

Third District Court of Appeal

State of Florida

Opinion filed July 15, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-753
Lower Tribunal No. 12-18464

Sompun Ruchimora,
Appellant,

vs.

Bernice Grullon,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, John W. Thornton, Jr., Judge.

Steinger Greene & Feiner and Alejandro M. Garcia (Ft. Lauderdale); Burlington & Rockenbach, P.A., Andrew A. Harris, and Nichole J. Segal (West Palm Beach), for appellant.

Clark Robb Mason Coulombe Buschman & Charbonnet and Marc S. Buschman; Russo Appellate Firm, P.A., and Elizabeth K. Russo, for appellee.

Before FERNANDEZ, LINDSEY, and GORDO, JJ.

FERNANDEZ, J.

Sompun Ruchimora appeals the final judgment entered in favor of Ruchimora against Bernice Grullon. In this personal injury action, Ruchimora contends that due to several errors during trial, the jury improperly found that Ruchimora did not suffer permanent injury and thus did not award her pain and suffering damages. We write only to address Ruchimora's contention that the trial court abused its discretion in permitting Grullon to introduce inference and argument purporting to assert a referral relationship between Ruchimora's former attorney and her chiropractor. Upon review of the record, we find that the trial court did not abuse its discretion as to this issue nor as to any of the other issues on appeal. We therefore affirm the final judgment.

The underlying case is a personal injury action involving Ruchimora, whose car was struck from behind by Grullon's vehicle traveling at low speed while the vehicles were exiting the highway. Ruchimora brought suit against Grullon claiming that she received permanent back injury as a result of the accident. Before trial, the trial court granted partial summary judgment in favor of Ruchimora finding Grullon liable. The jury trial proceeded to determine causation and the amount of damages. The jury found that Grullon had caused Ruchimora's injury but found that Ruchimora did not suffer a permanent injury and thus did not award pain and suffering damages. Ruchimora was awarded \$15,000.00 in past medical expenses despite the fact that she had requested more than \$300,000.00. Ruchimora moved

for a new trial, claiming several instances of trial court error during the proceedings. After a hearing on the motion, the trial court denied the motion. Final judgment was entered in Ruchimora's favor in the amount of \$5,000.00, after applying applicable setoffs. Ruchimora appealed.

On appeal, Ruchimora argues that the trial court abused its discretion in permitting Grullon to introduce inference and argument purporting to assert a referral relationship between Ruchimora's former attorney and her chiropractor, in violation of attorney-client privilege pursuant to Worley v. Central Florida Young Men's Christian Association, Inc., 228 So. 3d 18, 20 (Fla. 2017) (holding that "the attorney-client privilege protects a party from being required to disclose that his or her attorney referred the party to a physician for treatment."). During opening statements, Grullon's counsel inferred that Ruchimora's former attorney referred Ruchimora to her chiropractor, contradicting Ruchimora's former deposition testimony that she was referred by an emergency room doctor. Additionally, during Grullon's case, Grullon's counsel challenged Ruchimora's previous testimony concerning the referral.

We review the denial of a motion for new trial and a trial court's evidentiary rulings for abuse of discretion. Miami-Dade Cty. v. Jones, 232 So. 3d 1127, 1129 (Fla. 3d DCA 2017). "[A]dmission or rejection of impeaching testimony is within

the sound discretion of the trial court.” Jackson v. Albright, 120 So. 3d 37, 40 (Fla. 4th DCA 2013) (quoting Winner v. Sharp, 43 So. 2d 634, 635 (Fla. 1950)).

Upon review of the record, we find that Ruchimora opened the door for Grullon to challenge Ruchimora’s credibility on this point. “The concept of opening the door allows admission of otherwise inadmissible testimony to explain or limit evidence previously admitted.” Jackson, 43 So. 2d at 40. First, Ruchimora’s counsel asserted, during opening statement and closing argument, that the case is a credibility determination for the jury to decide. Second, on direct examination, Ruchimora’s counsel specifically asked Ruchimora who referred her to her chiropractor. Lastly, during her case-in-chief, Ruchimora entered the advanced chiropractic letter of protection into evidence, which Ruchimora presented to her chiropractor from her attorney. On this basis, Grullon properly challenged Ruchimora’s evidence in order to challenge Ruchimora’s credibility as to her chiropractor referral. During opening statements, Grullon’s counsel connected Ruchimora’s own evidence to infer that it was her attorney who referred her and not the ER doctor. Further, during Grullon’s case, Grullon’s counsel did not directly ask Ruchimora whether she received the referral from her attorney, which would have been a clear violation of attorney-client privilege under Worley. Ruchimora placed her credibility at issue, and the jury was permitted to draw inferences from Ruchimora’s own evidence. See Whiteaker ex rel. Parker v. Gilreath, 734 So. 2d

