STATE OF MICHIGAN

COURT OF APPEALS

NATALIE PARKS a/k/a NATALIE HAGNER, Plaintiff-Appellee, v LARRY TROMBLEY, Defendant-Appellant.	UNPUBLISHED May 25, 2001 No. 218256 Lapeer Circuit Court LC No. 97-024550-DP

Before: Neff, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Defendant appeals as of right the order granting summary disposition in favor of plaintiff. We affirm.

I

Plaintiff gave birth to a male infant on May 6, 1997. In a verified complaint for paternity filed on her behalf against defendant by the Lapeer County Family Independence Agency plaintiff named defendant the father of her child. The trial court ordered plaintiff, plaintiff's child, and defendant to undergo blood testing to determine paternity. Test results indicated that defendant's probability of paternity was 99.91 percent.

No objections to the test results were filed, and in accordance with MCL 722.716; MSA 25.496, the test results were admitted into evidence, and defendant's paternity was presumed. Plaintiff moved for summary disposition, the court heard arguments on the motion, and granted plaintiff's motion from the bench. An order of filiation and final order of custody, child support, and reimbursement was entered on October 15, 1998. Defendant now claims that the trial court erred in granting plaintiff's motion for summary disposition because defendant presented evidence sufficient to rebut the statutory presumption of his paternity and create a genuine issue of material fact. We disagree.

II

This Court reviews the ruling on a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition is not appropriate if a genuine issue of material fact exists. MCR 2.116(C)(10).

We first look to the statute giving rise to the presumption of defendant's paternity. In part, it states:

> (4) The result of blood or tissue typing or a DNA profile determination and, if a determination of exclusion of paternity cannot be made, a written report including, but not limited to, a calculation of the probability of paternity shall be filed with the court and served on the mother and alleged father. Objection to the result or report is waived unless made in writing, setting forth the specific basis for the objection, within 14 calendar days after service on the mother and alleged father. . . . If an objection is not filed, the court shall admit in proceedings under this act the result of the blood or tissue typing or the DNA profile and the written report without requiring foundation testimony or other proof of authenticity or accuracy. . . .
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> (5) If the probability of paternity . . . is 99% or higher, and the result and report are admissible as provided in subsection (4), paternity shall be presumed. . . .
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> (6) Upon the establishment of the presumption of paternity as provided in subsection (5), either party may move for summary disposition under the court rules. . . . [MCL 722.716; MSA 25.496.]

The test results did not exclude defendant from paternity – in fact, the probability of his paternity with regard to plaintiff's child was 99.91 percent. This percentage exceeds the statutory minimum percentage required to create a presumption of paternity.

Determining whether a party has offered enough evidence to rebut a presumption requires a court to weigh the evidence offered by the party with the burden of meeting the presumption. *Widmayer v Leonard*, 422 Mich 280, 289; 373 NW2d 538 (1985). Simply because a party introduces evidence tending to controvert a presumption does not mean summary disposition is improper. *In re Wood Estate*, 374 Mich 278, 291; 132 NW2d 35 (1965). The Michigan Supreme Court, in cases where a statutory presumption of negligence was at issue, noted that there must exist clear, positive, and credible evidence opposing the presumption before a trial court may eliminate the presumption from jury consideration. *Petrosky v Dziurman*, 367 Mich 539, 546; 116 NW2d 748 (1962); *Garrigan v LaSalle Coca-Cola Co*, 362 Mich 262, 264; 106 NW2d 807 (1961).

Defendant contends that his submission of an affidavit claiming he underwent a vasectomy more than twenty years ago, a recent medical report based on a fertility test almost two years after the conception of this child alleging that he is currently sterile, together with plaintiff's uncertainty about the father of her child[1] and her admission that defendant was not her

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[1] The record of the motion hearing during which plaintiff addressed the court reflects that she desired discontinue the paternity proceeding because of the inconvenience and stress it was causing in her life.

only sexual partner at the time her child was conceived[2], is sufficient to rebut the statutory presumption and create a question of fact for a jury. We disagree.

In *Isabella Co Dep't of Social Services v Thompson*, 210 Mich App 612, 615; 534 NW2d 132 (1995), we affirmed the trial court's grant of the plaintiff mother's motion for summary disposition and held that the defendant's denial of having had intercourse with the plaintiff and the plaintiff's difficulty remembering the event did not amount to evidence substantial enough to rebut the statutory presumption of defendant's paternity based on his blood tests.

In *Thompson*, the defendant denied under oath that he had intercourse with the plaintiff. *Thompson, supra* at 613. Here, defendant did not deny having intercourse with plaintiff. In *Thompson*, the plaintiff had no memory of intercourse with defendant. *Id.* at 614. Here, defendant did not question plaintiff's allegation that he engaged in intercourse with her at or around the time plaintiff's child was conceived. Finally, in *Thompson*, this Court affirmed the trial court's grant of summary disposition on the sole basis of the defendant's two paternity test results – despite his outright denial of intercourse and the plaintiff's admitted memory loss with regard to the event. *Id.*

The outcome should be no different in the instant case, where plaintiff and defendant admit to sexual relations at the time the child was conceived, blood test results indicate the probability of defendant's paternity is 99.91 percent, and defendant has not offered the court any clear, positive, or credible evidence to rebut the presumption of his paternity. Defendant's proofs amounted to cumulative negative evidence – that is, he persisted in *denying* his paternity in a variety of ways (i.e., allegation of past vasectomy, allegation of current sterility, and allegation denying exclusive access to plaintiff) but offered the court nothing *positive* to place his paternity in question. Notably, even defendant's submission of the results of his sterility test[3] – the evidence having the *most* potential of creating an issue of fact – was unaccompanied by a physician's affidavit offering to interpret the results and testify that such results indicated defendant was more likely than not sterile at the time plaintiff's child was conceived. Indeed, the report, without expert medical interpretation is of little or no value in determining the state of defendant's fertility at the time of the test almost two years after the conception of this child.

Defendant's efforts to rebut the presumption of his paternity fall short of the amount of evidence necessary to create a question of fact for a jury. The trial court properly found that defendant failed to adequately controvert the statutory presumption, and, as a result, no genuine issue of material fact existed.

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[2] Plaintiff never named any other alleged sexual partner who might have fathered her child.

[3] Curiously, defendant, having had the sperm count results since June 1998 (*before* entry of the court's final order of filiation), did not forward them to his counsel until *after* he received notice that the final order had been entered in October 1998. Defendant offered the court no explanation for this delay.

III

Finally, defendant contends that the notice informing him of the paternity test results was deficient because it did not alert him to the consequences of failing to file an objection to the results. Defendant first raised this issue in his appellate brief. This Court need not address issues raised for the first time on appeal. *Booth Newspapers, Inc v University of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). Although we need not address defendant's contention with regard to this issue, we conclude that it lacks merit.

The statutory language of MCL 722.716; MSA 25.496 clearly requires the distribution of paternity test results to the court, the mother, and the alleged father. The statute also clearly outlines the parties' obligation to object to the test results in writing within fourteen days, or the results will be admitted without further foundation or proof of accuracy, MCL 722.716(4); MSA 25.496(4). A careful reading of the statute reveals that it does *not* require that the notice include information about the obligation to object in writing to avoid the paternity report's admission into evidence. *Id.* This information, although *not* required, *was included* in the document served on defendant. The statute then clearly states the presumption that arises when an uncontested paternity report meeting the prescribed percentage of probability is admitted into evidence, MCL 722.716(5); MSA 25.496(5).

Defendant admits not filing any objection to the report even though the notice clearly stated that any objections to the report must be filed within fourteen days. Instead of questioning the requirement to object to the report within fourteen days, defendant contends:

> If the Notice had been clearer, Objections would have been filed and then it is this writer's opinion that the Court could then only make a determination of the admissibility of the test results as well as providing that a presumption of paternity has arisen and the case would then go to trial if a question of fact existed.

The notice here could not have been more clear in its declaration that written objections must be made within fourteen days, MCL 722.716(4); MSA 25.496(4). Presumably, the Legislature expected putative fathers to object to unfavorable test results in order to avoid the uncontested admission into evidence of such unfavorable results. The plain reading of the statute shows that the Legislature has already codified the procedure defendant presents as his "opinion" of the court's likely action when a party properly objects to paternity test results. As pointed out by plaintiff, defendant can point to no authority that plaintiff had an obligation to inform him of the specific statutory citation governing the notice and the subsequent presumption of paternity if he failed to object.

Affirmed.

/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey