2018 IL App (1st) 170074

SIXTH DIVISION
March 23, 2018

No. 1-17-0074

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

TARYN KESSEL and DOUG KESSEL, individually and as parents and next of kin for Z.K., a minor,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Contemnors-Appellants,	)	
v.	)	
NORTHWESTERN REPRODUCTIVE GENETICS, INC.; EUGENE PERGAMENT, M.D., P.C.,; EUGENE PERGAMENT, individually and as agent of Northwestern Reproductive Genetics, Inc. and Eugene Pergament, M.D., P.C.; ASPER BIOTECH, LTD., individually and as agent of Northwestern Reproductive Genetics, Inc. and Eugene Pergament, M.D., P.C.	)	No. 10 L 6340
	)	Honorable Moira S. Johnson,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

ORDER

¶ 1 ***Held:*** The circuit court did not abuse its discretion in denying parents' motion for a protective order to bar defendants from taking the deposition of their eight-year-old son. Affirmed.

¶ 2 Plaintiffs-appellants Taryn and Doug Kessel appeal from an order of circuit court of Cook County finding them in contempt of court and imposing a sanction of $100 for failure to tender their eight-year-old son, Z.K., for a deposition. We affirm.

¶ 3 On May 28, 2010, the Kessels filed a complaint against defendants Northwestern Reproductive Genetics, Incorporated (Northwestern); Asper Biotech, Limited (Asper); and Eugene Pergament, M.D. They later amended the complaint to include Dr. Pergament's professional corporation. The amended complaint alleges that, during her pregnancy with Z.K., Taryn went to Pergament and Northwestern for prenatal genetic screening, including screening for Maple Syrup Urine Disease (MSUD), a serious hereditary condition.[1]

¶ 4 Pergament performed the screening and sent Taryn's blood sample to Asper for analysis. Since the test revealed that Taryn carried the genetic mutation for MSUD, Pergament recommended that Doug also be tested. Doug underwent similar testing and received a report indicating that he did not carry the genetic mutation for MSUD. Because of this negative result, the Kessels chose not to undergo further testing and to continue the pregnancy to full term. Within days of Z.K.'s birth the Kessels were advised that he tested positive for MSUD. They returned to Pergament, who had Asper reanalyze Doug's blood. The reanalysis showed that, contrary to the prior results, Doug indeed carried the genetic mutation for MSUD, meaning that it was much more likely that any child born to the Kessels would be afflicted with MSUD than if only one parent carried the genetic mutation.

¶ 5 The amended complaint contains three counts. Count I is a claim for negligence with respect to Doug's first genetic analysis, which has been characterized as a "wrongful birth" claim. Count II is a claim for negligent infliction of emotional distress, and count III is a medical malpractice claim.

[1] MSUD is an animo acid metabolism disorder which prevents persons from metabolizing certain amino acids. The disorder allows by-products of these acids to build up in the body, "causing neurologic changes, including seizures and intellectual disability." Individuals with MSUD must scrupulously maintain a diet free from meat, dairy, and other foods high in amino acids. They must also monitor their amino acid levels and take supplements to maintain their health. The only cure for MSUD is a liver transplant. Merck Manual Consumer Version, https://www.merckmanuals.com/home/children-s-health-issues/hereditary-metabolic-disorders/overview-of-amino-acid-metabolism-disorders#v37802998 (last visited March 13, 2018).

¶ 6 The parties have engaged in discovery and motion practice for several years. In response to discovery requests, various parties indicated they might present Z.K.'s testimony at trial. On November 22, 2016, the Kessels filed a motion for a protective order seeking an order barring any party from deposing Z.K. The motion stated that the Kessels would not call Z.K. as their own witness and that Z.K. could not "add insight as far as what his medical needs will have been and the expenses incurred in connection with those needs to that time he reaches eighteen years old." The record also indicates that the Kessels orally asserted that a deposition would be harmful to Z.K. because, among other things, they have never told him about the lawsuit, nor have they told him that they would have terminated the pregnancy had they known that he would be afflicted with MSUD.

