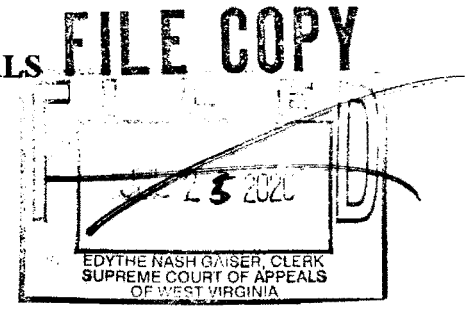
IN THE
WEST VIRGINIA SUPREME COURT OF APPEALS



No. 20-0033
Marshall County Case No.: 13-C-163

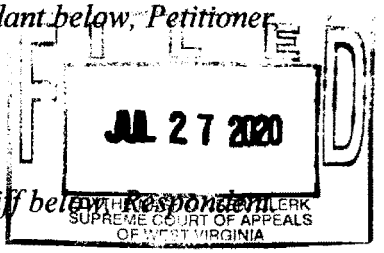
KAREN COFFIELD,

Defendant below, Petitioner

v.

RONALD NEIL ROBINSON,

Plaintiff below, Respondent



APPEAL FROM THE FINAL ORDER OF THE CIRCUIT COURT OF MARSHALL COUNTY

PETITIONER'S REPLY BRIEF

Paul J. Harris
W.Va. Bar # 4673
32 Fifteenth Street
Wheeling, WV 26003
304.232.5300
pjh7294@gmail.com
Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

RENEWED STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner believes that Rule 19 oral argument is appropriate given Petitioner's assignments of error. It is Petitioner's position that the Circuit Court failed to apply settled law to the facts of the case. This case is appropriate for a Rule 19 argument and disposition by memorandum decision.

ARGUMENT[1]

I. Respondent's first cross-assignment of error fails because Respondent's purported damages were adequate given his low amount of actual out of pocket costs and the fact that Respondent paid no child support for the child even after paternity was established.

After hearing all of the evidence presented by Respondent and Ms. Coffield at the jury trial of this matter, the jury decided to award Respondent his attorney costs for bringing a paternity action in an underlying family court matter, and punitive damages for a total of a $15,000 verdict. There is no evidence that the jury did not follow the trial court's instructions, or disregarded evidence presented at the trial of this matter. In fact, the jury deliberated for hours in reaching its verdict.

The evidence at the trial of this matter was not solely for Respondent. The jury heard all the evidence of Respondent's purported loss of solace, society, companionship, and services claims. The jury also heard that Respondent paid no child support for the child's 18 years, even though Respondent knew that he was the father when the child was approximately 10 years old. The jury also heard that Respondent was told by persons in the community that Ms. Coffield's child looked a bit like Respondent when the child was approximately two years old. (JA_000510) The jury also heard that Ms. Coffield did inform Respondent that she was pregnant. (JA_000487) Ms. Coffield testified that he was not interested in being a father and changed the subject. (JA_000487,

[1] As an initial matter, Ms. Coffield relies upon the statement of the case as set forth in her *Petitioner's Brief*. Any factual references set forth by Respondent not citing to the joint appendix should be stricken.

000492, 000495) Presumably, a reasonable man in that situation who had relations with a woman who tells him that she is pregnant may decide to inquire further into whether or not he was the father of said child. In addition, Respondent permitted the child to move to California after he found out he was the father. (JA_000520-21) Perhaps the jury did not believe that Respondent was wholly without fault in the matter for the loss of solace, society, companionship and services when it was clear that Respondent sued the child's mother when the child was in the beginning of her adolescent years.

The jury also heard evidence curiously produced by Respondent that Ms. Coffield had other relations with individuals who believed they were the father of her baby. (JA_000512-513, 486-87, 000504) As such, Ms. Coffield could not have known for an absolute fact that Respondent was the father of her child and she testified to that fact. (JA_000490)

Respondent failed to produce any invoices or hard evidence for any out of pocket damages in excess of approximately $2,500 for an attorney to represent Respondent in a paternity action in the family court. There were no invoices or evidence showing treatment for Respondent's purported past mental pain, suffering, anguish or anxiety.

