[Cite as *Burel v. Burel*, 2010-Ohio-6216.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Ronald A. Burel	Court of Appeals No. L-10-1057
Appellant	Trial Court No. CI0200806276
v.	
Angela L. Burel, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: December 17, 2010

* * * * *

Jack G. Fynes and Rebecca E. Shope, for appellant.

Beverly J. Cox, for appellee Angela L. Burel.

Keith L. Mitchell and Corey L. Tomlinson, for appellee Houston Johnson, Jr., M.D.

* * * * *

HANDWORK, J.

{¶ 1} Plaintiff-appellant, Ronald A. Burel, appeals various judgments entered by the Lucas County Court of Common Pleas in favor of defendants-appellees, Angela L.

Burel and Houston Johnson, Jr., M.D. For the reasons that follow, the judgments of the trial court are affirmed.

{¶ 2} Appellant Ronald and appellee Angela had a long-term and tumultuous personal relationship that began in the early 1990's and was characterized by a series of breakups and reunifications over a number of years.

{¶ 3} Angela and appellee Johnson were colleagues at Flower Hospital beginning in approximately 1994. Angela was employed as a surgical technician, and Johnson, a surgeon, had privileges at the hospital.

{¶ 4} At some point prior to Valentine's Day 1996, when Angela and Ronald became engaged, Angela's relationship with Johnson advanced to one of a sexual nature. The relationship between Angela and Johnson continued even after Ronald and Angela got married on September 21, 1996.

{¶ 5} Approximately four months after Angela and Ronald were married, Angela became pregnant. Angela testified that she believed the child was conceived on or near the 1997 New Year's Day holiday. She specifically recalled having sexual intercourse with Ronald after attending a comedy club with another couple on New Year's Eve 1996. Angela gave birth to a child in September 1997.

{¶ 6} Shortly after the child's birth, Angela introduced Ronald to Johnson. At Angela's suggestion, she and Ronald nominated Johnson to be the child's godfather. Johnson regularly visited the couple's home and participated in the family's activities and

holiday celebrations. Eventually, and with Angela and Ronald's approval, Johnson voluntarily agreed to pay the child's annual private school tuition.

{¶ 7} The marriage of Angela and Ronald was dissolved on January 21, 2001. In February 2007, Ronald subjected himself and the minor child to DNA testing in an effort to determine whether or not Angela had been faithful to him throughout their marriage. Ronald received the results of the test in March 2007. The results showed that Ronald was not the biological father of the child. After notifying Angela of the paternity test results, Angela informed Ronald that, if he was not the father of the child, then the father had to be Johnson. Angela provided Ronald with the option of keeping the paternity matter between themselves, with Ronald continuing his relationship with the child as though he were, in fact, the child's biological father.

{¶ 8} Prior to March 2007, neither Johnson nor Angela informed appellant of their sexual relationship or of the fact that appellant may not be—or in fact was not—the minor child's biological father. Angela and Johnson each testified that until they were presented with the DNA test results, they were unaware that Johnson was the minor child's biological father. Angela testified that Johnson seemed "shocked" when she told him that about the paternity results and the fact that he had to be the child's biological father.

{¶ 9} In January 2008, the Domestic Relations Division of the Lucas County Court of Common Pleas found, via consent judgment entry, that Johnson was the biological father of the child, and that Ronald was not. As a result of these

determinations, the court terminated Ronald's parental rights and responsibilities regarding the child. Although Ronald was granted visitation with the child (pursuant to an agreement between Ronald and Angela, which agreement was incorporated in a consent judgment entry file-stamped October 28, 2008), Ronald subsequently voluntarily relinquished all visitation rights with the child via a consent judgment entry dated July 12, 2009.

{¶ 10} Ronald instituted the current action against Angela and Johnson in August 2008. An amended complaint was filed on January 14, 2009. In the amended complaint, Ronald asserted several claims against appellees, including claims for invasion of privacy, intentional infliction of emotional distress, necessaries, and unjust enrichment. Ronald also asserted claims, against Angela only, for breach of confidential relationship, fraud, breach of marital contract, breach of the covenant of good faith and fair dealing, and promissory estoppel.

