STATE OF MICHIGAN

COURT OF APPEALS

GREG DOLL,

Plaintiff-Appellant,

v

CITY OF FLINT,

Defendant-Appellee.

UNPUBLISHED
April 27, 2004

No. 242308
Genesee Circuit Court
LC No. 00-067045-CL

Before: Hoekstra, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment, following a jury trial, of no cause of action with respect to his claims alleging violation of the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq*., and the whistleblowers' protection act (WPA), MCL 15.362. We affirm.

I

Plaintiff first argues that he was denied a fair trial because of defense counsel's remarks in opening statement suggesting that plaintiff had a friend, Kenny Williams, threaten the life of Cindy Cheek, an employee who worked with plaintiff. Plaintiff maintains that reversal is required because the trial court allowed defense counsel to interject this inflammatory accusation without evidence to support it and without giving a cautionary instruction or granting a mistrial. We note that while plaintiff challenged defense counsel's remarks in opening statement and requested a curative instruction, he did not formally move for a mistrial and, therefore, did not preserve that issue for appeal. Regardless, we conclude that reversal is not required.

In *Hunt v Freeman*, 217 Mich App 92, 95; 550 NW2d 817 (1996), this Court stated:

> When reviewing asserted improper comments by an attorney, we first determine whether the attorney's action was error and, if it was, whether the error requires reversal. *Wilson v General Motors Corp*, 183 Mich App 21, 26; 454 NW2d 405 (1990). An attorney's comments usually will not be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial. *Id*. Reversal is required only where the prejudicial statements of an attorney reflect a studied purpose to inflame or prejudice a jury or deflect the jury's attention from the issues involved. *Hammack v Lutheran Social Services*, 211 Mich App 1, 9; 535 NW2d 215 (1995).

In this case, defendant sought to introduce evidence that Williams told Cheek a story about a woman who was shot to death after accusing a golf professional in another state of sexual harassment. The evidence was offered to show the effect that it had on Kevin Briski, defendant's Director of Parks and Recreation and plaintiff's immediate supervisor, when Cheek told him the story. The trial court ruled that defendant could present evidence that Cheek complained to Briski about a threatening situation, but excluded the details of the threat. At trial, Briski testified that, in response to Cheek's complaint, he interviewed Williams, who admitted that he told the story to Cheek. Briski also testified that plaintiff had previously told him that Williams was his friend and that plaintiff had hired Williams at the golf course. Plaintiff admitted that he "might have" discussed his lawsuit with Williams while they were golfing together in Florida. As a result, Briski decided to suspend plaintiff with pay, pending a full investigation of the matter. In his trial testimony, Briski admitted that he found no evidence to connect plaintiff to the alleged threat conveyed by Williams.

Although plaintiff argues that he was denied a fair trial because the trial court did not instruct the jury that there was no evidence supporting defense counsel's remarks in opening statement, we conclude that any prejudice arising from the remarks was cured by the trial court's decision to exclude testimony about the substance of the alleged threat by Williams, and by Briski's testimony admitting that he found no evidence linking plaintiff to the threat.

Contrary to what plaintiff argues, the record here does not reflect a studied purpose by defense counsel to inflame or prejudice the jury or deflect the jury's attention from the issues involved. *Hunt, supra* at 95. In this regard, plaintiff's reliance on *Kern v St Luke's Hospital Ass'n of Saginaw*, 404 Mich 339, 354; 273 NW2d 75 (1978), is misplaced. In *Kern*, the Court found "a studied purpose to prejudice the jury" where counsel repeatedly claimed that the plaintiff had conspired to have false testimony presented in the case, and "continuously raised the groundless charge, by direct attack and innuendo, that the 'bought' testimony of plaintiffs' out-of-state expert witnesses was collusive and untrue." *Id*. at 354. Here, the challenged remarks by defense counsel were isolated and, considering the length of the trial and the number of witnesses who testified, together with the fact that the trial court excluded the substance of Williams' threatening story, and Briski's later admission that he found no evidence linking Williams' threat to plaintiff, we cannot conclude that defense counsel's remarks diverted the jury's attention from the merits of the case or affected the jury's consideration of the issues. Cf. *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 111-112; 330 NW2d 638 (1982) (reversing a jury verdict where "'the course of misconduct was so persistently followed that a charge of the court in an effort to obviate the prejudice would have been useless'").

