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IN THE DISTRICT COURT OF APPEAL
SIXTH DISTRICT, STATE OF FLORIDA

DCA NO.: 6D23-3103
L.T. NO.: 2020-CA-971

GERMAN DILONE,

Appellant,

v.

OWNERS INSURANCE COMPANY,

Appellee.
_________________________________/

ANSWER BRIEF OF APPELLEE OWNERS INSURANCE COMPANY

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INTRODUCTION

This Court should affirm dismissal. Severe actions call for severe consequences. The trial court had clear and convincing evidence that Dilone purposefully concealed and/or omitted facts he felt disadvantageous to his case in hopes of attaining an unfair advantage in this litigation. When his scheme was discovered, he provided no justification for his omissions and misstatements. The trial court was well within its discretion "to fashion the apt remedy" of dismissal. Cox v. Burke, 706 So. 2d 43, 47 (Fla. 5th DCA 1998).

STATEMENT OF THE CASE AND THE FACTS

A. Background

On June 27, 2018, Appellant German Dilone and an unnamed alleged tortfeasor were involved in an accident at the intersection of Combee Road and Main Street in Lakeland. (R. 13). Dilone allegedly sustained injuries as a result of the accident to his neck, back, and shoulders. (R. 269). On top of conservative care, Dilone underwent back surgery in July 2020. (R. 337).

Dilone brought suit against Owners for uninsured motorist benefits. (R. 13-18).[1] He sought damages for alleged permanent physical injuries, pain

[1] Dilone initially sued the incorrect entity, Auto-Owners Insurance Company but shortly amended his complaint to name Owners Insurance Company. (App. 13-18).

and suffering, mental anguish, lost wages, and loss of future earning capacity. (R. 16-18).

B. Initial Written Discovery

In discovery, Owners served Dilone with the Florida standard form interrogatories for general personal injury and auto negligence cases. (R. 259-67). In response to the form question asking Dilone to name all "physicians, medical facilities or other health care providers by whom or at which [he had] been examined or treated in the past ten years[,]" Dilone responded with three providers:[2]

> 16. I cannot recall all of the physicians, medical facilities, and/or other health care providers with whom I treated during the past ten (10) years. However, I recall having treated with the following providers in addition to those listed above[3]:
>
> Kissimmee Outpatient Center
> 1503 W. Oak Street
> Kissimmee, Florida 34741
>
> DaVita Medical Group-Poinciana
> 339 Cypress Pkwy., Suite 100
> Kissimmee, Florida 34759
>
> Osceola Regional Medical Center
> 700 W. Oak Street
> Kissimmee, Florida 34744

---

[2] Dilone listed four entries in response to Interrogatory number 16. However, Kissimmee Outpatient Center was listed twice.

[3] The providers "listed above" were those Dilone listed in response to Interrogatory number 15, which asked for providers who treated him for injuries sustained in the subject accident. (R. 264; 770-72).

(R. 264, 272).

Pertinent to his wage loss claim, Dilone swore in his interrogatory responses that he left his job at Battery USA, where he was working at the time of the accident, because of the "unbearable pain" and has been unable to keep a job since because of the pain. (R. 270).

When asked about prior lawsuits, he indicated he had a prior motor vehicle accident in 2007 in New York that resulted in a lawsuit. (R. 266, 273). He did not list any prior worker's compensation claims. (R. 273).

C. Plaintiff's Deposition Testimony

Lost Wages-Work History

Owners deposed Dilone on January 22, 2021. (R. 328). At that time, Dilone was working at McDonald's as a fry cook and had been for approximately six months. (R. 336). However, he testified that he anticipated leaving that job because he "feel[s] pain on [his] back and neck." (R. 339). Dilone could not tell Owners how many hours per week he regularly worked. (R. 336). Nor could he recall how many hours he worked the week before his deposition. (R. 339-40). Although he could tell Owners that he took some time off work following his surgery in July 2020 and was seeking those monies in damages, he could not recall how much time he lost. (R. 337-38).

Before working at McDonald's, Dilone worked at Lakeside Restoration, where he painted residential homes. (R. 341). He worked there for a short time but could not recall the timeframe. (R. 342). According to Dilone, he left Lakeside Restoration because they began requiring him to do "construction work" that he was unable to perform, given his injuries from this accident. (R. 342).

Prior to that, Dilone worked at J.R. Davis, where he would direct trucks delivering sand and soil and drive a roller but did not engage in heavy lifting. (R. 344). He could not recall how many hours per week he worked there. (R. 345). He left that job because of "[t]oo much pain." (R. 345). He told his supervisor he was leaving because of pain. (R. 345).

Prior to J.R. Davis, Dilone was a housekeeper at Vistana Villages. (R. 346). He could not remember how many hours per week he worked there. (R. 347). He left that position because he was unable to perform his tasks at the pace required. (R. 347-48; 351).

Prior to Vistana Villages, Dilone parked cars at Pinnacle. (R. 350-51). He claimed to be unable to park cars anymore because he "had to walk too much and stand too much physically." (R. 352). Prior to Pinnacle, Dilone was out of work for an amount of time he could not recall. (R. 353). Before

this period of unemployment, Dilone worked at Battery USA, where he worked at the time of the subject accident. (R. 353).

Prior and Subsequent Accidents, Injuries, and Treatment

As to accidents, injuries, and treatment not related to this accident, Dilone testified that prior to the subject accident in June 2018, he "[h]ardly ever experienced lower back pain." (R. 364). He added that he "[p]ossibly" experienced numbness and tingling in his legs but could not remember. (R. 365). As to his medical conditions overall, Dilone remembered going to an emergency room in Kissimmee for a kidney stone but could not remember whether he had ever been hospitalized for any reason. (R. 368-69).

