Third District Court of Appeal

State of Florida

Opinion filed December 26, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-1808
Lower Tribunal No. 16-20382

Anne Charlotte Sigrid Kratz,
Appellant,

vs.

Abdelmajid Daou,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Daryl E. Trawick, Judge.

Cooney Trybus Kwavnick Peets, PLC, and Warren B. Kwavnick (Fort Lauderdale), for appellant.

Jesus O. Cervantes, for appellee.

Before EMAS, C.J., and SALTER and LOBREE, JJ.

PER CURIAM.

Anne Kratz ("Ms. Kratz"), the prevailing defendant after a jury trial in a motor vehicle negligence case brought against her by Abdelmajid Daou ("Mr. Daou"),

appeals an order granting Mr. Daou's motion for a new trial and vacating the adverse final judgment. The complaint in the case alleged that Mr. Daou, a valet for arriving and departing vehicles at a Miami condominium, was injured by Ms. Kratz as she backed her car and struck Mr. Daou. At trial, the jury found that Ms. Kratz was not negligent and returned a verdict in her favor.

Mr. Daou argued, and the trial court agreed, that a new trial was warranted "due to the admission of inadmissible hearsay statements at trial," and defense counsel's cross-examination of Mr. Daou by reading "statements from [Mr. Daou's] medical records solely for the purpose of impeaching [Mr. Daou]."[1] The medical records themselves were not admitted into evidence during the course of the trial.

The trial court's order relied on reported opinions in Visconti v. Hollywood Rental Service, 580 So. 2d 197 (Fla. 4th DCA 1991) and Saul v. John D. and Catherine T. MacArthur Foundation, 499 So. 2d 917 (Fla. 4th DCA 1986), for the propositions that "hearsay statements contained in medical records are inadmissible unless the statements were made for the purpose of medical diagnosis or treatment, or if the medical records were properly admitted as business records," and "[s]tatements contained in medical records used solely for impeachment are not admissible." (Order, n.1 below).

[1] Order Granting Plaintiff's Motion for New Trial and Vacating the Final Judgment, Daou v. Kratz, Case No. 2016-20382 CA01 (Fla. 11th Jud. Cir. 2018).

We are constrained to reverse the order granting a new trial and reinstate the final judgment. Although a motion in limine was filed before trial by Mr. Daou to exclude as inadmissible hearsay at trial "all patient statements, narratives, and oral histories" regarding the accident, there was no definitive written or transcribed ruling granting the motion. After colloquy and argument of counsel regarding the pretrial motion, the trial court denied the motion for the time being, directing counsel to provide "the precise statements that we're referring to before you offer them in."

At trial, Ms. Kratz's counsel vigorously cross-examined Mr. Daou about statements he made regarding his alleged injuries (1) in the emergency room where he was taken after the incident, (2) to medical staff he consulted later regarding treatment and worker's compensation, and (3) in his sworn answers to interrogatories. These questions and answers were completed, with some seven pages of trial transcript thereafter, before Mr. Daou's trial counsel made an objection, "this is motion limine [sic], improper impeachment."

After further colloquy by counsel for the parties and consideration of case law, the trial court overruled the objection, concluding that the questions were not directed to causation of the accident but instead "to impeach and to determine the credibility of the witness." Concerned regarding the way the questioning was being conducted, however, the trial court instructed Ms. Kratz's counsel "to preface your questioning by making it clear that you're referring to medical records," and that

"these aren't necessarily sworn statements." Thereafter, an independent medical examiner, Dr. Sher, testified regarding his examination of Mr. Daou, and defense counsel questioned him regarding Mr. Daou's initial statements regarding the accident and his alleged injuries.

When the trial resumed the following day, Mr. Daou's counsel moved for a mistrial based on opposing counsel's cross-examination and apparent references to the medical records and statements attributed to Mr. Daou. The trial court observed that the objections were raised belatedly but heard argument on the motion before denying it. The court noted that the questions at issue "were permitted pursuant to our discussions both pre-trial and at sidebar." Mr. Daou's counsel did not seek to preclude Ms. Kratz's counsel from referring further (during closing argument) to the cross-examinations at issue, and her counsel did make such references during his closing, with no objection interposed.

Following the defense verdict, Mr. Daou filed a timely motion for new trial which was heard and granted. This appeal followed.

Analysis

> An order granting a new trial is generally reviewed for an abuse of discretion. See Van v. Schmidt, 122 So. 3d 243, 252-53 (Fla. 2013). An erroneous view of the law can constitute an abuse of discretion. Buitrago v. Feaster, 157 So. 3d 318, 320 (Fla. 2d DCA 2014). Moreover, appellate courts apply a de novo standard of review to a trial court's legal conclusions in an order granting a new trial. See Van, 122 So. 3d at 246 . . . .

Finkel v. Batista, 202 So. 3d 913, 915 n.1 (Fla. 3d DCA 2016).

In its initial rulings denying the motion in limine before trial, overruling the untimely objections, and denying the motion for mistrial, the trial court acted within its discretion. This is so because the objections were untimely and the medical records themselves were not admitted into evidence.[2] Ms. Kratz's counsel simply asked whether Mr. Daou had reported his injuries to various medical personnel in specific terms which varied from his sworn answers to interrogatories. Mr. Daou was free to answer the questions put to him, to deny a current recollection of those interviews, or to dispute any aspect of the purported medical records. There is no contention that Ms. Kratz's attorney cross-examined in bad faith or in violation of a specific ruling in limine (as to which no objection would need to be renewed under Florida Evidence Code section 90.104(1)(b), Florida Statutes (2018)).

This record is also distinguishable from the records before the Fourth District in the two cases relied upon by Mr. Daou and incorporated in the order granting the new trial: Visconti and Saul. In Visconti, a "hospital emergency room service report," a "hospital admission note," a "consultation note" by a medical provider, and a "hospital discharge summary" were all admitted into evidence "over

[2] No foundation was laid for the admission of the medical records in question, though obtained during pretrial discovery, whether as statements for purposes of medical diagnosis or treatment (section 90.803(4)) or as business records (section 90.803(6)) under the Florida Evidence Code.

[plaintiffs'] objections." 580 So. 2d at 198. In the present case, the medical documents themselves were not admitted into evidence; cross-examination was limited to questions of Mr. Daou about what he told various medical professionals at discrete points between the emergency room and the date of his answers to interrogatories. Additionally, no issue regarding the timeliness of the objections was addressed in Visconti.

Similarly, in Saul actual medical records were admitted, objectionable questions were asked about them, "the objection was properly preserved, and their admission seriously prejudiced [the plaintiff's] case." 499 So. 2d at 919. On that record, the Fourth District reversed a judgment entered in favor of the defendant. Saul, like Visconti, is distinguishable from the case at hand.

Based on the record before us and the preceding analysis, we conclude that the order granting Mr. Daou's motion for new trial must be reversed. On remand, the jury verdict and final judgment in accordance with that verdict are to be reinstated.

Reversed and remanded with instructions.