The verdict for $15,000 is reasonable given the evidence presented at the trial of this matter (although Ms. Coffield believes that Respondent is entitled to no verdict). There is no evidence that the jury acted outside of the instructions given by the trial court (and mostly submitted by Respondent).

II. Respondent's second cross-assignment of error fails because the trial court did not abuse its discretion in awarding counsel for Respondent her contingency fee basis of 40% of the verdict because the attorney fees awarded bore a reasonable relation to the amount of the verdict and Respondent was only entitled to attorney fees for his fraud claim and there was evidence that the attorney fees sought were unreasonable given the simplicity of the case.

As an initial matter, Ms. Coffield believes that no attorney fee award is warranted given Respondent's failure to file his case within the applicable statute of limitations. However, if Respondent is in fact able to recoup attorney fees, the trial court did not err on the amount awarded as the attorney fees awarded bore a reasonable relation to the jury verdict, the trial court took into account that Respondent prevailed on only one of his two claims (as, despite Respondent's assertion to the contrary, fraud and intentional infliction of emotional distress are two separate and distinct claims in which no attorney fees are permitted for intentional infliction of emotional distress had Respondent prevailed on that claim), the trial court assessed the attorney fees per the contract Respondent had with his attorney on a contingency basis, and the trial court evaluated the award based on the fact that Respondent's claims were time-barred.

Respondent's approach through the entirety of this case, including on appeal, is that this case is complicated and requires significant time to be expended. However, this is a simple case.[2] Boiled down to its essence, Respondent sought damages for Ms. Coffield telling him that she was artificially inseminated, when in fact, Respondent is the father of the child. This is not some complicated case based upon interpretation of complicated statutory language, nor is this some complicated case requiring thousands of pages of documents. Essentially, it is a he said she said case, and the case boils down to who the jury believed.

[2] Undersigned counsel noticed his appearance as co-counsel in the matter approximately three weeks before trial and was able to try the case. (*See* docket sheet entry 161)

It is not Ms. Coffield's fault that Respondent, from the beginning, requested in excess of one million dollars to settle the case. (JA_000382) Similarly, counsel for Respondent should have realized that the case was not worth in excess of one million dollars when the statute of limitations had clearly been missed. It would have been reasonable for counsel not to expend significant time on such a tenuous case—especially one without any real hard number damages with the exception of attorney fees in the paternity action. Ms. Coffield had no choice but to defend herself through trial of this matter given Respondent's unreasonable approach. It is not Ms. Coffield's fault that counsel for Respondent chose to expend so much time and energy on a simple case.

As any lawyer handling a civil case knows, there is risk in taking a case on contingency. Sometimes you win a large verdict. Sometimes you are not so lucky as to recoup the time spent on the case. Had counsel for Respondent intended to recoup her hourly fees, then she should have entered into an hourly agreement for her representation of Respondent. It is believed that had the verdict been for one-million dollars, for example, counsel for Respondent would have sought her contingency fee as it would be in excess of her purported hourly fee. Respondent cannot have it both ways as there is an inherent risk and reward in taking cases on a contingency fee basis.

In addition, the trial court did, in fact, analyze the factors in awarding Respondent 40% of the verdict per the contingency fee agreement. The trial court was cognizant that the statute of limitations had passed, and so it reasoned that Respondent's claims would not have otherwise ben presented to the jury:

> The Court is mindful of the fact that the [Respondent's] prevailing fraud claim could have easily been dismissed. The statute of limitations for claims of fraud is two (2) years. The statute in this case began to run on September 11, 2011, when the [Respondent] discovered that he was the father of the [Ms. Coffield's] child. The [Respondent] did not file his complaint until September 27, 2013, over two (2) weeks too late. However, [Ms. Coffield] failed to raise

> the statute of limitations for nearly five (5) years. By Order dated February 1, 2019, the Court denied [Ms. Coffield's] Motion for Summary Judgment on the statute of limitations issue due to [Ms. Coffield] slumbering on her right to raise the same. But for [Ms. Coffield's] neglect, the fraud claim may have been barred completely.

