

State of Michigan
Supreme Court

Appeal from Michigan Court of Appeals
BECKERING, P.J., and HOEKSTRA and GLEICHER, JJ.

Jenny N. Heinze (fka Glaubius),
Plaintiff-Appellee,

v

John A. Glaubius,
Defendant-Appellant.

SC No. 150206
COA No. 318750
TC No. 2012-004307-DM
Macomb Circuit Court
Hon. Kathryn A. Viviano

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**Defendant-Appellant's Reply to Answer
to Application for Leave to Appeal**

Proof of Service

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November 20, 2014



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Counter-Statement on Why Leave Should be Granted

Plaintiff is incorrect in her assertion this case does not merit this Court's attention. Although the issues presented here differ from the other ROPA appeals considered by this Court, that does not diminish the fact that this case also presents issues of first impression related to a complex statute. The Court of Appeals decision was the first published decision addressing the interplay between the Revocation of Paternity Act (ROPA) and precedent from this Court that Michigan adheres to a broad rule of *res judicata*. *Gose v Monroe Auto Equipment Co*, 409 Mich 147, 294 NW2d 165 (1980). Under the broad rule of *res judicata* binding on Michigan courts, *res judicata* bars relitigation of not only issues actually raised and decided in prior litigation, but also all issues which could have been raised and decided in that litigation.

Res judicata applies to consent and default judgments as well as litigated judgments. *Schwartz v Flint*, 187 Mich App 191, 194, 466 NW2d 357 (1991). When determining if facts constitute a single issue to apply this doctrine, a pragmatic approach is used, with a court considering whether the facts are related in time, space, origin or motivation, and whether the facts form a convenient trial unit. *Adair v Michigan*, 470 Mich 105, 125, 680 NW2d 386 (2004).

Plaintiff could have sought a determination of the child's paternity during the divorce action. However, for her own selfish reasons, she

withheld her claim that the child was not "of the marriage." Rather than reveal her allegation during the divorce proceedings, she first convinced defendant to surrender his interest in nearly all of the marital property in exchange for liberal parenting time rights - rights she never intended to honor. Once she secured a favorable property division in the divorce judgment, she returned to court 117 days later with her motion to disestablish defendant's paternity under ROPA. It is this manipulation and relitigation that the doctrine of *res judicata* prevents.

The application of *res judicata* to ROPA proceedings "involves legal principles of major significance to the state's jurisprudence." MCR 7.302(B)(3).

The classification of fathers under ROPA is similarly significant. Under the Court of Appeals ruling, entry of a divorce judgment treating a child as a child of the marriage, deciding custody and parenting time in the child's best interests, and imposing a support obligation, is rendered meaningless if the man declared to be the child's father remains merely a "presumed father" by virtue of the marital presumption. Judgments between parties must carry some meaning, even on those issues that were not contested.

Here, plaintiff alleged that defendant was the father of her child born during the marriage. Defendant did not contest that allegation and participated in proceedings at the Friend of the Court to determine custody and parenting time and set a level of child support. The parties negotiated a

very detailed custody and parenting time arrangement. To say that entry of a judgment treating defendant as the child's father fails to transform defendant into an adjudicated father. Whether divorce judgments have any role to play in determination of paternity is also a legal principle of major significance that should be reviewed by this Court.

Reply to Counter-Statement of Facts

Plaintiff leaves out important facts in her presentation. While acknowledging her extra-marital affair with Joseph Witt, she disingenuously denies suspecting that Witt might be the child's father until after she negotiated a favorable divorce property division incorporated into the divorce judgment. Her position she did not suspect Witt was the child's father until after the divorce is untenable.

Had the trial court needed to take testimony, defendant proposed to present considerable evidence, including::

- a. That on or about October, 2012, prior to the divorce being started, Plaintiff introduced Zia as Joe Witt's child to Joe's family at a funeral.
- b. That after the divorce was initiated, but prior to the entry of the Judgment, Plaintiff told Joe Witt that Zia was his.
- c. That, upon present information and belief, there was significant and frequent email communication between Joe Witt and Plaintiff regarding the child and communication relating to Joe being the father of the child.
- d. That Defendant was not privy to this information until after being informed that DNA testing suggest that Witt may be Zia's father.
- e. That attorney Julie Gatti, Nicole Witt's counsel is prepared to testify that during their FOC support recommendation, in January, 2012, that Joe Witt disclosed that he had another child other than those issue of his marriage.

f. That, upon present information and belief, Ms. Nicole Witt, whose divorce was entered with this court on May 30, 2012, would be able to testify that she had knowledge that Joe Witt assumed that Zia was his child.

