

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING  
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
SECOND DISTRICT

RITA PENA and REINALDO PENA, )  
)  
Appellants/Cross-Appellees, )  
)  
v. )  
)  
CITIZENS PROPERTY INSURANCE CO., )  
a Florida governmental entity, )  
)  
Appellee/Cross-Appellant. )  
\_\_\_\_\_ )

Case No. 2D10-2397

RITA PENA and REINALDO PENA, )  
)  
Appellants, )  
)  
v. )  
)  
CITIZENS PROPERTY INSURANCE CO., )  
a Florida governmental entity, )  
)  
Appellee. )  
\_\_\_\_\_ )

Case No. 2D11-1091

CONSOLIDATED

Opinion filed April 20, 2012.

Appeal from the Circuit Court for  
Hillsborough County; Martha J. Cook,  
Judge; and appeal pursuant to Fla. R. App.  
P. 9.130 from the Circuit Court for  
Hillsborough County; Sam D. Pendino,  
Judge.

Shea T. Moxon of Swope, Rodante P.A.,  
Tampa, for Appellants.

Andrew P. Rock and David R. Terry, Jr., of  
The Rock Law Group, P.A., Maitland, for  
Appellee.

CASANUEVA, Judge.

In appeal number 2D10-2397, Rita Pena and Reinaldo Pena, wife and husband, appeal the trial court's dismissal with prejudice of their first-party insurance action against Citizens Property Insurance Company. The trial court's order of dismissal with prejudice rested upon its conclusion that the Penas had perpetrated a fraud upon the court warranting that ultimate sanction. We affirm the trial court's finding that the Penas perpetrated a fraud upon the court but reverse the dismissal because it was with prejudice. In doing so, we do not condone the conduct of the Penas.

In the consolidated appeal, number 2D11-1091, pursuant to Florida Rule of Appellate Procedure 9.130(a)(4) (a nonfinal order entered after final order on an authorized motion), Citizens claims that the successor judge erred in denying Citizens' motion for reconsideration of the predecessor judge's rulings denying Citizens' motions for summary judgment. We find no merit in Citizens' arguments and affirm the successor judge's nonfinal order without further discussion.

### **Background**

The Penas' home suffered considerable damage from a sinkhole while it was covered by a homeowner's insurance policy issued by Citizens. The Penas sought coverage from Citizens under the policy to repair the damage. Citizens agreed that the policy provided coverage and that it was ultimately responsible for payment of the

necessary remedial work. It advanced some money for repairs but not the full amount the Penas sought. When Citizens provided no further funds, the Penas instituted the underlying first-party insurance suit.

Throughout the pretrial period, including its two unsuccessful motions for summary judgment, Citizens contended that the Penas were not entitled to additional funds for repairs under the policy language until they entered into a contract for building stabilization and repair with a contractor. Citizens argued that dismissal was warranted because the Penas did not complete this condition precedent before filing suit. During the discovery period it became clear that the Penas had not yet hired a contractor. So Citizens filed a motion seeking dismissal with prejudice because the evidence given by the Penas earlier, through affidavits and depositions relative to the existence of the necessary contract, was false. The trial court concluded that the affidavits in opposition to the summary judgment requests were false and that the Penas, through their conduct, had hampered the presentation of Citizens' procedural defense. The trial court granted Citizens' motion and dismissed the Penas' suit with prejudice.

### **Analysis**

Initially, without need for further discussion, we conclude that there was substantial, competent evidence of a clear and convincing force to support the trial court's finding of fraud upon the court. But we disagree with the trial court that the ultimate sanction of dismissal with prejudice is warranted in this instance.

"A dismissal for fraud on the court is reviewed under a narrowed abuse of discretion standard." Gilbert v. Eckerd Corp. of Fla., Inc., 34 So. 3d 773, 775 (Fla. 4th DCA 2010). "A more stringent abuse of discretion standard is appropriate because

dismissal is an extreme remedy." Jacob v. Henderson, 840 So. 2d 1167, 1169 (Fla. 2d DCA 2003). "Because dismissal is the most severe of all possible sanctions, however, it should be employed only in extreme circumstances." Id. (quoting Cox v. Burke, 706 So. 2d 43, 46 (Fla. 5th DCA 1998)). This is so especially when a case is dismissed with prejudice. Before entering a dismissal with prejudice, a trial court is required to consider a mix of factors in order to properly balance two important public policies of this state: our much preferred policy of adjudicating disputed civil cases on the merits and the policy of maintaining the integrity of this state's judicial system. See Gilbert, 34 So. 3d at 776.

Citizens' defense was that the Penas' civil suit did not comply with the condition precedent set forth in the policy of insurance, i.e., that prior to instituting a civil action against Citizens under the policy, the Penas were required to hire a contractor to undertake the remediation work. Citizens established only this procedural defense and was entitled to a dismissal on procedural grounds. Citizens did not establish that there was either no breach or no damages. Precluding a substantive issue of full payment for damages on the basis of a procedural irregularity in this instance was excessive. It would have been appropriate for the trial court to either abate the cause until the condition precedent was fulfilled or dismiss the Penas' suit with leave to amend. Here, at most, the Penas' conduct caused Citizens to expend time and money as well as suffer a delay in the disposition of the cause. But the trial court's dismissal with prejudice precluded forever what appears to be a viable cause of action based upon a good faith dispute between the parties that is not related to the merits of the case.

Unlike most of the reported appellate decisions, the fraud here did not impact Citizens' defense to a damages claim. These cases repeatedly discuss efforts to conceal medical injuries or conditions which impact on the issue of damages, particularly pain and suffering claims and those involving a loss of bodily function. Here, in comparison, Citizens conceded that the Penas suffered a covered injury and that it was required to pay substantial damages. Only the amount for full remediation of the property was contested.

### **Conclusion**

We conclude that the Penas' conduct warrants a sanction; it is the Penas' behavior that placed at risk the dispute between them and their insurance carrier over the quantum of funds contractually required to effectuate repairs to their property. The penalty for their fraudulent conduct, in this instance, is monetary.

In the context of this proceeding, the civil dispute warranting adjudication on the merits consists of the Penas' claims for contractual damages and Citizens' procedural defense that the Penas' suit was instituted prematurely, before a contractual condition precedent had been met. Determining the action was indeed premature, the trial court did not err in dismissing the Penas' claim. To that extent, the trial court's order of dismissal maintained the court's integrity and, as well, disposed of a disputed civil matter on its merits. However, the dismissal with prejudice, in this case's posture, was an abuse of discretion and furthered neither important public policy. Upon remand the trial court shall consider evidence on the amount of fees and costs necessarily expended by Citizens from the filing of the premature complaint through the dismissal

for its efforts in establishing the Penas' fraud and shall enter a judgment for the lodestar amount.

Further, we do not think that, as a creditor, Citizens should be forced to chase the Penas for reimbursement of the amounts determined by the trial court to be due. Therefore, on remand, the trial court may reinstate the suit and abate it until such time as all conditions precedent are satisfied. This will allow the Penas further time to pursue their cause on the merits and thus comply with the state's policy of determining issues on the merits. Alternatively, the trial court may dismiss the suit with leave to amend the complaint. If the trial court chooses the former method, Citizens shall be entitled to deduct the amount of the sanction award from any final judgment for damages in favor of the Penas. If the latter method is chosen, Citizens shall be entitled to an immediate judgment for attorney's fees and costs. Further, the trial court is not precluded from fashioning a different method to effectuate Citizens' sanction award reimbursement.

In appeal number 2D10-2397, we reverse the final order of dismissal with prejudice and remand for further proceedings in accordance with this opinion. We affirm the nonfinal order in appeal number 2D11-1091.

MORRIS, J., Concurs specially.

WHATLEY, J., Concurs and joins in special concurrence.

MORRIS, Judge, Specially concurring.

I concur with the majority in this case only because I am compelled to do so by our holding in Jacob v. Henderson, 840 So. 2d 1167 (Fla. 2d DCA 2003).

The trial court's conclusion that the Penas' affidavits in opposition to Citizens' motion for summary judgment were false is supported by substantial, competent evidence. However, based on our decision in Jacob, the ultimate sanction of dismissal with prejudice was not an option under the facts of this case. Given the growing concern over the increasing frequency of this type of behavior, there may soon come a time when the legislature feels compelled to sanction the imposition of the "death penalty"—dismissal with prejudice—for any acts of fraud on the court, regardless of their caliber. But that day has not yet come.

In Jacob, 840 So. 2d at 1168, the plaintiff in a personal injury case, Mrs. Jacob, lied in a deposition about the extent of her injuries. Unfortunately for her, she had been secretly videotaped doing the very things she testified under oath that her injuries would no longer allow her to do. In reversing the trial court's dismissal of her case with prejudice for fraud on the court, we acknowledged that her case was not one in which she suffered no injuries. Id. at 1169. Instead, the question was the severity of her injuries. Therefore, we reasoned, the totality of her fraudulent testimony in her deposition and the evidence of her injuries admitted at trial should be weighed and resolved by a jury. Id. at 1170.

Although the Penas lied under oath about whether they had entered into a contract with a contractor to repair their sinkhole damage, as required by their insurance policy, it is undisputed that their home suffered sinkhole damage and that there was

coverage for this damage in their policy with Citizens. As in Jacob, this is not a case in which the Penas suffered no injury. Rather, the issues are the severity of the damage, the cost to remediate it, and the assurance that the insurance proceeds would in fact be used to make the repairs. Just as in Jacob, the Penas' fraudulent misrepresentation may be considered by the factfinder when determining their credibility as it relates to the ultimate issues in the case, if and when the case proceeds to that stage. This, coupled with the sanctions outlined by the majority, is the remedy called for under the current law in this district.

As we acknowledged in Jacob, " '[b]ecause dismissal sounds the "death knell of the lawsuit," courts must reserve such strong medicine for instances where the defaulting party's misconduct is correspondingly egregious.' " 840 So. 2d at 1169 (quoting Cox v. Burke, 706 So. 2d 43, 46 (Fla. 5th DCA 1998)).