Dilone was unable to recall basic medical history such as whether he had ever had surgery. (R. 370). He testified after being asked several times whether he had a prior surgery, "Of course I know what a surgery is, it's just that I don't recall having had any other surgery aside from the other that I've had on my back." (R. 372-73). He was asked, "as you sit here today, you don't remember if you had any surgery before the accident in June 2018?" (R. 370). To which he responded, "No." (R. 370).

Concerned, Owners explained on the record that this was its only chance to ask Dilone questions and understand his circumstances. (R. 370-72). Owners asked: "Is there anything wrong with your memory that leads

you to not be able to remember such a significant thing as surgery?" (R. 373). To which Dilone responded negatively and indicated that he did not want to answer no to the question because "It's just that I cannot recall any other." (R. 373).

Dilone revealed that his memory lapses were partial and targeted toward treatment and incidents unrelated to this accident. He testified: "I cannot recall any others unless we're relating them to the accident." (R. 368). That response specifically concerned emergency rooms at which Dilone treated but, as evidenced by the number of times Dilone could not recall basic events and treatment, seemingly carried over into his testimony concerning unrelated medical treatment as a whole. (R. 368).

On the contrary, with respect to medical treatment from this accident, Dilone had no problems recalling those providers and the types of treatment received as well as specific medications and doses. (R. 365, 387-402). However, when it came to admitting to an unexplained gap in his treatment for nine months in 2019, he could not recall. (R. 393).

Because Owners had conducted its own investigation into Dilone's prior accident history, it knew that Dilone made insurance claims for accidents and injuries prior to this accident but did not know the details of each. (R. 240). Accordingly, after Owners asked generally whether Dilone

had been involved in any other motor vehicle accidents, it asked Dilone directly about each accident it found. (R. 357-63).

Dilone recalled an automobile accident in New York in 2007 that resulted in a lawsuit. (R. 357-60). He claimed that he had "minor" injuries to his neck and back. (R. 358). He testified that he "was treated and [he] was fine after treatment." (R. 358). "After [he] received treatment, [he] felt better and rarely experienced neck and back pain. (R. 360).

Needing information on whether there were any additional accidents, Owners followed up: "So you've only been in two motor vehicle accidents in your lifetime [including the subject one]"? (R. 357). To which Dilone responded, "Those are the ones that I remember." (R. 357).

Owners then asked Dilone about other motor vehicle accidents. (R. 362). Specifically, Owners asked specifically whether Dilone had been involved in a motor vehicle accident in November 1999 and August 2010. (R. 362). Both times Dilone responded that he could not recall. (R. 362).

Owners also asked about work injuries and worker's compensation claims. Dilone testified that he slipped and fell while carrying towels at Vistana Villages in 2019. (R. 348). He injured his neck, lower back, hip, and left leg. (R. 349). Dilone testified that, although he felt pain at the time of the fall and went to the hospital, he recovered quickly. (R. 348). According

to Dilone, at the hospital, "they gave [him] medication and the pain went away." (R. 348).

When asked whether he had any follow-up treatment for the slip and fall after leaving the hospital, Dilone first claimed to not remember, then said perhaps it was Centra Care but was only "once or twice." (R. 349). Notably, Centra Care was not listed in Dilone's responses to interrogatories as a provider with whom Dilone treated. (R. 270-72).

Owners asked, "apart from the fall at Vistana Villages have you had any other workers' compensation claims?" (R. 363). Dilone replied, "I can't recall." Owners continued, "Have you had any other injuries while on the job?" (R. 363). Dilone testified, "Not that I can recall." (R. 363).

To make sure Dilone was provided the opportunity to disclose all prior injuries and treatment, Owners asked him directly about incidents it believed he had based on its own research: "Do you recall being injured on the job in March 2004?" (R. 240, 363). Dilone responded that he could not recall. (R. 363). Owners next asked Dilone: "Do you recall being injured on the job in March 2013 while working for Battery USA? (R. 363). Predictably, Dilone answered, "I can't recall." Owners asked again whether Dilone had "any other accidents" with injuries aside from the 2007 motor vehicle accident

about which he testified and the subject accident. (R. 363). Dilone responded, "I can't remember." (R. 363).

D. Update Interrogatories

Following his deposition, on or about April 25, 2022, Dilone responded to update interrogatories from Owners. (R. 452-54). In Update Interrogatory 2, Owners asked:

> Since your deposition was taken, have you been involved [in] any other "incident" (incident is used in its broadest sense to mean any accidental injury such as an automobile accident, slip and fall, etc.) in which you received injuries, and if so, for each such incident, please state the date and place it occurred, the names and addresses of all persons who have knowledge of the incident and the names and addresses of all such persons and healthcare provider[s] who rendered medical treatment to you.

(R. 452). Dilone responded, "No." (R. 452).

E. Owners Discovers Dilone's Misstatements and Omissions

Records revealed that Dilone experienced several prior injuries, treatment, and subsequent injuries and treatment, many of which he failed to acknowledge under oath:

- Despite his deposition testimony otherwise, Dilone was involved in a work-related accident while employed at Battery USA, Inc., on or about March 23, 2013, where he injured his lower back and knee. (R. 239; 275). He was placed on a full suspension for his injuries. (R. 276). His pain was so severe that the following day

he was unable to get out of bed. (R. 284). He received treatment for approximately two months. (R. 275-306). A significant portion of that treatment was performed at Cora Physical Therapy, a provider Dilone failed to disclose under oath. (R. 272, 284-306).

