

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 CA 2208

**JAMES PATRICK McCLEARY AND
BARBARA NAQUIN McCLEARY**

VERSUS

**TERREBONNE PARISH CONSOLIDATED GOVERNMENT
AND HOUMA-TERREBONNE REGIONAL PLANNING COMMISSION**

RWB

JEK
by RWB

JMM
by RWB

**On Appeal from the 32nd Judicial District Court
Parish of Terrebonne, Louisiana
Docket No. 106,172, Division "D"
Honorable David W. Arceneaux, Judge Presiding**

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Government and Houma-Terrebonne
Regional Planning Commission**

BEFORE: PARRO, KUHN, AND McDONALD, JJ.

Judgment rendered SEP 30 2010

PARRO, J.

In this nullity action, Charles David Chauvin, II appeals a judgment dismissing his action to set aside a judgment rendered January 10, 1996, which he alleged was obtained through fraud and ill practices, and further dismissing his claims for intentional withholding and/or unlawful spoliation of evidence. For the following reasons, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On February 24, 1993, James and Barbara Naquin McCleary filed a petition for mandamus against the Terrebonne Parish Consolidated Government (TPCG) and the Houma-Terrebonne Regional Planning Commission (the Planning Commission), seeking an order directing TPCG to accept the maintenance and operations of the streets, servitudes, utilities, and rights-of-way for Sandy Beach Subdivision Addendum No. 1 (Sandy Beach), which they had developed in the City of Houma in Terrebonne Parish. The petition for mandamus was dismissed, and the McClearys amended their petition, converting the matter to an ordinary proceeding and seeking damages for losses incurred due to the Planning Commission's approval of the Sandy Beach project, thus permitting construction, and TPCG's subsequent refusal to accept the road and servitudes in Sandy Beach for "perpetual maintenance." After a lengthy trial, in a judgment rendered January 10, 1996, the court dismissed the claims against the Planning Commission, but rendered judgment in favor of the McClearys and against TPCG, finding that TPCG was negligent for failing to provide them with certain drainage regulations concerning subdivisions within the city of Houma, and awarding them \$134,151.13 for the development costs for construction of Sandy Beach. The court also found the McClearys fifty percent comparatively negligent, and the award was reduced to \$67,075.57, plus legal interest and all court costs. This court affirmed the judgment on appeal, and the supreme court denied writs on October 16, 1998.

Four years later, on September 20, 2002, Chauvin filed a petition to set aside the 1996 judgment on the grounds of fraud and ill practices, alleging that during the

original trial, key witnesses for the Planning Commission and TPCG had perjured themselves and had withheld crucial documents, thus depriving the court of information needed to adjudicate the matter. In a supplemental petition, Chauvin also sought damages for spoliation of evidence. Chauvin claimed he had been a co-owner and partner in Sandy Beach and, by virtue of a written assignment dated May 22, 1998, had obtained half of the McClearys' rights to recover damages for fraud related to Sandy Beach. TPCG and the Planning Commission were named as defendants in the nullity suit, and the McClearys were made nominal defendants as persons needed for the just adjudication of the matter, since they had declined to become plaintiffs. A default judgment was confirmed in favor of Chauvin and against the McClearys, precluding them from asserting any claims they might have raised in the litigation, including any claims arising out of the alleged nullity of the judgment and certain agreements they had with Chauvin. After a bench trial, in a judgment rendered June 10, 2008, the court dismissed all of Chauvin's claims. This appeal followed.¹

APPLICABLE LAW

Louisiana Code of Civil Procedure article 2004(A) provides that a final judgment obtained by fraud or ill practices may be annulled. The annulment of a judgment under this provision is not limited to cases of actual fraud or intentional wrongdoing. Kem Search, Inc. v. Sheffield, 434 So.2d 1067, 1070 (La. 1983). Rather, the criteria for determining whether a judgment has been rendered through fraud or ill practices are: (1) whether the circumstances under which the judgment was rendered show the deprivation of the legal rights of the litigant who seeks relief; and (2) whether the enforcement of the judgment would be unconscionable and inequitable. Wright v. Louisiana Power & Light, 06-1181 (La. 3/9/07), 951 So.2d 1058, 1067; State v. Batchelor, 597 So.2d 1132, 1135 (La. App. 1st Cir. 1992). A judgment will not be

