COURT OF APPEALS
DECISION
DATED AND FILED

November 21, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2201 **Cir. Ct. No. 2004PA167**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

IN RE THE PATERNITY OF BENJAMIN P.W.:

MARIJANE L. V. AND STATE OF WISCONSIN,

PETITIONERS-RESPONDENTS,

V.

LOREN L. M.,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: KAREN L. SEIFERT, Judge. *Affirmed.*

Before Brown, C.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Loren M. appeals from the judgment that adjudicated him to be the father of Benjamin P. W. Loren M. disputes that he is

the father of the child. He argues that the circuit court erred when it relied on a genetic report because it is inadmissible hearsay, and that he was denied his right to confront the doctor who prepared the report. Because we conclude that Loren M. entered into a valid stipulation to let the report decide the issue, and he has not established a valid reason for being released from that stipulation, he cannot now argue that the report to which he stipulated is hearsay. We affirm.

¶2 This paternity action was filed by Marijane L. V. and the State in July 2004. Loren M. denied that he was the father of Marijane L. V.'s child. The parties were ordered to appear for genetic testing. The results of the first test excluded Loren M. as the father. Because of concerns that the person who appeared for the test was not actually Loren M., the court ordered that another sample be taken from Loren M. The results of this test were that Loren M. could not be excluded as the father and there was a 99.99% probability that he was the father. These two tests were performed by LabCorp. To reconcile these two tests, Loren M. submitted for testing a buccal swab he had performed on himself. A different laboratory, Orchid GeneScreen, tested this sample, and suggested that Loren M. might be a "chimera."

¶3 The matter was set for a jury trial on November 29, 2005. On the day before trial, Loren M. spoke to Dr. Cynthia Taves from LabCorp about the tests that had been performed. As a result of the conversation, the parties agreed that Dr. Taves would compare the LabCorp results to the results from the other laboratory to determine which of the two LabCorp tests was credible. In court that day, Loren M. stated:

> I had an opportunity to talk to the person from LabCorp, I am comfortable and will stand by the results, and I have given [the attorney for the State] the letter agreeing to that. Whatever the determination of those results that will stand

> by that, whatever they are. And so if I'm – I don't know how say the term, excluded, yes, if not, then it's the other way, whatever, it's done with, and ….

The court then stated that it sounded as if Loren M. was agreeing to a stipulation, asked the attorney for the State to restate the stipulation for the record, and said that Loren M. could modify it "in any fashion." The State's attorney then said:

> My understanding of what we are doing is getting a copy of the profile that Orchid GeneScreen performed from a buccal swab submitted by [Loren M.]. My understanding was the swab was submitted for the purpose of obtaining an explanation as to why the two LabCorp tests had different results. The letter that was sent from Orchid indicated that there were two possibilities: one, that [Loren M.] had a bone marrow transplant, which we know has not happened; or two, is that [Loren M.] is possibly a chimera.

The State's attorney went on to explain that a chimera is someone who "absorbed fetal tissue from a twin in utero, so he carries DNA from a fetal twin along with his own." She further stated that the purpose of getting a copy of the third test was to "give Dr. Taves an opportunity to review that profile against the two test results from LabCorp and explain those to [Loren M.]." Loren M. continued:

> And if those – and if she makes the determination after the analysis that I match the profile of the mother and child, then that's the purpose and intent of it, to take those three tests and make some sense of it and conclude that if I'm correct.

¶4 Dr. Taves then went on to explain that after reviewing the reports she would not be able to testify as to whether Loren M. was excluded. She would, however, be able to provide him an explanation for the difference in the LabCorp reports. The court then asked:

> And I guess that is what I kind of need to understand, that the Doctor will be able to make a final decision that indicates that [Loren M.] is the father and he is willing to essentially throw in the towel in that aspect if she says – she says yes, the profile meets with my standards that he is

> the father, or it meets with my standards that he is not the father….

The court then asked Dr. Taves if it would be possible for her to do that, to which she replied yes. The court also asked Loren M. if that was his understanding as well, and he replied: "That's acceptable." The court concluded that it would hold the parties to the stipulation, and then dismissed the jury.

¶5 Although Dr. Taves reviewed the profiles that afternoon and handwrote her conclusions, the State did not pursue the matter until March 2006. In May 2006, the circuit court held a hearing on the State's request that the court adjudicate Loren M. to be the child's father. Dr. Taves' report verified that the genetic markers in the sample that did not exclude Loren M. as the child's father matched the markers in the Orchid GeneScreen profile. At the hearing, Loren M.'s counsel questioned the authenticity and validity of Dr. Taves' report because it was handwritten on notebook paper, it was not addressed to anyone in particular, parts of it were copied over, and there had been a four-month delay from the time the report was prepared until it was given to Loren M.

¶6 The State's attorney responded that Dr. Taves had compared the profiles and written the report the afternoon of the day they entered into the stipulation. She further stated that it was on notebook paper because Dr. Taves had done this in the State's attorney's office. The attorney said that her own procrastination was responsible for the four-month delay in getting the report to the parties. She further said that she had contacted Loren M. on the day Dr. Taves wrote the report to give him an opportunity to talk to the doctor, but that Loren M. had not returned her phone call. Based on these representations, the circuit court accepted the report. The court then found that the stipulation entered into between

the parties in November had been complied with, and the court adjudicated Loren M. to be the father of the child.

¶7 Loren M. now argues that Dr. Taves' report was inadmissible hearsay not supported by testimony. Loren M. ignores, however, that he stipulated to be bound by Dr. Taves' conclusion. Under WIS. STAT. § 807.05 (2005-06),[1] a stipulation may be binding when entered in court and recorded in the minutes or by the reporter. The transcript of the hearing held on November 29, 2005, establishes that both Loren M. and the State agreed to be bound by Dr. Taves' determination. As a result of this agreement, the court did not hold the trial of the issue and dismissed the jury. Further, the State was not required to offer any testimony because the parties agreed that the document would control. There is simply no basis for a hearsay objection.

¶8 A party may obtain relief from a stipulation by making a motion under WIS. STAT. § 806.07. Even construing Loren M.'s request to the circuit court to be a motion for relief from the stipulation, he has not offered any reason under the statute for granting such relief. Further, we review the circuit court's decision on a motion for relief from a stipulation for an erroneous exercise of discretion. *See* ***Hottenroth v. Hestko***, 2006 WI App 249, ¶23, 298 Wis. 2d 200, 727 N.W.2d 38, *rev. denied*, 2007 WI 59, 299 Wis. 2d 325, 731 N.W.2d 636. We conclude that the circuit court did not erroneously exercise its discretion when it held the parties bound by the stipulation entered in court on November 29, 2005. As a result of the stipulation, the only issue was whether Loren M. can be

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

excluded as the father. The report says that the markers from the test that establish that he cannot be excluded match the markers in the third sample. We conclude that this is sufficient to support the circuit court's conclusion that Loren M. is the father of the child. For the reasons stated, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.