NOT FOR OFFICIAL PUBLICATION
See Okla.Sup.Ct.R. 1.200 before citing.

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

DERRICK R. SCOTT,

Petitioner/Appellant,

vs.

CANDICE J. FOSTER,

Respondent/Appellee.

Case No. 122,063

APPEAL FROM THE DISTRICT COURT OF
BLAINE COUNTY, OKLAHOMA

HONORABLE PAUL K. WOODWARD, DISTRICT JUDGE

AFFIRMED

Eric N. Edwards
ERIC N. EDWARDS, P.C.
Enid, Oklahoma — For Petitioner/Appellant

Maria Tully Erbar
MARIA TULLY ERBAR
ATTORNEY AT LAW, P.C.
Oklahoma City, Oklahoma — For Respondent/Appellee

OPINION BY GREGORY C. BLACKWELL, JUDGE:

Derrick Scott appeals the court's grant of summary judgment in favor of Candice Foster. The court found that Mr. Scott's petition seeking to adjudicate the paternity of Ms. Foster's child, was time barred as it was filed two years after the relevant statute of limitations expired. Upon review, we agree. Even after all potential equitable extensions to the statute of limitations are accounted for, Mr.

Scott's petition was filed at least two years after the statute of limitations expired. We thereby affirm the trial court's judgment.

BACKGROUND

It is agreed that the parties shared an intimate relationship at some point prior to the birth of Ms. Foster's child, K.J.F., born February 21, 2013. Mr. Scott alleges that he is the father of K.J.F; however, shortly after the child's birth, non-party to this suit, Jason Redinger, signed an acknowledgement of paternity. Mr. Scott waited until January 2019, almost six years later, to file a petition requesting adjudication of the paternity of the child. In proceedings that were the subject of a prior appeal, Ms. Foster alleged that 10 O.S. § 7700-609(B) was a statute of repose that required Mr. Scott to commence a paternity action within two years from the date of acknowledgement of paternity. The trial court agreed with Ms. Foster and granted the motion, and this Court affirmed that decision. However, the Supreme Court vacated our ruling and reversed the trial court, holding that § 7700-609(B) is not a statute of repose, but rather a statute of limitations subject to exceptions. *Scott v. Foster*, 2023 OK 112, ¶ 22, 538 P.3d 1180, 1189.

On remand, Mr. Scott filed a "motion to enter, to order return of garnished funds for judgment, genetic testing, to appoint a GAL and for speedy trial." Doc. 29, pgs. 1-4 (capitalization modified). Ms. Foster filed a motion to dismiss or alternatively a motion for summary judgment in response. In her motion, Ms. Foster argued that according to § 7700-609(B), Mr. Scott had two years from the time he knew of the child or believed the child was his to bring suit. Because the

Court found that the statute is a statute of limitations subject to exceptions, she also noted that even applying the discovery rule or equitable tolling the time-bar would only be extended to two years from the time that Mr. Scott knew or reasonably should have known material facts regarding the pregnancy, childbirth, and paternity of the child. She alleged that Mr. Scott was most certainly aware of her pregnancy and childbirth as early as March 2013. The trial court found that Mr. Scott knew of the minor child at the very latest on February 29, 2015,[1] the statute of limitations began running that day, and, therefore, the statute of limitations expired on or before March 1, 2017. The court noted that Mr. Scott's petition was filed on January 9, 2019, which was nearly two years after the statute of limitations had run. Mr. Scott appeals.

STANDARD OF REVIEW

Although a trial court in making a decision on whether summary judgment is appropriate considers factual matters, the ultimate decision turns on purely legal determinations, *i.e.*, whether one party is entitled to judgment as a matter of law because there are no material disputed factual questions.[2] *Carmichael v.*

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[1] This date used in the court's order appears to be an error, as there was no February 29th in 2015. The child was born on February 21, 2013. The court found that Mr. Scott requested genetic testing at some point during the two years after the child's birth. Thus, the latest date possible Mr. Scott could have known about the child's birth would have been February 21, 2015. We presume this was the date intended in the court's order. The error in no way affects the analysis.

[2] Ms. Foster's motion was styled as a "motion to dismiss or alternatively motion for summary judgment." We are using the standard of review for summary judgment, not a motion to dismiss, because the court issued its order pursuant to Rule 13, *Summary Judgment*, of the Rules of District Courts of Oklahoma. Ms. Foster also sets forth her "undisputed material facts" and Mr. Scott generally denies each fact, without any supporting evidence. Mr. Scott also requested discovery pursuant to Rule 13(d).

Beller, 1996 OK 48, ¶ 2, 914 P.2d 1051, 1053. Therefore, as the decision involves purely legal determinations, the appellate standard of review is *de novo*. *Id.* We, like the trial court, will examine the pleadings and evidentiary materials submitted by the parties to determine if there is a genuine issue of material fact. *Ross v. City of Shawnee,* 1984 OK 43, ¶ 7, 683 P.2d 535, 536. Further, all inferences and conclusions to be drawn from the evidentiary materials must be viewed in the light most favorable to the non-moving party. *Id.*

ANALYSIS

Mr. Scott raises several issues on appeal. However, the dispositive question is whether the trial court properly granted summary judgment. Thus, we will first address that question.

The relevant statute of limitations, reads as follows:

> If a child has an acknowledged father or an adjudicated father, an individual, other than the child, who is neither a signatory to the acknowledgment of paternity nor a party to the adjudication and who seeks an adjudication of paternity of the child shall commence a proceeding not later than two (2) years after the effective date of the acknowledgment or adjudication.

10 O.S. § 7700-609(B). In the present case, the child had an acknowledged father who signed the acknowledgment of paternity March 1, 2013, eight days after the child was born. Thus, on its face, Mr. Scott would have needed to bring his paternity suit by March 1, 2015, which he did not. However, a statute of

limitations is subject to exceptions such as the discovery rule,[3] equitable tolling,[4] or estoppel.[5] *Scott*, 2023 OK 112, ¶¶ 15, 22.

In her motion for summary judgment, Ms. Foster provided evidence of several dates by which Mr. Scott would have or should have known that she was pregnant, that she had given birth to a child, and that he believed he was the father.[6] For example, Ms. Foster notes in a sworn affidavit that Mr. Scott knew

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[3] "Oklahoma also follows the discovery rule allowing limitations in certain tort cases to be tolled until the injured party knows or, in the exercise of reasonable diligence, should have known of the injury. The rule is applied to delay the running of the statute of limitations when doing so would not offend the purpose of the rule." *Calvert v. Swinford*, 2016 OK 100, ¶ 11, 382 P.3d 1028, 1033.

[4] "One relying on fraudulent concealment to toll the statute of limitations must not only show that he did not know the facts constituting a cause of action, but that he exercised reasonable diligence to ascertain said facts. 'If the means of knowledge exist and the circumstances are such as to put a man of ordinary prudence on inquiry, it will be held that there was knowledge of what could have been readily ascertained by such inquiry' and a plaintiff cannot successfully assert fraudulent concealment in answer to the defense of the statute of limitations." *Masquat v. DaimlerChrysler Corp.*, 2008 OK 67, ¶ 18, 195 P.3d 48, 55 (quoting *Kansas City Life Ins. v. Nipper*, 1935 OK 1127, ¶ 0, 51 P.2d 741, 742).

[5] "A fact question as to whether a defendant is estopped from interposing the defense of a time bar is generally raised by a plaintiff's allegations that the defendant had made (a) some assurance of settlement negotiations reasonably calculated to lull the plaintiff into a sense of security and delay action beyond the statutory period, or (b) an express and repeated admission of liability in conjunction with promises of payment, settlement or performance, or (c) any false, fraudulent or misleading conduct or some affirmative act of concealment to exclude suspicion and preclude inquiry, which induces one to refrain from timely bringing an action." *Jarvis v. City of Stillwater*, 1987 OK 5, ¶ 3, 732 P.2d 470, 472 (footnote omitted).

[6] Ms. Foster also highlights that there were certain facts that the Supreme Court noted were unclear in the prior record on appeal. Doc. 30, *Motion to Dismiss or Alternatively Motion for Summary Judgment*, pg. 2; *Scott v. Foster*, 2023 OK 112, ¶ 23, 538 P.3d 1180, 1189. These facts are: when their relationship started and ended, when Mr. Scott learned of her pregnancy and the birth, when Mr. Scott first believed he was the child's father, when he became aware of the acknowledgement of paternity, or when he came to believe Ms. Foster committed fraud. All of the above facts are sufficiently addressed in the record, with the exception of the date Mr. Scott became aware of the acknowledgment of paternity. However, the date on which Mr. Scott discovered the acknowledgment is not determinative in this case as there is sufficient evidence presented that Mr. Scott knew of the child's existence within two years of her birth and believed he was the father. *Hill v. Blevins*, 2005

she was pregnant because he stalked her throughout her pregnancy, and he had made several remarks about her pregnancy to friends, family, and acquaintances during her pregnancy. Doc 30, Exhibit A, *Affidavit of Candice Jean Foster.* Jason Redinger, the acknowledged father of K.J.F., stated that he overheard Mr. Scott talking at a rodeo about being the father of K.J.F. on August 5, 2013. *Id.*, Exhibit B, *Affidavit of Jason Redinger.* Further, the affidavit of Kimberly Taylor states that Mr. Scott sent her a message on June 21, 2013, about him "not getting a chance to see my daughter or be a daddy." *Id.*, Exhibit F, *Affidavit of Kimberly Taylor.* Jacklyn Foster also received a message from Mr. Scott, on July 5, 2013, which read: "Just a little secret I know about [K.J.F.] I have been talking to Candice for awhile I know your parents are making her lie about who [K.J.F.'s] real father is ...." *Id.*, Exhibit G, *Affidavit of Jacklyn Foster.* Ms. Foster generally shows, with evidence, that Mr. Scott knew about Ms. Foster's pregnancy, knew

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OK 11, 109 P.3d 332, though decided before the enactment of the Uniform Parentage Act, is instructive on this issue. In *Hill*, an unmarried couple, Heather Blevins and Howard Hill, decided that they would conceive a child; however, they separated when Heather was six months pregnant. *Id.* ¶¶ 4-5. Heather gave birth to a child in 1997 and another man signed an acknowledgment of paternity. *Id.* ¶¶ 5-6. In 2002, five years later, Hill inquired about genetic testing for the child and was informed that paternity for the child had already been established. He brought an action to vacate the acknowledgment, and the Court, in denying his claim, found "[t]he means of discovery of the alleged fraud were no less available to Hill in the fall of 1997 than they were five years later in June of 2002. So, even if Blevins' naming of [the signatory] was false, means of discovering the alleged fraud were readily available to Hill any time from and after the issuance of the birth certificate ...." *Id.* ¶ 11. Here, even if Ms. Foster and Mr. Redinger conspired for him to sign the acknowledgment falsely, and Mr. Scott claims he did not become aware of it until the name change action filed in 2018, his paternity action is still time barred. The means of discovering this fraud were no less available to Mr. Scott in 2013 than they were in 2019, in light of the fact that, as further discussed below, he had already requested genetic testing some time between 2013 and 2015, sent various messages indicating that he was the father of K.J.F. in 2013, and had conversations with several people regarding his belief he was the father of K.J.F also before 2015.

that she had given birth to a child, and knew that he could be the father of that child as early as March 2013, shortly after Ms. Foster gave birth.