¹ At oral arguments, the question of Chauvin's standing to bring the nullity action was raised, and he was allowed to file a supplemental brief addressing this issue. Having reviewed that brief and this court's previous writ action, in which Chauvin's right of action was upheld by this court, we conclude that Chauvin's standing has been established as the law of the case. See McCleary v. Terrebonne Parish Consol. Gov't, 05-2691 (La. App. 1st Cir. 2/13/06) (unpublished writ action).

annulled on account of fraud or ill practices in the course of a legal proceeding if the fraud or ill practices pertained to a matter irrelevant to the basis of the decision, and therefore, the judgment was not obtained by fraud or ill practices. Ward v. Pennington, 523 So.2d 1286, 1289 (La. 1988). Discovery of evidence that could have been presented at the original trial usually cannot serve as the basis for an action for nullity, and the mere failure to disclose information at a trial does not necessarily constitute fraud or ill practices. Gladstone v. American Auto. Ass'n, Inc., 419 So.2d 1219, 1223 (La. 1982). That determination depends upon the nature of the information and the circumstances surrounding the proceeding. Absent a specific discovery request or "knowing concealment," failing to disclose information that might have been helpful to the opposing party's case does not constitute fraud or ill practices if, with reasonable diligence, the party could have ascertained the information himself. Wright, 951 So.2d at 1074.

It is imperative that courts review a petition for nullity closely, because an action for nullity based on fraud or ill practices is not intended as a substitute for an appeal or as a second chance to prove a claim that was previously denied for failure of proof. The purpose of an action for nullity is to prevent injustice which cannot be corrected through new trials and appeals. Belle Pass Terminal, Inc. v. Jolin, Inc., 01-0149 (La. 10/16/01), 800 So.2d 762, 766. In reviewing a decision of the trial court on a petition for nullity, the issue for the reviewing court is not whether the trial court was right or wrong, but whether the trial court's conclusions were reasonable. Id. Trial courts are permitted discretion in deciding when a judgment should be annulled because of fraud or ill practices, to which discretion reviewing courts will defer. Power Marketing Direct, Inc. v. Foster, 05-2023 (La. 9/6/06), 938 So.2d 662, 670.

Spoliation of evidence generally refers to an intentional destruction of evidence for the purpose of depriving an opposing party of its use. If evidence is "spoiled" in such a fashion, the trier of fact is entitled to assume the evidence would be adverse to the party failing to produce it. If the failure to produce evidence is adequately

explained, no adverse presumption is permitted. Randolph v. General Motors Corp., 93-1983 (La. App. 1st Cir. 11/10/94), 646 So.2d 1019, 1026, writ denied, 95-0194 (La. 3/17/95), 651 So.2d 276. To employ the presumption otherwise would be to treat the failure to produce evidence under the terms of strict liability, such that the mere failure to produce evidence, regardless of the reason, would trigger the adverse presumption. This is not the standard. Paradise v. Al Copeland Investments, Inc., 09-0315 (La. App. 1st Cir. 9/14/09), 22 So.3d 1018, 1027.

Our jurisprudence has recognized two causes of action for spoliation of evidence, one based on an intentional act and the other under a negligence theory. See Robertson v. Frank's Super Value Foods, Inc., 08-592 (La. App. 5th Cir. 1/13/09), 7 So.3d 669, 673. The obligation or duty to preserve evidence arises from the foreseeability of the need for the evidence in the future. Id. at 675 n.3. Thus, the pertinent question raised in negligent spoliation cases is helpful in this situation: "[d]id the defendant have a duty to preserve the evidence *for the plaintiff*, whether arising from a statute, a contract, a special relationship between the parties, or an affirmative agreement or undertaking to preserve the evidence?" Longwell v. Jefferson Parish Hosp. Serv. Dist. No. 1, 07-0259 (La. App. 5th Cir. 10/16/07), 970 So.2d 1100, 1104-05, writ denied, 07-2223 (La. 1/25/08), 973 So.2d 756 (emphasis added). If so, then the plaintiff has a claim for the defendant's breach of this duty. If not, the plaintiff has no remedy. Id. at 1105; Dennis v. Wiley, 09-0236 (La. App. 1st Cir. 9/11/09), 22 So.3d 189, 195-96, writ denied, 09-2222 (La. 12/18/09), 23 So.3d 949. Where a suit has not been filed and there is no evidence that a party knew a suit would be filed when the evidence was discarded, the theory of spoliation of evidence does not apply. Quinn v. RISO Investments, Inc., 03-0903 (La. App. 4th Cir. 3/3/04), 869 So.2d 922, 926-27, writ denied, 04-0987 (La. 6/18/04), 876 So.2d 808.

