STATE OF MICHIGAN

COURT OF APPEALS

AZELARABE BENNANI, Plaintiff-Appellant, v DEPARTMENT OF MANAGEMENT AND BUDGET, Defendant-Appellee.	UNPUBLISHED October 14, 2008 No. 276167 Ingham Circuit Court LC No. 03-001658-NO

Before: Hoekstra, P.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

In this employment discrimination case, plaintiff appeals as of right following a jury verdict of no cause of action and an award of costs in favor of defendant. We affirm in part and reverse in part.

I. Evidentiary Issues

Plaintiff first argues that the trial court erred by admitting evidence of a previous lawsuit because this was inadmissible character evidence. We review a trial court's decision to admit evidence for an abuse of discretion. *Barnett v Hidalgo*, 478 Mich 151, 158-159; 732 NW2d 472 (2007). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Id.* at 158.

MRE 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Further, under MRE 404(b)(1), other acts evidence "is not admissible to prove the character of a person in order to show action in conformity therewith[,]" but may "be admissible for other purposes." The Michigan Supreme Court has determined that MRE 404(b)(1) allows for the admissibility of other acts evidence that is offered for a non-propensity purpose, so long as the "safeguards already present in the Rules of Evidence" are satisfied. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993).

During its cross-examination of plaintiff, defense counsel inquired into plaintiff's prior employment with EDS, and a wrongful termination lawsuit that he brought against that company. Defense counsel's inquiry was brief, but the jury learned that plaintiff was terminated, plaintiff filed an employment lawsuit based on age discrimination and a hearing impairment, and that the lawsuit had settled.

We conclude that plaintiff has failed to show harmful error. A trial court's evidentiary error only requires reversal "if a substantial right of a party is affected and it affirmatively appears that failing to grant relief would be inconsistent with substantial justice." *Reed v Reed*, 265 Mich App 131, 160; 693 NW2d 825 (2005). Because the prior lawsuit was settled, the exchange did not demonstrate that it was a meritless claim and could be taken as indicating the prior suit had merit. As the trial court stated during oral arguments on plaintiff's motions, whether plaintiff was harmed by the inquiry at all was ambiguous. Because the error involved such a minor fact in the trial, and did not clearly harm plaintiff, the error was harmless.

In asserting that the improper admission of the above-discussed evidence warrants reversal plaintiff claims that defendant "not only biased the jury with Plaintiff's prior litigation and termination, but it told the jury that Plaintiff is a claim-happy foreign Muslim," quoting two examples from the course of trial. It is apparent from these examples that plaintiff is not claiming that defendant's counsel literally called plaintiff "a claim-happy foreign Muslim." Rather, plaintiff seems to be indicating that defendant improperly injected reference to plaintiff being "foreign" or a "Muslim" in an effort to prejudice the jury against him. However, review of the two examples cited by plaintiff do not support a conclusion that defendant made any such appeal to anti-immigrant or religious bigotry.

First, plaintiff cites to evidence elicited by defense during cross-examination of plaintiff that plaintiff wrote to his supervisor, "that based on the spurious nature of your criticisms and false allegations, I can only conclude you are setting me up for termination because number one, you requested a religious accommodation to go pray at the Greater Islamic Center, is that correct." This evidence is plainly relevant to the tension between plaintiff and superiors, which lies at the heart of this case. While the question and answer suggest that plaintiff was a Muslim the question cannot reasonably be considered as disparaging Muslims or plaintiff in particular for evidently being Muslim.

Second, in regard to plaintiff indicating that defendant effectively told the jury that plaintiff was "foreign," plaintiff quotes the emphasized sentence from the following portion of defendant's closing argument:

> Furthermore, you heard Dr. Shiener talk about his relatively short employment history. I mean he hadn't really had that much work experience. *He had a lot of periods of time when he was simply not employed since he's come to this country*. So you don't have to speculate on damages if you feel that that's, you know, insufficient, an insufficient way to determine his economics. You don't need to necessarily use that report.

Again, defendant's counsel cannot reasonably be considered to have been appealing to bigotry in these remarks. Rather, it is plain that these remarks were directed at assessing damages in light of periods of time when plaintiff was unemployed in the event that the jury found in favor of

plaintiff as to liability. Further, it is apparent that defendant did not effectively "tell" the jury that plaintiff was "foreign" in these remarks because plaintiff had already testified on direct examination that he came from Morocco but was a naturalized United States citizen, thereby informing the jury that he had a "foreign" background but had become an American.

In addition, the trial court specifically instructed the jury "nor should your decision be influenced by any prejudice regarding race, sex, religion, national origin, age, disability or other factors irrelevant to the rights of the parties." Thus, absent any showing of an improper appeal to bigotry based on national origin or religion, it should be presumed that, in accordance with the trial court's express instruction, the jury did not allow any prejudice based on plaintiff's national origin or apparent religion to affect its verdict. See, e.g., *Bordeaux v Celotex Corp*, 203 Mich App 158, 164; 511 NW2d 899 (1993) ("in order for the jury system to function, jurors are and must be presumed to understand and follow the court's instructions"). Accordingly, defendant's argument in this regard should be rejected and does not alter our conclusion that the improper admission of the other acts evidence discussed above should be treated as harmless error.

