FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D21-2368

DANIEL KELLENBERGER,

Appellant,

v.

WAL-MART STORES EAST, LP, a
Foreign Limited Partnership,

Appellee.

On appeal from the Circuit Court for Baker County.
Gloria R. Walker, Judge.

November 30, 2022

PER CURIAM.

AFFIRMED.

KELSEY and M.K. THOMAS, JJ., concur; JAY, J., dissents with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

JAY, J., dissenting.

Appellant sued Appellee ("Wal-Mart") for the personal injuries he allegedly suffered in a slip-and-fall accident at the Wal-Mart store in Macclenny. The part of the aisle where the alleged accident occurred was not visible on the store surveillance video. This made Appellant's credibility a central feature of the trial.

Appellant initially claimed damages for lost wages and loss of earning capacity. During discovery, Wal-Mart asked Appellant to produce various financial documents. In response, Appellant's counsel stated that the documents were not in Appellant's possession and were not relevant because Appellant was no longer making a claim for lost wages or loss of earning capacity. Appellant's counsel reiterated this position in a subsequent response in which counsel stated that the requested financial records were "not applicable" because Appellant was not advancing a claim for lost income. As one would expect, Appellant did not sign the responses to the requests for production.

At trial, Appellant presented testimony concerning the emotional/psychological impact that the accident had on him, including testimony about his alleged inability to financially support his family. Wal-Mart took issue with this testimony, arguing that Appellant was—in effect—trying to revive his abandoned claim for lost wages or loss of earning capacity. A series of sidebar conferences ensued. In sum, Wal-Mart argued that the testimony opened the door to cross-examination about Appellant's earning history, including the financial documents that he did not produce during discovery. Counsel for Appellant countered that any questions about the discovery of financial documents unfairly insinuated that Appellant was hiding something. Appellant's counsel maintained that questions about the documents were irrelevant, and that Wal-Mart could have moved to compel the document production—before trial—if Wal-Mart believed it was entitled to Appellant's financial papers. Ultimately, the trial court allowed Wal-Mart to cross-examine Appellant about the documents.

During cross-examination, Appellant was asked to confirm that Walmart requested his financial records and that none of those documents was ever produced. In response, Appellant stated that he was unaware that his business records were not provided. Based on that answer, counsel showed Appellant the discovery responses. He was then asked to confirm that the requested records were never produced. Different forms of that question were repeated several times. After multiple objections, Appellant's counsel moved for a mistrial. That motion was denied. At the trial's conclusion, the jury reached a defense verdict. This appeal followed.

Purported discovery abuses, like the one Wal-Mart alleged here, are for pre-trial resolution by the trial court. *See Amlan, Inc. v. Detroit Diesel Corp.*, 651 So. 2d 701, 703 (Fla. 4th DCA 1995). Indeed, the Rules of Civil Procedure supply courts with an array of options for addressing discovery abuses without involving the jury. *See* Fla. R. Civ. P. 1.380. Thus, it is improper to insinuate at trial that the opposing party is guilty of some type of discovery abuse. *See Emerson Elec. Co. v. Garcia*, 623 So. 2d 523, 525 (Fla. 3d DCA 1993) (reversing a jury verdict and remanding for a new trial in a case where counsel accused—in the jury's presence—opposing counsel of "picking and choosing the evidence it would produce in response to discovery demands," given that "[n]o pretrial discovery violation was ever established and, even if there had been evidence of a violation, an appropriate sanction was a matter for the court and not for the jury.").

In this case, the clear implication of Wal-Mart's questioning was that Appellant—or his lawyers—had something to hide. There were ways that Wal-Mart could have cross-examined Appellant about his work history without improperly impeaching him with unsworn discovery responses. For example, Wal-Mart could have simply asked, "Now, Mr. Kellenberger, you agree that aside from your testimony and your family's testimony, there is no evidence suggesting that you had a successful business before your accident?" Such a question would have made the point that—with respect to Appellant's claim that he had a successful business—Appellant was essentially asking the jury to take his word for it. Instead, Wal-Mart asked a non-lawyer to explain his lawyer's responses to pre-trial discovery requests, and it did so in a manner

which implied that Appellant was acting in a dishonest way. In a case where Appellant's credibility was a critical feature, I believe that there is a reasonable possibility that the jury's verdict was affected by Wal-Mart's improper impeachment. *See Special v. W. Boca Med. Ctr.*, 160 So. 3d 1251, 1256 (Fla. 2014) (for an error to be harmless in a civil case, "the beneficiary of the error must prove that there is no reasonable possibility that the error contributed to the verdict."). Accordingly, I respectfully dissent and would remand the case to the circuit court for a new trial.

E. Aaron Sprague, Chelsea R. Harris, Dana A. Jacobs, and Fraz Ahmed of Coker Law, Jacksonville; Christopher D. Campione of Campione Law, P.A., Jacksonville, for Appellant.

Scott A. Cole of Cole, Scott & Kissane, P.A., Miami; Michele D. Morales and Stephanie L. McCoy of Cole, Scott & Kissane, P.A., Orlando, for Appellee.