{¶ 11} Appellees moved to dismiss the claims against them, pursuant to Civ.R. 12(B)(1) and (6). On January 30, 2009, the trial court granted in part and denied in part appellees' motions. The court held that subject matter jurisdiction was proper and that Ronald's claims against appellees were not barred by the applicable statute of limitations. The court also concluded, however, that Ronald's claims for breach of confidential relationship, breach of marital contract, and breach of the covenant of good faith and fair dealing were all amatory in nature and, thus, barred under R.C. 2305.29.

{¶ 12} The court further ruled, on the authority of *Weinman v. Larsh* (1983), 5 Ohio St.3d 85, that Ronald's claims for recovery of necessaries and unjust enrichment likewise failed to state a claim. In addition, the court found that Ronald's claims for fraud and promissory estoppel appeared to be a "restatement of Plaintiff's claim for necessaries and a recoupment of expenditures for the child that was not his own," and, as a result, those claims, too, were dismissed.

{¶ 13} Angela and Johnson filed motions for summary judgment on September 30 and October 5, 2009, respectively. Ronald filed a motion to strike the motions for summary judgment on October 21, 2009, on the grounds that appellees failed to file the deposition transcripts to which they cited and, thus, the motions for summary judgment were unsupported by evidence as required by Civ.R. 56(C).

{¶ 14} On October 26, 2009, Johnson filed the deposition transcripts of Ronald, Angela, and Johnson.

{¶ 15} On December 11, 2009, the court denied Ronald's motion to strike, distinguishing the cases cited in the motion on the basis that the court "did not erroneously [consider] the testimony offered by Plaintiff or Defendants."

{¶ 16} On January 27, 2010, the trial court granted appellees' motions for summary judgment and dismissed all remaining claims. The court held that Ronald's claim for invasion of privacy was time barred because the alleged invasion of privacy had only occurred during Ronald and Angela's marriage, which ended in 2001.

{¶ 17} The court also ruled that appellees were entitled to summary judgment with respect to Ronald's claim for intentional infliction of emotional distress, finding, inter alia, "no evidence that the instant Defendants *knew* the child's true paternity and/or were concealing the same from Plaintiff."

{¶ 18} Finally, the court found that, because appellees were entitled to judgment with respect to Ronald's claims for invasion of privacy and intentional infliction of emotional distress, Ronald's claim for civil conspiracy necessarily failed as well.

{¶ 19} Ronald timely filed an appeal from the judgments of the trial court that: (1) partially granted appellees' motions to dismiss; (2) denied Ronald's motion to strike; and (3) granted appellees' motions for summary judgment. In this appeal, Ronald raises the following assignments of error:

{¶ 20} "I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING DEFENDANTS' MOTIONS TO DISMISS PLAINTIFF'S CLAIMS FOR NECESSARIES AND UNJUST ENRICHMENT.

{¶ 21} "II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING DEFENDANTS' MOTIONS TO DISMISS PLAINTIFF'S CLAIMS FOR FRAUD AND PROMISSORY ESTOPPEL.

{¶ 22} "III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING PLAINTIFF'S MOTION TO STRIKE DEFENDANTS' PURPORTED MOTIONS FOR SUMMARY JUDGMENT.

{¶ 23} "IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT."

{¶ 24} Appellant argues in his first and second assignments of error that the trial court erred in granting appellees' Civ.R. 12(B)(6) motions to dismiss. Appellate courts reviewing rulings on motions to dismiss use a de novo standard of review. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, ¶ 5. In ruling on a motion to dismiss for a failure to state a claim upon which relief can be granted, an appellate court must presume the truth of the factual allegations in the complaint and must make all reasonable inferences in favor of the non-moving parties. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192.

{¶ 25} Appellant argues in his first assignment of error that the court erred in granting appellees' motions to dismiss appellant's claims for necessaries and unjust enrichment. Ronald brought his claims against appellants for necessaries pursuant to R.C. 3101.03(D), which pertinently provides:

{¶ 26} "If a parent neglects to support the parent's minor child in accordance with this section and if the minor child in question is unemancipated, any other person, in good faith, may supply the minor child with necessaries for the support of the minor child and recover the reasonable value of the necessaries supplied from the parent who neglected to support the minor child."

{¶ 27} In considering whether appellant's claims were properly dismissed, we first look to authority set forth by the Supreme Court of Ohio in *Weinman v. Larsh* (1983), 5

Ohio St.3d 85. There, the court addressed an action by a husband against an alleged biological father for past necessaries that were provided by the husband for the benefit of the children during the period that the husband believed that the children—who were born during his marriage to the mother—were his own. The court, in considering the matter, specifically framed the issue for review as follows: "[W]hether an action which alleges that a woman has conceived, during wedlock, an illegitimate child by a man other than her husband may be maintained by the husband in the court of common pleas as an action for past necessaries furnished, against the alleged natural father of such child." Ultimately, the court concluded that such an action could not be maintained by the husband, and that the husband's claim was properly dismissed under Civ.R. 12(B)(6), because there was no statutory basis or common-law right for the maintenance of his action. In rendering its decision, the court remarked that its "paramount concern in interpreting and expanding the relevant law was to insure that the welfare of the children involved was properly attended to." Id., at 87.

{¶ 28} It is undisputed that the *Weinman* decision predated the enactment of R.C. 3103.03 and, for this reason, appellant challenges its applicability to the present case. We note at the outset of our examination that several other courts have continued to rely on *Weinman*, subsequent to the enactment of R.C. 3101.03. See *Oxender v. Castle* (June 28, 2000), 5th Dist. No. CA1315 (dealing with a claim filed under R.C. 3103.03(D)); *Phillips v. Cochrum*, 9th Dist. No. 23349, 2007-Ohio-247 (dealing with a claim for unjust enrichment).

{¶ 29} In determining the applicability of *Weinman* and the propriety of dismissing appellant's claims for necessaries, we look to the language of R.C. 3103.03(D) itself, which, when read in its entirety, clearly provides for an action for recovery by a person, *other than a parent*, who may have supplied the minor child with necessaries. See id. Here, during all relevant time periods, appellant was the minor child's father by law and, thus, was himself under a duty, *as a parent*, to support the child. See R.C. 3111.03(A)(1) (providing that a man is presumed to be the natural father of a child, where the man and the child's mother are or have been married to each other and the child is born during the marriage); R.C. 3103.031 (providing that a man determined to be the natural father of a child under sections 3111.01 to 3111.18 assumes the parental duty of support for that child). Inasmuch as appellant was the minor child's parent during the period for which he seeks to collect, he is without standing to maintain an action under R.C. 3103.03(D). Further, because R.C. 3103.03(D) does not provide any new, statutory basis for the maintenance of appellant's claims for necessaries, we find that *Weinman* both remains applicable and militates in favor of dismissal of appellant's claims for necessaries and unjust enrichment. Cf. *Oxender*, supra; *Cochrum*, supra.

{¶ 30} For all of the foregoing reasons, appellant's first assignment of error is found not well-taken.

{¶ 31} Appellant argues in his second assignment of error that the trial court erred in granting appellees' motions to dismiss his claims for fraud and promissory estoppel. The trial court, in making its ruling, concluded that appellant's claims for fraud and

promissory estoppel were properly dismissed because they were nothing more than "restatement[s] of plaintiff's claim for necessaries." On appeal, appellant argues that this court should reverse the trial court's ruling, solely on the grounds that dismissal of his claim for recovery of necessaries was "erroneous." As indicated above, the trial court did not commit error in dismissing appellant's claim for recovery of necessaries. Accordingly, appellant's second assignment of error is found not well-taken.

{¶ 32} Appellant argues in his third assignment of error that the court erred in denying his motion to strike the motions for summary judgment that were filed by appellees. A trial court making a summary judgment determination has discretion when considering which evidence is appropriate under Civ.R. 56. *Hastings Mut. Ins. Co. v. Halatek*, 174 Ohio App.3d 252, 2007-Ohio-6923, ¶ 15. An abuse of discretion involves more than an error of law or judgment; instead, it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 33} In the instant case, the trial court stated, in an order dated July 13, 2009, that motions for summary judgment were due on or before September 30, 2009. Angela filed her motion by the stated deadline, and Johnson received an extension of time until October 5, 2009, to file his. Johnson filed his motion for summary judgment on October 5, 2009. Appellant filed the motion to strike the motions for summary judgment on October 21, 2009. Five days later, on October 26, 2009, Johnson filed the necessary transcripts with the trial court.

{¶ 34} On December 11, 2009, the trial court denied appellant's motion to strike, and granted appellant until January 14, 2010, to respond to appellees' motions for summary judgment. In the trial court's opinion and judgment entry denying the motion to strike, the court expressly stated: "Because the Court has not yet considered the arguments for summary judgment that have been asserted by the parties, there has been no error. Further, because the transcripts have been filed with the Court and Plaintiff has been given additional time to respond to Defendants' motions, there is no need to strike the same."

{¶ 35} Even if September 30 were the final date to submit evidence on the motions, there is no rule that would have precluded the court, in its discretion, from considering the evidence once it was filed. Cf. *Rostorfer v. Mayfield* (1991), 72 Ohio App.3d 515, 518 (trial court acted within its discretion in considering an affidavit filed after the deadline set by the trial court). "Late filing of evidence, if accepted and considered, does not destroy its evidentiary value to the court." Id.

{¶ 36} For the foregoing reasons, appellant's third assignment of error is found not well-taken.

{¶ 37} Appellant argues in his fourth assignment of error that the trial court erred in granting appellees' motions for summary judgment.

{¶ 38} An appellate court reviewing a trial court's granting of summary judgment does so de novo, applying the same standard used by the trial court. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Civ.R. 56(C) provides:

{¶ 39} "* * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as considered in this rule. * * *"

{¶ 40} Summary judgment is proper where: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) when the evidence is viewed most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, a conclusion adverse to the nonmoving party. *Ryberg v. Allstate Ins. Co.* (July 12, 2001), 10th Dist. No. 00AP-1243, citing *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621, 629.

{¶ 41} The moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of fact as to an essential element of one or more of the non-moving party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292. Once this burden has been satisfied, the non-moving party has the burden, as set forth at Civ.R. 56(E), to offer specific facts showing a genuine issue for trial. Id.

{¶ 42} In the instant case, appellant argues that the trial court erred in granting appellees' motions on appellant's claims for intentional infliction of emotional distress ("IIED"). To establish a claim for intentional infliction of emotional distress, a plaintiff

must demonstrate: (1) the defendant intended to cause, or knew or should have known that his actions would result in serious emotional distress; (2) the defendant's conduct was so extreme and outrageous that it went beyond all possible bounds of decency and can be considered completely intolerable in a civilized community; (3) the defendant's actions proximately caused psychological injury to the plaintiff; and (4) the plaintiff suffered serious mental anguish of a nature no reasonable person could be expected to endure. *Ashcroft v. Mt. Sinai Med. Ctr.* (1990), 68 Ohio App.3d 359, 366.

{¶ 43} Appellant's claim for IIED is based upon his assertion that appellees knew the child's true paternity and "intentionally or, at the very least, recklessly, caused him emotional distress." In considering this issue, we are mindful that a distinction must be made between the act of engaging in an extramarital affair and the alleged act of knowing and concealing the true paternity of the minor child. The former is not actionable under Ohio law, as amatory torts were abolished by this state by the enactment of R.C. 2305.29.

{¶ 44} Appellant acknowledges in his briefs that knowledge on the part of appellees concerning the minor child's paternity is essential to the establishment of his claim for IIED. Unfortunately for appellant, we do not find in the record evidence sufficient to support his claim that appellees had the requisite knowledge. Appellees each testified that they did not know of or suspect the child's true paternity.