- In January 2016, Dilone reported to doctors at Optumcare Florida complaining of neck and jaw swelling over several months, as well as left knee pain. (R. 307-319). He attributed this pain to the 2013 work accident at Battery USA and so advised doctors. (R. 307-319). He also complained that his lower back pain from the 2013 work incident was getting progressively worse. (R. 316). This lower back pain caused Dilone numbness and tingling known as paresthesia for two years. (R. 316). The pain also caused him to have lumbar imaging performed at Kissimmee Outpatient Center. (R. 320). Dilone disclosed Kissimmee Outpatient Center as a prior provider but did not disclose his treatment for neck and lower back pain at Optumcare Florida under oath. (R. 264, 272).
- Following the subject accident, in June 2019, while working at Vistana Villages, Dilone slipped on a wet floor at work. (R. 321). He injured his left hip and rated his pain a 10 out of 10. (R. 321).

The pain radiated to his lower back and down his left leg to the point where he was unable to move his left leg. (R. 321). Dilone disclosed this injury during his deposition but indicated that he treated only "once or twice" and that his pain was relieved immediately by medication at the hospital. (R. 348-49).

- On February 19, 2021, about one month following his deposition, Dilone was injured while working at McDonald's as a fry cook. (R. 455). He pulled his right shoulder while changing grease traps. (R. 455). He declined treatment and a drug screen required for treatment. (R. 455). Dilone failed to disclose this incident in response to Update Interrogatory 2. (R. 452).
- Dilone was not honest about his prior injuries and treatment with pain management doctor, Jose Torres, who treated Dilone for his alleged injuries in this case and was also an expert witness for Dilone. Dr. Torres testified that Dilone failed to provide him with an accurate history of his prior neck and low back pain and failed to give him an accurate history of his slip and fall at Vistana Villages. (R. 1321).

As to his employment, records demonstrated that Dilone misrepresented the circumstances of his employment and his ability to work post-accident. Owners uncovered the following:

- Employment records from Lakeside Restoration indicated that, despite Dilone's testimony to the contrary, he quit without any explanation or notice. (R. 441).
- Employment records from J. R. Davis Construction revealed that Dilone was terminated after missing three days of work without calling. (R. 442). Contrary to his testimony, he did not inform his supervisor he was quitting or that pain that prevented him from working. (R. 442).
- Dilone had a similar fate at Vistana Villages, where unlike his testimony, records demonstrate that he was terminated, not that he resigned due to pain. (R. 443).

Owners also captured and presented to the court still images from surveillance footage showing that, contrary to Dilone's sworn testimony, Dilone was able to perform his job tasks at McDonald's for long periods of time without any apparent limitations or pain. (R. 445-50).

F. The Motion to Dismiss

At a clear disadvantage in the litigation due to Dilone's misstatements and omissions, Owners moved to dismiss Dilone's complaint with prejudice for fraud on the court. (R. 238-455). Dilone opposed the motion, maintaining that, even though he was not forthcoming in his deposition, he provided Owners with records that evidenced his prior and subsequent accidents and medical treatment. (R. 541-566). He further argued that memory deficiencies, as opposed to mal intentions, led to his omissions of prior incidents and treatment. (R. 541-566). He also criticized the employment records Owners referenced but did not provide any controverting evidence regarding the circumstances of his employment, aside from deposition testimony from a co-worker from Battery USA who indicated that Dilone did not complain specifically to the witness of back pain before this accident. (R. 541-566, 1308).

At no point in time did Dilone request an evidentiary hearing or ask for a continuance to provide evidence to the court.

G. The Trial Court Dismisses Dilone's Complaint

Following a hearing, the court entered a detailed order dismissing the action. (R. 1336-39). In the order, the court found that Dilone "fraudulently concealed or misrepresented relevant prior and subsequent accidents and

medical treatment and purposefully exaggerated the severity and impact of his alleged injuries on his ability to work and earn income." (R. 1336).

Upon review of all of the exhibits provided and argument of counsel, the court found by clear and convincing evidence that Dilone "'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 or unfairly hampering the presentation of the opposing party's claim or defense.'" (R. 1338).

The court also noted that Owners provided "clear and convincing evidence that Plaintiff has lied or purposefully omitted pertinent facts regarding his prior and subsequent accident history, prior relevant medical history and subsequent employment history entitling Defendant to a dismissal of Plaintiff's Complaint with prejudice for perpetrating fraud on the Court." (R. 1338).

Specifically, the court found that Dilone failed to truthfully disclose under oath the following facts:

- Information concerning injuries sustained in a work-related accident at Battery USA, Inc. on or about March 23, 2013. (R. 1336).

- Medical providers with whom he treated for neck and low back pain prior to this accident to include treatment rendered at CORA Physical Therapy and Poinciana Family Medical Center. (R. 1337).
- The severity of his prior low back pain, including radiating symptoms into his left leg for two years, affecting his ability to perform his job and get out of bed. (R. 1337).
- That he had a history of arthritis which he had acknowledged in a self-reported medical form. (R. 1337).
- That he had undergone X-Ray imaging of his lumbar spine in January 2016 and was referred for a MRI of his lumbar spine and an evaluation with a neurosurgeon in February 2016. (R. 1337).
- That he complained of neck pain to physicians in 2016. (R. 1337).
- Information concerning a motor vehicle accident in 1999 with injuries to his neck and low back, a work-related accident in 2004 with unknown injuries, and a motor vehicle accident with injuries in August 2010. (R. 1337).

- A motor vehicle accident in 2007 that resulted in litigation. (R. 1337).[4]
- The severity of injuries to his neck and low back sustained in a subsequent work-related slip and fall in June 2019. (R. 1337).
- Treatment he received at Dr. Phillips Hospital, Florida CentraCare, and Sanitas Medical Center after a work-related slip and fall in June 2019 for injuries to his neck and low back. (R. 1337).
- Information concerning a subsequent work-related injury to his right shoulder while working at McDonald's on February 19, 2021. (R. 1338).
- Information concerning his employment since the subject accident, including the employment held, hours worked, and reasons for leaving each employer, relevant to his claim for lost wages and loss of future earning capacity. (R. 1338).

The court continued that Dilone testified under oath that he could not remember or recall "over 100 times during the deposition, including to the

[4] This finding appears to be listed in error. Owners did allege in its fraud motion that Dilone failed to disclose this accident. However, this does not affect that the order—as a whole—is supported by clear and convincing evidence.

most basic of medical questions." (R. 1338). The court also noted that Dilone's "misrepresentations in his interrogatories and deposition go to the heart of his claim for past and future medical damages and wages resulting from the June 2018 motor vehicle accident." (R. 1338).

To make these factual findings, the lower court relied upon Dilone's deposition transcript, sworn discovery responses, and records filed by both parties. (R. 1338).

H. Dilone's Motion for Rehearing

Dilone filed a motion for rehearing. (R. 1340-46). He claimed that the trial court's ruling was erroneous because, despite his failure to admit prior accidents and treatment under oath, Dilone provided records to Owners that evidenced his prior accidents and treatment. (R. 1340-46). Dilone also complained that the trial court made certain findings in the order that were not within the records Owners submitted to the court. (R. 1340-46).

Owners opposed rehearing, arguing that there were no new facts or arguments made in the motion for rehearing; it merely regurgitated prior arguments. (R. 1353-99). At no point did Dilone request that the rehearing be evidentiary in nature.

On September 26, 2023, the lower court entered an order denying rehearing. (R. 1482-83). This appeal ensued. (R. 1347).

SUMMARY OF THE ARGUMENT

This Court should affirm. The lower court did not abuse its discretion in dismissing the action because Owners presented clear and convincing evidence that Dilone sentiently set in motion an unconscionable scheme calculated to unfairly hamper Owners' defense of Dilone's claims.

Under oath, Dilone made misrepresentations regarding his employment history and ability to work following this accident. Further, he failed to disclose numerous prior and subsequent incidents as well as resulting injuries and extensive medical treatment to the same body parts he claims he injured in the subject accident. Although he blamed his omissions on a faulty memory, there was no evidence to support that contention in the record, and the circumstances surrounding his purported memory loss proved disingenuous. Dismissal was within the trial court's discretion, and this Court should affirm.

STANDARD OF REVIEW

Dismissal of a lawsuit for fraud is reviewed under an abuse of discretion standard. Bass v. City of Pembroke Pines, 991 So. 2d 1008, 1010 (Fla. 4th DCA 2008); Morgan v. Campbell, 816 So. 2d 251, 253 (Fla. 2d DCA 2002); Leo's Gulf Liquors v. Lakhani, 802 So. 2d 337, 338 (Fla. 3d DCA

2001). See Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980) (explaining abuse of discretion standard). "Thus, to justify reversal, it would have to be shown on appeal that the trial court clearly erred in its interpretation of the facts and the use of its judgment and not merely that the court, or another fact-finder, might have made a different factual determination." Mercer v. Raine, 443 So. 2d 944, 946 (Fla. 1983).

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHERE CLEAR AND CONVINCING EVIDENCE SHOWED DILONE SENTIENTLY SET IN MOTION AN UNCONSCIONABLE SCHEME CALCULATED TO INTERFERE WITH THE JUDICIAL SYSTEM'S ABILITY IMPARTIALLY TO ADJUDICATE FACTS AND BY UNFAIRLY HAMPERING THE PRESENTATION OF THE DEFENSE.

The Florida Supreme Court has made clear:

> A primary purpose in the adoption of the Florida Rules of Civil Procedure is to prevent the use of surprise, trickery, bluff and legal gymnastics. Revelation through discovery procedures of the strength and weaknesses of each side before trial encourages settlement of cases and avoids costly litigation. Each side can make an intelligent evaluation of the entire case and may better anticipate the ultimate results.

Surf Drugs, Inc. v. Vermette, 236 So. 2d 108, 111 (Fla. 1970). Accord Cabot v. Clearwater Const. Co., 89 So. 2d 662, 664 (Fla. 1956) ("The trial of a lawsuit should be a sincere effort to arrive at the truth. It is no longer a game

of chess in which the technique of the maneuver captures the prize."). Justice can only be served where all relevant facts are before the tribunal. Dodson v. Persell, 390 So. 2d 704, 707 (Fla. 1980).

"Witnesses who give sworn testimony by way of interrogatories, at depositions, pretrial hearings and trial, swear or affirm to tell the truth, the whole truth, and nothing but the truth. [Courts] expect and will settle for nothing less." Leo's Gulf Liquors v. Lakhani, 802 So. 2d 337, 343 (Fla. 3d DCA 2001). "The integrity of the civil litigation process depends on truthful disclosure of facts. A system that depends on an adversary's ability to uncover falsehoods is doomed to failure, which is why this kind of conduct must be discouraged in the strongest possible way." Cox v. Burke, 706 So. 2d 43, 47 (Fla. 5th DCA 1998). "Honesty is not a luxury to be invoked at the convenience of a litigant." Baker v. Myers Tractor Servs., Inc., 765 So. 2d 149, 150 (Fla. 1st DCA 2000).