(JA_000427)

Respondent only prevailed on one of his two claims, and so the entirety of the hourly fee sought by Respondent could not have been spent solely on the prevailing claim. In other words, Respondent was not successful on every claim, and so the number of hours spent on the unsuccessful claim cannot be recouped.

Ms. Coffield set forth extensive objections to the attorney billings propounded by Respondent. (JA_000382-426) Respondent is not entitled to recover any fees unrelated to his fraud claims. For example, Respondent is unable to recover fees related to work in the custody case, defending a writ previously filed with this Court, or the appeal of Respondent following the denial of a new trial.

Ms. Coffield specifically objected to the block billing, excessive time spent, excessive rounding of time, and failure to provide enough detail of the billing entry to properly analyze the time spent. (JA_000385-98) Ms. Coffield objected to costs not recoverable because the billings were unrelated to the fraud claims. (JA_000422-26) Ms. Coffield objected to billings related to work that should have been performed by a paralegal, and thus, not billed at the attorney rate. (JA_000416-21) Ms. Coffield made objections related to travel. (JA_000414-15) Ms. Coffield made objections regarding the amount of almost $15,000 billed with regard to meetings and phone calls with Respondent. (JA_000399-413) Counsel for Respondent arguably filed unnecessary pleadings. For example, Respondent filed a response in opposition to Ms. Coffield's motion for new trial on or about December 26, 2019 even though the trial court had already ruled upon the

motion on December 17, 2019. (*See* entries 203 and 208 on the docket sheet) Counsel for Respondent also sought fees following the trial of the matter in his efforts to collect attorney fees. (JA_000385) As these efforts are unrelated to his fraud claims, those fees were rightly excluded by the trial court.

The trial court specifically found that the claims of Respondent did not involve novel issues of the law as he relied upon the case of *Kessel v. Leavitt*, 511 S.E.2d 720 (W.Va. 1998). (JA_000429) The trial court found that the attorney-fee arrangement was a contingency based fee of 40% if the case went to trial. (JA_000429) The trial court found that attorney's fees should bear a reasonable relation to the result obtained. (JA_000430) This requirement protects all litigants from excessive fees and keeps costs at a minimum so that justice can be served, and not weaponized. The trial court specifically made a finding that the amount of attorney fees sought by Respondent is over seven times the verdict. (JA_000430) The trial court awarded the entirety of Respondent's costs. (JA_000430)

Because the award of attorney fees bore a reasonable relation to the amount of the verdict and the fact that Respondent prevailed on only one theory he propounded, the award of attorney fees was reasonable even though Ms. Coffield believes that the Respondent is entitled to no recovery.

III. Respondent failed to present any case law to show that the statute of limitations was not a total bar to his causes of action, or in the alternative, the evidence should not have been presented to the jury.

Respondent argues that the statute of limitations can be waived by Ms. Coffield by not asserting it early enough in the case and that the clock should begin ticking when the court-ordered DNA results were returned, not when Respondent found out he was the biological father through

a drug-store DNA kit. *Respondent's Brief,* pp. 9-10. In the alternative, Respondent argues the doctrines of equitable estoppel or equitable tolling would apply.

Respondent cites to *Luborsky v. Carroll*, Nos. 15-0787 and 16-0329 (W.Va. April 5, 2017) for the proposition that active participation in litigation waives any affirmative defense a party may have. However, the facts in *Luborsky* are significantly different then the facts at bar. *Luborsky* dealt with a lack of personal jurisdiction and insufficiency of process. Of course active participation in litigation would waive the affirmative defense of jurisdiction as it shows that the litigant has consented to the jurisdiction of the court and/or state. However, the statute of limitations defense could not have been waived because that issue is often one requiring a factual determination that is within the jury's province to determine. In other words, Ms. Coffield may have waived her ability to have the case dismissed on summary judgment, but Ms. Coffield should have been permitted to raise the defense to the jury.

