
> ***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.***
>
> Q. Or down the steps or up the steps of the house you were moving out of–
>
> A. (Interposing) I used the wall because it doesn't have a handrail on the side.

(R. 398-99 at lines 32:16-33:22 (emphasis added).) Given the context of the deposition question, when Appellant testified that she needed to use her cane or a handrail, it is likely she was referring to when she needs to go up a flight of stairs (the stairs "in" her two-story home). For Appellees to argue that this testimony is

evidence of a scheme to defraud is preposterous. This is not evidence of a scheme to defraud. It is evidence of Appellees' counsel mincing words in a desperate attempt to obtain a dismissal, rather than have to face a jury on the issue of liability and damages.

3. Testimony that Appellant walks with a limp

In Appellees' motion to dismiss, Appellees cited to Appellant's deposition testimony that she walks with a limp. (R. 129-30 at ¶¶4, 5.) At the hearing, Appellees' counsel repeatedly questioned Appellant on this issue, apparently seeking to elicit some contradiction. Each time the issue was raised, however, Appellant confirmed that she does walk with a limp, and she described in detail the specific cause of it, that the rod and screws in her leg cause her pain and her "foot goes out to the left." (See R. 397 at lines 27:10-23; R. 398 at lines 31:16-23; R. 399 at lines 34:13-36:4; R. 401 at lines 41:4-42-21.)

Appellees' put forth no evidence to refute this testimony. While in their opening argument, Appellees' counsel claimed that Appellant's March 2015 medical records showed that she did not have a limp (R. 394 at lines 15:15-21), no records were ever put into evidence supporting this assertion, nor was any testimony by her physician or any other expert offered on this issue. In reality, the medical records support Appellant's testimony. On May 5, 2015, Appellees' own physician, Dr. Stephen S. Wender, conducted an independent medical examination

of Appellant, and he 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.) This medical report was submitted to the trial court in support of Appellant's motion for reconsideration.

Appellees offered no evidence to contradict Appellant's consistent deposition and hearing testimony that she walks with a limp. While counsel implied that medical records contradicted this testimony, no records were offered, and in fact, Appellees' own physician confirmed Appellant's testimony. The video itself provides no evidence refuting Appellant's testimony, and Appellees offered no expert analysis the video in support of their argument.

4. Testimony that Appellant did not carry large, heavy items

Finally, Appellees argue that Appellant lied during her deposition as to her ability to carry items:

> 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. You have difficulty carrying heavy items or bulky items?
>
> A. I haven't tried.

(R. 476-77 at lines 35:19-36:2.)[2]

> Q. Ms. Koonce, when you moved into your townhome . . . did you carry the large bulky items in and out of your townhome up and down those steps you were talking about?
>
> A. No.
>
> Q. You needed help with that because you couldn't — you can't do that without a cane, right?
>
> A. Correct.

(R. 488 at lines 47:5-12.)

Appellant was thus asked about carrying four types of items: large boxes, heavy items, bulky items, and "the large bulky items." Appellees contrasted this deposition testimony with video of Appellant carrying items into the home, specifically focusing on an instance where Appellant carried, in counsel's words, "a big plastic container."

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

[2] In the four-minute video Appellees presented to the trial court, Appellees misleadingly cited to deposition transcript testimony wherein Appellant described an instance where she attempted to walk to her car without a cane. (R. 476 at lines 35:3-18.) Appellant testified that during that instance, she was not carrying anything. Appellees displayed this testimony next to video footage of her carrying items to her car, implying that she lied during her deposition. The quoted deposition testimony, however, was not discussing the day of her move. Rather it was describing a separate incident where Appellant walked to her car to look inside. There is absolutely no evidence to suggest that Appellant's testimony was anything other than truthful.

(R. 400 at lines 39:22-24.)

In addressing this issue, the trial court heard the above cross-examination testimony, but it also asked its own questions, and in doing so appears to have misunderstood what was testified to during the deposition.

> THE COURT: I have a question. I understand that you're stating that you weren't asked about the medications and whatnot, so as far as walking with a cane or without a cane or up the stairs or no stairs. ***But you were also asked about carrying objects, and you made the statement that you never tried to carry anything***. . . .

(R. 402 at 48:1-6 (emphasis added).) At her deposition, however, Appellant never testified that she never tried to carry anything. Rather, she was only asked about those four types of items.

Eventually, the Court asked specifically about the large plastic bin:

> THE COURT: But the day you moved was prior to the day you gave the sworn testimony is my point. The testimony was on March 25th. On March 5th you're carrying heavy items. That was three weeks before the deposition. Why did you say "no" instead of "yes"?
>
> THE WITNESS: I mean, those were clothes. They were prepared items. I mean, they weren't major — heavy, heavy items.
>
> 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 cloths in it.***
THE COURT: Okay. Thank you.

