

**IN THE DISTRICT COURT OF APPEAL OF FLORIDA,
FIRST DISTRICT**

CASE NO.: 1D22-2393

L.T. NO.: 19000222CAAXMX

**PRO CHOICE REMEDIATION INC a/a/o
ST. JAMES AME CHURCH OF TRUSTEES,**

Appellant,

vs.

OLD DOMINION INSURANCE COMPANY,

Appellee.

ON APPEAL OF A FINAL JUDGMENT
FROM THE CIRCUIT COURT IN AND FOR
JACKSON COUNTY

REPLY BRIEF OF APPELLANT

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REPLY ARGUMENT

Appellee's Answer brief can best be summed up by stating: "everything PRO CHOICE mentioned in their Initial brief is irrelevant and this Court should only focus on the trial court's conclusion that PRO CHOICE committed fraud on the court." (Answer Brief).¹ However, the law requires more than this Court simply taking the trial court's word. The law requires this Court to determine whether PRO CHOICE sentiently set in motion a scheme to defraud Appellee or interfere with the trial court's ability to adjudicate this case.

As we explained in the Initial brief, the record does not support—and Appellee failed to establish—clearly and convincingly that PRO CHOICE engaged in fraudulent conduct which justified the case ending dismissal of PRO CHOICE's case. As such, the trial court's decision must be reversed and remanded with instructions to reinstate this case for further proceedings.

¹ The record will be cited as "R," the Supplemental Record will be cited as "SR," the Second Supplemental Record will be cited as "SSR," the Amended Appendix will be cited as "AA," and the Second Amended Appendix will be cited as "SAA," followed by the corresponding page numbers. For example, (R at 1), (SR at 1), (SSR at 1), (AA at 1), and (SAA at 1).

Appellee contends this Court must use the “reasonableness test” to determine whether the trial court abused its discretion. (Answer brief at 17). However, when there are allegations of fraudulent conduct, the trial court’s discretion is narrowed, and a more stringent standard is applied. *Synergy Contracting Group, Inc. a/a/o James McGinity v. Homeowners Choice Prop. & Cas. Ins. Co., Inc.*, 2023 WL 6278823 *1, *2 (Fla. 2d DCA Sept. 27, 2023) (stating the trial judge’s discretion is narrower and the appellate court’s review is more stringent than other abuse of discretion cases because “dismissal is regarded as an extreme remedy that should be reserved for extreme cases”).

Therefore, contrary to Appellee’s contention, the standard is not simply whether the trial court acted arbitrarily or fanciful in exercising its discretion. Instead, in fraud upon the court cases, the trial court must have a sound evidentiary basis to make its decision. *Hernandez v. City of Miami*, 35 So. 3d 942, 943 (reversing dismissal when court had no clear and convincing evidentiary basis to dismiss the case for fraud). This is so because dismissal for fraud should only be exercised upon a clear showing of fraud, pretense, collusion, or other similar wrongdoing. *Tri Star Invs., Inc. v. Miele*, 407 So. 2d 292,

293 (Fla. 2d DCA 1981) (court’s inherent authority to dismiss for fraud should be exercised cautiously and sparingly); *Distefano v. State Farm Mut. Auto. Ins. Co.*, 846 So. 2d 572, 574 (Fla. 2d DCA 2017) (dismissal appropriate “only upon the most blatant showing of fraud, pretense, collusion, or other similar wrongdoing” (quoting *Young v. Curgil*, 358 So. 2d 58, 59 (Fla. 3d DCA 1978))).

The evidence Appellee presented to support its dismissal motion, at best, demonstrated inconsistencies in discovery responses, email communications and Mr. Sanchez’s deposition testimony. (Initial brief at 15-26, 30-31).² Likewise, in its Answer Brief, Appellee merely regurgitated findings the trial court made from the cold record, but Appellee failed to address the real issue in this appeal. That is, does the record evidence clearly and convincingly demonstrate PRO CHOICE set in motion a scheme to defraud the trial

² Throughout Appellee’s brief, it trumpeted that PRO CHOICE’s corporate representative, Mel Sanchez, lied under oath. However, Appellee failed to present any definitive evidence Mr. Sanchez lied under oath, or that Mr. Sanchez was even aware of the billing mistakes until these mistakes were brought to Mr. Sanchez’s attention for the first time at deposition. (SSR at 3468-72; Initial Brief at 19-22). Hence, Appellee’s contention that PRO CHOICE does not contest that it gave false testimony is inaccurate. (Answer Brief at 20).

court and Appellee? Without a doubt, the answer to this question is resoundingly, no.