"On the spectrum of sanctionable conduct, perjury is perhaps the most egregious." Empire World Towers, LLC v. CDR Creances, S.A.S., 89 So. 3d 1034, 1038 (Fla. 3d DCA 2012). "Perjury, regardless of the setting, is a serious offense that results in incalculable harm to the functioning and integrity of the legal system as well as to private individuals." United States v. Holland, 22 F.3d 1040, 1047 (11th Cir. 1994). "Accordingly, Florida

appellate courts have readily affirmed the dismissal of pleadings against a party that engages in perjury when that perjury permeates throughout the trial proceedings and is related to a party's claim or defense." Empire World Towers, LLC, 89 So. 3d at 1038.

"The law is clear that a trial court has the inherent authority to dismiss an action when fraud has been perpetrated on the court. Such power is indispensable to the proper administration of justice, because no litigant has a right to trifle with the courts." Tri Star Investments, Inc. v. Miele, 407 So. 2d 292, 293 (Fla. 2d DCA 1981). Trial courts have "the right and obligation to deter fraudulent claims from proceeding in court." Savino v. Florida Drive-In Theatre Mgmt., Inc., 697 So. 2d 1011, 1012 (Fla. 4th DCA 1997). "A trial court has a duty and an obligation to dismiss a cause of action based upon fraud." Long v. Swofford, 805 So. 2d 882, 884 (Fla. 3d DCA 2001). The trial court in this case properly obliged.

> 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 (citing Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1118 (1st Cir. 1989)).

Dismissal is especially warranted where a party lies about matters which go directly to the heart of the opposing party's case, such as the issue of damages. See, e.g., Papadopoulos v. Cruise Ventures Three Corp., 974 So. 2d 418, 420 (Fla. 3d DCA 2007); Distefano v. State Farm Mut. Auto. Ins. Co., 846 So. 2d 572, 574 (Fla. 1st DCA 2003); Baker, 765 So. 2d at 151; Desimone v. Old Dominion Ins. Co., 740 So. 2d 1233, 1234 (Fla. 4th DCA 1999); Savino, 697 So. 2d at 1012.

A. DILONE'S MISSTATEMENTS AND OMISSIONS WERE INTENTIONAL AND NOT THE PRODUCT OF POOR MEMORY.

"Where a plaintiff makes misrepresentations and omissions about [his] accident and medical history in interrogatories and in deposition, those misrepresentations and omissions go to the heart of [his] claim and subvert the integrity of [his] action. When the extensive nature of the plaintiff's past medical history belies [his] claim that []he had forgotten or was confused, []he thereby forfeits [his] right to proceed with [his] personal injury action." Austin v. Liquid Distrib. Inc., 928 So. 2d 521, 521 (Fla. 3d DCA 2006). Dilone did just that.

Dilone concedes that his misstatements and omissions bear directly on the damages claimed in this case, as he makes no argument that they are collateral in nature. To avoid the consequences of his lack of candor,

however, Dilone blames memory loss. He contends that the trial court "assume[d]" that his lack of recall was intentional. (Initial Br. 25). The record proves otherwise.

The trial court did not need to make any assumptions because Dilone's own deposition testimony revealed his intent to feign forgetfulness: "I cannot recall any others [urgent care providers] unless we're relating them to the accident." (R. 368). This statement told the trial court all it needed to know—Dilone was intentionally forgetting providers who did not treat him for the subject accident.

Nevertheless, the types of significant life events that Dilone "forgot" is telling. For example, when asked whether he had ever had surgery before the accident, he claimed several times over not to recall. (R. 370-73). Certainly, surgery is a memorable experience, and Dilone confirmed he understood the question and what surgery means. (R. 372). He testified after being asked several times whether he had a prior surgery, "Of course I know what a surgery is, it's just that I don't recall having had any other surgery aside from that one that I've had on my back." (R. 372-73).

If the answer was no he had never had surgery before, Dilone was required to say no under oath, not that he could not recall. His evasiveness under the pretense of faulty memory, demonstrates that he wanted to have

a safety net should Owners find information (like the records it provided the trial court in support of dismissal) that proved he was not truthful. This was Dilone's unconscionable scheme to "attempt to gain an unfair advantage in this litigation" and hamper the defense. Baker, 765 So. 2d at 150.

Moreover, the extensive nature of his past and subsequent injuries and treatment belie any contention that Dilone simply forgot. He had a prior 2013 worker's compensation claim and a subsequent work injury at McDonald's he failed to disclose. Additionally, he had complaints for years regarding his neck and back before this accident and providers who treated him before this accident that he failed to disclose. Despite his prior accidents and treatment, he testified that he "[h]ardly ever" experienced lower back pain" before this accident. (R. 364). The court had extensive records proving that to be untrue.

When other incidents and injuries are extensive, claims of forgetfulness are disingenuous and support dismissal for fraud. See Metro. Dade Cty. v. Martinsen, 736 So. 2d 794, 795 (Fla. 3d DCA 1999) ("The extensive nature of plaintiff's history belie her contention that she had forgotten about the incidents, injuries and treatment"). This is particularly true where, as here, the claimant remembered prior accidents and treatment in other contexts, such as when treating for pain for those prior injuries, but

not in the context of litigation. See id at 795-96. Dilone had no problem remembering his 2013 work injury three years later in 2016 when he was still feeling pain neck and low back pain and seeking treatment. Yet, when it came to litigation, he conveniently forgot to disclose the incident and injuries even when asked about it specifically. At the time of treatment for the alleged injuries he sustained in this case, Dilone conveniently "forgot" to disclose his prior and subsequent work injuries and treatment to his pain management doctor and expert for trial in this case, Jose Torres. (R. 1321).