(R. 402 at lines 49:2-19 (emphasis added).)

At the hearing, Appellant provided a perfectly reasonable explanation for why she testified during her deposition that she had not tried to carry large boxes and bulky, heavy objects: the large plastic bin was not heavy. This fact—the bin's weight—is undisputed. The video cannot provide the trial court with the weight of the bin, and there is no reason to discount Appellant's testimony, which is the only evidence on this issue.

Appellant's explanation is also consistent with the affidavit she submitted in opposition to the motion to dismiss, in which Appellant confirmed that she did not consider the items she carried to fall into the same category as those items Appellees asked about in the deposition. (R. 371 at ¶18.) She also stated that she had her family members assist her during the move and that they moved the large boxes and heavy, bulky items like furniture and appliances. (R. 371 at ¶18.) Tellingly, this family assistance, while captured on the surveillance video, was not included in the four minute except shown to the trial court—a fact that Appellant's counsel highlighted during his argument:

MR. FRITZ: I would just like to bring up one point. At the update deposition Plaintiff was only asked

> specifically about the four categories of items. One was large boxes; two was heavy items; three was bulky items; and four was large bulky items. She was not asked about any other types of items.
>
> Also I would like to add 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 lines 49:21-50:9.) This family assistance, and the scale of the items moved, provides important context in considering Appellant's deposition testimony. Given Appellant's move, it is more than reasonable that she did not consider a "big plastic bin" containing clothes and shoes to be a large, bulky item when that plastic bin is being compared to an appliance like a washing machine.

Based on the evidence presented, the video surveillance of Appellant's movements do not constitute clear and convincing evidence that Appellant "sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate [this] matter"—the standard required for dismissal. In fact, 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 Guillen, 138 So. 3d at 1145 (Fla. 5th DCA 2014). Indeed, courts have regularly held that even false statements are not enough, unless the "process

of trial has itself been subverted." See Hair, 36 So. 3d at 769; see also Suarez, 88 So. 3d at 353 (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)).

The evidence in this case simply does not come close to demonstrating, by clear and convincing evidence, an intentional false statement, 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.

III. This Dispute Should Have Been Left to the Jury

It is beyond question that "[i]n all but the most extreme cases, our system entrusts juries with the ultimate decisions as to whether claimed injuries are genuine or not." Francois v. Harris, 366 So. 2d 851, 852 (Fla. 3d DCA 1979). When considering a motion to dismiss for fraud on the court, 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 v. Curgil, 358 So. 2d 58, 59-60 (Fla. 3d DCA 1978) (reversing an order of dismissal for fraud on the court where the trial court's factual inferences are fair, but are "by no means overwhelming or compelling" and holding that the issue should be decided by a jury).

Here, the factual dispute was whether Appellant intentionally lied when she testified at her deposition that she always walks with a cane, without proffering the caveat: except when she takes Tramadol. This is exactly the type of question that a jury is in the best position to answer. Likewise, a jury is best suited to decide whether a reasonable lay person would think two front-porch steps qualified as a flight of stairs. A jury is also best situated to determine whether, given the context of her move, the Appellant was being truthful when she said that she could not carry large, bulky objects, notwithstanding the "big plastic bin" during her move. Indeed, even if the evidence here could support the trial court's determination, the evidence does not come close to providing the sort of "overwhelming or compelling" support necessary to remove the issue from the jury. See 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").

Misconduct, including "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." Perrine, 85 So. 3d at 1212. Moreover, such "misconduct" extends to discrepancies between testimony and surveillance

video as to the extent of a party's injuries. See Guillen, 138 So. 3d at 1145 (citing Perrine and holding that "any discrepancies between [the plaintiff's] testimony and the surveillance DVD are best resolved by a jury"). As in Guillen, the parties' dispute should have been determined by a jury. Consequently, the trial court's order of dismissal was an abuse of discretion and should be reversed.

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

Even if Appellant's deposition testimony were intentionally fraudulent, such misconduct would not warrant dismissal of her complaint. While Appellees may deny liability, this is hardly a frivolous case. However the events transpired, 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. Even if she had fully recovered from her injuries, she would still have a substantial claim for damages, and the alleged misrepresentations are unrelated to such amount.

In cases such as this, where the misconduct does not address the issue of liability or the entirety of the claim for damages, dismissal is not justified. See Hair, 36 So.3d at 770 (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"). 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 Id. Because Appellant's supposed misstatements only address a limited aspect of her damages and do not address liability, dismissal of her complaint was an abuse of discretion, and the trial court's order should be reversed.

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: May 3, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

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

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