COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1572

NICHOLAS FRENCH, personal representative,[1]

vs.

MICHELLE J. SMITH & others.[2]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendants, signatories to a letter to the Amateur Softball Association (ASA) accusing the plaintiff, Martin D. French, of various forms of misconduct, appeal from an amended judgment after a jury trial for defamation, intentional infliction of emotional distress, and interference with contractual or prospective advantageous relations. They also appeal from an order denying their pro se motion for relief from

[1] Of the estate of Martin D. French. During the pendency of this appeal, Martin D. French died, and leave was granted for a motion to be filed in the trial court regarding the appointment of a substituted party for Martin D. French. The trial court subsequently allowed a motion to substitute Nicholas French as the plaintiff-appellee. We refer to the original plaintiff, Martin D. French, as the plaintiff throughout this memorandum and order.

[2] Kevin F. Fall, William Ameen, William Kazanek, Joseph Kelliher, Kelly Dickerman, David Dickerman, Sean Reed, Janet M. Lambert, and Sharon M. Hurley.

judgment pursuant to Mass. R. Civ. P. 60, 365 Mass. 828 (1974). Finding no merit in their various claims of error, we affirm.

1. Transfer of venue. The lawsuit was originally filed in Suffolk County, which was not a proper venue. When the defendants moved to dismiss for improper venue, a Superior Court judge ordered that the matter be transferred to Norfolk County, where there was proper venue. When faced with a lawsuit filed in the wrong venue, a judge has the discretion under G. L. c. 223, § 15, to transfer the matter to the proper venue. Generally, there is "no basis on which to dismiss the case as a matter of discretion" simply because it was filed in the wrong venue. Cormier v. Pezrow New England, Inc., 437 Mass. 302, 307 (2002). Accordingly, we discern no abuse of discretion in the judge's order of transfer.[3]

2. Anti-SLAPP motion. A special motion to dismiss pursuant to the anti-Strategic Litigation Against Public Participation law, G. L. c. 231, § 59H, must be "filed within sixty days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper." Here, the defendants waited until over three years from the filing of the complaint, after discovery had closed, to file

[3] Similarly, we see no indication in the record that the judge was misled by the plaintiff's citation of irrelevant statutes in his opposition to the motion to dismiss. The judge's order was arguably the only one permitted under Cormier.

their anti-SLAPP motion. The motion judge denied the motion as untimely, concluding that "[b]oth parties have endured the expense of litigation over the last three years since this case was filed, and as such, the allowance of such a late motion in this case would not serve the policy underlying the statute."

To conclude that the motion judge abused his discretion we would have to find a "clear error of judgment in weighing the factors relevant to the decision . . . such that the decision falls outside the range of reasonable alternatives." Spinosa v. Tufts, 98 Mass. App. Ct. 1, 6 (2020), quoting L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014). As "[t]he purpose of the anti-SLAPP statute is to provide 'a procedural remedy for early dismissal' of meritless SLAPP suits . . . with a 'specific goal of resolving "SLAPP" litigation quickly with minimum cost,'" Blanchard v. Steward Carney Hosp., Inc., 483 Mass. 200, 211 (2019), quoting Office One, Inc. v. Lopez, 437 Mass. 113, 126 (2002); Duracraft Corp. v. Holmes Prods. Corp., 427 Mass. 156, 161 (1998), we discern no abuse of discretion in the motion judge's decision.[4]

3. Exclusion of evidence of alcohol use. The defendants proposed to introduce evidence that, during a tournament trip to

[4] As the anti-SLAPP motion to dismiss was properly denied, the defendants' request for attorney's fees under G. L. c. 231, § 59H, is denied.

North Carolina, the plaintiff drank alcohol while not around the players. There was no mention of this in the letter, nor were any such allegations otherwise communicated to the ASA. "Relevant evidence is admissible unless unduly prejudicial, and, '[i]n weighing the probative value of evidence against any prejudicial effect it might have on a jury, we afford trial judges great latitude and discretion, and we uphold a judge's decision in this area unless it is palpably wrong.'" Bank v. Thermo Elemental, Inc., 451 Mass. 638, 670 (2008), quoting Commonwealth v. Arroyo, 442 Mass. 135, 144 (2004). Here, the evidence of alcohol use had no connection to the defamation case, and we discern no abuse of discretion in the trial judge's determination that any probative value was outweighed by its prejudicial effect. See Masters v. Khuri, 62 Mass. App. Ct. 467, 471 (2004).

4. Judicial bias. The defendants argue that the trial judge exhibited bias, but they made no objection or request for recusal during trial. "Substantial authority exists that recusal motions filed after trial are presumptively untimely at least absent a showing of good cause for tardiness." Demoulas v. Demoulas Super Mkts., Inc., 428 Mass. 543, 547 (1998). The defendants' "belated request suggests a tactical decision in the face of an adverse ruling." Matter of a Care & Protection Summons, 437 Mass. 224, 239 (2002). Moreover, had the

defendants interposed a timely motion for recusal, we would discern no evidence of judicial bias. Even where a judge exhibits frustration with the unnecessarily slow pace of a trial, "nothing the judge said or did would cause his impartiality reasonably to be questioned, and so it was not an abuse of discretion not to recuse himself." Cooper v. Keto, 83 Mass. App. Ct. 798, 810 (2013).[5]

5. Denial of motion for a directed verdict. "[A] jury verdict shall be sustained if 'anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be made in favor of the [nonmovant].'" Filbey v. Carr, 98 Mass. App. Ct. 455, 461 (2020), quoting O'Brien v. Pearson, 449 Mass. 377, 383 (2007). The defendants focus their argument on the claim of defamation. "To prevail on a claim for defamation, a plaintiff must establish that (1) the defendant published a defamatory statement of and concerning the plaintiff; (2) the statement was a false statement of fact (as opposed to opinion); (3) the defendant was at fault for making the statement, and any privilege that may have attached to the statement was abused;

[5] The defendants misunderstand the import of finding that a witness is hostile. This is merely a finding that the witness's interests are contrary to that of the party calling him or her and allows counsel to ask leading questions on direct examination. See White v. White, 40 Mass. App. Ct. 132, 142 n.6 (1996).

and (4) the plaintiff suffered damages as a result, or the statement was of the type that is actionable without proof of economic loss." Lawless v. Estrella, 99 Mass. App. Ct. 16, 18-19 (2020).

The statement in the letter accusing the plaintiff of misappropriating funds had little basis. William Ameen, Joseph Kelliher, Sean Reed, Sharon Hurley, and William Kazanek testified that they never saw the plaintiff taking or handling money. Kevin F. Fall testified that he handled the money the first year. Kelly Dickerman testified that she gave money to Melissa Kelleher,[6] never to the plaintiff, and "just assumed" that the plaintiff was responsible. Michelle J. Smith testified that she gave money to Reed at one point and to Kelleher and the plaintiff jointly at another point, contradicting earlier deposition testimony that she gave money to the plaintiff. The plaintiff and Kelleher both testified that the plaintiff did not handle the money. The jury could reasonably have found that the accusation that the plaintiff misappropriated funds was false and that the defendants had no reasonable basis for making it.

Similarly, the jury could reasonably have found that the statement in the letter that the plaintiff exposed himself to players was knowingly false and that the suggestion that the

[6] Joseph Kelliher and Melissa Kelleher have similar last names but are not related.

plaintiff might have exposed himself knowingly to players had no basis. The plaintiff denied ever exposing himself, being told that he exposed himself, or even failing to wear underwear. The jury was entitled to believe this testimony. See, e.g., Gyulakian v. Lexus of Watertown, Inc., 475 Mass. 290, 301 n.19 (2016) ("The jury, having observed the witnesses, were entitled to credit [the plaintiff's] testimony").

Ameen, Kelliher, Kazanek, and Janet M. Lambert testified that they never saw any exposure. Reed testified to two incidents of exposure, but neither occurred in front of "a lot of girls in the organization" as the letter alleged. Fall testified to one of the incidents that Reed testified to, but saw no exposure to female players. David Dickerman also testified to an incident of exposure but did not testify to any specifics.

Kelly Dickerman and Hurley testified to seeing the plaintiff expose himself to the softball players, but Karen Bigley testified that Kelly Dickerman testified to the opposite at the ASA hearing and that Hurley did not testify to the exposure at the hearing. Smith's testimony about exposure was internally inconsistent; she testified that she saw him exposed for two to three minutes, but also that she looked away immediately.

Even if the jury believed that the plaintiff exposed himself, which they were under no obligation to do, there was no evidence to support the allegation that the exposure might have been knowing. The Dickermans each testified that they thought the exposure they witnessed was unknowing. Smith testified that she asked the plaintiff to change his shorts and that he immediately did so and never exposed himself again. Nonetheless, she justified alleging that the plaintiff may have exposed himself knowingly saying, "I couldn't be definitively sure that it was unknowingly, so I wrote knowingly." The jury was entitled to conclude that not being definitively sure that someone did not commit the crime of indecent exposure was not adequate cause to publicly accuse him of that crime.

Regarding the allegations that the plaintiff stated that certain girls either would become, or already were, prostitutes and exotic dancers, again the plaintiff denied doing so, and the jury could have believed his testimony and thus concluded that the defendants were lying. See, e.g., Gyulakian, 475 Mass. at 301 n.19. In this regard, the Dickermans, Ameen, Kelliher, and Lambert never heard such statements.

The testimony of the defendants who purported to hear such comments was remarkably inconsistent. Reed described this as happening at a bar with Kelleher and Arnie Milks. Minutes later, perhaps realizing that Kelleher would not corroborate

this, Reed denied saying that Kelleher was there. Fall and Kazanek testified to being there, contrary to Reed's testimony. Furthermore, the plaintiff fired Reed,[7] and Reed formed a new softball organization that competed with the plaintiff's, giving Reed ample reason to lie to remove the competition unfairly. Smith testified to hearing such a comment about her own daughter at practice but then admitted that she left her daughter on the team and that her husband later asked the plaintiff for a recommendation for that daughter for another softball program. In short, the jury could reasonably have concluded that the defendants' testimony about hearing these comments was simply false. See, e.g., Glavin v. Eckman, 71 Mass. App. Ct. 313, 316-317 (2008) ("The jury were free to disbelieve the [defendants'] testimony").

For these reasons, the defendants' argument that the verdicts were against the weight of the evidence also fails. "The judge should only set aside a verdict as against the weight of the evidence when it is determined that the jury 'failed to exercise an honest and reasonable judgment in accordance with the controlling principles of law.'" Parsons v. Ameri, 97 Mass.

[7] In their brief, the defendants claim that Reed was not fired, but that directly contradicts the testimony of Reed, not to mention Ameen and the plaintiff. Indeed, it appears that one of the reasons the ASA suspended the plaintiff was for failing to fire Reed earlier.

App. Ct. 96, 103 (2020), quoting O'Brien, 449 Mass. at 384. Here, the evidence well supported the verdicts.

6. Amendment of the judgment. The original judgment called for prejudgment interest beginning on May 6, 2014, when the case was transferred to Norfolk County. On the motion of the plaintiff, the trial judge amended the judgment to include prejudgment interest from August 23, 2013, the date on which the complaint was filed in Suffolk County. "In any action in which a verdict is rendered . . . for pecuniary damages for personal injuries to the plaintiff or for consequential damages, . . . there shall be added by the clerk of court to the amount of damages interest thereon at the rate of twelve per cent per annum from the date of commencement of the action." G. L. c. 231, § 6B. This statute "provides that the clerk of the court shall add interest to damages from the date of the complaint to the date of judgment." Gore v. Arbella Mut. Ins. Co., 77 Mass. App. Ct. 518, 537 (2010). Accord Salvi v. Suffolk County Sheriff's Dep't, 67 Mass. App. Ct. 596, 610 (2006). Although there is an exception for when the damages are not incurred until after the filing of the complaint, see Bank, 451 Mass. at 662-663, here that exception is inapplicable. Accordingly, the trial judge properly amended the judgment.

7. Waived issues. The defendants argue that they had various defenses against the defamation claim -- a privilege

under the First Amendment; the litigation privilege; the Noerr-Pennington doctrine; and that the plaintiff was a public figure, limited public figure, or the letter was on a subject of public interest, such that the plaintiff had to show actual malice to prevail. None of these claims, however, were raised at trial. "Issues not raised in the trial court are considered waived on appeal." Trapp v. Roden, 473 Mass. 210, 220 n.12 (2015). Accord Zielinksi v. Connecticut Valley Sanitary Waste Disposal, Inc., 70 Mass. App. Ct. 326, 335-336 (2007).

Similarly, the defendants neither objected to a juror being excused on the third day of trial nor requested a mistrial on the ground that the jury were then seven persons. See G. L. c. 234A, § 74 (error in juror procedure "shall not be sufficient to cause a mistrial or to set aside a verdict unless objection to such irregularity or defect has been made as soon as possible after its discovery or after it should have been discovered and unless the objecting party has been specially injured or prejudiced thereby"). Accordingly, this is not a basis to reverse the verdicts. See Commonwealth v. Santa Maria, 97 Mass. App. Ct. 490, 500-501 (2020).[8]

[8] Also not raised in the trial was the defendants' claim that they "were forced to atone for a false charge" because the complaint mislabels defamation per se as "slander per se." The complaint properly described the defamation as libel in the text, and the trial judge instructed the jury on defamation and defamation per se. Similarly, the defendants raised no request

8. Denial of motion for relief from judgment. "The resolution of motions for relief from judgment 'rests in the discretion of the trial judge.'" Atlanticare Med. Ctr. v. Division of Med. Assistance, 485 Mass. 233, 247 (2020), quoting Wojcicki v. Caragher, 447 Mass. 200, 209 (2006). "[A]n appellate court will not reverse the motion judge's decision 'except upon a showing of a clear abuse of discretion.'" Stephens v. Global NAPs, 70 Mass. App. Ct. 676, 684-685 (2007), quoting Tai v. Boston, 45 Mass. App. Ct. 220, 224 (1998).

In briefing, the defendants argue that the judge who ruled on the motion, who was also the trial judge, should have granted them a new trial because of the asserted incompetence of their trial counsel. Where a litigant has a constitutional right to counsel such that the Commonwealth must appoint counsel if the litigant is indigent, the litigant may seek relief on the basis of ineffective assistance of counsel. See, e.g., Poe v. Sex Offender Registry Bd., 456 Mass. 801, 811 (2010); Commonwealth v. Saferian, 366 Mass. 89, 96-97 (1974). Here, however, the defendants have no right to counsel to defend against a defamation action, and "[w]here there is no constitutional right to counsel there can be no right to effective assistance of

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for a "[d]efamation by implication" instruction at trial, and thus waived that issue. See, e.g., Matsuyama v. Birnbaum, 452 Mass. 1, 36 (2008).

counsel." Noe v. United States, 601 F.3d 784, 792 (8th Cir. 2010), quoting Pollard v. Delo, 28 F.3d 887, 888 (8th Cir. 1994). The defendants chose their counsel and are now bound by the results of that choice. Cf. Lewis v. Sumner, 13 Met. 269, 272-273 (1847) ("a litigant party shall not be permitted to deny the authority of his attorney of record, whilst he stands as such on the docket. He may revoke his attorney's authority, and give notice of it to the court and to the adverse party; but whilst he so stands, the party must be bound by the acts of the attorney").

The defendants also argue that the verdicts were inconsistent. "Where, as here, a jury returns a special verdict, an objection that verdicts on several counts are inconsistent with each other must be taken at the time when the verdicts are returned and before they are recorded, so that the trial judge has an opportunity to correct the error if there is one." Netherwood v. American Fed'n of State, County & Mun. Employees, Local 1725, 53 Mass. App. Ct. 11, 21 n.11 (2001). Here, there was no such objection, and the claim is waived.

In any event, "[t]o constitute inconsistent verdicts, it must be shown that the verdicts are based on inconsistent findings of fact." Palriwala v. Palriwala Corp., 64 Mass. App. Ct. 663, 672-673 (2005), quoting Technical Facilities of Am., Inc. v Ryerson & Son, Inc., 24 Mass. App. Ct. 601, 605 (1987).

The third statement in the letter, on which the jury concluded that the plaintiff did not prove defamation, was supported by Smith's testimony that the plaintiff made about a derogatory statement regarding a player other than Smith's daughter. The jury could reasonably have believed that the plaintiff made the third statement while disbelieving the inconsistent testimony of Reed, Fall, and Kazanek regarding the second statement in the letter, on which the jury concluded that the plaintiff did prove defamation. There was no inconsistency in the jury verdicts. See, e.g., Wodinsky v. Kettenbach, 86 Mass. App. Ct. 825, 836 n.28 (2015).[9]

Amended judgment and order denying motion for relief from judgment affirmed.

By the Court (Rubin, Neyman & Ditkoff, JJ.[10]),

Joseph F. Stanton

Clerk

Entered: February 19, 2021.

[9] The plaintiff's motion for attorney's fees is denied. Although there is little in the defendants' brief that offered a reasonable hope of reversal, we cannot say that the appeal is frivolous, especially in light of the defendants' consulting with appellate experts before proceeding. See Filbey, 98 Mass. App. Ct. at 462 n.10, quoting Gianareles v. Zegarowski, 467 Mass. 1012, 1015 n.4 (2014) ("Although the appeal . . . is unsuccessful, it is not frivolous").

[10] The panelists are listed in order of seniority.