The fact that Dilone's omissions were constant and pervasive throughout his deposition and interrogatory answers further demonstrate his true intentions. To this point, Bass v. City of Pembroke Pines, is instructive. 991 So. 2d 1008 (Fla. 4th DCA 2008). In Bass, dismissal was not an abuse of discretion because, despite seeking damages for head and neck injuries sustained in a motorcycle/vehicle accident, in her interrogatory answers and deposition, the claimant "failed to disclose a rather extensive history of migraine headaches for which she was treated over several years." Id. at 1011.

Like Dilone, Bass blamed these omissions on "memory problems." Id. at 1012. Other than that, she provided no explanation. Id. The Court quickly rejected that excuse, holding "[i]t is not a single moment of forgetfulness that

this trial court witnessed in the plaintiff's answers to interrogatories and her deposition testimony. Here, the plaintiff consistently provided answers that were either incomplete or intentionally omitted significant information." Id. at 1011. As a result, the District Court upheld dismissal. Id. at 1012.

The same occurred here. It was not a single moment of forgetfulness at issue before the trial court. Rather, Dilone testified over 100 times during his deposition that he did not remember or did not recall. Additionally, the record supports, and the trial court found in detail, numerous instances where Dilone either omitted or misrepresented facts concerning his medical condition and treatment and/or his ability to maintain work. (R. 1336-39).

Like Bass, Dilone never explained his significant lapse in memory; he simply claimed Owners has records to find all of his prior treatment. The defendant city in Bass had records as well, which, like here, prompted its fraud motion. See id. See also Morgan v. Campbell, 816 So. 2d 251, 254 (Fla. 2d DCA 2002) ("half-truths" are not truthful and jeopardize the integrity of the civil litigation process). Just like the Fourth District did in Bass, this Court should uphold the trial court's dismissal of Dilone's claims. See 991 So. 2d at 1012.

Lastly, the lack of evidence supporting memory loss is telling.[5] Without evidence to support some sort of mental incapacity, memory loss cannot justify a litigant's omissions and misstatements. Bass, 991 So. 2d at 1011; Distefano, 846 So. 2d at 575 (upholding dismissal concluding that a claimant's misstatements should not be excused as mere forgetfulness without any evidence from the claimant that she "had any physical or mental problems affecting her memory"); Morgan, 816 So. 2d at 252-54 (rejecting oversight and failed memory claims and upholding dismissal when claimant provided some, but not all, information regarding her extensive prior treatment).

Dilone's misstatements and omissions were intentional, and the trial court did not abuse its discretion in concluding such by clear and convincing evidence.

B. <u>AN EVIDENTIARY HEARING WAS NOT REQUIRED</u>.

Dilone attempts to attack the trial court's decision because it ruled without an evidentiary hearing. (Initial Br. 20). This argument is

[5] Dilone cites page 1299 of the Record on Appeal to tell this Court that he provided evidence of memory loss. The record demonstrates otherwise. Page 1299 is one page from a larger population of medical records noting an examination on an unknown date and indicating that Dilone "is complaining of neurocognitive issues difficulty with his memory" but could not recall being evaluated for that. There is no diagnosis of memory issues.

unconvincing. First, it is not preserved for this Court's review as this specific argument was not presented below. Aills v. Boemi, 29 So. 3d 1105, 1108 (Fla. 2010); Sunset Harbour Condo. Ass'n v. Robbins, 914 So. 2d 925, 928 (Fla. 2005) ("In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved."); Savino v. Fla. Drive In Theatre Mgmt., 697 So. 2d 1011, 1012 (Fla. 4th DCA 1997) (refusing to consider the appellant's claim that the court's dismissal was improper in the absence of an evidentiary hearing when not presented below).

At the hearing on Owners' motion to dismiss, Dilone did not argue that the hearing should have been evidentiary in nature nor did he ask for a continuance to present evidence to the court. (R. 1357-82). Similarly, when moving for rehearing he failed to argue that he was entitled to an evidentiary hearing nor did he specify that the rehearing he sought in that motion should be evidentiary. (R. 1340-46). Thus, this argument is not preserved for this Court.

Second, notwithstanding the lack of preservation, an evidentiary hearing was not required here. This is because Dilone does not contest that he failed to disclose *under oath*, via sworn interrogatory responses or

deposition testimony, certain accidents, injuries, and treatment. He argues instead that he provided records that disclosed the incidents and treatment but does not actually dispute that he failed to *testify* about them.[6]

Where the fact that omissions and/or misstatements occurred is uncontroverted, an evidentiary hearing is not required. McKnight v. Evancheck, 907 So. 2d 699, 701 (Fla. 4th DCA 2005) (upholding dismissal for fraud without an evidentiary hearing when one was not requested and the fact that omissions occurred was not disputed by evidence); Bass, 991 So. 2d at 1012 (upholding dismissal for fraud without evidentiary hearing when trial court did not believe, based upon the circumstances, that the plaintiff forgot her prior injuries).[7] But see Gilbert v. Eckerd Corp. of Fla., Inc., 34 So. 3d 773, 776 (Fla. 4th DCA 2010) (evidentiary hearing is warranted when there is competing evidence as to whether a misrepresentation occurred that the court must weigh). There was no competing evidence here. Rather, there were Dilone's admissions that he failed to provide information under

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[6] Dilone does contend that he testified about the 2007 motor vehicle accident. As indicated *supra*, Owners agrees that Dilone disclosed his 2007 motor vehicle accident in response to interrogatories and in deposition. However, the trial court's decision was based on numerous other findings, the least of which was the 2007 accident.

[7] The fact that there was no evidentiary hearing is confirmed in the dissenting opinion at 1013.

oath. Thus, an evidentiary hearing was unnecessary. See Bass, 991 So. 2d at 1012; McKnight v. 907 So. 2d at 701.

C. COUNSEL'S PRODUCTION OF RECORDS DOES NOT OVERCOME DILONE'S DISHONESTY.

Along the same lines, Dilone complains that the trial court should not have dismissed his case because his counsel provided many of the records Owners relies upon that show misstatements and omissions in his sworn testimony. In essence, he maintains that Owners found out anyway. He claims this absolves him of his failure to be forthcoming in his responses to interrogatories and in his deposition testimony. This argument misses the mark.

The proper inquiry is not what his *attorneys* provided or failed to provide, but what *Dilone* disclosed under oath. See Perez v. SafePoint Ins. Co., 299 So. 3d 1087, 1090-91 (Fla. 3d DCA 2019) (refusing to dismiss an action when the source of non-disclosure was the attorney as opposed to the party).

Furthermore, revealing only some of the facts by providing records does not constitute 'truthful disclosure.'" Morgan v. Campbell, 816 So. 2d 251, 254 (Fla. 2d DCA 2002) (quoting Martinsen, 736 So. 2d 794, to dismiss the same argument that the claimant disclosed some medical treatment and injuries but not all); Distefano, 846 So. 2d at 575 ("Although appellant

revealed some facts regarding the names of her doctors and the existence of the accident, that alone does not constitute 'truthful disclosure.'").

This is because "[t]he integrity of the civil litigation process depends on truthful disclosure of facts. A system that depends on an adversary's ability to uncover falsehoods is doomed to failure, which is why this kind of conduct must be discouraged in the strongest possible way." Cox, 706 So. at 47. The strongest possible way to discourage Dilone's behavior here was to dismiss the case just as the trial court did. The onus was on Dilone to disclose under oath, not on Owners to dig through hundreds of records. See id.

D. OWNERS WAS NOT REQUIRED TO DRAW OUT DILONE'S DISHONESTY.

Further attempting to blame Owners for his own dishonesty, Dilone emphasizes that Owners did not show him his medical and employment records when deposing him. As Dilone would have it, Owners should have acted as his counsel and attempted to rehabilitate him with his own records. This argument is nonsensical and does not support reversal. See Distefano, 846 So. 2d at 576 (affirming dismissal for fraud when the claimant twice failed to disclose relevant accidents and injuries, but then admitted a prior accident only after being confronted with the accident report). If Owners could have rehabilitated Dilone with records, so too could Dilone's counsel; particularly

if, as Dilone claims, his counsel was the one who provided most of the records to Owners.

Nevertheless, Owners probed in detail about specific incidents depicted in the records and asked pointed questions with obvious answers, as opposed to vague questions that might trick Dilone into making misstatements or omissions. Compare Baker 765 So. 2d at 150 (upholding dismissal for fraud when the "questions which Baker was asked at deposition were straight forward and easily understandable, and clearly required disclosure of these prior injuries" but he failed to do so), with Bologna v. Schlanger, 995 So. 2d 526, 529 (Fla. 5th DCA 2008) (noting defense counsel had a "fraud strategy" when asking vague questions and not asking in at least some detail about claimant's treatment for a prior accident).

Owners did all it could to provide Dilone the opportunity to explain his prior and subsequent injuries and medical treatment. He chose not to. At some point, Dilone needs to take personal responsibility for this actions instead on attempting to pass the buck to others.

E. DILONE MADE BLATANT MISREPRESENTATIONS REGARDING HIS EMPLOYMENT AND ABILITY TO WORK.

In addition to his feigned forgetfulness, Dilone made blatant misrepresentations concerning the circumstances of his employment and his ability to work following this accident. In deposition, Dilone testified that he

was forced to leave Lakeside Restoration because they began requiring him to do “construction work” that he was unable to perform. (R. 342). When in reality, records show he quit that job without notice. (R. 441). At J.R. Davis Construction, he testified he left because of severe pain and that he informed his supervisor that he could not work due to pain. (R. 345). However, the records show that Dilone did not inform his supervisor and was terminated for failing to report to work or call in for three days. (R. 442). Dilone was similarly fired from Vistana Villages but failed to admit that during his deposition. (R. 347-48; 443).

Furthermore, Dilone’s testimony that he struggled to work at McDonald’s as a fry cook because of his neck and back pain and that he would likely need to resign due to pain, was disingenuous. Owners captured and presented to the court still images from surveillance footage showing Dilone was able to perform his job tasks at McDonald’s for significant periods of time without any apparent limitations or pain. (R. 339; 445-50).

Dilone’s testimony regarding the circumstances of his employment and his purported inability to work was untruthful. Because Dilone lied about facts bearing directly on his wage loss and loss of earning capacity, his claims were properly dismissed. <u>Distefano</u>, 846 So. 2d at 574 (“When a party

lies about matters bearing directly on the issue of damages, dismissal is an appropriate sanction.”).

F. DISMISSAL WAS THE CORRECT SANCTION.

Multiple Courts have upheld dismissals when a claimant failed to truthfully and/or completely disclose medical history or prior injuries under oath. See e.g., Ramey v. Haverty Furniture Cos., 993 So. 2d 1014 (Fla. 2d DCA 2008) (upholding dismissal where claimant provided intentionally false deposition testimony and interrogatory answers); Austin v. Liquid Distrib. Inc., 928 So. 2d 521 (Fla. 3d DCA 2006) (“When the extensive nature of the plaintiff's past medical history belies her claim that she had forgotten or was confused, she thereby forfeits her right to proceed with her personal injury action.”); McKnight v. Evancheck, 907 So. 2d 699 (Fla. 4th DCA 2005) (affirming lower court’s dismissal for fraud as a result of claimant failing to disclose prior medical treatment); Distefano v. State Farm Mut. Auto. Ins. Co., 846 So. 2d 572 (Fla. 1st DCA 2003) (upholding dismissal when a claimant lied and omitted facts directly bearing on the issue of damages); Morgan v. Campbell, 816 So. 2d 251 (Fla. 2d DCA 2002) (dismissal was not an abuse of discretion where claimant provided “half-truths” during discovery regarding her prior medical treatment); Long v. Swofford, 805 So. 2d 882 (Fla. 3d DCA 2001) (upholding dismissal when claimant testified untruthfully

in deposition that she had no prior injury or hospital treatment and provided incomplete interrogatory answers); Baker v. Myers Tractor Servs., Inc., 765 So. 2d 149 (Fla. 1st DCA 2000) (trial court's dismissal of personal injury claim, based upon injury to plaintiff's right knee, was justified because plaintiff had lied about a pre-existing injury to his right knee); Rosenthal v. Rodriguez, 750 So. 2d 703, 704 (Fla. 3d DCA 2000) (trial court did not abuse its discretion in dismissing matter based upon "repeated and pervasive perjurious statements" on matters "central" to the claims throughout the course of discovery and trial); Desimone v. Old Dominion Ins. Co., 740 So. 2d 1233, 1234 (Fla. 4th DCA 1999) (upholding dismissing where claimant "made deliberate misrepresentations and gave false information regarding his prior involvement in personal injury litigation, prior similar injuries, past medical treatment, criminal history, employment status and income"); Cox v. Burke, 706 So. 2d 43 (Fla. 5th DCA 1998). This Court should too.

Dilone relies upon Bologna v. Schlanger, 995 So. 2d 526 (Fla. 5th DCA 2008) to argue that dismissal was too harsh a sanction. This reliance is misplaced. In Bologna, the claimant failed to disclose prior treatment during a deposition that was "very broad in scope with virtually no follow-up questions." Id. at 529. The deposition was so vague that the Court suspected that defense counsel engaged in a "fraud strategy," essentially

attempting to trap or trick the claimant into omitting or misrepresenting information. Id.

Moreover, there were "multiple circumstances that militate against" finding an intentional scheme to defraud. Id. at 528. The most significant of which was that the claimant's undisclosed treatment occurred years prior with the same provider who treated the claimant for the incident at issue. Id. The Court noted that, on top of the vague, tricky deposition questions, the fact that the claimant's prior treatment was with the same provider, made it difficult to draw a "clear line of what pain happened when" such that whether the claimant truly lied was a question for the jury and appropriate for cross-examination. Id. at 528-29.

That was not the case here. There was no trickery or vague questions. Dilone was asked during deposition very specifically, with months and years, whether he was involved in prior accidents/incidents. Dilone failed to disclose accidents and treatment that were entirely separate and distinct from the underlying accident. (R. 264, 270-272). He failed to disclose a 2013 worker's compensation injury to his neck and back (the same areas he claims injury from this accident) that resulted in a worker's compensation claim, severe pain, and treatment for several months following. He told doctors three years later in 2016 that he was still suffering pain from that

accident. Yet, when it came time to disclose such accident during deposition and even to the doctors treating him for this case, he failed to. Unlike Bologna, Dilone had a "clear line of what pain happened when" and was asked clear questions that were not designed with a "fraud strategy." Id. Dismissal was an "apt remedy" within the trial court's discretion to impose. Cox, 706 So. 2d at 47. This is true even if this Court would have imposed a lesser sanction. Id.

G. EVEN IF A FINDING IS NOT SUPPORTED, THIS COURT MUST STILL AFFIRM.

Desperate to revive his claims, Dilone complains that the trial court abused its discretion in dismissing this action because it found in the order that Dilone failed to disclose information concerning auto accidents in 1999 and 2010 as well as a work-related accident in 2004. (Initial Br. 30-31). Owners included this information in its motion and argued it at the hearing.

Nevertheless, even when "not all of the trial court's findings were supported by the record," an appellate court has "no choice but to affirm" when there are other findings that clearly support the court's ruling. D.S. v. Dep't of Child. & Families, 842 So. 2d 1071, 1073 (Fla. 4th DCA 2003) (affirming an order terminating parental rights despite several inaccurate factual findings because the record otherwise supported the trial court's

ultimate conclusion that clear and convincing evidence supported termination).

Even if this Court finds that this finding is not supported, this Court must still affirm. The trial court's finding of fraud was supported by clear and convincing record evidence.

CONCLUSION

This Court should affirm the trial court's order dismissing this matter. Dilone "sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by . . . unfairly hampering the presentation of the opposing party's claim or defense." Cox, 706 So. 2d at 46. Dilone failed to disclose and misrepresented facts directly relevant to his claims and hampered Owners' defense of this action. This was fully shown by clear and convincing evidence.

WHEREFORE, Appellee OWNERS INSURANCE COMPANY request that this Court affirm the trial court's order dismissing this matter.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the foregoing has been furnished via E-PORTAL to: **Justin M. Bleakley, Esq.,** Martinez Manglardi, 903 N. Main Street, Kissimmee, FL 34744, (jbleakley@martinezmanglardi.com; vilmarie@martinezmanglardi.com); **Catherine M. Verona, Esq.,** Stoler Russell Keener Verona, 201 N. Franklin Street, Suite 3100, Tampa, FL 33602 (stolerservice@stolerrussell.com); on this 28th day of May, 2024.

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CERTIFICATE OF COMPLIANCE

In accordance with Florida Rule of Appellate Procedure Rules 9.045 9.100(g) the undersigned counsel hereby certifies that this brief complies with the font and word requirements of the Rules: Arial 14-point font and does not exceed 13,000 words.

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