{¶ 45} Arguing that appellees did, in fact, know of the child's paternity, appellant points to evidence that appellees knew or should have known that, by engaging in sexual relations with one another, without the benefit of contraception, conception was a

possibility. He also points to the fact that Johnson became godfather to the child at Angela's behest, that Johnson maintained an active role in his family's life, and that Johnson paid the minor child's private school tuition.

{¶ 46} Such evidence is, at best, speculative and is not, in this court's opinion, sufficient to demonstrate that appellees knew of the child's true paternity in this case. Evidence that appellees knew that there was a possibility of pregnancy is wholly insufficient to establish that appellees knew that Johnson was the child's father.

{¶ 47} Likewise, evidence of Johnson's selection as godfather, his role in the family's life, and his decision to pay the child's private school tuition are simply not enough, even when considered together, to establish knowledge of paternity. For example, although there was, in fact, evidence that Johnson was the child's godfather, additional evidence that is set forth in the record reveals that Johnson is also godfather to the child of another female colleague, one with whom he denied ever having a sexual relationship. Additional evidence demonstrates that Johnson, a single man with an ivy-league education, has a belief in the importance of education, and has paid educational expenses, not just for Angela's minor child, but for various other individuals in his life, including a nephew of his, and Angela, herself. Further evidence demonstrates that, at some point in the past, Johnson wrote checks to another former lover who "was having some hard times," but with whom he had no children. If anything, the evidence shows that Johnson is generous with his money when it comes to those he cares for. It does not, however, establish that he knew he was the father of Angela's child.

{¶ 48} Even assuming, arguendo, that it could be established that appellees were *uncertain* of the minor child's paternity, appellant's claim for IIED would still, of necessity, fail, because the failure to reveal uncertainty of paternity does not constitute "outrageous" conduct within the meaning of the law. See *Bailey v. Searles-Bailey* (2000), 140 Ohio App.3d 174, 182. "To rule otherwise would mean that such a disclosure is so normal and socially usual that its rare deviation would outrage society. Unfortunately, the reverse is probably true and most participants to an adulterous affair, even one in which paternity is in doubt, are not eager to confront someone to announce that they might be the father of his child. While the conduct of [the defendant] might be reprehensible or morally deficient, we cannot state that such a concealment is one that is so clearly outrageous and extreme in degree that it fits within the umbrella of the tort of intentional infliction of emotional distress." Id.

{¶ 49} Accordingly, we find that summary judgment was properly entered with respect to appellant's claim for IIED.

{¶ 50} Finally, we consider appellant's argument that it was error for the trial court to conclude that appellant's claims for invasion of privacy were barred by the applicable statute of limitations. Appellant stated in his amended complaint that "[d]uring the course of plaintiff's marriage, Angela and Johnson wrongfully intruded into plaintiff's private activities in such a manner as to cause plaintiff outrage, mental suffering, shame or humiliation."

{¶ 51} Pursuant to R.C. 2305.09, the limitations period for bringing a claim for invasion of privacy is four years. See, also, *Murawski v. Roberts*, 1st Dist. No. C-060741, 2007-Ohio-3555, ¶ 8. Although R.C. 2305.09 provides a limited discovery rule for certain actions—i.e., for trespassing underground, for injury to mines, and for the wrongful taking of property—the statute fails to provide a discovery rule for invasion of privacy actions. It has been held that the legislature's express inclusion of a discovery rule for certain torts provided for under R.C. 2305.09, implies the exclusion of other torts arising under the statute, including invasion of privacy. See *Herbert v. Banc One Brokerage Corp.* (1994), 93 Ohio App.3d 271, 274, citing *Kirsheman v. Paulin* (1951), 155 Ohio St. 137, 146 (explaining the statutory significance of the Latin phrase expressio unius est exclusion alterius).

{¶ 52} Because the alleged invasion of privacy occurred during appellant's marriage, which ended in 2001, we find that appellant's claims for invasion of privacy are clearly time-barred. Accordingly, appellant's fourth assignment of error is found not well-taken.

{¶ 53} For the foregoing reasons, the judgment from which this appeal is taken is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE