IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

NIMO DEMOURA,

Appellant,

v.

Case No. 5D21-109
LT Case Nos. 2012-SC-9369-O
2019-AP-74-A-O

THE TRAVELERS HOME AND MARINE INSURANCE COMPANY,

Appellee.

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Opinion filed October 29, 2021

Appeal from the County Court
for Orange County,
Faye Allen, Judge.

Nicholas A. Shannin and Carol B. Shannin, of Shannin Law Firm, P.A., Orlando, for Appellant.

L. Allen Gaffney and David B. Kampf, of Ramey & Kampf, P.A., Tampa, for Appellee.

EDWARDS, J.

In May 2009, while entering onto Interstate 4, Nimo Demoura, Appellant, was struck from behind by a vehicle driven by the insured of Appellee, The Travelers Home and Marine Insurance Company. After paying Appellant's chiropractic bills for several months, Appellee stopped after Dr. VanderSchaaf, at Appellee's request, performed a compulsory medical exam and concluded that the chiropractic treatment was not reasonable, medically necessary, or related to the subject accident. When Appellant's demand letters got no results, he sued Appellee. The trial court ultimately entered a directed verdict in favor of Appellee, dismissed the jury, entered judgment in favor of Appellee, and denied Appellant's motion for new trial.

Appellant seeks reversal of the trial court's denial of his motion for new trial. Appellant points to several rulings made during trial as reversible error that led the trial court to grant Appellee's motion for directed verdict. Among other claims, Appellant asserts that the trial court erred when it prevented him from publishing to the jury, pursuant to Florida Rule of Civil Procedure 1.330(a)(2), the deposition testimony of Appellee's corporate representative. We agree that was error. Accordingly, we reverse and remand for a new trial on all issues. Based on this ruling, we need not address the other issues raised by Appellant.

During the discovery phase of this case, Appellant deposed Appellee's duly designated corporate representative, Ruben Infinger. In that deposition, Mr. Infinger agreed he had received certain letters from Appellant's counsel demanding Appellee to resume paying Appellant's medical bills. Mr. Infinger also agreed that the only reason Appellee stopped paying Appellant's chiropractic bills was Dr. VanderSchaaf's opinion that the treatment was unnecessary, unreasonable, and unrelated to the subject accident.

At the start of trial, Appellant announced that the first testimony would be presented by publishing the deposition of Mr. Infinger. Appellee, when asked by the court, objected. The trial court inquired how Appellant intended to publish the deposition, given that Mr. Infinger was not present at trial. Appellant advised the court that he was proceeding in accordance with rule 1.330(a)(2), which provides, in part, that the deposition of a person, such as Mr. Infinger, designated under rule 1.100(b)(6) to testify on behalf of a corporate party may be used by an adverse party for any purpose. Thus, Appellant argued that he was entitled to publish Mr. Infinger's deposition regardless of whether he was present or not.

At the end of the first trial day, the court questioned whether Appellant should be allowed to just read the transcript to the jury. The court also inquired as to whether he had complied with the pretrial order in terms of

timely designating those portions of depositions which he intended to offer. As specifically authorized by the court, on the following morning, Appellant provided case law supporting his position, i.e., that rule 1.330 permits a party opponent to publish the deposition of an opposing party or its designated representative to the extent that the testimony is otherwise admissible.

Appellant also advised the trial court, correctly, that the pretrial order did not require counsel to make, share, or file any deposition designations in advance of trial. We note that Appellant's trial witness list included Mr. Infinger, associating him with Appellee, and his deposition transcript was contained in Appellant's list of trial exhibits. The trial court denied Appellant's request to publish the deposition and told him that he would be permitted to proffer the testimony at a later time. As the trial continued, Appellant asked more than once to proffer Mr. Infinger's deposition testimony, and each time the trial court advised he would have his opportunity to do so, but later.

After the trial court granted Appellee's motion for directed verdict and only after the jury was discharged, Appellant was finally permitted to proffer what he intended to publish from Mr. Infinger's deposition. Appellant did so by advising the trial court of the specific page and line numbers for each question and answer that he had intended to publish from the deposition. Under the circumstances, that was sufficient.

Although the standard of review for admissibility of evidence is abuse of discretion, a trial court's discretion is limited by the rules and statutes governing admissibility. *Castaneda v. Redlands Christian Migrant Ass'n*, 884 So. 2d 1087, 1090 (Fla. 4th DCA 2004). In other words, trial courts do not have discretion "to ignore the Rules of Evidence or the Rules of Civil Procedure." *Id.* at 1093.

Florida Rule of Civil Procedure 1.330(a) governs the use of depositions in court proceedings, and provides in pertinent part:

> (a) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice of it so far as admissible under the rules of evidence applied as though the witness were then present and testifying in accordance with any of the following provisions:
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> . . . .
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> (2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent or **a person designated under rule 1.310(b)(6) or 1.320(a) to testify on behalf of a public or private corporation**, a partnership or association, or a governmental agency that is a party **may be used by an adverse party for any purpose.**

(Emphasis added).

In *Canales v. Compania De Vapores Realma, S.A.*, 564 So. 2d 1212 (Fla. 3d DCA 1990), the Third District, citing rule 1.330(a)(2), found reversible error in the trial court's refusal to allow plaintiff to publish the deposition

testimony of the designated representative of the defendant. The Third District in *Canales* cited to an earlier case, *LaTorre v. First Baptist Church of Ojus, Inc.*, 498 So. 2d 455, 457–58 (Fla. 3d DCA 1986), in which the trial court was found to have reversibly erred when it refused to allow plaintiff to publish the deposition of a director of the church and required plaintiff to call that witness, live, to the stand. In both cases, the Third District described the mandate of rule 1.330(a)(2) to be clear, thus permitting the publication of the deposition of the defendant's representative or director, regardless of whether he was available to testify live. *Canales*, 564 So. 2d at 1214; *LaTorre*, 498 So. 2d at 458 (noting rule allows introduction of "deposition testimony as substantive evidence without being exposed to the witness's [potential] evasiveness and other self-serving devices" if trial court forces proponent to call that witness live during trial).

In *Kelley v. Webb*, 676 So. 2d 538, 539–40 (Fla. 5th DCA 1996), this Court found that the trial court erred in refusing to allow a personal injury plaintiff to publish portions of the defendant's deposition at trial in accordance with rule 1.330(a)(2). When faced with that prohibition, the plaintiff advised the trial court that she would not be presenting any other liability witnesses and would rely only on the testimony she gave earlier in the day. *Id.* at 539. The trial court directed a verdict in favor of the defendant. *Id.*

We reversed the directed verdict, noting the following:

> [W]e conclude that appellant has not been fully accorded her day in court. While we appreciate the trial court's preference for appellees' [sic] in-court testimony and commend its obvious desire to resolve this case expeditiously, we feel that the court's concern with these matters could have unfairly influenced appellant to prematurely, albeit conditionally, rest her case. Because appellant expressed an unequivocal desire to present appellees' [sic] deposition testimony in her case in chief, as was her prerogative under Florida Rule of Civil Procedure 1.330(a)(2), we do not believe that appellant fairly can be held to have concluded her evidence at the time of the "directed verdict's" entry.

Id. at 539–40.

Likewise, here Appellant was not permitted to present his case as he wished and as he was entitled to do. Thus, refusal to permit Appellant to read admissible portions of Mr. Infinger's deposition, entry of the directed verdict, and denial of his motion for new trial constitute reversible error. We reverse and remand for a new trial.

REVERSED AND REMANDED for a new trial.

LAMBERT, C.J. and COHEN, J., concur.