Because plaintiff did not address the issue of prior-counseling evidence admitted at trial, we consider this issue abandoned. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims . . . ." *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003).

II. Jury Instruction

Plaintiff next argues that the trial court erred by refusing to give a jury instruction on defendant's failure to produce evidence of a witness, M Civ JI 6.01. We disagree. We review claims of instructional error de novo, *Lewis v LeGrow*, 258 Mich App 175, 211; 670 NW2d 675 (2003), and we review a trial court's determination of whether a standard jury instruction is applicable and accurate for an abuse of discretion. *Id*.

If a party requests that a court read a Model Jury Instruction, the requested instruction must be read if it is applicable and accurate. MCR 2.516(D)(2); *Lewis, supra* at 211. Plaintiff requested that the court read M Civ JI 6.01, "Failure to Produce Evidence or a Witness," which deals with the adverse inference that a jury may draw from a party's failure to produce evidence. That inference may only be drawn when: "(1) the evidence was under the party's control and could have been produced; (2) the party lacks a reasonable excuse for its failure to produce the evidence; and (3) the evidence is material, not merely cumulative, and not equally available to the other party." *Ward v Consolidated Rail Corp*, 472 Mich 77, 85-86; 693 NW2d 366 (2005). M Civ JI 6.01 contains instructions to be given to a jury if the three requirements are met, as well as instructions to be given if there is a question of fact raised concerning a party's control of evidence or the reasonableness of the party's excuse. M Civ JI 6.01.

In the present case, plaintiff demonstrated that an agent of defendant maintained a personal file in which she kept handwritten notes and copies of official documents. Those notes were destroyed, along with pertinent emails about plaintiff's performance. The agent of defendant testified that her files were destroyed upon her retirement in 2002. Plaintiff argued that the documents were destroyed against the department's document-retention policy, but according to defendant's labor relations officer, the documents were personal property.

Plaintiff's proposed jury instruction under M Civ JI 6.01 stated:

> The Defendant in this case has not offered evidence that it claims supports its termination of the Plaintiff. (A second personnel file and e-mails it claims exist). This evidence was under the control of the Defendant and as no reasonable excuse was given for the Defendant's failure to produce this evidence, you may infer that the evidence would have been adverse to the Defendant.

The court did not include the requested instruction.

The trial court did not abuse its discretion in concluding that the above-mentioned jury instruction should not have been given to the jury. Here, defendant provided a reasonable excuse for its failure to produce the evidence. Gaffney testified that;

> I ended up shredding the documents that were in the supervisor's file. Anything that was important was in the official personnel files. There wasn't any pending action at that point in time, so it wasn't anything that was appropriate to leave laying around. Certainly wasn't appropriate for me to take them home.

We conclude that defendant provided a reasonable excuse for destroying the supervisor's personal documents after she retired. Given this reasonable excuse from defendant, we cannot conclude that the trial court abused its discretion in finding that M Civ JI 6.01 was not required and would not be appropriate.

III. Deposition Transcript Cost

Plaintiff's third argument is that the trial court erred by awarding defendant deposition transcript costs where the transcripts were never filed with the court clerk. We agree. We review questions of statutory interpretation de novo, *In re MCI Telecommunications*, 460 Mich 396, 413; 596 NW2d 164 (1999), and we review a trial court ruling on motions for costs for an abuse of discretion. *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 518; 556 NW2d 528 (1996).

Here, the trial court awarded costs to defendant for deposition transcripts. Taxation of costs for depositions is governed by MCL 600.2549, which states:

> Reasonable and actual fees paid for depositions of witnesses filed in any clerk's office and for the certified copies of documents or papers recorded or filed in any public office shall be allowed in the taxation of costs only if, at the trial or when damages were assessed, the depositions were read in evidence, except for impeachment purposes, or the documents or papers were necessarily used. [MCL 600.2549.]

A trial court does not have statutory authority to tax the costs of depositions where the prevailing party failed to comply with MCL 600.2549. *Elia v Hazen*, 242 Mich App 374, 382; 619 NW2d 1 (2000); *Portelli v IR Constr Products Co, Inc*, 218 Mich App 591, 606-607; 554 NW2d 591 (1996). Thus, the trial court abused its discretion by awarding defendant costs for depositions that were not filed with the court clerk.

Defendant contends that the depositions were not filed because the trial court does not accept depositions due to space concerns. However, this argument must be rejected because there is no evidence in the lower court record or in defendant's argument on appeal to establish that defendant attempted to file the depositions with the trial court clerk. Further, the *Elia* Court rejected this exact argument. *Supra*, at 384 (White, J,. dissenting).

We generally affirm but reverse the award of deposition costs. Accordingly, we remand this case to the trial court for appropriate modification of the award of costs. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra