

RENDERED: NOVEMBER 24, 2004; 10:00 a.m.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2003-CA-001805-MR

CANDY G. DENZIK (NOW BLAZAR)

APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE THOMAS R. LEWIS, JUDGE  
ACTION NO. 00-CI-01647

GARY I. DENZIK

APPELLEE

OPINION  
REVERSING

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BEFORE: BARBER AND McANULTY, JUDGES; MILLER, SENIOR JUDGE.<sup>1</sup>

BARBER, JUDGE: Appellant, Candy Denzik Blazar (Blazar), appeals from a judgment rendered against her for fraudulent misrepresentation, holding that she must pay Appellee, Gary Denzik (Denzik), restitution in the sum of \$54,720.26 for child support payments. The payments were made for the benefit of the

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<sup>1</sup> Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

minor child born during the parties' marriage, and were used for the support and well being of the child. We reverse the judgment against Blazar, finding that no evidence of fraud was submitted to the jury, and that the child support payments are not recoverable.

The parties were initially married in 1981. They divorced in May, 1984. The parties remarried in December, 1984. That marriage ended in March, 1990. During the parties' second marriage, Blazar gave birth to a daughter in June, 1987. The parties lived together as a family until the 1990 divorce, and neither party sought a paternity determination at the time of the divorce. Dissolution documents show that the parties had one child together. Denzik was ordered to pay weekly child support, and did so. Denzik was granted regular visitation with the child and Blazar had custody of the child. The parties acted in all respects as if Denzik was the child's father for thirteen years.

At trial, Blazar testified that she saw a picture of her ex-boyfriend's daughter in the paper in 2000, and claimed to notice a similarity between that child and her daughter. At that time her daughter was thirteen years old. Blazar approached her former boyfriend and requested that he take a paternity test. He did so, and it was determined that the child born during the parties' marriage was in fact fathered by the

ex-boyfriend. Blazar disclosed this fact to Denzik in September, 2000. The time of the disclosure was shortly after the paternity test results showed that Denzik was not the child's father. At no time prior to receipt of the paternity test results had Blazar ever indicated to Denzik that he might not be the father of the child born during the parties' marriage. Denzik testified before the court that he had suspected that Blazar had been unfaithful to him during the marriage, but that she had denied such conduct when questioned. Once it was determined that Denzik was not the biological father of the child, Denzik filed a motion to terminate child support obligations. The motion was granted in December, 2000. Denzik has not paid child support since that date, but has continued to request visitation with the child.

After his child support obligations were terminated, Denzik filed the underlying action, claiming that Blazar had fraudulently misrepresented the paternity of the child to him. Denzik sought damages for fraud. Denzik demanded judgment in the sum of all child support payments made by him for the support of the minor child for the past five years. The parties had been divorced for ten years at the time Denzik's action was filed, and Denzik had paid child support for all ten of those years. The jury found Blazar guilty of fraud, and awarded Denzik the damages sought.

Blazar contends that Denzik's claim was barred by the applicable Statute Of Limitations, KRS 413.120(12) and 413.130(3). Blazar asserts that as the complaint lists the alleged misrepresentations as having occurred "during the marriage" and "during the divorce," and those dates were ten or more years prior to the filing of the action and therefore, outside the limitations period. KRS 413.120(12) provides a five year limitations period for actions based on fraud. KRS 413.130(3) provides a discovery rule delaying the date for filing an action for fraud until the fraud is discovered, but states "the action must be commenced within ten (10) years of making the contract or the perpetration of the fraud." As Denzik's action was not filed within ten years of the marriage or divorce, Blazar contends that the action was untimely.

Denzik asserts that the injury resulting from the alleged fraudulent misrepresentations continued up to the time that he last made his required monthly child support payment. He contends that the limitations period began to run on the date of the last payment, in the summer of 2000. During the underlying action, Denzik requested child support for the five years previous to the disclosure of the paternity test, contending that this claim met with Statute Of Limitations requirements. We agree that the fraud, if there was in fact fraud, was ongoing such that Denzik's action fell within the

applicable limitations period. The underlying action was not barred by the Statute Of Limitations.

Blazar argues that Denzik failed to meet the applicable standard for proof of the elements of fraudulent misrepresentation. Blazar argues that Denzik could not provide evidence of any instance in which she intentionally misrepresented paternity either during or after the parties' marriage. Blazar also asserts that Denzik failed to plead fraud with the specificity required by CR 9.02. It was uncontroverted that Denzik and Blazar had an ongoing sexual relationship during the period of time in which the minor child was conceived. It is uncontroverted that there was no evidence presented showing that Blazar knew Denzik was not the father of the minor child prior to 2000, other than the fact that she was engaging in sexual relations with both men at the approximate time the child was conceived. There was no evidence presented that Denzik contacted the child's biological father until 2000 or that she knew that Denzik was not the child's father prior to that time.

The record shows that the parties acted as though Denzik was the father of the minor child from the date of her birth through 2000. Denzik sought and received visitation with the child despite various disputes through the years as to how much visitation was appropriate. During the custody and visitation battles, Blazar never indicated that that Denzik was

not the child's father. In his sworn deposition testimony Denzik admitted that neither he nor anyone else had ever questioned the child's paternity. He stated that his sister, who is married to Blazar's brother, never knew he was not the father of the child until Blazar revealed the paternity test results. The record is devoid of any evidence that Blazar fraudulently concealed paternity of the child.

Denzik argues that the jury is the finder of fact, and had the right to determine the veracity of Blazar based on the evidence before it. He contends that a mother "knows" who the father of her child is, and claims that Blazar must have somehow known he was not the child's father at the time she was conceived. This argument is clearly without basis in fact or law. As this Court recognizes, even in cases where the child's skin and hair tone differ markedly from that of the parent, a paternity test is required to prove or disprove paternity. In the present case, no such marked difference is present. The child's appearance as shown in photographs exhibited at trial is not markedly different from Denzik's. There is a legal presumption that a child born in wedlock is the natural child of the married parties. Little v. Little, Ky., 275 S.W.2d 588, 589 (1955). No evidence in the record supports a finding that Blazar intentionally deceived Denzik as to the paternity of the child, or that Blazar knew of the fact that Denzik was not the

father of the child until 2000. Upon the discovery of the true paternity of the child, Blazar promptly notified Denzik, and his child support obligation was stopped.

In order to be successful on a claim of fraud, the claimant must prove all applicable elements of fraud. Rivermont Inn, Inc. v. Bass Hotels & Resorts, Inc., Ky. App., 113 S.W.3d 636, 639 (2003), citing United Parcel Service v. Rickert, Ky., 996 S.W.2d 464 (1999). Denzik failed to provide any evidence in support of his claims of fraud. Evidence supporting a claim for fraud must be sufficient to warrant sending the case to the jury. Hanson v. American Nat. Bank & Trust Co., Ky., 865 S.W.2d 302, 307 (1993). The record in this action is devoid of any evidence supporting the claim of fraud.

When reviewing a jury determination, this Court “. . . must accept the evidence as true; draw all reasonable inferences from it in favor of the claimant; refrain from questioning the credibility of the claimant, and refrain from assessing the weight that should be given to any particular item of evidence.” United Parcel Service v. Rickert, Ky., 996 S.W.2d 464, 468 (1999), citing Lewis v. Bledsoe Surface Mining Co., Ky., 798 S.W.2d 459 (1990). The reviewing court may reverse the jury's determination only where the jury verdict is so flagrantly against the weight of the evidence as to indicate passion or prejudice. Bierman v. Klapheke, Ky., 967 S.W.2d 16, 19 (1998).

In the present case, the record does not contain any evidence of intentional fraud on the part of Blazar. The credibility of the witnesses is not an issue here. The only evidence submitted was the admitted fact that Blazar had a brief affair during the time that the child was conceived. All parties agree that at the same time she had an ongoing physical relationship with her husband. There is no showing that she knew the child was not his at any point earlier than 2000. For this reason, the jury's verdict goes directly against the evidence before it, even when all reasonable inferences are made in favor of the claimant. For this reason, we reverse the jury verdict.

Denzik claims that he is entitled to an award of all child support previously paid by him. Denzik admitted under oath that he believed all payments made were used to benefit the child, and that he could not provide any evidence that Blazar used the payments inappropriately. Child support is paid for the benefit of the child, and any change in the amount of support only operates prospectively. Clay v. Clay, Ky. App., 707 S.W.2d 352, 353-54 (1986). Child support does not benefit the mother, and thus she is not liable for support wrongfully paid. McBride v. McBride, 803 So.2d 1168, 1169 (Miss. 2002). A putative father generally will not be provided restitution for child support made for a child which ultimately turns out not to



be his. Miller v. Miller., 956 P.2d 887 (Okla. 1998). Child support payments made in error, or in excess of the support legally required are considered gifts to the child, and are not recoverable by the payor. Newman v. Newman, 451 N.W.2d 843 (Iowa, 1990). Recoupment of back child support paid in error is generally barred by the courts, as such a judgment would inflict harm upon the child. Wigginton v. Commonwealth, Ky. App., 760 S.W.2d 885, 886 (1988). Even where, as here, a child support order is vacated, such vacation does not permit the payor a right to recoup payments previously made. Clay v. Clay, Ky. App., 707 S.W.2d 352 (1986). Under the circumstances in this case, even if the evidence supported a finding that Blazar acted fraudulently in obtaining child support, Denzik would not be able to recoup payments made in the past which were used for the benefit of the child. For this reason, the jury's verdict must be reversed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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