DISCUSSION

Chauvin urges fifteen assignments of error, some of which are duplicative and some of which border on being rhetorical questions. We will organize our discussion of

Chauvin's arguments topically, rather than numerically.

We begin by addressing assignment of error number seven, which questions whether this court should disregard the judgment and reasons of the trial court and conduct a *de novo* review of the record, because all of the evidence in the case, which Chauvin describes as irreconcilable, was derived from the records of the defendants and testimony of witnesses who were officials of, employed by, or associated with the defendants. The answer to this question is that a *de novo* review is not appropriate unless this court finds that legal error interdicted the fact-finding process, skewing the outcome of the trial and depriving a party of substantial rights.² In reviewing a decision of the trial court on a petition for nullity, the issue for this court is not whether the trial court was right or wrong, but whether its conclusions were reasonable. This court must give deference to the trial court's discretion in deciding when a judgment should be annulled because of fraud or ill practices.

In related assignments of error numbered nine, ten, and eleven, Chauvin asks whether it was an error of law for the district court in this case "to refuse to make findings of fact and conclusions of law concerning the admitted perjury in the presence of the district court of [two of the defendants' witnesses], because of an unwarranted conclusion that such perjury, even if it constituted an ill practice, was not a cause in fact of any prejudice to the plaintiffs," and whether the occurrence of admitted perjury is "an ill practice that *ipso facto* requires that the resulting judgment be set aside." He further questions whether there was manifest or legal error in the district court's conclusions that the complained-of testimony was not relevant to the legal or factual findings underlying the 1996 judgment.

Assuming for the sake of argument that there was "admitted perjury" in the presence of the district court in this case, if that perjury did not cause any damage or

² When a trial court incorrectly applies a principle of law, which causes a substantial deprivation of a party's rights or materially affects the disposition, it commits a legal error. *Evans v. Lungrin*, 97-541 (La. 2/6/98), 708 So.2d 731, 735. Legal errors are prejudicial when they materially affect the outcome and deprive a party of substantial rights. *Id.* When such a prejudicial error of law skews the trial court's finding of a material issue of fact and causes it to pretermitt other issues, the appellate court is required, if it can, to render judgment on the record by applying the correct law and determining the essential material facts *de novo*. *Hains v. Hains*, 09-1337 (La. App. 1st Cir. 3/10/10), 36 So.3d 289, 296.

prejudice to the plaintiffs in the original suit, it did not deprive them of their legal rights. The district court in this case found that the testimony of which Chauvin complains did not prejudice the plaintiffs in the original suit, because the court ultimately found in their favor and imposed liability on one of the defendants in the 1996 judgment. Further, because that testimony did not relate to the degree of fault of the plaintiffs, it did not affect the finding of fifty percent comparative fault. Based on our review of the record, we find that these conclusions of the district court were reasonable. One of the requirements for nullification of a judgment is that the circumstances under which the judgment was rendered show the deprivation of the legal rights of the litigant who seeks relief. A judgment will not be annulled on account of fraud or ill practices in the course of a legal proceeding if the fraud or ill practices pertained to a matter irrelevant to the basis of the decision. If fraud or ill practices, even in the form of perjury, caused no damage to the party seeking nullification of the judgment, it was irrelevant to the basis of that judgment and was not an *ipso facto* cause for nullification. Therefore, we find no legal error in the district court's conclusion that since the complained-of testimony did not result in any prejudice to the rights of the original plaintiffs, it was not a cause for nullification.³

Along similar lines, assignment of error number eight alleges that a defendant's witness violated a sequestration order imposed in the original trial by meeting with the attorney for the defendant between one day of trial on October 6, 1994, and another day of the trial, February 1, 1995. Chauvin contends that the witness admitted this violation in his depositions, but stated at the trial in this case that he was not aware of having violated that order and did not recall whether or not he and the attorney met after that order was entered. Chauvin further contends that the testimony of this witness after the break in the original trial was "obviously orchestrated and rehearsed." As previously noted, the 1996 judgment imposed liability for damages on the defendant, finding that its negligence in failing to advise the McClearys of the applicable

³ We note that Chauvin's right of action in this case is derived from a written assignment of the rights of the McClearys, who were the plaintiffs in the original suit.

subdivision regulations amounted to "reckless misconduct." Therefore, the judge in that proceeding clearly was not swayed in his opinion by the allegedly perjured, orchestrated, or rehearsed testimony on the part of a defendant's witness, and any such violation did not deprive the original plaintiffs of their rights.

The gist of assignments of error numbered twelve and fourteen appears to be that the court in this suit erred as a matter of law by not recognizing that the "elaborate scheme of deception" engaged in by the defendants in the original suit was so "deliberate and intentional," that it impacted the court's findings concerning the type and amount of damages, as well as causing the court to punish the plaintiffs by finding them comparatively negligent. Most of the newly discovered evidence submitted in connection with the nullity suit indicated that some of the TPCG and Planning Commission officials had some prior knowledge of the conflicting regulations, although they professed ignorance in the original suit. Chauvin again seemingly fails to realize that the McClearys were not "victims" in the original suit; the court found in their favor and imposed damages on the adverse party in the 1996 judgment. The record of the original suit indicates that confusion over which subdivision regulations were applicable to the City of Houma was not confined to the McClearys; it was shared to some extent by many of the officials charged with enforcing those regulations. As a consequence, the court found that the TPCG was at fault for failing to communicate the correct regulations to developers, including the McClearys. However, because the conflicting regulations had been brought to the attention of the McClearys before they began construction of the subdivision, the court found they were comparatively negligent in going forward with construction. Whether or not the district court in the nullity suit or this court would have agreed with that assessment is beside the point. As the court in this case found, nothing in the allegedly perjured testimony dissuaded the court in the original suit from imposing liability on TPCG, nor did that testimony have any relevance concerning the plaintiffs' comparative negligence. As previously stated, we consider these reasonable conclusions and, finding no legal or manifest error in the court's

analysis in this case, we defer to its judgment not to nullify the 1996 judgment on these grounds. We note also that this was not a case in which general damages were appropriate, nor was it one of the few instances in which punitive damages are allowed by law for certain egregious behavior. Therefore, the allegedly perjured testimony could not have had any influence on the type of damages available to the McClearys.

Chauvin's assignment of error number five states that given the "admission of pervasive perjury" by a defendant's witness, "which perjury was solicited by" the attorneys representing that defendant "(perhaps innocently)," the court should have disbelieved all of the witnesses presented by the defendants. Again assuming only for the sake of argument that Chauvin's characterization of certain testimony as perjured is correct, we find no logic in the argument that one witness's lack of credibility somehow tainted the testimony of all the witnesses. This argument is clearly untenable.

In assignment of error number two, Chauvin contends the court erred in "failing to advert to the fact that judgment had been rendered in favor of the [Planning Commission] in the original judgment on account of the acts of fraud and ill practices that were deemed irrelevant and insufficient by the district court but only as to the TPCG." Assignment of error number thirteen asks whether there should have been consequences, "such as a judgment on liability, visited upon the Planning Commission on account of the deliberate disregard of the applicable law by that body (a separate legal entity) its staff and its attorney, so that it was an error of law to deny such relief either in the original judgment or after this was proven to the court [in the nullity action] at the time of the presentation of live testimony to the district court?" Chauvin correctly points out that the 1996 judgment imposed liability for all the damages on TPCG and found no liability on the part of the Planning Commission. Chauvin vehemently disagrees with this result and believes the district court in this case should have nullified at least this portion of the 1996 judgment and imposed liability on the Planning Commission. However, the decision as to the allocation of fault between the two defendants has no relevance in this suit for nullity. Even if the district court trying

the nullity action or this court disagreed with that allocation of fault, the amount of damages incurred by the McClearys would not change, regardless of whether one or two defendants were required to pay those damages. A finding of liability on the part of an additional defendant would not increase the amount of damages available to the plaintiffs. Therefore, the district court in this suit did not err in failing to discuss whether the 1996 judgment should have imposed liability on the Planning Commission.