PRO CHOICE's corporate representative, Mel Sanchez, repeatedly advised Appellee's counsel the duplications in the bills were made in error and were never noticed until Appellee's counsel brought the mistakes to Mr. Sanchez's attention—for the first time—at the deposition. (SSR at 3468-72; Initial Brief at 19-22). What is more, once Mr. Sanchez learned of the mistakes, he admitted the errors under oath, conferred with PRO CHOICE's billing company RIBS, and PRO CHOICE then amended its interrogatory responses and filed an affidavit explaining the inconsistencies. (SR at 2953, 2883-2937, 2792-2881, SAA8 at 631-37). Significantly, Appellee presented no evidence to contradict these explanations.³

Accordingly, Appellee's evidence of "fraud" could not have survived the motion for summary judgment standard let alone the

³ For example, Appellee did not come forward with any evidence that PRO CHOICE intentionally created duplicate charges with the intent to defraud Appellee, or that PRO CHOICE even knew the bills included duplicate charges prior to PRO CHOICE filing suit. In short, the record does not demonstrate PRO CHOICE kept the duplication charade going and only admitted to the mistakes when PRO CHOICE got caught with its "hand in the cookie jar." (A13 at 804).

heightened clear and convincing standard required to justify dismissal for fraud upon the court. *Gilbert v. Eckerd Corp. of Fla.*, 34 So. 3d 773, 776 (Fla. 4th DCA 2010) (stating that “if the motion to dismiss for fraud would not likewise survive a motion for summary judgment, the trial court should presume the matter not subject to dismissal); *Jacob v. Henderson*, 840 So. 2d 1167, 1170 (Fla. 2d DCA 2007) (reasoning that when facts for which case is dismissed for fraud would not withstand a motion for summary judgment or directed verdict, dismissal for fraud is inappropriate); *Bob Montgomery Real Estate v. Djokic*, 858 So. 2d 371, 374 (Fla. 4th DCA 2003) (abuse of discretion standard is narrowed to take into account the heightened clear and convincing evidence that is required to prove the alleged fraud).

Appellee next claims the extrinsic versus intrinsic analysis only applies to situations concerning relief from judgment under Florida Rule of Civil Procedure 1.540 and is “irrelevant.” (Answer brief at 14, 25-28). However, nothing in Rule 1.540 limits the extrinsic versus intrinsic analysis to cases involving relief from judgment. In fact, PRO CHOICE submits the intrinsic versus extrinsic analysis is consistent

and applies equally to both Rule 1.540 relief from judgment and common law fraud on the court.

As the Florida Supreme Court explained in *DeClaire v. Yohanan*, 453 So. 2d 375 (Fla. 1984), if the false or misleading information can be addressed within the proceeding, such fraud is intrinsic and cannot be the basis of dismissal for fraud on the court. *Id.* at 377 (stating fraud on the court is limited to extrinsic fraud and “only extrinsic fraud may constitute fraud on the court”). As such, if the alleged “fraud on the court” occurs in the current proceeding, the “fraud” is intrinsic and can be best handled by cross-examination. *Gilbert*, 34 So. 3d at 776 (“[f]actual inconsistencies or even false statements are better managed through the use of impeachment or other discovery sanctions”); *Ruiz v. City of Orlando*, 859 So. 2d 574, 576 (Fla. 5th DCA 2003) (“[e]xcept in the most extreme cases, where it appears that the process of the trial has itself been subverted, factual inconsistencies, even false statements are well managed through the use of impeachment and traditional discovery sanctions”).

In *Wells Fargo Bank, N.A. v. Reeves*, 92 So. 3d 249 (Fla. 1st DCA 2012) this Court reasoned that fraud upon the court is an egregious

offense and is more than a simple assertion in a pleading which may later fail for lack of proof. *Id.* at 251. Specifically, this Court stated:

Inartful pleadings, inconsistent testimony, and even lying to the court by a witness are generally insufficient to support a dismissal for fraud upon the court.

Id. The Second District Court of Appeal recently considered a case with strikingly similar facts and reversed the trial judge's dismissal for fraud upon the court because the record evidence fell short of the stringent standard required to dismiss a case for fraud on the court. *Synergy Contracting Group, Inc. a/a/o James McGinity v. Homeowners Choice Property & Cas. Ins. Co., Inc.*, 2023 WL 6278823 *1, *2 (Fla. 2d DCA Sept. 27, 2023). *McGinity* is instructive and supports reversal.

In *McGinity*, the insurer claimed the plaintiff, Synergy Contracting Group, committed fraud upon the court based upon interrogatory responses, request for admission responses and deposition testimony. *McGinity*, 2023 WL 6278823 at *1. Following a non-evidentiary hearing, the trial judge dismissed the case for fraud upon the court. *Id.* After reviewing the evidence, but giving less

deference to the trial judge,⁴ the Second District recognized that there were inconsistencies between the discovery responses, deposition testimony, and maybe even false statements. *Id.* at *2-3. However, the Second District concluded:

But after reviewing the cold record, we are unconvinced that the inconsistencies or the false statements in the evidence are enough to demonstrate clearly and convincingly that Synergy set into motion an 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.

Id. at *3. Similarly, any inconsistent statements in PRO CHOICE's interrogatory responses, email communications and deposition testimony does not clearly and convincingly demonstrate PRO CHOICE set in motion an unconscionable scheme calculated to interfere with trial court's ability to adjudicate the case or unfairly hamper Appellee's defense of this case.

Simply put, Appellee failed to present any evidence that demonstrated—without a doubt—that PRO CHOICE engaged in

⁴ *Duarte v. Snap-On Inc.*, 216 So. 3d 771 (Fla. 2d DCA 2017) (when lower court makes decision without hearing evidence, appellate court gives that decision less deference as appellate court can evaluate a cold record just as well as the lower court).

blatant fraud. *Distefano*, 846 So. 2d at 574 (dismissal appropriate “only upon the most blatant showing of fraud, pretense, collusion, or other similar wrongdoing” (quoting *Young v. Curgil*, 358 So. 2d 58, 59 (Fla. 3d DCA 1978)). As such, the trial court’s decision cannot stand; it must be reversed.

Finally, Appellee’s argument concerning the affirmative defenses misconstrued PRO CHOICE’s position concerning the trial court’s error on this point. PRO CHOICE does not contend Appellee was required to amend its affirmative defenses to pursue its motion to dismiss for fraud upon the court. There is no dispute that the trial court has the inherent authority to dismiss a case as a sanction for fraud upon the court.

The affirmative defenses of fraud and misrepresentation Appellee raised were separate and distinct from its motion to dismiss for fraud upon the court. Instead, as an additional “gotcha,” Appellee sought leave to amend its affirmative defenses to pursue a motion for summary judgment based upon these new affirmative defenses. PRO CHOICE’s counsel vehemently opposed the amendment because Appellee failed to plead these new affirmative defenses with the requisite specificity required by law. As such, the affirmative defenses

were futile as a matter of law. (Initial Brief at 35-38). Even Appellee conceded its affirmative defenses were not plead with requisite specificity the law requires. (Answer Brief at 29, 31).

In short, PRO CHOICE was prejudiced by the amendment as the affirmative defenses did not contain the level of specificity required by law and with trial only one month away, PRO CHOICE would have no ability to conduct the discovery necessary to defend against the new affirmative defenses. The trial court's decision to the contrary was wrong and must be reversed.

CONCLUSION

For the reasons stated and upon the authorities cited in the Initial and Reply Briefs, the trial court's case-ending dismissal and final judgment must be reversed and remanded to the trial court with instructions to reinstate this case for additional proceedings.

[CERTIFICATE OF SERVICE ON NEXT PAGE]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via email to: Stuart C. Poage, Esq., 215 S. Monroe Street, Ste. 200, Tallahassee, FL 32301 at spoage@penningtonlaw.com, whorgan@penningtonlaw.com and stephg@penningtonlaw.com this 21st day of November 2023.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY the size and style of type used in this Reply Brief is: Bookman Old Style 14-Point Font and complies with the word limit requirements of Fla. R. App. P. 9.210(a)(2)(B).

/s/ Earl I. Higgs, Jr.

Earl I. Higgs, Jr., Esq.