II

Next, plaintiff argues that the trial court abused its discretion in excluding testimony from defense witness Vicki Rose, who worked as the employee health clinic coordinator in defendant's Employee Health Clinic, concerning complaints of alleged discrimination on the ground that her testimony was barred by the physician-patient privilege, MCL 600.2157. We disagree.

The application of the physician-patient privilege involves a legal question that is reviewed de novo. *Baker v Oakwood Hospital Corp*, 239 Mich App 461, 468; 608 NW2d 823 (2000). "Once we determine whether the privilege is applicable to the facts of this case, we

determine whether the trial court's order was proper or an abuse of discretion." *Id*. In addition, error requiring reversal may not be predicated on an evidentiary ruling unless a substantial right was affected. MRE 103(a); *Miller v Hensley*, 244 Mich App 528, 531; 624 NW2d 582 (2001).

The physician-patient privilege was not recognized at common law, and its scope is governed by the language of the statute. *Dorris v Detroit Osteopathic Hospital Corp*, 460 Mich 26, 33; 594 NW2d 455 (1999). "[T]he purpose of the statute is to protect the confidential nature of the physician-patient relationship and to encourage a patient to make a full disclosure of symptoms and condition." *Id*. The privilege belongs to the patient and therefore can be waived only by the patient. *Id*. at 34, quoting *Gaertner v Michigan*, 385 Mich 49, 53; 187 NW2d 429 (1971); see also *Baker*, *supra* at 470.

In *VanSickle v McHugh*, 171 Mich App 622, 626; 430 NW2d 799 (1988), this Court held that the physician-patient privilege is applicable only to information obtained by a physician for the purpose of giving medical advice or care to a patient. More recently, however, in *Baker*, *supra* at 469, 475, this Court noted that "[t]he physician privilege bars disclosure of '*any information*' acquired in the course of the professional relationship" and that "the statute broadly and clearly forbids physicians from disclosing 'any information' acquired under the requisite circumstances." Accordingly, in *Baker*, this Court held that medical records of patients involved in a study were protected by the physician-patient privilege.

In this case, the trial court did not err in concluding that the information that Rose obtained in her position at the Employee Health Clinic from the clinic's patients regarding complaints about alleged racially preferential treatment in the city was protected by the physician-patient privilege. Rose's job included the collection of confidential medical information from Employee Health Clinic patients, which enabled the clinic doctor to decide whether first aid should be given or whether the patient should be referred to another doctor. Because "[t]he physician privilege bars disclosure of '*any information*' acquired in the course of the professional relationship," the trial court did not err in ruling that the physician-patient privilege barred Rose from testifying about the information provided to her by these employees while patients at the clinic. *Baker*, *supra* at 469.

Furthermore, even if the trial court erred in excluding the testimony in question, we would conclude that reversal is not required because plaintiff's substantial rights were not affected. MRE 103(a); *Miller*, *supra* at 531. The testimony in question was sought for the purpose of showing that there was a perception among white employees that black employees received preferential treatment. Although the trial court did not allow Rose to testify about employee complaints of discrimination, the court allowed her to testify about her own belief that there was preferential treatment regarding the discipline of black employees, and that defendant's personnel director, Tony Morolla, told her that he is "sick of the blacks and their shit and what goes on around here." Additionally, the excluded testimony did not pertain directly to plaintiff and there was overwhelming evidence of plaintiff's inappropriate and unprofessional conduct during his employment. For these reasons, we conclude that admission of the evidence in question would not have affected the jury's verdict.

III

Finally, plaintiff argues that the trial court abused its discretion when it precluded plaintiff from impeaching Sandra Lord by offering testimony that she spoke on the telephone to a male friend about the color of her underwear. We disagree. The trial court properly excluded the impeachment evidence under MRE 401 because it was not relevant to Lord's credibility. *Dep't of Transportation v VanElslander*, 460 Mich 127, 129; 594 NW2d 841 (1999).

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot