M.L. v. S.N.

12-P-621

APPEALS COURT OF MASSACHUSETTS

2014 Mass. App. Unpub. LEXIS 354

March 19, 2014, Entered

NOTICE: DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS *RULE 1:28* ARE PRIMARILY ADDRESSED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, *RULE 1:28* DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO *RULE 1:28*, ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT.

DISPOSITION: [*1] Amended judgment affirmed.

OPINION

MEMORANDUM AND ORDER PURSUANT TO *RULE 1:28*

1. Background. The plaintiff and the defendant are two men who were involved in a serious romantic relationship for almost a decade. The relationship lasted from late 1998 until the middle of 2008. Following the breakup of the parties, the plaintiff brought this suit, in which two counts, intentional infliction of emotional distress and battery, were tried to a jury.[1] The jury found in favor of the defendant on both counts, and the plaintiff now appeals.[2] Evidence was introduced at trial regarding a wide range of alleged actions by the defendant that degraded and distressed the plaintiff. We describe only the few that are relevant here.

1 The plaintiff's first amended verified complaint also included several other counts. The judge allowed the defendant's motion to dismiss the plaintiff's claims for breach of the covenant of good faith and fair dealing, violation of *G. L. c. 93A*, rape, negligence, and assault and battery. He later entered summary judgment in favor of the defendant on the plaintiff's claims of breach of contract, breach of fiduciary duty, conversion, misrepresentation, unjust [*2] enrichment, and accounting. Although the plaintiff asserts that the judge's grant of summary judgment was in error, he presents no argument in his appellate brief with respect to any of the counts on which it was entered. While he asserts in his reply brief that summary judgment was improperly entered with respect to two counts, he does not present any persuasive argument as to why. In any event, to the extent he raises such arguments for the first time in his reply brief, they come too late. See *Boxford v. Massachusetts Hy. Dept., 458 Mass. 596, 605 n.21, 940 N.E.2d 404 (2010)*. There is therefore no basis to reverse the judge's decision on those counts.

2 We acknowledge the amicus letter of Gay & Lesbian Advocates & Defenders.

There was evidence that the defendant would on occasion pull the plaintiff's shorts or pants down in public, exposing him. The plaintiff testified that the defendant would "joke around about it and say he was pimping [plaintiff's] ass out." The plaintiff felt that the defendant exposed him to use the plaintiff as "the bait" to solicit third parties for sex.

The plaintiff testified that in August, 2006, the defendant invited another individual over for "three-way" sex with the parties. [*3] The plaintiff stated that this person "held [the plaintiff's] head down while performing

oral sex, causing [the plaintiff] to gag. The individual then urinated on [the plaintiff] in the shower and [the defendant] was coaching it and decided to videotape it."

The plaintiff also testified about a 2002 incident when the defendant allegedly urinated in the plaintiff's rectum without the plaintiff's consent. However, the trial court judge held that the statute of limitations barred consideration of events that occurred before December 5, 2005, as acts causing emotional distress. Consideration of this testimony was limited to the question of the defendant's intent.

There was evidence that the parties took gamma hydroxybutyric acid (GHB), an illegal drug that can cause incapacitation and has been used as a so-called "date rape drug." See, e.g., *United States v. Ansaldi, 372 F.3d 118, 121 (2d Cir. 2004)* (describing the effects of GHB and its classification as a Schedule I controlled substance following enactment of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000). The plaintiff testified that in or around early February of 2007, after beginning to have sexual intercourse [*4] with the defendant, the plaintiff lost consciousness due to his prior ingestion of GHB and Ecstasy. The plaintiff introduced evidence that the defendant nonetheless completed the process of intercourse, boasting to the plaintiff when he awoke of the physical discomfort he believed the plaintiff would later experience. This alleged incident formed the basis for the plaintiff's battery claim, along with two incidents in 2006 and 2007 when the defendant allegedly pushed the plaintiff down during arguments. When questioned at a deposition about many of the above incidents, the defendant invoked his right against self-incrimination under the *Fifth Amendment to the United States Constitution*. In a civil case, the jury may draw a negative inference against an individual on the basis of his invocation of that right. See *Falmouth v. Civil Serv. Commn., 447 Mass. 814, 826, 857 N.E.2d 1052 (2006)* ("We have long held that a party in a civil case seeking shelter under the privilege against self-incrimination of the *Fifth Amendment to the United States Constitution* . . . may be the subject of a negative inference by a fact finder").

2. The photographs. At trial, the judge admitted into evidence for the jury's view [*5] numerous sexually explicit nude and partially nude color photographs of the plaintiff. All but one of these came from a photo spread in Men Magazine, a magazine whose intended audience is gay men. As amicus accurately details, "a number of the photographs depict the plaintiff naked with an erection or in a position signaling his receptivity to being penetrated through anal sex." In one of these photographs, the otherwise naked plaintiff is wearing black chaps with a yellow stripe down the side. Some evidence at trial indicated that yellow striped chaps express the wearer's interest in sexual conduct involving urination.

The plaintiff filed two motions in limine seeking to exclude these nude or partially nude photographs. The first sought to exclude all evidence of the plaintiff's past sexual conduct, his sexual reputation, and his modeling, as well as any and all modeling photographs of the plaintiff, pursuant to the rape shield statute, *G. L. c. 233, § 21B*. A contemporaneous motion in limine argued specifically for the exclusion of the modeling photographs themselves. The plaintiff did not dispute that these were photographs of himself, but contended that their admission would violate [*6] the standard described in § 403 of the Massachusetts Guide to Evidence (2012), that even "[r]elevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . or needless presentation of cumulative evidence."

The judge denied the motions in limine. He opined that "if [the plaintiff] is basically advertising himself, . . . it certainly would otherwise be relevant, okay. Just like some evidence . . . barred by the rape shield law is relevant . . . ." Deciding that the photographs "have to do with urination or exposure [but] have nothing to do with the rape," the judge concluded, "that's just exposure of one's body doing certain acts, but it's not a sexual act; and, therefore, I don't see that it's prohibited at all by the rape shield law. The rape shield law doesn't concern itself."

3. Admissibility and waiver. We have little doubt that the failure to allow the plaintiff's motion to exclude these photographs was error. Although the Massachusetts rape shield statute, *G. L. c. 233, § 21B*, by its terms does not apply in this civil context, the principles that it articulates are also embodied in our rule that evidence may be excluded [*7] where its potential for unfair prejudice outweighs its probative value.

Notwithstanding the judge's ruling and the argument of the defendant, these photographs, which amicus

describes as "inflammatory," bear, at most, marginal relevance to the question whether the plaintiff would have suffered emotional distress from having his genitals exposed against his will in a public place. Even if they were relevant, the introduction of the photographs themselves, as opposed to testimony informing the jury that they were taken, was wholly unnecessary, and the prejudice from their introduction outweighed any relevance they could imaginably have. As amicus explains, sexually explicit images such as the ones at issue here "inherently have a prejudicial effect and . . . the risk was great that the photographs unduly swayed the jury. . . . Such inherently prejudicial effect is only compounded in this case by society's deep, psychological prejudice and disgust regarding gay male sexuality."

We think all would agree that evidence of a nude or partially nude photographic spread showing a young woman, for example in Playboy magazine, would not be admissible as evidence in a trial in which she alleged that [*8] her boyfriend years later degraded her and intentionally inflicted emotional distress by forcibly removing her clothing in public and exposing her breasts or genitals. A failure to recognize that the photographs at issue here are the same as those in the hypothetical case may be attributable to prejudice concerning the difference between same sex and opposite sex couples that has no place in the law of our Commonwealth.

Likewise, the fact that an individual may have engaged in a sexual act in the past is not license to force him or her to engage in such conduct unknowingly or involuntarily. The rule that is now well entrenched in our law, and codified for certain cases in our rape shield statute, is that an individual's past sexual conduct cannot and does not mean that he or she is "asking for" rape, sexual assault, or other forms of abuse. The photographs, therefore, should not have been admitted.

The plaintiff, however, did not renew his objection to the admission of the photographs at trial; in fact, he affirmatively stated he had no objection. It has been firmly settled by the Supreme Judicial Court that in a civil case in this Commonwealth, an objection is not preserved, even by [*9] a written motion in limine supported by legal memoranda, unless trial counsel renews the objection at trial prior to the introduction of the evidence sought to be excluded. *Hoffman v. Houghton Chem. Corp., 434 Mass. 624, 639, 751 N.E.2d 848 (2001)* ("[T]he plaintiffs cannot rest on a motion in limine to preserve their appellate rights. The consequence of the failure properly to object at trial is to waive the issue on appeal") (internal citations omitted).

To be sure, there is one Supreme Judicial Court decision issued over a decade ago holding that the appellant was not required to have made at trial what was described as a "futile" objection. *Commonwealth v. Vinnie, 428 Mass. 161, 172 n.14, 698 N.E.2d 896*, cert. denied, *525 U.S. 1007, 119 S. Ct. 523, 142 L. Ed. 2d 434 (1998)*. However, in that case, multiple similar objections by appellant's counsel had already been overruled. The consistent rule of the Commonwealth's appellate courts both before and since then is that error must be preserved through objection at trial unless the judge has used a phrase like "your objection is preserved" in denying the motion in limine. See *Dolan v. Commonwealth, 25 Mass. App. Ct. 564, 566 n.2, 520 N.E.2d 506 (1988)* ("plaintiff presented and the judge formally denied a new motion [*10] in limine . . . . The judge stated that he was noting the plaintiff's 'exception.' . . . In the circumstances, we see nothing . . . which requires us to blind ourselves to prejudicial error merely because the plaintiff did not voice a useless objection at the time the record was actually offered in evidence"); *Commonwealth v. LaSota, 29 Mass. App. Ct. 15, 24 n.12, 557 N.E.2d 34 (1990)* ("Following his denial of the defendant's motion to suppress . . ., the judge ruled that the . . . pamphlet would be admissible at trial. The defendant had not presented a motion in limine directed to the admissibility of the pamphlet. Twice the judge said that he noted the defendant's objection and that his rights were preserved as to it. In the circumstances, we consider the defendant's appellate rights to have been properly preserved"). See also *Commonwealth v. Kee, 449 Mass. 550, 553 n.5, 870 N.E.2d 57 (2007)* ("The defendant did not object at trial to the admission of testimony . . . . Here, the defendant objected to the denial of his motion and the judge stated, 'Your objection's noted, and your rights are saved.' We construe the judge's comment as relieving the defendant of the necessity to object to the evidence at trial"); [*11] *Commonwealth v. Aviles, 461 Mass. 60, 64, 958 N.E.2d 37 (2011)* ("After indicating that she would not change her ruling, the judge stated that defense counsel's 'objection [was] noted.' When defense counsel then asked whether his rights were preserved, the judge responded, 'Very much so'"). Cf. *Rotkiewicz v. Sadowsky, 431 Mass. 748, 751-752, 730 N.E.2d 282 (2000)* (objection to jury charge preserved in a civil case where "[t]he judge did, however, acknowledge his awareness of the issue,

explicitly ruled on it, and expressed his intention not to instruct as requested. Further, the judge expressly noted the defendant's objection to the ruling. In these circumstances, we conclude that the requirements of the rule have been met").

No such statement was made here. In the civil context, unlike the criminal context, we lack authority to review unpreserved claims of error for a "substantial risk of a miscarriage of justice." See *Hoffman v. Houghton Chem. Corp., 434 Mass. at 639* ("The consequence of the failure properly to object at trial is to waive the issue on appeal"). Compare *Commonwealth v. Alphas, 430 Mass. 8, 13, 712 N.E.2d 575 (1999).*[3] We are [*12] therefore constrained to affirm the judgment notwithstanding the introduction of the photographs.

3 Relaxation of the requirement of a renewed objection would be consistent with practice under the Federal Rules of Evidence. See *Fed.R.Evid. 103(b)* ("Once the court rules definitively on the record -- either before or at trial -- a party need not renew an objection or offer of proof to preserve a claim of error for appeal"). A number of States have followed the approach of the updated Federal Rules since this provision was enacted in 2000. See *Kobashigawa v. Silva, 129 Haw. 313, 327-328, 300 P.3d 579 (2103)* (listing jurisdictions that have adopted the approach of the Federal Rules and holding that "the definitive ruling exception" applies in Hawaii).

4. Continuing tort. The plaintiff argues that the judge erred in excluding evidence of tortious behavior by the defendant that occurred before December 5, 2005, in particular an alleged rape of the plaintiff by a third party that was instigated by the defendant while the plaintiff was unconscious. The judge excluded this evidence because the acts occurred outside the three-year statute of limitations for intentional infliction of emotional distress. See *Mellinger v. West Springfield, 401 Mass. 188, 191, 515 N.E.2d 584 (1987)* [*13] (three-year statute of limitations on intentional infliction of emotional distress) (citing *G. L. c. 260, § 2A* [1986 ed.]).

We may assume without deciding that the plaintiff is correct that a person asserting a claim of intentional infliction of emotional distress may validly allege a "continuing tort." The continuing tort doctrine has been applied to a limited number of torts in Massachusetts. See *Doe v. Blandford, 402 Mass. 831, 525 N.E.2d 403 (1988)* (negligent supervision and failure to fire); *Cuddyer v. Stop & Shop Supermarket Co., 434 Mass. 521, 750 N.E.2d 928 (2001)* (sexual harassment); *Clifton v. Massachusetts Bay Transp. Authy., 445 Mass. 611, 839 N.E.2d 314 (2005)* (racial discrimination); *John Beaudette, Inc. v. Sentry Ins., 94 F. Supp. 2d 77, 107 (D. Mass. 1999)* (nuisance and trespass). Other jurisdictions have adopted the doctrine specifically in the context of intentional infliction of emotional distress. See, e.g., *Mears v. Gulfstream Aerospace Corp., 225 Ga. App. 636, 640, 484 S.E.2d 659 (1997)*; *Feltmeier v. Feltmeier, 207 Ill. 2d 263, 284, 798 N.E.2d 75, 278 Ill. Dec. 228 (2003)*; *Bustamento v. Tucker, 607 So. 2d 532, 542 (La. 1992)* (intentional infliction of emotional distress resulting from sexual harassment); *McCorkle v. McCorkle, 811 So. 2d 258, 263-264 (Miss. Ct. App. 2001)*; [*14] *Newton v. Newton, 895 S.W.2d 503, 506 (Tex. Ct. App. 1995)*. Cf. *Murphy v. Allstate Ins. Co., 83 Cal. App. 3d 38, 51, 147 Cal. Rptr. 565 (1978)* (statute of limitations does not begin to run on intentional infliction of emotional distress claim based on continuing conduct by defendant until plaintiff's emotional distress becomes severe).

Under the continuing tort doctrine, if a tort began outside the limitation period but continued into it, redress may be had for injuries caused by actions that would otherwise have been barred by the statute of limitations. The case before us, however, falls outside the scope of the continuing tort doctrine. The plaintiff argues that evidence of any behavior by the defendant between 2001 and 2008 that caused the plaintiff emotional distress should have been admitted. However, the plaintiff focuses primarily on a single excluded incident: the defendant's alleged instigation of a rape of the plaintiff by a third party in 2005. This incident is sufficiently discrete that we think it is better understood as an individual allegedly tortious act outside the statute of limitations, rather than as part of a continuing course of conduct all aspects of which are actionable regardless [*15] of when they occurred.

5. Other claims of error. The plaintiff raises three other claims of error. First, he argues that the trial judge erred in excluding the testimony of the plaintiff's expert witness. "The extensive discretion of trial judges with respect to . . . the admission of evidence, particularly expert testimony, and the great deference appellate courts accord the rulings of trial judges in these areas are too well established to require citation." *Beaupre v. Cliff Smith & Assocs., 50 Mass. App. Ct. 480, 485, 738 N.E.2d*

753 (2000). In this case, the trial judge found both that the expert witness's report was submitted after unreasonable delay, and that it inadequately explained the methods by which the expert reached his conclusions. The exclusion of the report was not an abuse of discretion.

Second, the plaintiff objects to an instruction on consent given by the judge in response to a question from the jury related to the battery charge. Because there was no objection to the charge at trial, the plaintiff's claim on this point is waived.

Finally, the plaintiff has not demonstrated an abuse of discretion in the trial judge's award to the defendant of certain deposition costs.[4]

4 The defendant's [*16] motion for fees and costs on appeal is denied.

Amended judgment affirmed.

By the Court (Rubin, Milkey & Agnes, JJ.),

Entered: March 19, 2014.