

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLINTON COUNTY

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| PEGGY L. KNECHT, | : | |
| Plaintiff-Appellee, | : | CASE NO. CA2011-06-010 |
| - vs - | : | <u>OPINION</u> |
| | : | 7/23/2012 |
| JOSEPH E. KNECHT, | : | |
| Defendant-Appellant. | : | |

APPEAL FROM CLINTON COUNTY COURT OF COMMON PLEAS
Case No. DRB 20100290

Ronald C. Carey, 283 North South Street, Wilmington, Ohio 45177, for plaintiff-appellee
Fred J. Beery, 125 North High Street, Hillsboro, Ohio 45133, for defendant-appellant

HENDRICKSON, P.J.

{¶ 1} Defendant-appellant, Joseph E. Knecht (Husband), appeals from a judgment of the Clinton County Common Pleas Court, Domestic Relations Division.

{¶ 2} On April 7, 2010, plaintiff-appellee, Peggy L. Knecht (Wife), filed for divorce from Husband due to incompatibility. Husband responded with a cross-complaint for divorce and annulment based upon adultery and fraud. The trial court eventually granted the divorce

in favor of Wife on the ground of incompatibility and in favor of Husband on the ground of adultery.

{¶ 3} During the pendency of the divorce, Husband filed a Motion for Discovery Order seeking to compel Wife to undergo testing for herpes.¹ In the motion, Husband asserted that he was faithful during the couple's 11-year marriage but had contracted herpes near the end of the relationship. Husband believed that Wife had become infected with herpes through an extramarital affair and transmitted it to him.

{¶ 4} The magistrate denied Husband's discovery request, finding that the evidence had no purpose in a divorce proceeding. The case then progressed to a hearing, after which the magistrate made her decision, granting a divorce to both parties. Husband objected to the magistrate's decision, arguing that the magistrate erred in denying his motion to test Wife for herpes. The trial court agreed with the magistrate, finding that Husband's motion was irrelevant. From the trial court's judgment, Husband appeals, raising the following two assignments of error:

{¶ 5} Assignment of Error No. 1:

{¶ 6} THE TRIAL COURT ERRED BY DENYING HUSBAND'S MOTION FOR DISCOVERY UNDER OHIO CIVIL RULE 35.

{¶ 7} Assignment of Error No. 2:

{¶ 8} THE TRIAL COURT ERRED BY FAILING TO CONSIDER EVIDENCE OF HARM CAUSED BY A SEXUALLY TRANSMITTED DISEASE COMMUNICATED TO ONE SPOUSE BY ANOTHER SPOUSE.

{¶ 9} In his first assignment of error, Husband argues that the trial court erred by denying his request to have Wife tested for herpes.

1. Genital herpes, or herpes, is a sexually transmitted disease spread through sexual intercourse and has no known cure. See *Mussivand v. David*, 45 Ohio St.3d 314, 316 (1989).

{¶ 10} We review a trial court's ruling on discovery matters "under an abuse of discretion standard." *Roe v. Planned Parenthood Southwest Ohio Region*, 122 Ohio St.3d 399, 421 (2009). An abuse of discretion occurs when the trial court's judgment is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 11} Husband argues that, pursuant to Civ.R. 35, he should have been permitted to test Wife for herpes. Civ.R. 35 governs the use of mental and physical examinations for discovery purposes and provides, in pertinent part:

When the mental or physical condition (including the blood group) of a party, * * * is in controversy, the court in which the action is pending may order the party to submit himself to a physical or mental examination * * *. The order may be made only on motion for good cause shown and upon notice to the person to be examined * * *.

{¶ 12} "Before a court may order a physical or mental examination, the physical or mental condition of a party must be in controversy, and there must be good cause shown by a movant party." *Kinsey v. Erie Ins. Group*, 10th Dist. No. 03AP-51, 2004-Ohio-579, ¶ 17. "The determination of 'in controversy' and 'good cause' is a case by case determination." *Id.*, citing 1970 Staff Note, Civ.R. 35. In *Schlagenhauf v. Holder*, 379 U.S. 104, 118, 85 S.Ct. 234 (1964), the United States Supreme Court provided that the "good cause" and "in controversy" requirements "are not met by mere conclusory allegations of the pleadings—nor by mere relevance to the case—but require an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination."²

{¶ 13} First, we note that Husband's Motion for Discovery Order failed to provide any

2. Civ.R. 35 is nearly identical to the Federal Civil Rule 35 discussed in *Schlagenhauf* except for Ohio's use of the term "examiner" instead of "physician."

cause, good or otherwise, why the test should be performed and to what, if any, controversy the test relates. Rather, Husband's motion merely states that he discovered he was infected with herpes, he has been a faithful husband and, consequently, Wife should be tested for herpes. The magistrate awarded the parties additional time to brief the issue of the herpes test, but Husband failed to do so. Thus, at the time the magistrate ruled on the discovery request, Husband had failed to demonstrate "good cause" as to why the test should be performed and to what "controversy" the test could possibly relate. It was only after the discovery request had been denied, a hearing had been held, and the magistrate issued her decision that Husband objected and argued that the test for herpes would have been relevant to the issues of spousal support and property division. Therefore, we cannot say that the trial court erred in determining that the discovery request was irrelevant at the time it was made.

{¶ 14} However, even had Husband argued in his discovery request that the test would be applicable to the issues of spousal support and property division, there is still no evidence to indicate that Wife's alleged infection with herpes was "in controversy" in this case. Although one spouse communicating a sexually transmitted disease to the other spouse may be evidence of adultery, a test revealing that Wife had herpes does not, in itself, prove that she contracted it during the marriage or due to infidelity. Further, Wife admitted to being unfaithful during the marriage and, therefore, a test showing whether she had herpes would be cumulative, at best. Therefore, whether Wife had herpes was not really and genuinely "in controversy" in this case. As such, the trial court did not err in denying Husband's discovery request.

{¶ 15} Furthermore, regardless of the application of Civ.R. 35, the trial court did not err in finding that testing Wife for herpes would only produce irrelevant information. Civ.R. 26(B)(1) provides for the discovery of material which is relevant to the subject matter of a pending action. The test for whether information is relevant in a discovery request "is much

broader than the test to be utilized at trial." *Icenhower v. Icenhower*, 10th Dist. No. 75AP-93, 1975 WL 181668, *1 (Aug. 14, 1975); *State ex rel. Fisher v. Rose Chevrolet, Inc.*, 82 Ohio App.3d 520, 523 (12th Dist.1992). "It is only irrelevant by the discovery test when the information sought will not reasonably lead to the discovery of admissible evidence." *Icenhower* at *1.

{¶ 16} As stated above, Husband eventually argued that evidence of Wife's infection with herpes would be relevant as to the award of spousal support and property division. Yet, Husband failed to present any evidence that he was infected with herpes and that his infection had caused him to suffer a loss of wages or medical expenses. Without this information, the question of whether Wife suffered from herpes is irrelevant, as the trial court could not alter an award of spousal support or property division simply upon a showing that Wife was infected with herpes.

{¶ 17} Husband argues that, due to the magistrate's denial of his discovery request, he was precluded from introducing any evidence regarding herpes at the hearing. However, this is not the case. Husband was only prevented from testing Wife for herpes, not from introducing any evidence relating to herpes or his alleged injury. Therefore, we cannot say that the trial court abused its discretion in denying Husband's motion to have Wife tested for herpes, as any evidence procured from such a test would be irrelevant.

{¶ 18} Finally, we note that Ohio has long recognized a cause of action in tort for the transmission of a sexually transmitted disease. *Mussivand v. David*, 45 Ohio St.3d 314 (1989). As such, we believe that Husband's arguments better lie in tort and not domestic relations. See *Tumeo v. Tumeo*, 10th Dist. No. 89AP-1140, 1990 WL 179937, *5.

{¶ 19} As Husband failed to satisfy the requirements of Civ.R. 35 and Civ.R. 26, the trial court did not abuse its discretion in denying Husband's motion for discovery order. Therefore, Husband's first assignment of error is overruled.

{¶ 20} In his second assignment of error, Husband contends that the trial court erred in not permitting evidence that Wife permanently injured Husband in determining the distribution of property.

{¶ 21} "In any divorce action, the starting point for a trial court's analysis is an equal division of marital assets." *Neville v. Neville*, 99 Ohio St.3d 275, 2003-Ohio-3624, ¶ 5; R.C. 3105.171(C). However, where an equal division of the marital assets would be inequitable, the trial court has broad discretion to divide the marital property in a manner that the trial court determines to be equitable. *Neville* at ¶ 5. "Since a trial court has broad discretion in the allocation of marital assets, its judgment will not be disturbed absent an abuse of discretion." *Id.*

{¶ 22} Husband argues that the marital property should not have been divided equally, as he will permanently suffer injury due to his Wife infecting him with herpes. However, Husband failed to present any evidence of medical expenses or lost wages that he has suffered due to his herpes infection. As discussed above, Husband was not prevented from submitting this evidence to the trial court, but only prevented from testing Wife for herpes. Thus, we cannot say that the trial court erred by not awarding Husband a larger portion of the marital property when no evidence was presented to merit an inequitable division. Therefore, Husband's second assignment of error is overruled.

{¶ 23} Judgment affirmed.

RINGLAND and PIPER, JJ., concur.