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NO. 24-CI-004645

JEFFERSON CIRCUIT COURT

DIVISION EIGHT (8)

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JON DAVID WALKER, M.D.,

PLAINTIFF,

v.

**OBJECTION AND RESPONSE TO MOTION TO DISMISS**

LYNN LEMMON WALKER,

DEFENDANT.

\* \* \* \* \*

The Plaintiff objects to the Defendant's Motion to Dismiss. The Motion is unsupported by the facts of the case, Kentucky's statutory framework, and established and controlling case law on the issues of misrepresentation, specifically on matters related to misrepresentation of paternity.

**I. Inappropriate Nature of the Motion**

A motion to dismiss under CR 12.02(f) is *only* appropriate when the Complaint does not state a claim upon which relief can be granted. In ruling on such a motion, the court must take all allegations in the Complaint as true and must construe them in the light most favorable to the plaintiff. See *James v. Wilson*, 95 S.W.3d 875, 884 (Ky. App. 2002). The Plaintiff's Complaint sets forth sufficient factual allegations to support claims of fraud, misrepresentation, and outrage, which, if proven, would entitle Plaintiff to relief.

While the Motion admits the correct standard in the first section of her Memorandum, the Defendant ignores her own standard throughout her argument. The ongoing nature of the *continuous* pattern of fraud is central to the Plaintiff's cause of action. It is not necessary to conduct a "deep dive" into the text of the Complaint to know that Plaintiff alleges a pattern of deceit over many decades. For example, the Complaint states, "Lynn kept her fraud a secret for

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over forty (40) years.” Complaint at Paragraph 41, page 6. Similarly, the Complaint details specific acts that have taken place over the past five years to continue the pattern of concealment and fraud of the Defendant. For example, the Complaint identifies an affidavit of the Defendant that restates the falsehood regarding paternity that was filed on June 28, 2024

Despite the specificity of the Complaint, Defendant falsely claims that the final date that an action might have been brought was on January 3, 2021. This date is arbitrary and was “cherry-picked” by the Defendant to bolster a specious statute of limitations defense. The self-serving deadline is undermined by the Defendant’s actions as detailed in the Complaint itself. These actions include:

- a. Lynn has been receiving maintenance payments from the date of the Decree (January 4, 2011) for more than ten years (through January 4, 2021) and is seeking to continue them into the foreseeable future. (All of these dates served to toll the clock pursuant to *Denzik v. Denzik*, an argument discussed in greater detail below.)
- b. Lynn’s actions and denials of knowing the biological father were memorialized in text messages on December 21, 2020.
- c. Lynn filed an affidavit with Jefferson Family Court on June 28, 2022, in which she restated her misrepresentations that there were “three children born of the marriage.”

Any of these actions undermines her statute of limitations arguments. As the Court is required to accept them as facts at this juncture in the litigation, the Court must deny the Motion to Dismiss.

## II. Disputed Issues of Fact

The Defendant’s motion improperly seeks to resolve disputed issues of fact. Plaintiff alleges that Defendant engaged in fraudulent behavior that only came to light following the results of a DNA test in 2024. This allegation directly impacts the application of the discovery

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rule to the statute of limitations. The discovery rule, as outlined in KRS 413.130(3), provides that a cause of action for fraud does not accrue until the fraud is discovered. Therefore, whether the Plaintiff knew or should have known about the fraud prior to 2024 is a factual question that cannot be resolved in a Motion to Dismiss.

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### III. Unsupported by Existing Case Law

Despite the fact that the Defendant claims that misrepresentation is time-barred, the Motion fails to acknowledge the leading case on the subject of fraud under these factual situations. In *Denzik v. Denzik*, 197 S.W.3d 108 (Ky., 2006), the Supreme Court held the common law of fraud applied to misidentification of paternity. In that case, the child was born in 1987, and the parties divorced in 1990. On December 18, 2020, *more than 10 years* following the entry of the decree, the Plaintiff filed a civil lawsuit against the mother of the child. The Supreme Court held the six elements of traditional fraudulent misrepresentation applied in instances of paternity fraud. Additionally, and perhaps more importantly, Kentucky's high court recognized the fraud was not only related to the infidelity, but continued after the birth of the child and so long as the mother continued to receive financial benefits from her fraud.

In the instant case, the Defendant fails to even acknowledge the existence of the discovery rule, which serves to toll the statute of limitations. Like her insistence that the cause of action was framed as adultery or infidelity, the Defendant seems to argue that the fraud stopped once the decree was entered. This is not the case. (Interestingly, the Defendant has not yet answered the Complaint itself and, in her Motion for Summary Judgement (now withdrawn) and her Motion to Dismiss, continues to duck the essential question of paternity itself and whether the Defendant claims that she has acknowledged her decades of deceit.) Ignoring the holding in *Denzik* indicates the known flaws in the Motion to Dismiss. Further, the Motion fails to

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acknowledge that *Denzik* has been applied in other Kentucky cases. *See, e.g., Wheat v. Commonwealth*, 217 S.W.3d 266 (Ky App. 2017). Of course, Kentucky is not the only state that has addressed the civil remedies involving paternity fraud.<sup>1</sup>

The Defendant's reliance on *Hernandez v. Daniel*, 471 S.W.2d 25 (Ky. 1971), is misplaced at best. A careful examination of that case actually indicates that *Hernandez* supports the Plaintiff's cause of action and his position regarding the applicable statute of limitations. In that case, the fraud was related to a deed to real property rather than issues related to paternity. The Kentucky Court of Appeals, then the state's highest court, found the statute of limitations contained in KRS 413.130(3) applied. However, the Court also held that KRS 413.130(3) provides: "In an action for relief or damages for fraud or mistake, referred to in subsection (12) of KRS 413.120, the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake. However, the action shall be commenced within ten years after making the contract or the perpetration of the fraud."

In the above case, the fraud, like the fraud in *Denzik* and here, was ongoing in nature. The complaint details how the deception has continued until the current date. Additionally, the

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<sup>1</sup> For example, in *Hodge v. Craig*, 382 S.W.3d 325 (2012), the Supreme Court of Tennessee addressed the same issue and summarized the state of the law in other states as follows:

"We note that the courts in five other states have recognized that a putative father may maintain an action for damages for intentional misrepresentation or fraud against a child's biological mother based on her misrepresentations regarding the identity of the child's biological father. *Koelle v. Zwiren*, 284 Ill.App.3d 778, 220 Ill.Dec. 51, 672 N.E.2d 868, 875 (1996); *Denzik v. Denzik*, 197 S.W.3d 108, 112-13 (Ky.2006); *G.A.W., III v. D.M.W.*, 596 N.W.2d 284, 290 (Minn. Ct.App.1999); *Miller v. Miller*, 1998 OK 24, ¶¶ 46-49, 956 P.2d at 904-05 (recognizing a claim for restitution of child support based on extrinsic fraud); *Masters v. Worsley*, 777 P.2d 499, 502 (Utah Ct.App. 1989); *see also* John G. Hall, Note, *Child Support Supported: Policy Trumps Equity in Martin v. Pierce Despite Fraud and a Controversial Amendment to the Paternity Code*, 61 Ark. L.Rev. 571, 588 (2008).<sup>[27]</sup> One other court has recognized a claim by the putative father against the child's biological father. *R.A.C. v. P.J.S., Jr.*, 192 N.J. 81, 927 A.2d 97, 104 (2007) Other courts have concluded that similar misrepresentations by a child's biological mother regarding the identity of a child's biological father constitute fraud and provide a basis for setting aside an earlier adjudication of paternity. *See, e.g., Williams v. Williams*, 2001-CA-01666-SCT (¶ 17), 843 So.2d 720, 723 (Miss.2003); *Glover v. Severino*, 2008 PA Super 51, ¶ 26, 946 A.2d 710, 712-14; *N.C. v. M.H.*, 2007 PA Super 123, ¶ 12, 923 A.2d 499, 503; *Batrouny v. Batrouny*, 13 Va.App. 441, 412 S.E.2d 721, 723-24 (1991).

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*Hernandez* opinion specifically referenced *McMurray v. McMurray*, 410 S.W.2d 139, (Ky. 1966).

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In that case, the Court held that statute provides that such a cause does not accrue until the discovery of the fraud. Justice Palmore explained this as the rationale of the actual notice requirement: “persons in a confidential relationship do not have the reason or occasion to check up on each other that would exist if they were dealing at arm's length.” *McMurray* at 142. In the present case, there was (or should have been) the same sort of relationship envisioned by the Court in *McMurray*. In sum, the Plaintiff, in this case, should have been able to take his wife’s word that he was the baby’s father. He was not required to continue to “check up on this,” and, more importantly, the Defendant and her counsel should not be able to profit from the fact that she continued the paternity charade for a longer period of time.

#### IV. Conclusion

The Defendant argues that the claims related to fraudulent misrepresentation and outrage fail “as a matter of law.” Despite the fact that the Motion to Dismiss must be based on the facts as alleged in the Complaint itself, the Defendant seeks to inject her own facts (or create inferences of fact that may be developed in the discovery process she seeks to curtail) to support a flawed argument. For example, the Motion indicates that “there is no evidence that Lynn had any knowledge that Jesse’s paternity could be in dispute.” Of course, this assertion strains the bounds of credibility. *Adults know how babies are made.* Notwithstanding the obvious, the Complaint details the facts regarding paternity as well as the decades of lies and inconsistent “stories” related to the conception of the child and Lynn’s efforts to hide the truth. Similarly, the Motion claims that the Plaintiff makes no contention that he was injured by Lynn’s falsehood. Again, this statement is false. The Complaint clearly states that the material misrepresentation made by Lynn Waker resulted in millions of dollars in damages to David Walker.

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The bottom line is that the Defendant seeks to avoid accountability that is inevitable once discovery begins. Discovery is an essential process for gathering evidence. At this stage, discovery has not been completed, and Plaintiff has not had the opportunity to investigate the facts surrounding the alleged fraud and misrepresentation fully. Prematurely dismissing the case would deny the Plaintiff the opportunity to develop the factual record necessary to support his claims. Further, the Court must recognize the Motion for what it is: a shallow attempt to have the Court sanction her misconduct.

Ultimately, an action based on fraud, in this case paternity fraud, is an action to compensate for injustices, rooted in deterring lies which result in profit to one party to the detriment of the other. While the Defendant seeks to be rewarded with a quick dismissal for her lying, the Plaintiff seeks to prevent this from happening to others.

Dated: September 16, 2024

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

It is hereby certified that a true and correct copy of the foregoing was served via electronic mail on this 16th day of September, 2024, upon:

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