¶ 7 The defendants responded that, although Z.K. is only eight years old, he could provide information relevant to his parents' claim for emotional distress. They also claimed that information regarding his daily routine and home life would provide information relevant to the defendants' claim for set-off based on the joy/benefit rule,[2] which some jurisdictions, but not Illinois, have adopted in wrongful birth cases. In reply, the Kessels argued that they, and their own psychiatrist, had already been deposed, giving defendants all the information they needed. They also noted that the joy/benefit set-off rule should not be considered because it had not yet been recognized in Illinois.

¶ 8 On January 5, 2017, the circuit court denied the Kessels' motion for a protective order. However, the court limited the deposition to one hour, allowed both parents to attend, and

[2] Section 920 of the Restatement (Second) of Torts provides in part as follows: "When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable." This rule has provided a basis for courts to apply a set-off in wrongful birth cases for the benefits the parents received from having a child. *Harbeson v. Parke-Davis, Inc*., 98 Wash. 2d 460, 475, 656 P.2d 483, 493 (1983) (stating that "the jury should be entitled to consider the countervailing emotional benefits attributable to the birth of the child"); but see *contra*, *Lodato v. Kappy*, 353 N.J. Super. 439, 449, 803 A.2d 161,166 (2002) (declining to apply the joy/benefit offset rule).

permitted only one attorney for the various defendants to ask questions (permitting the other defendants' attorneys to furnish questions to be posed by the deposing attorney). The parties discussed the possibility of some additional limitations to make the deposition less stressful on Z.K. But rather than pursuing those options, the Kessels took the all-or-nothing strategy of refusing to produce their son for the deposition and requested the court to find them in "friendly contempt" so they could appeal the order. On January 6, 2017, the circuit court found the Kessels in "friendly contempt" and imposed a sanction of $100. This appeal followed.

¶ 9 Ordinarily, a circuit court's discovery orders are not appealable because they are not final, but "the correctness of a discovery order may be tested through contempt proceedings." *Norskog v. Pfiel*, 197 Ill. 2d 60, 69 (2001). Accordingly, when a party appeals contempt sanctions imposed for violating, or threatening to violate, a pretrial discovery order, the sanction order becomes immediately appealable under Supreme Court Rule 304(b)(5) (Ill. S. Ct. R. 304(b)(5) (eff. Feb. 26, 2010)), and when a contempt order based on a discovery violation is appealed, the underlying discovery order is also subject to review (*Reda v. Advocate Health Care*, 199 Ill. 2d 47, 54 (2002)).

¶ 10 Discovery procedures are designed to be flexible and adaptable to the infinite variety of cases and circumstances appearing before a trial court. *Atwood v. Warner Electric Brake & Clutch Co.*, 239 Ill. App. 3d 81, 88 (1992). To that end, Rule 201(c)(1) permits the court to issue a protective order as justice requires. Ill. S. Ct. R. 201(c)(1) (eff. July 1, 2014). Specifically, the rule provides: "[t]he court may at any time on its own initiative, or on motion of any party or witness, make a protective order as justice requires, denying, limiting, conditioning, or regulating discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or oppression." *Id.*

¶ 11 We review discovery orders not involving a question of law for an abuse of discretion. *Sander v. Dow Chemical Co.*, 166 Ill. 2d 48, 66-67 (1995). An abuse of discretion exists where the trial court's decision is arbitrary, fanciful, or unreasonable, such that no reasonable person would take the view adopted by the trial court. *Seymour v. Collins*, 2015 IL 118432, ¶ 41. "Illinois adheres 'to a strong policy of encouraging disclosure, with an eye toward ascertaining that truth which is essential to the proper disposition of a lawsuit.' " *Center Partners, Ltd. v. Growth Head GP, LLC*, 2012 IL 113107, ¶ 32 (quoting *Waste Management v. International Surplus Lines Insurance Co*., 144 Ill. 2d 178, 190 (1991)).