The Circuit Court, by Order entered February 1, 2019, found that Ms. Coffield failed to timely raise the issue of statute of limitations for purposes of summary judgment even though Ms. Coffield previously listed the statute of limitations as the fifth affirmative defense in her answer to Respondent's complaint. (JA_000041) At the jury trial of this matter, Ms. Coffield was prohibited from arguing the statute of limitations defense, nor was an instruction regarding the defense given to the jury per *Dunn v. Rockwell*, 225 W.Va. 43 (2009).

The Facebook post admitted as Ms. Coffield's trial exhibit 1, unequivocally shows that Respondent knew he was the father of Ms. Coffield's child on September 11, 2001. The post reads:

> I just wanted every one to know that I just found out That im the father of A ten year old little girl. Her name is S****** Coffield[3]

[3] The child's first name has been redacted.

> and she is so beautiful. I lost ten years not knowing she was mine but I intend on making up for lost time. I am so happy.

(JA_000331) The Facebook post did not say that Respondent "thinks" he is the father, or "may be" the father of Ms. Coffield's child. There is no evidence that after the drug store DNA results were returned that Ms. Coffield ever took the position that Respondent was not the father. Neither Ms. Coffield nor Respondent took the position that the drug store DNA results were inaccurate or tainted. The Facebook post states unequivocally that Respondent *is* the father of Ms. Coffield's child.

The complaint was filed September 27, 2013, more than two years after Respondent knew he was the father. (JA_000001) The exhibit was admitted in evidence, and Respondent cannot now argue that the Facebook post admission was not admissible based upon an objection to foundation. Respondent knew or should have known he was the father of Ms. Coffield's child on or before September 10, 2011.

Respondent also argues that the drug store paternity test taken could not have confirmed that he was the father of Ms. Coffield's child because such paternity tests are inadmissible in a court of law. This is incorrect. Witnesses can be called to testify regarding the testing procedure and the chain of custody. There is no argument as to the accuracy of the testing procedure. However, the drug store paternity test came back listing Respondent as the father of Ms. Coffield's child. If the test came back negative for paternity, Respondent's argument may hold weight (evidencing a tampering with the samples).

There can be no equitable estoppel or equitable tolling as the drug store test results were that Respondent was the father. The statute of limitations did not expire before he discovered he was the father. This is not a situation, for example, where a person works in a factory for 25 years, retires for 10 years, and then develops cancer related to his work. Nor is it a situation where that

person's employer lies about the presence of a toxic chemical in the factory for years. Equitable tolling and equitable estoppel is not present in this case as Respondent knew he was the father of Ms. Coffield's child more than two years prior to the filing of his case.

Contrary to Respondent's contention to the contrary, the applicable statute of limitations is two years. If there was any doubt as to the date he knew or should have known that he was the father of Ms. Coffield's child, that issue should have been presented at the trial of the matter for the jury to determine. The case must be reversed and remanded for dismissal.

IV. Before Ms. Coffield had an opportunity to move for a bifurcation of liability and punitive damages, the Circuit Court informed the parties that he would not bifurcate. Ms. Coffield objected to this ruling, and so the issue has been preserved for this Court's determination.

It is irrefutable that Ms. Coffield objected when the Circuit Court refused to bifurcate the damages aspect of liability before punitive damages. (JA_459, JA_477). There would have been no reason to file a written motion when the Circuit Court already ruled on the issue. The trial court stated:

> Normally I would bifurcate a punitive, you know, but the fraud in and of itself, if it's found, gives rise to punitive damages.

(JA_000458). The Court therefore ruled upon the issue and refused to bifurcate punitive damages from liability. The jury heard evidence of Ms. Coffield's financials prior to a finding of liability.

It was error to permit punitive damages to be considered in the case. *See* W.Va. Code §55-7-29(a) wherein it sets forth when punitive damages are available:

> (a) An award of punitive damages may only occur in a civil action against a defendant if a plaintiff establishes by clear and convincing evidence that the damages suffered were the result of the conduct that was carried out by the defendant with actual malice toward the plaintiff or a conscious, reckless and outrageous indifference to the health, safety and welfare of others.

There was no evidence that Ms. Coffield had actual malice toward Respondent, nor was there any indifference to the health, safety and welfare of others. Ms. Coffield's story of being artificially inseminated was not malicious. She was uncertain who the father was of her child and she was afraid of Respondent as discussed *supra*.

V. Even if the statute of limitations expired on Ms. Coffield's counterclaim, Ms. Coffield throughout the case, wished to provide her explanation as to her actions given Respondent's abusive behavior toward her. Ms. Coffield was unable to provide any meaningful defense to the allegations despite the Circuit Court ruling that her justification defense could be presented to the jury, and then later ruling that it could not be presented.

Ms. Coffield's first attorney may have filed the counterclaim outside the statute of limitations when she improperly filed an "Defendant Karen Coffield's Answer, Affirmative Defenses and Counterclaim" with no counterclaim attached.[4] (JA_000078-84) When the counterclaim was eventually filed for abuse of process, it was filed more than one year after the complaint was originally filed. (JA_107-111) However, because Respondent continued to pursue his claims against Ms. Coffield, the statute may not have expired based upon a tolling doctrine. However, there were other defenses that Ms. Coffield wished to address at the trial of the matter. She was prohibited from doing so.

Besides the statute of limitations defense, Ms. Coffield wished to introduce evidence related to abuse of Ms. Coffield by Respondent. The jury should have been able to hear an explanation of Ms. Coffield's reasoning for her actions, particularly since Respondent sought, and was awarded, punitive damages against Ms. Coffield. Contrary to Respondent's argument that there is a slippery slope in permitting the admission of a justification in a suit for paternity fraud, there is no harm in permitting this type of defense in a *civil* suit for damages. Respondent's own

[4] Respondent seeks to have the statute of limitations protect him from Ms. Coffield's counterclaim, but argues that it is somehow tolled or should not apply for his allegations against Ms. Coffield.

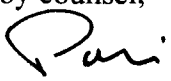
culpability in the loss of companionship with Ms. Coffield's child should have been permitted to be heard by the jury, if for no other reason but to explain Ms. Coffield's conduct in failing to definitively determine the paternity of her child.

In other words, Ms. Coffield's defense was extremely limited by the Circuit Court's rulings. First, Ms. Coffield's justification defense would be permitted. (JA_000190 p. 5) The Circuit Court then changed its ruling and prohibited the same. Justification is a question of fact that the jury should have been permitted to hear and decide.

CONCLUSION

Ms. Coffield prays the Circuit Court's judgment entered against her be reversed, Respondent's cross-assignments of error be denied, and the case against her be dismissed on the basis that Respondent's claims are time-barred by the statute of limitations. In the alternative, Ms. Coffield seeks a reversal of the matter and remand with instructions to permit a new trial wherein Ms. Coffield may offer evidence and argument regarding her defenses, as well as present evidence of her counterclaim against Respondent.

Petitioner,
by counsel,

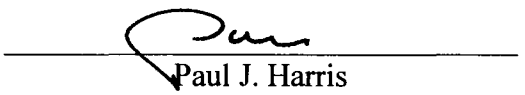


Paul J. Harris
W.Va. Bar # 4673
32 Fifteenth Street
Wheeling, WV 26003
304.232.5300
Pjh7294@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that on this 24th of July, 2020, a true and accurate copy of the foregoing *Petitioner's Reply Brief* was delivered via facsimile and electronic mail as follows:

Amy Pigg Shafer, Esq.
Shafer Law Offices
The Board of Trade Building
80 Twelfth Street, Suite 407A
Wheeling, WV 26003
304.905.1152—fax



Paul J. Harris
Counsel of Record for Petitioner