

Third District Court of Appeal

State of Florida, July Term, A.D. 2008

Opinion filed December 24, 2008.

Not final until disposition of timely filed motion for rehearing.

No. 3D07-2089

Lower Tribunal No. 03-29598

Linda Plaut,
Appellant,

vs.

Norwegian Cruise Line, Limited, d/b/a Norwegian Cruise Line,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Sarah I. Zabel,
Judge.

Lipcon, Marguiles & Alsina and Michael A. Winkleman, for appellant.

Mase & Lara and Curtis J. Mase, Natasha K. Talib, and Joel V. Lumer, for
appellee.

Before SUAREZ, CORTIÑAS, and ROTHENBERG, JJ.

ROTHENBERG, J.

Linda Plaut (“the plaintiff”) appeals from an adverse final judgment following a jury verdict, and an order denying her motion for a new trial. The sole issue before this Court is whether the conduct of counsel for the defendant, Norwegian Cruise Line (“NCL”), during his cross-examination of the plaintiff, vitiated the fairness of the trial. While counsel for NCL’s conduct was clearly improper, because the error was harmless, we affirm.

The plaintiff sued NCL after suffering a fall onboard an NCL vessel. Shortly before the commencement of trial, counsel for NCL obtained a statement from one of the plaintiff’s neighbors. The neighbor was not listed as a witness, the existence of the statement was not disclosed to opposing counsel, and the statement was inadmissible as substantive evidence or for impeachment purposes.

During cross-examination of the plaintiff, counsel for NCL asked the plaintiff whether her use of a walker at trial was to garner sympathy for the claimed injuries. When the plaintiff denied using her walker at trial for this purpose, counsel for NCL asked the plaintiff whether she recalled discussing the upcoming trial with her neighbor. When the plaintiff admitted speaking with her neighbor, counsel for NCL handed the plaintiff a bound copy of the neighbor’s statement and asked her to turn to page five and to take a look at line twenty-two. Counsel for the plaintiff immediately requested a sidebar conference, objected to the use of the document, notified the trial court that the witness had not been listed

by either side, and that he had not been notified that a statement had been taken of the plaintiff's neighbor. Counsel for NCL's response was that he was handing the plaintiff her neighbor's statement to refresh her recollection for his upcoming questions. The trial court apparently agreed that counsel for NCL's intended use of the statement was improper, as the trial court admonished counsel for NCL and offered to give a curative instruction to the jury.

When counsel for NCL resumed his cross-examination of the plaintiff, he asked her whether she recalled telling her neighbor that she intended to use the walker at trial to "play up her injuries." When the plaintiff claimed that her neighbor was lying and that she did not recall making such a statement, counsel for NCL requested permission to approach the plaintiff and to hand her the statement to see if the statement would refresh her recollection. The trial court denied the request. Counsel for NCL asked no more questions about the neighbor or the neighbor's statement, and he did not refer to the matter during closing argument. The jury found in favor of NCL. The plaintiff asserts in this appeal that the trial court erred in denying her motion for a new trial.

The standard of review applicable to a circuit court's denial of a motion for a new trial is abuse of discretion. SDG Dadeland Assocs., Inc. v. Anthony, 979 So. 2d 997, 1001 (Fla. 3d DCA 2008). The evidentiary issue raised in this appeal

is subject to a harmless error analysis. § 59.041, Fla. Stat. (2007); Herbello v. Perez, 754 So. 2d 840 (Fla. 3d DCA 2000).

Although counsel for NCL argued that the use of the neighbor's statement was permissible under section 90.613, Florida Statutes (2007), to refresh the plaintiff's recollection, it is clear that counsel for NCL intended to use the statement to impeach the plaintiff and to call her credibility into question. Section 90.608, Florida Statutes (2007), however, does not authorize impeachment of a witness with an out-of-court statement made by a third party. See Claussen v. State, Dep't of Transp., 750 So. 2d 79, 81 (Fla. 2d DCA 1999) (holding that in order to impeach a witness with a prior inconsistent statement, counsel must use the witness's own statement, not the statement of a third party); Gross Builders, Inc. v. Powell, 441 So. 2d 1142, 1143 (Fla. 2d DCA 1983) (finding that it was error to permit a witness to be impeached with prior statements made by someone other than the witness). Thus, it is clear, and counsel for NCL now admits, that his attempt to use a statement by a third party to impeach the plaintiff was error. The resolution of this appeal therefore rests on whether the error was so serious that we must find that the trial court abused its discretion in denying the plaintiff's motion for a new trial.

We begin our analysis by noting that the trial court did not allow counsel for NCL to use the document to refresh the plaintiff's recollection or to impeach her.

While counsel for NCL did have the document marked and did hand it to the plaintiff “to refresh her recollection,” counsel for NCL, based upon proper objection by counsel for the plaintiff and the appropriate ruling by the trial court, was not permitted to use the document in any way. Additionally, counsel for NCL did not attempt to refer to the document, the neighbor, or the use of the walker during closing arguments. While the credibility of a party is always relevant, a review of the entire transcript reflects that, in this particular case, NCL’s defense was, in great measure, dependent on the plaintiff’s credibility and her own admissions—that she was simply not looking where she was going and she was not looking at the floor because she assumed there would be an elevator, not stairs, to take her to the lower level. We therefore find that the trial court did not abuse its discretion by denying the plaintiff’s motion for new trial as the error was harmless.¹

Affirmed.

¹ Counsel for NCL, Curtis J. Mase, conceded at oral argument that his attempted use of the document at trial was error. We accept counsel for NCL’s representations to this Court and his assurances that this error will not be repeated.