¶ 12 When considering whether to allow the testimony of a minor, we are mindful that "[i]t is the degree of a child's intelligence, rather than mere chronological age, that determines a child's competence, and '[i]f the witness was sufficiently mature to receive correct impressions by her senses, to recollect and narrate intelligently, and to appreciate the moral duty to tell the truth, she was competent.' " *People v. Garcia*, 97 Ill. 2d 58, 75 (1983) (quoting *People v. Davis*, 10 Ill. 2d 430, 436 (1957)).

¶ 13 The object of discovery procedures is disclosure, and the right of any party to a discovery deposition is "basic and fundamental." *Slatten v. City of Chicago*, 12 Ill. App. 3d 808, 813 (1973). Supreme Court Rule 201(c)(1) requires a trial court to weigh a party's need for the information against the harm incurred by the person providing it. Ill. S. Ct. R. 201(c) (eff. July 1, 2014). "The powers vested in the trial court require a careful exercise of its discretion to balance the needs of seeking the truth against the needless harassment of a party litigant." *Doe 1 by Doe v. Board of Education of the City of Chicago*, 2017 IL App (1st) 150109, ¶ 16.

¶ 14 With these principles in mind, we conclude that the circuit court did not abuse its discretion in denying the Kessels' motion for a protective order. Evidentiary material developed

in the record demonstrates that a good portion of Z.K.'s daily routine centers around strict dietary regimes aimed at protecting him from ingesting foods that might upset his metabolism. His schoolteacher testified, for instance, that he does not eat meals with the rest of his class, but instead quickly consumes the special "shakes" that he brings from home before joining his classmates to socialize during lunchtime without actually eating with them. Perhaps Z.K., even at his young age, could offer some information regarding the toll that maintaining his regime has taken on his parents. Z.K.'s responses to questions may provide relevant information admissible at trial or lead to such information. Accordingly, the circuit court did not abuse its discretion in ordering Z.K.'s parents to produce him for a deposition. *Leeson v. State Farm Mutual Automobile Insurance Co.*, 190 Ill. App. 3d 359, 366 (1989).

¶ 15 That being said, we acknowledge that deposing Z.K. will require his parents to provide him with some sort of explanation of the case, whose existence they have heretofore not revealed to him. Deciding to protect him from that information was undoubtedly done through the exercise of sound and considered parental judgment. But by filing suit, they have placed certain facts at issue and opened their family to some level of examination of the damage caused by the defendants' alleged conduct. As noted above, the Kessels chose an "all or nothing" strategy by appealing without seeking further modifications to the circuit court's order. We are affirming the circuit court's order as written. But we nonetheless strongly encourage the parties to confer to determine if any additional restrictions might help alleviate the stress the deposition will have on Z.K. and his family. To that end, the parties might wish to consider steps such as dressing in casual clothing, holding the deposition in a setting familiar to Z.K., and having the court pre-screen the questions to ensure that distressing information will not be disclosed to him. See, *e.g.*, *Doe 1 by Doe*, ¶ 11 (approving use of similar protocols for testimony of a minor sexual abuse

victim). We trust that the defense attorney will proceed cautiously and pose only questions appropriate for an eight-year-old to answer.

¶ 16 We last turn to the order holding the Kessels in "friendly contempt" and imposing a $100 sanction. To facilitate the immediate appeal of a trial court's discovery order, a party may move the circuit court for the entry of a contempt order. See *Tomczak v. Ingalls Memorial Hospital*, 359 Ill. App. 3d 448, 457 (2005). Where a party does so in good faith and without contempt for the authority of the circuit court, we have vacated the contempt order even if we held that the underlying discovery order was proper. *Id.*; see also *Harris v. One Hope United, Inc.*, 2013 IL App (1st) 131152, ¶ 20 (citing *In re Marriage of Earlywine*, 2013 IL 114779, ¶ 36). Here, the Kessels' refusal to comply with the court's discovery order was made in good faith to facilitate appellate review and without contempt for its authority. Accordingly, we vacate that portion of the circuit court's order holding the Kessels in contempt and imposing a $100 sanction.

¶ 17 Affirmed in part and vacated in part.