Assignment of error number fifteen contends the court erred in failing to consider ill practices concerning the testimony by the defendants as to the availability of utilities to the Sandy Beach subdivision, which testimony was utilized by the court in the original suit in determining whether or not damages other than construction expenses would be awarded. As stated by Chauvin, despite the testimony of the utilities director and others that utilities would be available in Sandy Beach, that testimony was incorrect, because the regulations governing the water works department require waterlines to be constructed within a servitude adjacent to the street servitude, and the definition of "street" requires that it be accepted for maintenance by TPCG. Since the Sandy Beach street was not accepted for maintenance by TPCG, no waterlines could be constructed there. Chauvin characterizes this error by the witnesses as a fraud or ill practice, because it significantly affected the outcome of the trial, causing the court to conclude that the McClearys could have mitigated their losses by selling the lots and were, therefore, not entitled to lost profits. However, the regulations governing the water works department were in place at the time of the trial, could have been ascertained by the McClearys' attorney with reasonable diligence, and could then have been brought to the attention of the court in order to rebut the erroneous testimony. We conclude that, given the nature and availability of these regulations as published law, the uncorrected error of the witnesses does not constitute a fraud or ill practice and does not serve as a basis to nullify the judgment.

Finally, Chauvin contends that the defendants breached a duty to preserve the Sandy Beach file maintained by the Planning Commission, giving rise to a presumption

that the contents of the file would have been adverse to the defendants. He also describes other letters and meeting "tapes" that the defendants in the original suit refused to provide to him, contending that this constituted an ill practice, such that the 1996 judgment should have been annulled. We note first that while the Sandy Beach matter was being litigated in the original suit, Chauvin requested the entire Sandy Beach file from the Planning Commission, plus copies of legal opinion letters and other documents bearing directly on the issues at trial. In response to those requests, the parish attorney, who represented the defendants, noted that Chauvin's connection with the McClearys had become a matter of public knowledge and that Chauvin had been observed regularly attending the trial and engaging in discussions with the McClearys and their attorney during the proceedings. For that reason, Chauvin was denied access to files and documents having a direct bearing on the ongoing litigation. We conclude that the district court in this suit did not err in finding there was no "fraud or ill practice" on the part of the defendants in the original suit in denying Chauvin, who was not a party, access to those files and documents during the pending case. Eventually, during the ongoing trial, the McClearys subpoenaed the entire Sandy Beach file, but after a hearing, the district court quashed that request as untimely. This was a matter within the court's discretion, and can certainly not form the basis of a nullification action.

Between the 1996 judgment and the filing of the nullity suit in 2002, the parish attorney who defended the original suit died, and the legal files and boxes of evidence were transferred to three successive parish attorneys. Chauvin alleges that a portion of the Sandy Beach file maintained by the Planning Commission was intentionally or accidentally lost or destroyed while in the custody of the defendants, giving rise to a presumption that the documents in that file would have been adverse to them. Given the lapse of time, the shuffling of boxes from one parish attorney to the next, and the fact that, as far as the defendants knew, the Sandy Beach matter had been finally and definitively adjudicated with the supreme court's writ denial in 1998, we conclude there was an adequate and reasonable explanation for the failure to produce the documents

requested by Chauvin in this case.

Ultimately, the fact remains that the original suit did not exonerate the defendants from liability, but resulted in a judgment in favor of the McClearys. Even though their recovery was reduced by the court's finding of comparative negligence, the enforcement of that judgment would not be unconscionable or inequitable. Addressing assignment of error number one, after reviewing the record and arguments in this appeal, we do not find that the district court erred in dismissing Chauvin's claims for failure to bear his burden of proof or in the court's refusal to nullify the 1996 judgment.⁴

CONCLUSION

For the above reasons, we affirm the judgment of June 10, 2008, and assess Chauvin with all costs of this appeal.

AFFIRMED.

⁴ We pretermitted assignment of error number six, which was not addressed to any error of the district court, but asked whether this court should render judgment on the merits, addressing not only the allegations regarding nullity, but also the issues of liability and attorney fees in the underlying case so that, if Chauvin were successful on appeal, the only remaining issue for the district court would be damages. Since Chauvin was not successful in this appeal, there is no need to address this assignment of error.