1105, 1107 (Fla. 2d DCA 1999) (“An inference is a logical deduction of fact that the trier of fact draws from the existence of another fact or group of facts. Whether the inferred fact is found to exist will be decided by the trier of fact.”)

Before trial, Ruchimora filed a motion in limine, in which she sought to exclude argument that Ruchimora’s treating physicians “prostitutes himself for the benefit of lawyers, that the doctor and/or lawyer have orchestrated the entire case or created a scheme...” She also sought to exclude questioning as to when Ruchimora first contacted or hired an attorney. After a hearing on the motion, the trial court denied Ruchimora’s request, as the trial court believed that the evidence was appropriate for the purpose of challenging Ruchimora’s credibility. The relevant portion of the hearing transcript is as follows:

[DEFENSE COUNSEL]: [T]he plaintiff under oath told us that the emergency room referred her to the chiropractor that she went to see in this case, which is totally untrue. Number one, hospitals never refer people to chiropractors. They referred her to a primary care.

[THE COURT]: Is that witness going to testify?

[DEFENSE COUNSEL]: Those records are coming in. We’ve agreed the records custodians of the hospital are coming in, and it shows they referred her to the primary. The plaintiff herself is going to testify that the hospital sent her to the chiropractor. We know that when she shows up to the chiropractor, there’s what’s called a letter of protection. You know what those are, Judge. So there’s testimony that three days after the accident, she’s at a chiropractor signing a letter of protection with her attorney’s name on it. They know about all that. Yes, there is timing there, and it tends to impeach her testimony that the hospital sent her to this chiropractor. It goes directly to her credibility, not to show that she did anything wrong by doing that, but to show that she’s less than truthful because that’s what all these cases come down to, is the credibility of the plaintiff in the case.

[PLAINTIFF'S COUNSEL]: Your Honor, first of all, under Whorley [sic], that's not relevant. Second, your Honor, in her deposition testimony, she says she believes the hospital referred her to the doctor that she followed up with. There is no testimony anywhere that says my attorney referred me to the doctor. First of all, that would be improper under Whorley [sic]. Second of all, there is no testimony to that effect. The only testimony they have is that she said in her deposition that the chiropractor referred her to the orthopedic doctor in this case. And when they took the deposition of the chiropractor, he said we did not refer her.

[THE COURT]: The problem is it does go to her credibility.

[PLAINTIFF'S COUNSEL]: They can certainly impeach her, your Honor. But what they're trying to do is they're trying to take a leap into when she hired the law firm. That has nothing to do with whether the hospital referred her to the chiropractor[.]

[THE COURT]: How far are you going?

[DEFENSE COUNSEL]: That's where I'm going. The fact that you told us under oath that the hospital sent you to this chiropractor, that simply is not true, ma'am, basically. And then I'll show her the discharge note from the hospital, and then I'll show her the letter of protection she signed the day she showed up at the chiropractor's office with the attorney's name on it.

During both opening statement and closing argument, Ruchimora's counsel definitively stated that the case hinged on Ruchimora's credibility before the jury:

[OPENING]: This case boils down to who is telling the truth. Is it Ms. Ruchimora or is it Ms. Grullon? You will need to decide whether this accident and the severity of this accident was sufficient to cause the injuries that Ms. Ruchimora treated for. And when you're making that decision, you will need to decide, and you will be able to consider the credibility of the witnesses and make a decision as to whether you believe Ms. Ruchimora is telling the truth about the severity of the accident or whether Dr. Grossman is.

[CLOSING]: When you retire to the jury room, the primary question that should be on your mind is who is telling you the truth about this

crash and who's not. If the greater weight of the evidence, the greater weight supports Ms. Ruchimora's claim, then we ask that you award her what's fair and just in light of all of the evidence in this case.