Further, in a prior motion, Mr. Scott acknowledged that he had previously requested or attempted to require genetic testing to establish paternity within two years of the child's birth. Doc. 30, Exhibit H, pg. 2 (ROA 283). Ms. Foster asserts that therefore, by Mr. Scott's own admission, he knew about K.J.F. within the first two years of her life. In response, Mr. Scott does not dispute that he made this request; rather, he merely states that his "prior attempt to establish paternity" was denied because Ms. Foster refused to allow testing. Yet, he took no action in court to determine parentage until K.J.F was almost six. Ms. Foster's denial of his request does not negate that the request was made by Mr. Scott or that such a request could not have been made without knowledge of the child's existence and would not have reasonably been made but for a belief he was the father. As K.J.F was born in February 2013, even if Mr. Scott's attempt to establish paternity occurred when he first knew about the child and occurred at the end of those two years, for example in February 2015, the two-year statute of limitations would have expired in February 2017.

In response to Ms. Foster's motion for summary judgment, Mr. Scott generally argues that Ms. Foster committed fraud by knowingly allowing a man other than the child's biological father to sign the acknowledgement of paternity, by repeatedly telling him he was not K.J.F.'s father, and that she otherwise concealed or hid the child from him. However, he submitted no affidavit or any evidentiary substitutes of any kind to support his denials. Rather, he "generally

denies" each allegation Ms. Foster makes. While he still maintains that Ms. Foster and her family concealed the child from him and they continue to "fraudulently" maintain that Mr. Redinger is the father, he presents no evidence as to how the fraud prevented him from presenting his paternity challenge. And, when faced with evidence that he had conversations with different individuals about knowing that he was or could be the father of K.J.F., Mr. Scott provided no evidence disputing that those conversations occurred. Further, by his own admission he requested genetic testing sometime between 2013 and 2015. Mr. Scott does not dispute that such a request was made on appeal, which makes February 2017 the latest possible date he could have brought his paternity action.

When evidence is presented showing the existence of uncontroverted material facts, the burden shifts to the opposing party to identify those material facts that party alleges remain in dispute and provide contradictory evidentiary materials justifying trial on the issue. Okla. Dist Ct. R. 13(b). "In attempting to show the existence of a question that must be tried, the party may not rely on bald contentions that facts exist to defeat the motion." *Faught v. Wilcox,* 2011 OK 82, ¶ 19, 267 P.3d 106. Rather, the party opposing a motion for summary judgment must provide "acceptable evidentiary material," which is evidence that appears to be convertible to admissible evidence at trial. Okla. Dist Ct. R. 13(b). Mr. Scott offers none.

Here, as Ms. Foster presented uncontroverted material facts regarding the timeline in the present case, the burden shifted to Mr. Scott to identify any

remaining dispute and provide any supportive evidentiary materials justifying proceeding to trial. Mr. Scott did not produce any evidentiary materials to dispute Ms. Foster's material facts and instead relies on a general denial, as if it were an answer to a petition rather than a motion for summary judgment. Mr. Scott has not presented any evidence suggesting that the conversations referenced in Ms. Foster's affidavits did not occur. And, importantly, he apparently agrees that he did request genetic testing sometime between 2013 and 2015. Thus, it is undisputed that Mr. Scott could have brought his claim at the latest, in 2017. Instead, for reasons that remain unknown, he waited until 2019 to file his petition seeking to prove his claim of paternity. Accordingly, we find that the trial court properly granted the motion for summary judgment.

In his petition in error, Mr. Scott also generally alleges that the court erred in denying his "motion to enter, to order return of garnished funds, for judgment, genetic testing, to appoint GAL and for speedy trial." Doc 29. (capitalization modified). First, we will address the garnishment issue. Mr. Scott argues that $5,066.40 was improperly garnished from him. The trial court had previously granted judgment to Ms. Foster for costs and attorney's fees, this Court reversed that award, and the Supreme Court found that neither party appealed the fee issue; therefore, that portion of the Court of Appeals opinion remained intact. As a result, Mr. Scott claims that he is entitled to return of the money that was garnished from him to pay the judgment.

Upon review of the court's order granting summary judgment in favor of Ms. Foster, we find that the trial court did not address the garnishment or fee

issue. However, we need not address the issue of the return of attorney's fees paid via garnishment in this case because the trial court retains jurisdiction to "take action with respect to any issue collateral to a pending appeal" and determine "any issue whose resolution pending appeal is explicitly authorized by law." Supreme Court Rule 1.37(a)(9). We note that this Court, citing Supreme Court Rule 1.22(d), has held that, "the trial court retains jurisdiction over trial-related attorney fees which were not included in the judgment appealed even while the other issues are on appeal." *Reynolds v. Kindred,* 2000 OK CIV APP 104, ¶ 4, 12 P.3d 496. In this case, the trial court has not decided whether Ms. Foster should return the attorney's fees that she obtained via garnishment of Mr. Scott. Even though that issue was not addressed in the court order, it does not affect the other issues before this Court now as the trial court still has jurisdiction to address the fee issue below. Thus, we decline to decide the issue or reverse on this basis. The trial court must make a first-instance determination regarding whether the money was improperly garnished from Mr. Scott.

Mr. Scott raises other allegations of error related to his contentions that the court denied his request to conduct discovery, refused to appoint a GAL, refused to order genetic testing, refused to address the validity of the acknowledgement of paternity, refused to preserve a record for appeal, and his allegation of the trial judge's impartiality and bias.[7] First, we note that any

[7] Mr. Scott also raises an issue related to the constitutionality of DHS's forms and policies; however, upon review of the record it does not appear this issue was addressed or briefed in plaintiff's motion to enter, the summary judgment responses, or in any of the prior pleadings. Issues not raised below will not be considered for the first time on appeal. *Jones v. Alpine Inv., Inc.,* 1987 OK 113, ¶ 11, 764 P.2d 513, 515.

argument related to the court's denial to conduct discovery,[8] refusal to order genetic testing, or appoint a GAL is effectively moot in light of the ruling on summary judgment. Because we find that Mr. Scott did not file his petition within the required statute of limitations, he has no cause of action. Therefore, there is no need for discovery, genetic testing, or a GAL, as the case may not proceed.[9]

Additionally, Mr. Scott argues that the court did not have a court reporter available for some type of proceeding or hearing (the proposition in error does not specify) and, therefore, the court erred in "refusing to preserve a record." However, according to 20 O.S. § 106.4(B), court reporters transcribe proceedings upon request of either party. In absence of such a request, it is clear the court

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[8] We note that the only request for discovery Mr. Scott made in his response to the motion for summary judgment sought "statements concerning Redinger's paternity results" because "[t]he timing and results of any Redinger paternity test are a contested issue of fact in this case." Doc. 33, *Response to Defendant's Motion to Dismiss or Alternatively Summary Judgment*, pg. 5. Per 12 O.S. § 2056(F), a party responding to a motion for summary judgment may obtain discovery if the party shows "by affidavit that, for specified reasons it cannot present facts essential to justify its opposition ...." *See also* District Court Rule 13(d). We do not agree that the results of Mr. Redinger's paternity test were material to the resolution of Ms. Foster's motion for summary judgment, which concerned only the question of the application of 10 O.S. § 7700-609(B) to Mr. Scott's paternity action. And, even if those results were viewed as material to that question, Mr. Scott failed to offer any affidavit regarding the need for such discovery, as required by the cited statute and rule. As such, the court properly denied Mr. Scott's request for discovery, a question subject to the sound discretion of the district court. *See Bookout v. Great Plains Reg'l Med. Ctr.*, 1997 OK 38, ¶ 10, 939 P.2d 1131, 1134; *K.M. ex rel. Arnold v. Steger Lumber Co. of Durant*, 2013 OK CIV APP 8, ¶ 13, 296 P.3d 517, 521.

[9] Mr. Scott opens his reply brief to Ms. Foster's motion for summary judgment by saying "this paternity case was filed five (5) years ago and Derrick still cannot get an order for a DNA paternity test to confirm he is [K.J.F.'s] father." Doc. 33, *Response to Defendant's Motion to Dismiss or Alternatively Summary Judgment*, pg. 1. By prematurely requesting that the court order genetic testing, before the court can even determine whether his paternity action was validly brought, Mr. Scott puts the cart well before the horse. As Ms. Foster correctly points out, these issues need not be addressed if it is shown through summary judgment that the paternity action was not timely filed.

is under no duty to provide a court reporter at every hearing or proceeding. Nothing in this record suggests any request for a court reporter was made and denied. As such, the court in the present case did not "refus[e]to preserve a record for appeal," as Mr. Scott alleges. Further, even if a hearing or proceeding did occur without a court reporter despite a request, we note that Mr. Scott had the option to submit a narrative statement of the hearing. *See* Supreme Court Rule 1.31. He did not do so.

Finally, we address Mr. Scott's proposition in error alleging that the court acted in a biased and discriminatory manner towards him, so much so, that it violated his constitutional rights and right to a fair trial by a neutral judge. However, it does not appear that this issue was raised in any of the motions or briefing and this Court will not consider issues raised for the first time on appeal. *Jones v. Alpine Inv., Inc.,* 1987 OK 113, ¶ 11, 764 P.2d 513, 515.

Additionally, while the Supreme Court has held that a judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, *Pierce v. Pierce*, 2001 OK 97, ¶ 13, 39 P.3d 791, 797 (citing 5 O.S.Supp.2000, Ch. 1, App. 4, Code of Judicial Conduct, Canon 3(E)(1)), there is a proper procedure for disqualification that must be followed.

> [A] party seeking disqualification of a judge in a civil proceeding must make an *in camera* request of the judge to disqualify or to transfer the cause to another judge as required by Rule 15, and then upon the judge's refusal the party must file a written application in the cause, as required by [20 O.S.] § 1403, and upon refusal of the motion, re-present the motion to the Chief Judge or the Presiding Judge as required by Rule 15.

Id. ¶ 10 (footnote omitted). Then, if the judge is still not disqualified, the party seeking disqualification may seek extraordinary relief in the form of mandamus or preserve the disqualification issue for review on appeal from the subsequent judgment. *Id.* Here, the record reflects that Mr. Scott took the initial step of making an *in camera* request for the judge to disqualify or transfer the case, *see* Doc. 26, *Order*, but did not pursue the matter any further. Therefore, it is clear that Mr. Scott did not adequately preserve this issue for appeal or otherwise comply with proper disqualification procedure.[10]

CONCLUSION

Ultimately, the trial court correctly granted Ms. Foster's motion for summary judgment as she presented evidentiary material showing that there is no material dispute of fact, and, based on her recited facts, she was entitled to judgment as a matter of law. In response, Mr. Scott submitted no evidence controverting Ms. Foster's recitation of the facts. Upon review, Ms. Foster properly posited several dates and times which demonstrate that Mr. Scott knew that she had been pregnant, that she had given birth, and that he suspected that he was the father. The statute of limitations expired, at the latest, in February 2017, and therefore, Mr. Scott's claim was time barred when he filed it in 2019. Mr. Scott's remaining allegations are all without merit or were not preserved. As such, the trial court's entry of judgment in favor of Ms. Scott is affirmed.

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[10] If the issue had been preserved, we note that there is nothing in the appellate record to so much as suggest Judge Woodward should have recused from this case.

AFFIRMED.

HUBER, P.J., and HIXON, J., concur.

December 4, 2024