STATE OF MICHIGAN

COURT OF APPEALS

EILEEN M. POHL,

Plaintiff-Appellee,

v

ALLEN M. PEISNER,

Defendant-Appellant.

UNPUBLISHED
December 29, 1998

No. 199474
Wayne Circuit Court
LC No. 95-568172 DP

Before: Markey, P.J., and Sawyer and Whitbeck, JJ.

PER CURIAM.

Defendant appeals by right an order of filiation. We affirm.

Defendant first argues that the trial court and plaintiff's counsel improperly failed to advise him of the right to counsel for indigent defendants in paternity proceedings. While we agree that the failure to provide defendant with this information constituted error, the error was harmless.

Reversal of a verdict of paternity is not the automatic result of an error at trial. See *Covington v Cox*, 82 Mich App 644, 651; 267 NW2d 469 (1978) (a defendant in a paternity action may not challenge the verdict on the ground that he was denied effective assistance of counsel). Although MCR 3.217(D)(1) and (D)(2) regarding notice to the alleged father in a paternity action that he has the right to appointed counsel were not complied with in this case, this error is harmless because defendant is an attorney. He represented himself in these proceedings, and there is no evidence that he is indigent. Consequently, he could not avail himself of appointed counsel. Therefore, we conclude that reversal is not required under the very specific facts of this case.

Defendant next argues that the trial court abused its discretion by failing to compel plaintiff to provide pretrial discovery regarding an escrow agreement entered into between the parties involving the payment for a second paternity test. We disagree. The trial court did not abuse its discretion in deferring a decision on defendant's discovery motion until trial or by failing to compel discovery where plaintiff never attempted to introduce any evidence regarding the escrow agreement at trial. See *Linebaugh v Sheraton Michigan Corp*, 198 Mich App 335, 343; 497 NW2d 585 (1993). The parties' escrow agreement was not relevant to the issue of paternity as the arrangements regarding payment for the second paternity test were unconnected to the scientific validity of the test. See MRE

401. Further, plaintiff never introduced any evidence on this topic; consequently, there was never any need for the trial court to rule on this discovery issue.

Defendant next argues that the trial judge should have been disqualified from presiding over this case. We disagree. The trial judge did not err by refusing to disqualify himself or by declining to refer defendant's post-trial motion for disqualification to the chief judge. Although defendant had the primary responsibility for asserting his right to a referral to the chief judge before trial, any deficiency in the lower court procedure is cured by this Court's de novo review. See *Cain v Dep't of Corrections*, 451 Mich 470, 503 & n 38; 548 NW2d 210 (1996).

Defendant failed to satisfy the heavy burden required to overcome the presumption of judicial impartiality. *Id*. at 497. The judge's comments made before trial with regard to the lack of any need for a third paternity test, or for an adjournment so that plaintiff could depose defendant's experts, did not indicate that the court had prejudged the case. Those pretrial discussions regarding procedural and discovery issues did not preclude the judge from independently assessing the evidence once it was presented at trial. See *Ferrell v Vic Tanny Int'l, Inc*, 137 Mich App 238, 248; 357 NW2d 669 (1984) (a judge's comment that the case was frivolous did not establish disqualifying bias or prejudice without some other showing that the judge acted in an impartial manner). The trial judge's knowledge of certain disputed evidence, including the evidence of the escrow agreement regarding the second blood test and defendant's admission that he had a sexual relationship with plaintiff, did not require his disqualification. The escrow agreement was not relevant to the issue of paternity, and knowledge of its existence could not bias the judge in favor of either party. The trial judge's question to defendant about the nature of his relationship with plaintiff was an error, which the trial judge admitted. Defendant, however, never asserted the lack of a sexual relationship as a defense and never tried to impeach plaintiff's testimony concerning the nature of their relationship. Therefore, any error in the question was harmless, and the trial judge's knowledge that the parties had a sexual relationship did not prejudicially alter his ability to render a fair decision in this case.

Defendant next argues that the trial court erred by striking his jury demand moments before the trial began. We disagree. The trial court did not err by holding a bench trial because defendant's jury demand was untimely. In a paternity action, either party may demand a trial by jury, and MCR 2.508 governs the demand for and waiver of that right. See MCR 3.217(B). A party who fails to file a jury demand within twenty-eight days of filing an initial pleading waives his right to a jury. MCR 2.508(B)(1), (D)(1). Defendant's jury demand was untimely as it was filed over five months after his answer. The question of whether to grant a jury trial, therefore, was a matter of discretion with the court. See *Adamski v Cole*, 197 Mich App 124, 130; 494 NW2d 794 (1992). The trial court concluded that the demand was extremely tardy, was not properly supported by a request to file a late jury demand, and would be imprudent given the nature of the complex scientific evidence to be presented. These reasons for denying defendant's request for a jury trial indicate that the trial court did not abuse its discretion.

Defendant also argues that the trial court erred in admitting the original and revised results of the second blood test. We disagree. The trial court did not abuse its discretion by admitting this evidence. The parties cite conflicting case law with regard to the proper foundation for the admission of blood tests in a paternity action. See *Burnside v Green*, 171 Mich App 421, 425; 431 NW2d 62 (1988);

Willerick v Hanshalli, 136 Mich App 484, 488-489; 356 NW2d 36 (1984). Both of these cases are irrelevant because they predate the 1994 statutory language that the trial court was bound to apply. See 1994 PA 388; 1996 PA 308.[1] The current pertinent portion of the Paternity Act, as in effect at the time of the proceedings below, provided that the party objecting to the admission of a blood test "has the burden of proving that foundation testimony or other proof of authenticity or accuracy is necessary for admission of the result or written report." MCL 722.716(4); MSA 25.496(4).

We find that defendant failed to prove that additional foundation testimony or proof of authenticity or accuracy was necessary. Plaintiff's expert laid a sufficient foundation with regard to the regular procedures used for collecting and testing the blood samples. He also explained why the erroneous negative result was reached in the first test, and why he believed that the results of the second test were accurate. Defendant's experts did not directly impeach the foundation for the admission of the results of the second test. Defendant's documents examiner testified to a possible error in the dating of a summary sheet in the laboratory file, but the summary sheet did not alter the test results in any way. Defendant's laboratory expert testified that in the event of an error, his laboratory would report the retest values in a different manner, but he did not question the validity of the second test's conclusions. Any conflict in the expert testimony, therefore, would go to the weight given to the results of the second test, not to the admissibility of its results.

Defendant next argues that the verdict was against the great weight of the evidence. We disagree. Indeed, the verdict was supported by the overwhelming weight of the evidence. See *Heshelman v Lombardi*, 183 Mich App 72, 76; 454 NW2d 603 (1990). Plaintiff testified that she had sexual relations exclusively with defendant during the relevant time period. Although the first blood test excluded defendant from being the father, a second test concluded that there was a greater than 99.99 percent probability that defendant was the father. Moreover, the director of the laboratory explained the anomalous result on the first test. The trial court correctly concluded that this evidence established a presumption of paternity. MCL 722.716(5); MSA 25.496(5). Defendant failed to rebut this presumption. As discussed above, neither of defendant's experts rebutted the validity of the second test results.

Given that the document and reporting anomalies cited by defendant's experts could not have altered the validity of the second test results, there was no reason to require any additional foundation for the admission of the test results or to otherwise rebut the presumption of paternity. See MCL 722.716(4),(5); MSA 25.496(4),(5). The trial court correctly concluded that for the presumption to be rebutted, either an implausible conspiracy between the laboratory director and plaintiff would be required or a practically impossible mistake resulting in the switching of defendant's blood with the blood of an unknown third party who was the real father must be proven. Therefore, the trial court's analysis was correct, and defendant has made no showing that the trial court's verdict was against the overwhelming weight of the evidence. See *Heshelman, supra*.

Defendant further argues that the trial court erred in awarding attorney fees to plaintiff. We disagree. The trial court did not abuse its discretion in awarding attorney fees to plaintiff. MCL 722.717(2); MSA 25.497(2) provides that an order of filiation should also provide for the payment of "expenses in connection with . . . the proceedings as the court considers proper." This language has been interpreted to include an award of attorney fees where such an award is deemed to be necessary

to permit a party to pursue the action. *Bessmertnaja v Schwager*, 191 Mich App 151, 158; 477 NW2d 126 (1991). Contrary to defendant's assertions, it is not necessary for the trial court to determine that the defense to a paternity action was frivolous before imposing such an award. See *id*. at 157-158. Although the trial court did not make an explicit finding of need on the record, plaintiff testified that she worked as a waitress earning only $3.25 per hour plus tips. Because it was supported by law and by the testimony presented at trial, the trial court's award of attorney fees was not an abuse of discretion.

Defendant next argues that the trial court erred by assessing the costs of confinement against him. We again disagree. The trial court did not err by ordering defendant to pay plaintiff's costs of confinement. MCL 722.717(2); MSA 25.497(2) provides that an order of filiation should also provide for "the payment of the necessary expenses incurred by or for the mother in connection with her confinement . . . and for the expenses in connection with the pregnancy of the mother." Defendant did not dispute the reasonableness or necessity of plaintiff's claimed expenses. Therefore, the trial court did not abuse its discretion in assessing those costs against defendant because the award was based on the applicable statute and was not prevented by the earlier discovery dispute between the parties.

Moreover, although the actual medical bills were not entered into evidence, and plaintiff did not testify to the amount, plaintiff presented the bills to defendant before trial, and defendant admitted on the record before the start of trial that he received two bills totaling $2,100. Therefore, plaintiff's counsel's failure to admit the bills into evidence or to have plaintiff testify to them was harmless error.

Finally, pursuant to MCR 7.216(C)(2), this Court, on its own initiative, remands this case to the trial court for a determination of plaintiff's actual and punitive damages and expenses incurred as a result of this vexatious appeal and entry of an award against defendant and in favor of plaintiff for that amount. In our view, defendant raised frivolous defenses to plaintiff's paternity claim below, has pursued the vexatious and cumbersome appeal at hand, and is an attorney who has abused his familiarity with the legal process to plaintiff's detriment. An award of punitive damages in favor of plaintiff is therefore warranted to deter similarly situated fathers from pursuing such vexatious appeals and to deter attorneys from abusing the legal process. Further, we find that this appeal was taken without reasonable basis for belief that there was a meritorious issue to be determined on appeal. MCR 7.216(C)(1)(a).

We affirm and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ William C. Whitbeck

[1] The 1996 amendments to MCL 722.716(4); MSA 25.496(4) were not effective until June 1, 1997, and the trial in this case was resolved by order dated November 1996. Thus, the statute in its 1994 form, per 1994 PA 388, controls.