Ruchimora had testified in her deposition that the ER doctor had referred her to the chiropractor. However, the ER discharge report stated that Ruchimora had been told to “[f]ollow up with [her] primary care provider within 1-2 days.” Notwithstanding the fact Ruchimora’s counsel knew that the ER records showed that Ruchimora was not referred to the chiropractor by the ER doctor, Ruchimora’s counsel introduced that very subject in the direct examination of Ruchimora during her case-in-chief as follows:

[PLAINTIFF’S COUNSEL]: Now, you stated you were referred to the chiropractor. Do you know who referred you?

[RUCHIMORA]: The doctor, the doctor [at the emergency room] told me.

Therefore, upon Ruchimora’s counsel’s own invitation, Grullon sought to challenge Ruchimora’s credibility throughout trial on a number of different issues and specifically challenged Ruchimora on the apparent contradiction regarding the chiropractor referral. In opening statements, Grullon’s counsel specifically challenged Ruchimora’s credibility as follows:

[DEFENSE COUNSEL]: We took the plaintiff's deposition, had her swear to tell the truth. She had her attorneys there to represent her. Nothing was lost in the translation. She was provided every opportunity to tell us if she didn't understand a question, if she was confused about a question. And here's one of the answers she gave us. She told us that the emergency room personnel referred her to the chiropractor that she

ended up going to three days after the accident. Absolutely, completely untrue.

The evidence in this case will be that that is not the case.

[PLAINTIFF'S COUNSEL]: Objection. Argumentive [sic], Judge.

[DEFENSE COUNSEL]: It's the evidence.

THE COURT: Overruled.

[DEFENSE COUNSEL]: You will have the discharge summary from the hospital that tells her to go to a primary care physician. You'll hear that no hospital -- the evidence in this case will be from even her own doctors that they don't know any hospital that refers people to a chiropractor from the emergency room. It just doesn't happen because they're not medical doctors, and facilities don't do that. Yet she insisted that it was the hospital that sent her to the chiropractor. And you're like, okay, so what's the big deal, Mr. Robb? Three days after she shows up -- and this record will be in evidence -- it's a doctor's lien. You'll also hear we call it a letter of protection. And on that day, she shows up. Her attorney's name is on there three days after the accident. And it's our contention that this is how she got to the chiropractor.

You get to use your common sense. They attorney's name is on this form the first time she goes to see the --

After opening statements were complete and the jury had left the courtroom, Ruchimora moved for a mistrial, based in part, on defense counsel's comments about how Ruchimora was referred to her chiropractor. The trial court denied the motion.

Grullon's counsel repeated the same inference in closing argument:

[DEFENSE COUNSEL]: She told you before today when her attorney was asking her questions that the hospital gave her the name and the address of the chiropractor that she ended up going to see. Absolutely not true. Absolutely not true. Follow up with your primary care provider and do it within one to two days. Where is the letter of protection? Here we are again. I don't know if it was a leap year, but February 26th, this was a Friday. 27th, 28th, on Monday the 1st, she's at the chiropractor, and you see the name of her attorney on that record three days after the

accident. So you're allowed to draw inferences from what you heard in this particular case.

Ruchimora renewed her previous objection to this line of argument. The trial court overruled the objection.

During Grullon's case, counsel called Ruchimora to the stand and questioned her as follows:

[DEFENSE COUNSEL]: Didn't you tell us that a day and a half ago, ma'am, that the hospital gave you the name and address of the chiropractor you went to see?

[RUCHIMORA]: No.

[DEFENSE COUNSEL]: So you were not sent by the hospital to the chiropractor. You were told to go see somebody else; correct?

[RUCHIMORA]: Someone told me to, but I don't remember who.

[DEFENSE COUNSEL]: It wasn't the hospital, like you tried to tell this jury, though; isn't that true?

[RUCHIMORA]: I really not remember that.

Grullon properly challenged Ruchimora's previous statement without directly asking Ruchimora whether she was referred by her attorney, which would have been a violation of attorney-client privilege pursuant to Worley.

Because Ruchimora opened the door during opening statement and closing argument, as well as during direct examination, Grullon properly challenged Ruchimora's credibility as to who referred her to the chiropractor. Therefore, the trial court did not abuse its discretion in allowing the inference and argument for the purpose of challenging Ruchimora's credibility. Accordingly, we affirm the trial court's final judgment in this case.

Affirmed.