IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

TT OF INDIAN RIVER, INC. D/B/A MERCEDES-BENZ OF MELBOURNE AND JAMES C. DORMAN,

Appellants,

v. Case No. 5D16-2001

HEIDI FORTSON,

Appellee.

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Opinion filed December 15, 2017

Appeal from the Circuit Court
for Brevard County,
George Maxwell, III, Judge.

Richard A. Sherman, Sr., and James W. Sherman, of Richard A. Sherman, P.A., Fort Lauderdale, and Chris Killer and Todd Bohnenstiehl, of Law Offices of J. Christopher Norris, Orlando, for Appellants.

Thomas J. Seider and Celene H. Humphries, of Brannock & Humphries, Tampa, and Mark S. Roman and Morgan L. Gaynor, of Roman & Gaynor, Clearwater, and Douglas R. Beam, of Douglas R. Beam, P.A., Melbourne, for Appellee.

PER CURIAM.

Appellants, TT of Indian River, Inc. (d/b/a Mercedes-Benz of Melbourne) and James C. Dorman, appeal a final judgment rendered after a jury verdict awarding damages to Appellee due to an automobile accident. We find the trial court erred when it allowed Appellee to question Mercedes-Benz's corporate representative about the automobile accident even though liability was not at issue. We reverse on that ground, and need not reach the remaining issues raised by Appellants.

At the start of trial, Appellants moved to quash a subpoena of the corporate representative, noting Appellants' stipulation to liability, and that the corporate representative "has no personal knowledge of anything" including the damages issues. As Appellants highlight, Appellee's counsel refused to disclose any basis for calling the corporate representative, stating that he did not want to reveal "trial strategy."

The trial court denied the motion to quash and allowed Appellee to call the corporate representative. During direct examination, Appellee's counsel asked numerous questions that were not related to damages, but instead tended to denigrate Mercedes-Benz and inflame the jury, including but not limited to, asking the corporate representative: (1) if "Mercedes-Benz of Melbourne admits guilt"; (2) after establishing that the accident occurred in 2012, "isn't it true that until last week, in 2016, that that was the first time Mercedes-Benz of Melbourne admitted guilt"; (3) "even though Mercedes-Benz of Melbourne is admitting guilt for negligence . . . we just heard that Mercedes-Benz's defense is that [Appellee] is making up her injuries"; (4) "[n]ow I believe your testimony is that it's your position that Mercedes-Benz of Melbourne has admitted guilt as far as negligence, correct"; (5) "[s]o Mercedes-Benz of Melbourne is totally responsible for this motor vehicle crash"; and Appellee "is totally innocent as far as negligence"; (6)

about her designation as the person with the most knowledge of the accident investigation even though she "did that without . . . doing any investigation into this crash at all"; (7) if her accident investigation was limited to reviewing the accident report and questioning, "[t]hat was it . . . on behalf of Mercedes-Benz of Melbourne, as the risk manager, that is the only investigation you did into a major crash"; (8) "[a]nd so we have a full picture, you answered questions that we've relied on in this lawsuit on behalf of Mercedes-Benz of Melbourne when you did not work for Mercedes-Benz of Melbourne"; and (9) "[i]n fact, you're only here today because we subpoenaed you; is that correct?"

At closing argument, Appellee's counsel then highlighted the testimony of the corporate representative when he asked the jury:

> You know, they bring someone who is identified as in risk management with the Defendant, and she says that all she did to investigate was look at an accident report. And then we find out that she didn't even work for them. What does that mean?

"When a defendant admits the entire responsibility for an accident and only the amount of damages is at issue, evidence regarding liability is irrelevant and prejudicial." *Swanson v. Robles*, 128 So. 3d 915, 918 (Fla. 2d DCA 2013) (citing *Metro. Dade Cty. v. Cox,* 453 So. 2d 1171, 1172-73 (Fla. 3d DCA 1984) (citing *Barton v. Miami Transit Co.,* 42 So. 2d 849 (Fla. 1949))). Moreover, as this court has recognized, it is improper to refer to "guilt" or "innocence" at a civil trial on negligence. *See Irizarry v. Moore*, 84 So. 3d 1069, 1071 (Fla. 5th DCA 2012).

We cannot agree with Appellee that this error was harmless. The great majority of Appellee's direct examination of the corporate representative was not only entirely irrelevant to damages, but was also formulated with the inescapable end of inflaming the

jury. For instance, Appellee's counsel inexplicably continued using the term "guilt" to describe Appellants' stipulation to liability even after the trial court sustained an objection to the use of that term, and described his own client's conduct as "innocent." The error was then compounded by counsel's closing argument where he not only reminded the jury of the corporate representative's testimony, but also asked a rhetorical question which was consistent with the improper themes of direct examination implying collusion, indifference, or misconduct by Appellants. As such, we reverse for a new trial on damages.

REVERSED and REMANDED.

COHEN, C.J., EISNAUGLE, J., and EGAN, R.J., Associate Judge, concur.