Exhibit A attached to defendant's application/brief, p 2.

Despite overwhelming evidence that plaintiff knew Witt may be the child's father, she signed and filed a divorce complaint alleging: "The parties have had one (1) child born of this marriage, whose names and birthdate is as follows: Zia S. Glaubius, born May 18, 2011." Divorce Complaint attached as Exhibit B to defendant's application for leave to appeal, p 2.

That allegation was not contested by defendant, who had no reason to doubt his paternity of the child. It was accepted as true by the trial court when it approved and signed the parties' negotiated divorce judgment. The judgment not only declared the child to be issue of her marriage to defendant, but granted defendant joint legal custody and a very detailed parenting time schedule making up the largest portion of the judgment. Judgment of Divorce attached as Exhibit C to defendant's application for leave to appeal, pp 2-11.

Remarkably, in light of subsequent events, the judgment contained a provision called "Parental Designation" stating:

The parties shall ensure that the designations of "Dad" and "Mom", or their equivalents, are used by the child only to refer to the parties hereto, and not to other third persons. Neither party shall permit any third parties to use such designations when referring to the relationship between the child and any such third parties.

Exhibit C to defendant's application/brief, p 13. Plaintiff believes this clause was valid for just 117 days.

The judgment also contains several "acknowledgement" clauses at ¶¶35-38 stating that "its terms are being freely entered into of his/her own volition" and "Each has executed this Judgment with the express intention of being bound to the terms thereof...." Exhibit C to defendant's application/brief, pp 20-21. Finally, it contains a mutual release clause stating that "each of the parties hereby release the other from any cause of action that either may have against the other for any incident which may have occurred prior to the entry of this Judgment of Divorce, whether that claim be founded in contract, tort or any other basis" *Id*, p 19.

When plaintiff filed her motion to disestablish paternity, defendant refused to acknowledge Mr. Witt's paternity. Instead, he admitted that plaintiff contacted him about Witt's alleged paternity of the child, but that "He has since, in review of his relationship with his daughter, would like that relationship to continue and believes that it is the best interest to remain her father." Defendant's Response to Plaintiff's Motion for Revocation of Parentage, ¶16. There was no "mutual acknowledgment" as required by *Parks v Parks*, 304 Mich App 232, 239, 850 NW2d 595 (2014), in its interpretation of MCL 722.1441(1)(a)(ii). Had *Parks* predated the trial court's decision, plaintiff's motion would have been dismissed for failure to meet the required threshold for relief under ROPA.

Reply to Argument

Plaintiff's assertions concerning the purpose of ROPA are inaccurate and overly broad. ROPA was enacted to grant certain **limited** rights that did not exist at common law. It expanded legal standing for biological fathers to establish paternity of their children. The intent was to bypass the requirement in the Paternity Act, MCL 722.711 *et seq*, that there be a prior determination that a child born during the mother's marriage was not issue of that marriage. ROPA was a long-awaited response to this Court's decision in *Girard v Wagenmaker*, 437 Mich 231, 470 NW2d 372 (1991). In *Girard*, the husband and wife remained married, no divorce action was pending, and there had been no divorce judgment finding the husband to be (or not to be) the child's father. Addressing the *Girard* problem required only that ROPA permit a remedy during the marriage or while divorce proceedings were pending. The trial court correctly found that post-divorce remedies are not mentioned anywhere in ROPA. The Court of Appeals improperly read into the statute a post-divorce remedy which does not exist.

It is odd that plaintiff references something she calls a "Serafin action." No such action exists. This Court's decision in *Serafin v Serafin*, 401 Mich 629, 258 NW2d 461 (1977), addressed an evidentiary issue. It created no action, common law or otherwise. *Serafin* abrogated Lord Mansfield's Rule that barred testimony by one spouse against the other in a divorce case that would bastardize a child born during the marriage.

Pre-*Serafin*, testimony of the husband's non-paternity could come from anyone other than the parties. Post-*Serafin*, the parties were added to that list. Nothing in ROPA's language making common law actions unavailable two years after its effective date affects this Court's *Serafin* decision. A party to a divorce action may, under *Serafin*, attempt to disestablish the husband's paternity, but may only do so during the divorce proceedings. Once a judgment is entered treating a child born during the marriage as a child of the parties, that decision is final and not subject to relitigation under ROPA or otherwise. *Hackley v Hackley*, 426 Mich 582, 395 NW2d 906 (1986); *Cogan v Cogan*, 119 Mich App 476, 326 NW2d 414 (1982).

Contrary to the Court of Appeals decision, it is irrelevant that the divorce proceeding was resolved by agreement rather than trial. It is also irrelevant that designation of defendant as the child's father in the judgment was by consent rather than a contested finding by the court. A long history of family law decisions declares that provisions reached by agreement, including those affecting a child, are equally binding and enforceable by the court as those provisions included in a judgment after a contested trial. *Holmes v Holmes*, 281 Mich App 575, 592, 760 NW2d 300 (2008). Agreed-upon provisions in divorce judgments are given status greater than those imposed by the court. Parties may agree to provisions beyond the authority to the court to impose absent such agreement. Once included in a judgment

by agreement, these provisions become binding on the parties and fully enforceable by the court. *Aussie v Aussie*, 182 Mich App 454, 452 NW2d 859 (1990)

A judgment of divorce must determine, as an essential element of the action, the parties' parental status and rights and obligations. Once determined in the judgment, plaintiff was estopped and barred by the judgment and by principles of collateral estoppel from disputing its terms. Had the trial court needed to reach that issue, it would have dismissed the motion under MCR 2.116(C)(7).

If plaintiff believed, as she undoubtedly did well before she filed her complaint for divorce, that Witt was the child's father, she had to pursue that claim in the divorce action. MCR 2.203(A) states that a pleader must join every claim that the pleader has against the opposing party at the time of serving the pleading, if it arises out of the transaction or occurrence that is the subject matter of the action and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction. The rule applies to claims both legal and equitable. Plaintiff knew of the facts and the claim, but did not include it in her complaint or file an amended complaint. Nor did she move to determine paternity during the divorce proceedings. All of the claims plaintiff possessed against defendant arising out of the marriage, including her claim under ROPA, were merged together in the divorce judgment and thereby extinguished. This result is

made clear in the "acknowledgment" and "waiver" provisions in the judgment.

Not only is plaintiff wrong in arguing that *res judicata* does not apply, her argument that defendant is merely a "presumed father" is without support. Once the divorce judgment was entered treating the child as a child of the parties, defendant became an "affiliated father." Under MCL 722.1433(4), an "affiliated father" is "a man who has been determined ***in a court*** to be the child's father." [Emphasis added.] The Court of Appeals acknowledged that "any judicial order establishing a determination in court that a man is a child's father could demonstrate the determination of an affiliated father within the meaning of" ROPA. COA, p 5.

Conclusion/Relief Requested

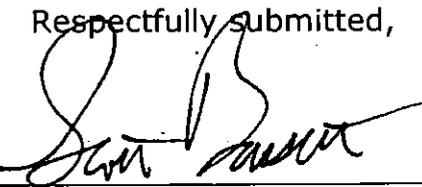
ROPA provides no remedy to plaintiff. First, she failed to meet the threshold of showing a mutual acknowledgment by herself, defendant, and Witt of the relationship between Witt and the child. Defendant unequivocally rejected that acknowledgment in ¶16 of his response to plaintiff's motion to disestablish his paternity.

Next, once the divorce judgment was entered determining defendant to be the child's father, he was no longer a presumed father. No relief may be granted under Section 11. As an affiliated father who participated in the proceedings that resulted in the paternity determination, Section 9 is similarly unavailable to plaintiff.

ROPA preserves the common law prohibition against re-litigation of paternity once it has been determined by entry of a court order, including in a divorce judgment. If she could have satisfied the threshold showing of mutual acknowledgment (which she cannot), her only remedy would have been a Section 11 claim if filed **during the marriage or while divorce proceedings were pending**. Once there was a provision in the divorce judgment declaring the child to be "of the marriage," this case was moved outside the scope of ROPA. The Court of Appeals erred by reading into ROPA a remedy not provided in the text adopted by the Legislature. The trial court should be affirmed.

Defendant asks this Court to grant leave to appeal and ultimately reverse the Court of Appeals and affirm the trial court.

Respectfully submitted,

By: 

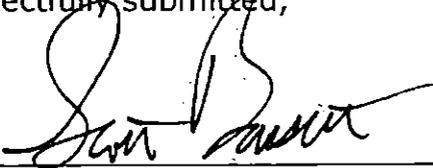
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Dated: November 20, 2014

PROOF OF SERVICE

Scott Bassett (P33231), attorney for defendant-appellant, certifies that on November 20, 2014, he served a digital copy of the attached **Reply to Answer Opposing Application to Leave to Appeal** on the attorneys for plaintiff-appellee, **Liisa R. Speaker** and **Jeanne M. Hannah**, via email to **lspeaker@speakerlaw** and **jeannemhannah@charter.net**, respectively, per counsels' agreement.

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