

STATE OF MICHIGAN
IN THE COURT OF APPEALS

SHAE KEVIN GRAHAM

Plaintiff-Appellee,

v

Court of Appeals No.: 318487
Lower Court No.: 2013-808521-DP

SHAREA FOSTER

Defendant-Appellant.

**PLAINTIFF-APPELLEE'S BRIEF IN OPPOSITION TO APPLICATION FOR LEAVE TO
APPEAL**

ORAL ARGUMENT REQUESTED

PERKINS LAW GROUP, PLLC
TODD RUSSELL PERKINS (P55623)
DAVID MELTON, JR. (P63891)
Attorneys for Plaintiff-Appellee
615 Griswold, Suite 400
Detroit, Michigan 48226
(313) 964-1702

T.DANIELS & ASSOCIATES, PLLC
TAMMY DANIELS (P53705)
Attorneys for Defendant-Appellant
26677 W. Twelve Mile Rd.
Southfield, Michigan 48034
(248) 358-6998

Statement of Basis of Jurisdiction of the Supreme Court

The Supreme Court has jurisdiction based upon MCR 7.305.

RECEIVED by MSC 9/8/2015 4:49:10 PM

Counter-Statement of Questions Presented

- I. Whether the Court of Appeals committed reversible error by issuing an order deeming the presumed father under the Revocation of Paternity Act a necessary party to be added as a defendant after the statute of limitations.

Court of Appeals Answer: No

Appellant's Answer: Yes

Appellee's Answer: No

Statement of Facts

This action arises from Plaintiff-Appellee's filing of the instant action as a Complaint for Paternity pursuant to the Revocation of Paternity Act. MCL 722.1431 et seq. [hereinafter may be referred to as "RPA"]. The instant appeal arises from the June 16, 2015 Court of Appeals Order and Opinion which affirmed the denial of Defendant's motion for summary disposition but also concluded that Defendant's husband is a necessary party to Plaintiff's lawsuit. Therefore, the Court of Appeals remanded the matter so that Defendant's husband, Christopher Foster, may be added as a defendant.

Plaintiff-Appellee, Shae Graham, and Defendant-Appellant, Sharea Foster, were high school sweethearts. They reignited an intimate relationship years after high school which resulted in the conception of the minor child, Blake, on or about January 1, 2009. Blake was born on September 23, 2009 at Providence Hospital in Southfield, Michigan. Plaintiff-Appellant, Shae Graham, is the biological father of the child and that fact has been admitted by Defendant-Appellant on several occasions, including sworn testimony. Plaintiff-Appellee was present for all of Defendant-Appellant's prenatal visits and was present for the birth of Blake whereby he even cut the umbilical cord. Christopher Foster, Defendant-Appellant's purported husband, has been listed on the birth certificate of the child, although he is not the biological father and is essentially the "presumed father" under the Revocation of Paternity Act by virtue of being married to Defendant-Appellant at the time of the birth of the child. [Hereinafter may be referred to as "Foster"]. Plaintiff-Appellee and Defendant-Appellant briefly lived together after the birth of the child. Plaintiff-Appellee and Defendant-Appellant carried on a very public relationship for several years prior to the child being conceived in January of 2009. Plaintiff was unaware that Defendant was married at the time that the child was conceived. It was only by chance that Plaintiff-Appellee was made aware of a communication between Defendant-Appellant and her husband, Christopher Foster, that he confronted Defendant-Appellant and was informed that she was actually married. Plaintiff-Appellee, Defendant-Appellant and the presumed father,

Christopher Foster all openly acknowledged that Plaintiff-Appellee was the biological father of the minor child.

Plaintiff-Appellee timely filed the instant Complaint on May 15, 2013 in Oakland County Circuit Court, within the one year effective date of the Revocation of Paternity Act. The action involved the paternity of the minor child, Blake Foster, born September 23, 2009. Plaintiff-Appellee named Sharea Foster, the mother of the minor child, as the Defendant in the matter.

By way of procedural history in this matter, On September 22, 2010, Plaintiff-Appellee had previously filed a paternity complaint against Defendant-Appellant alleging that he was the biological father of the minor child, Blake. He requested that an Order of Filiation be entered establishing paternity of the child. That previously filed matter was dismissed at that time in the Wayne County Circuit Court due to Plaintiff-Appellee's lack of standing to bring an action under the Paternity Act, MCL 722.711. The Michigan Legislature, however, subsequently saw fit to create the Revocation of Paternity Act, MCL 722.1431 et seq. which gives standing for an alleged father to seek an order establishing paternity. The Act was signed into law by Governor Rich Snyder and became effective June 12, 2012.

As stated above, the instant matter was filed May 15, 2013. After serving Defendant-Appellant with the Complaint pursuant to the Revocation of Paternity Act, Defendant filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(8) and (C)(10). Defendant-Appellant argued that Plaintiff-Appellee's matter should be dismissed due to not naming the husband, Christopher Foster, as a party to the action. Plaintiff-Appellee filed a written response to the Motion for Summary Disposition along with a subsequent Motion for Genetic Testing.

On August 21, 2013, the trial court entered an Order denying Defendant-Appellant's Motion for Summary Disposition and granting Plaintiff-Appellant's Motion for Genetic Testing, ordering that the results be sealed and only provided to the Court. The lower court ruled that Plaintiff-Appellee was not

required to name Defendant-Appellant' Defendant-Appellant then filed a Motion for Reconsideration on August 28, 2013 of the trial court's denial of the Motion for Summary Disposition. The trial court denied Defendant-Appellant's Motion for Reconsideration on September 13, 2013. On June 16, 2015 the Court of Appeals issued the above referenced opinion and order.

ARGUMENT

- I. *The Defendant-Appellant's Application for Leave to Appeal must be denied where the presumed father under the Revocation of Paternity Act is a necessary party to be named as a defendant which suspends the running of the statute of limitations pursuant to Amer v Clarence A Durbin Assoc, Inc, 87 Mich App 62; 273 NW2d 588 (1978) and other relevant caselaw.*

The Court of Appeals essentially held that Defendant's husband, Christopher Foster is a necessary party to the instant action brought by Plaintiff under the Revocation of Paternity Act. Further, that as a necessary party, he must be added as a defendant to the instant lawsuit. In support of its opinion, the lower court concluded that generally if a defendant is brought into a lawsuit for the first time upon the filing of an amended complaint, the filing constitutes the commencement of the action with regard to that particular defendant. However, the relevant exception is that an additional defendant may be brought in to an action after the expiration of the limitations period if the new party is a necessary party. *Amer v Clarence A Durbin Assoc, Inc*, 87 Mich App 62, 65; 273 NW 2d 588 (1978). See also, *O'Keefe v Clark Equipment Co*, 106 Mich App 23, 26-27; 307 NW2d 343 (1981). Therefore, the added defendant may be brought into the action after the statute of limitations where the lower court has deemed Foster a "necessary party". Defendant has thus also failed to indicate a proper grounds for why this Court should disturb the lower court's ruling and accept this application under MCR 7.305(B), as the Defendant's application appears to erroneously cite MCR 7.302(B)(3)(5) as the grounds for the appeal. The law is well-settled as it relates to the addition of necessary parties and the application of the limitations period.

Defendant-Appellant's argument that there should be an inquiry into the Plaintiff-Appellee's diligence or any alleged prejudice in not naming Foster prior to the running of the statute of limitations is flawed. The applicable rule involves the fact that where the additional party is a "necessary party" as opposed to merely a permissive joinder of an added party, the necessary party may be brought in after the limitations period. Moreover, "whether a party seeking to add parties to the litigation has complied

with the court rules so as to entitle him to suspend running of an applicable statute of limitations in favor of an added party, is for determination in the first instance by the trial court.” *Amer*, 67 (quoting *Carpenter v Young*, 83 Mich App 145, 268 NW2d 322 (1978)). Of course, in the instant matter, the trial court concluded Foster was not even required to be named at all under the Revocation of Paternity Act. Further, Plaintiff immediately requested that he be allowed to amend his complaint in response to Defendant’s initial motion for summary disposition.

Further, the court rule pertaining to the joinder of necessary parties does not prescribe dismissal as the appropriate course of action for non-joinder of necessary parties. See MCR 2.205(B). “The defect could presumably have been cured by amending the pleadings and joining the necessary parties.” *Skiera v National Indem Co*, 165 Mich App 184, 188-189; 418 NW2d 424 (1987).

Defendant-Appellant relies upon *Miller v Chapman Construction*, 477 Mich 102, 730 NW2d 462 (2007) and *Cussan v Harris*, 118 Mich App 567; 325 NW2d 793(1982) in support of the argument that the court must engage in an inquiry into whether the amendment would be futile or constitute undue prejudice. However, neither case is applicable to the instant matter because they do not involve joining or adding necessary parties to an action. For example, *Miller* involved adding new parties, not “necessary parties”. The proper inquiry is whether the new defendant is a necessary party or merely an additional party. Necessary parties require the exception to the general rule, whereby the new party may be brought into the lawsuit after the statute of limitations. *Forest v Parmelee*, 60 Mich App 401, 406; 231 NW2d 378 (1975).

Relief

Plaintiff-Appellee, SHAE KEVIN GRAHAM, respectfully requests that this Honorable Court affirm the lower court's decision and DENY the application for leave to appeal.

Respectfully submitted,

/s/ DAVID MELTON, JR.

DAVID MELTON, JR. (P63891)
PERKINS LAW GROUP, PLLC
Attorney for Plaintiff-Appellee
615 Griswold, Suite 400
Detroit, Michigan 48226
(313) 964-1702

Dated: September 8, 2015