Third District Court of Appeal

State of Florida

Opinion filed September 23, 2020.
Not final until disposition of timely filed motion for rehearing.

Nos. 3D19-2127 & 3D19-1535
Lower Tribunal No. 17-23897

Darryl Hunt, Sr., et al.,
Appellants / Cross-Appellees,

vs.

SCI Funeral Services of Florida, LLC, etc.,
Appellee / Cross-Appellant.

Appeals from the Circuit Court for Miami-Dade County, Reemberto Diaz, Judge.

Charlip Law Group, L.C., and David H. Charlip; Kula & Associates, P.A., and Elliot B. Kula, W. Aaron Daniel, and William D. Mueller, for appellants/cross-appellees.

GrayRobinson, P.A., and Ted C. Craig, for appellee/cross-appellant.

Before FERNANDEZ, LINDSEY, and MILLER, JJ.

LINDSEY, J.

These two consolidated cases stem from allegations that SCI Funeral Services of Florida, LLC unlawfully moved a casket containing the Hunt family's[1] stepfather to an adjacent burial space after it had been interred. In Case No. 3D19-1535, the Hunts appeal from an order entering final summary judgment in favor of SCI, and SCI cross-appeals the lower court's order granting the Hunts' motion to amend to add punitive damages to their complaint. In addition, in Case No. 3D19-2127, the Hunts appeal from an order granting SCI's motion for attorney's fees and costs. Because the Hunts failed to provide notice of their summary judgment evidence as required by Florida Rule of Civil Procedure 1.510(c), we affirm the final summary judgment in favor of SCI and the order granting SCI's motion for attorney's fees and costs.

I. BACKGROUND

Appellants/Cross-Appellees, the Hunts, are the children of Johnnie Mae Mitchell, who was married to Ulysses Mitchell, the Hunts' stepfather. In 1991, the Mitchells purchased space 2DD, a double-depth grave spot, at Caballero Rivero Dade North Cemetery, owned by Appellee/Cross-Appellant SCI. When Ulysses died in January 1999, he was buried in the cemetery. It is disputed where he was initially buried. The Hunts allege Ulysses was correctly buried in the lower portion

[1] The Hunt family plaintiffs are Darryl Hunt, Sr.; Donnell Hunt; Dwight Hunt; Granville Hunt; Keith Hunt; Robert Hunt; and Linda Tolliver.

of space 2DD and secretly moved to the lower portion of 3DD, the neighboring space, at some point between September 2016 and March 2017. SCI's position is that Ulysses was mistakenly buried from the beginning in the lower portion of 3DD. After Ulysses's death, Johnnie Mae purchased space 3DD, in July 1999. There is no dispute that when Johnnie Mae was buried in February 2012, she was correctly interred in the upper portion of 2DD. After Johnnie Mae's burial, a permanent marble grave marker with brass name plates was placed over 2DD.[2]

In September 2016, Darryl Hunt, Sr.'s son, Darryl Hunt, Jr., died, and the family decided to bury him in the lower portion of 3DD. On the date of the burial service, SCI advised the Hunts that it had unexpectedly discovered the lower portion of 3DD was already occupied by a casket. Darryl Hunt, Jr. was instead entombed in a mausoleum.

In March 2017, the Hunts and SCI inspected 2DD and 3DD. It was discovered that Ulysses was not in the lower portion of 2DD but was instead in the lower portion of 3DD. In October 2017, the Hunts sued SCI. The initial complaint contained five counts but was eventually whittled down to Tortious Interference with a Dead Body

[2] There is some dispute when the permanent marker was placed over 2DD. According to both the complaint and a grave marker purchase agreement, the marker was installed *after* Johnnie Mae was buried. Regardless, there is no dispute that the permanent grave maker was in place before September 2016, the operative timeframe for this appeal and the time when SCI unexpectedly discovered a casket in the lower portion of 3DD while attempting to bury Darryl Hunt, Jr.'s casket.

(Count III) and Intentional or Reckless Infliction of Emotional Distress (Count IV).[3] The Hunts' theory of the case is that between September 2016 and March 2017, SCI secretly moved Ulysses's properly buried casket from 2DD to 3DD to cover up the fact that SCI had buried an unidentified third-person's casket in 3DD.[4] Thereafter, the Hunts filed a motion to amend their complaint to add punitive damages. The trial court granted the Hunts' motion to amend, and the Hunts filed an amended two-count complaint—Tortious Interference with a Dead Body (Count I) and Intentional or Reckless Infliction of Emotional Distress (Count II)—with requests for punitive damages.[5]

SCI moved for summary judgment on the Hunts' remaining two claims. SCI attached the declaration of Debora Ramirez, the cemetery's general manager, which stated that "cemetery personnel never disinterred the remains of Ulysses Mitchell from Grave Space 2DD . . . and reinterred the remains of Ulysses Mitchell in Space

[3] The trial court dismissed the "Tort of Outrage" (Count V) as redundant to Intentional or Reckless Infliction of Emotional Distress (Count IV). The trial court also granted partial summary judgment on the Hunts' two negligence claims: Negligence (Count I) and Negligent Infliction of Emotional Distress (Count II). These orders are not challenged on appeal.

[4] The trial court entered an agreed order precluding unpled liability theories, which limited the Hunts to this "specific theory pled in the Complaint."

[5] SCI petitioned this Court for certiorari review of the order granting leave to amend (3D19-1367). On June 6, 2020, this Court dismissed SCI's petition as moot because the issue is now before the Court on SCI's cross-appeal.

3DD. . . ." SCI also relied on deposition testimony from all seven plaintiffs: Darryl Hunt, Keith Hunt, Donnell Hunt, Dwight Hunt, Granville Hunt, Linda Tolliver, and Robert Hunt. Several of the Hunts testified that they visited the cemetery regularly, some as often as multiple times per week, and none of the Hunts could point to evidence that the grave sites had been opened between September 2016 and the inspection that occurred in March 2017. It is undisputed that the Hunts never filed a response of any kind to SCI's motion for summary judgment.

At the summary judgment hearing, counsel for SCI pointed out that "Plaintiff[s] did not file any opposition to our motion."[6] The Hunts primarily relied on evidence attached to their previously filed (amended) motion to amend to add punitive damages. At the conclusion of the hearing, SCI again reminded the court that "Plaintiff[s] ha[ve] not met their burden to file counter evidence. . . . To the extent Plaintiffs were going to rely on evidence, I was supposed to be appraised of that five days before this hearing. I received nothing."

[6] The trial court judge acknowledged this but permitted the Hunts to proceed:

> I guess I'm just pointing out that you've made my job here today a little bit more difficult by not filing a response. It would have been kind of nice if you had appropriately responded as you're required under the rules, but I'm giving you latitude and letting you explain it to me, okay? Go ahead. I'm listening.

Based on the evidence presented at the hearing, the trial court ruled as follows: "Quite frankly, there's just simply no evidence here to support the claims as alleged in Counts 3 and 4, and therefore, the motion for summary judgment is granted." An unelaborated written order entering judgment in favor SCI was rendered on July 30, 2019. The Hunts timely appealed the final summary judgment, and SCI cross-appealed the order granting the Hunts' motion to amend to add punitive damages. Following entry of final summary judgment, SCI filed a motion for attorney's fees and costs pursuant to section 768.79, Florida Statutes, which governs Proposals for Settlement and section 57.041, Florida Statutes, which governs the award of court costs. The trial court granted SCI's motion and awarded $237,549.00 in attorney's fees and costs, assessed against the Hunts jointly and severally. The Hunts timely appealed.[7]

II. ANALYSIS

A. SUMMARY JUDGMENT

1. Standard of Review for Summary Judgment

We review the trial court's order granting summary judgment de novo. See Chirillo v. Granciz, 199 So. 3d 246, 249 (Fla. 2016). Summary judgment is only appropriate when there is no issue of genuine material fact and the moving party is

[7] Case No. 3D19-2127, the fee order appeal, is consolidated for all purposes with the main appeal, Case No. 3D19-1535.

entitled to judgment as a matter of law. Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000). If the movant presents competent evidence in support of summary judgment, the nonmoving party must then show sufficient counterevidence to warrant a genuine issue of fact. Landers v. Milton, 370 So. 2d 368, 370 (Fla. 1979). The nonmoving party cannot merely assert that an issue exists. Id. The trial court may not consider the credibility of the witnesses or weigh the evidence. Garcia v. First Cmty. Ins. Co., 241 So. 3d 254, 257 (Fla. 3d DCA 2018).

2. SCI's Motion for Summary Judgment and the Lack of a Response

Relying on the evidence they offered in support of their motion to amend to add punitive damages, the Hunts argue that the trial court erred in granting summary judgment in favor of SCI because there was sufficient record evidence to establish genuine issues of fact with respect to the following: (1) Ulysses was originally buried in 2DD; (b) Ulysses was moved from 2DD to 3DD; and (3) Ulysses was moved during the period of time after Darryl Jr.'s death but prior to the joint inspection, between September 2016 and March 2017. SCI argues that this Court must affirm summary judgment because the Hunts failed to provide notice of their summary judgment evidence as required by Florida Rule of Civil Procedure 1.510(c), and

therefore, the trial court was precluded from considering any of the evidence the Hunts presented at the hearing.[8]

There is merit to SCI's argument. The notice requirement in rule 1.510(c) is mandatory: "The adverse party *must* identify, by notice . . . any summary judgment evidence on which the adverse party relies." (Emphasis added). Moreover, in caselaw interpreting rule 1.510, Florida courts have held that neither party may rely on summary judgment evidence unless it was identified in a timely filed notice. See Varnedore v. Copeland, 210 So. 3d 741, 747 (Fla. 5th DCA 2017) ("Neither the movant nor the opponent may rely upon any evidence, even if already on file, unless it was identified in its timely filed notice."); State Farm Mut. Auto. Ins. Co. v. Figler Family Chiropractic, P.A., 189 So. 3d 970, 974 (Fla. 4th DCA 2016) ("Just as [rule

[8] This is a Tipsy Coachman-type argument because although the lower court granted summary judgment in SCI's favor, the court appeared to allow the Hunts to rely on record evidence that had not been noticed pursuant rule 1.510(c). See supra note 6. Under the Tipsy Coachman doctrine, "if a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support the judgment in the record." Dade Cty. Sch. Bd. v. Radio Station WQBA, 731 So. 2d 638, 644 (Fla. 1999); see also Applegate v. Barnett Bank, 377 So. 2d 1150, 1152 (Fla. 1979) ("The written final judgment by the trial court could well be wrong in its reasoning, but the decision of the trial court is primarily what matters, not the reasoning used. Even when based on erroneous reasoning, a conclusion or decision of a trial court will generally be affirmed if the evidence or an alternative theory supports it."); Miller v. Fla. Ins. Guar. Ass'n, Inc., 200 So. 3d 200, 205 (Fla. 2d DCA 2016) ("[B]ecause [Appellee] obtained a favorable result in the underlying action, albeit for the wrong reason, it was not required to appeal the underlying logic supporting that result, nor could it have.").

1.510(c)] requires that the ***grounds*** for the motion be specifically identified, the rule also requires that the ***evidence*** *in support of* and *in opposition to* the motion be specifically identified, prior to the hearing. Thus, if the movant or opposing party, at the hearing on the motion, tries to rely on record evidence in the court file that is not identified in advance of the hearing as being in support of, or in opposition to, the motion, the motion or defense to the motion should properly be denied.").

Despite rule 1.510(c)'s mandatory language, the Hunts assert that the trial court, in its discretion, could allow the Hunts to rely on evidence that was not properly noticed pursuant to rule 1.510(c). However, to do so would invalidate the mandatory language used in the rule along with the de novo standard that frames our review. The Hunts cite no authority in support of this proposition.[9]

B. THE HUNTS' MOTION TO AMEND TO ADD PUNITIVE DAMAGES

Because we need only address the order granting the Hunts' motion to amend to add punitive damages if we are reversing the final summary judgment, which we are not, we do not address the motion to amend, and we express no opinion thereon.

[9] The Hunts' theory of the case would require the permanent granite grave marker above 2DD to be removed; the ground around both 2DD and 3DD to be disturbed; and Johnnie Mae's casket to be removed from the upper portion of 2DD in order to remove Ulysses's casket, which was allegedly in the lower portion. However, we express no opinion regarding whether the evidence the Hunts presented and argued to the lower court at the summary judgment hearing created a genuine issue of material fact or whether SCI was entitled to summary judgment as a matter of law on the Hunts' claims for Tortious Interference with a Dead Body and Intentional or Reckless Infliction of Emotional Distress.

C. THE FEE ORDER

The Hunts' only argument on appeal with respect to the fee order is that the order must be reversed if this Court reverses the final summary judgment. Because we are not reversing the final summary judgment and because the Hunts have not set forth a basis to reverse the fee order, we affirm the fee order.

III. CONCLUSION

For the reasons set forth above, we affirm the trial court's order entering final judgment in favor of SCI because the Hunts failed to comply with the mandatory language in rule 1.510(c), which requires notice of "any summary judgment evidence on which the adverse party relies." We also affirm the trial court's fee award in favor of SCI.

Affirmed.