

**STATE OF MICHIGAN
IN THE SUPREME COURT**

SHAE KEVIN GRAHAM
Plaintiff-Appellee,

v.

SHAREA FOSTER,
Defendant-Appellant.

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

DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENTS REQUESTED

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Statement of Basis of Jurisdiction of the Supreme Court

The Supreme Court has jurisdiction of this Appeal pursuant to MCR 7.301(A)(2).

Grounds for Appeal to the Supreme Court

The grounds for this appeal to the Supreme Court is based on MCR 7.302(B)(3)(5).

Statement Identifying Order Appealed and Relief Sought

This appeal seeks the partial reversal of the June 16, 2015, Order and Opinion of the Michigan Court of Appeals, wherein it was determined that the Plaintiff/Appellee could amend its complaint to add the necessary party, Christopher Foster, the presumed/legal father of the subject minor child to the Plaintiff/Appellee's Revocation of Paternity Action more than two years after the statute of limitation has expired. The Plaintiff-Appellee should be prohibited from amending his complaint to add Christopher Foster, because such an amendment would constitute an undue prejudice to the Defendant-Appellee and Christopher Foster, and would be futile.

Statement of Questions Presented

- I. Did the appeals court commit reversible error by issuing an order that would allow for the addition of the presumed/legal father, a necessary party, more than two (2) years after the expiration of the statute of limitation?**

Court of Appeals Answer: No

Appellant's Answer: Yes

Appellee's Answer: No

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<i>Ben [P] Fyke & Sons, Inc. v. Gunter [Co], 390 Mich 649, 213 N.W.2d 134 (1973)</i>	4
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Statement of Facts

This appeal arises from the June 16, 2015, Court of Appeals Order and Opinion wherein it was held that “Plaintiff properly named defendant in his timely filed lawsuit, and now Foster [presumed/legal father] will merely be added as a necessary party.... We affirm the denial of summary disposition but remand this case for the addition of Foster as a defendant in the lawsuit.”

On September 22, 2010, the Plaintiff-Appellee filed a paternity action (10-1660005-DP) in Wayne County Circuit Court against Defendant-Appellant, alleging that her son Blake Foster was born out of wedlock and the Plaintiff-Appellee was the child’s biological father. The Plaintiff-Appellee sought an order of filiation pursuant to the Paternity Act, MCL 722.711 et seq, MSA 25.491 et seq. The Defendant-Appellee filed a Motion for Summary Disposition citing the Plaintiff-Appellee’s lack of standing because the minor child, Blake Foster, was born during her marriage with Christopher Foster. On February 3, 2011, the Wayne County Circuit Court entered an Order granting the Motion for Summary Disposition finding that the Plaintiff-Appellant lacked standing to maintain an action for paternity, because the subject child was not born out of wedlock and Christopher Foster is the minor child’s legal father.

On May 15, 2013, the Plaintiff/Appellee filed a paternity action in the Oakland County Circuit Court pursuant to the recently enacted Revocation of Paternity Act, MCL 722.1441 Sec. 11(3) “RPA”, alleging that the he was in fact the biological father of the Defendant-Appellant’s minor child, Blake Foster, and that the child was conceived during an extra-marital relationship with the Defendant-Appellant. The relief sought in the Plaintiff-Appellee’s complaint included: (1) an order determining his paternity to the child, (2) an order of filiation naming him as the father of the child, (3) an order of joint legal and physical custody of the minor child, and (4) an

order of reasonable and liberal parenting time. The minor child, Blake P. Foster, was born on September 23, 2009, during the marriage of the Defendant-Appellant to her husband of nine (9) years, Christopher Foster. The Defendant-Appellant Sharea Foster and Christopher Foster were legally married on September 18, 2004, and remain legally married as of the date of this appeal. The Plaintiff-Appellee named the mother of the minor child as a Defendant to the action but failed to name the child's father, Christopher Foster, as a Defendant.

Despite having full knowledge of the existence of Christopher Foster's and his legal status as the father of Blake Foster by the latest date of February 3, 2011, the Plaintiff-Appellee's complaint failed to name Christopher Foster, the presumed/legal father of the minor child, as a defendant in the action. These facts are not contested. The RPA's statute of limitations to file an action against Christopher Foster lapsed on June 12, 2013.¹ No facts exist, nor have been pled, that would justify an extension of the time to file under MCL 722.1443 §13 (12).

On June 14, 2013, in lieu of an Answer, the Defendant-Appellant filed a Motion for Summary Disposition pursuant to MCR 2.116 (C)(8) and (C)(10)² arguing in relevant part that the Plaintiff-Appellee's case should be dismissed with prejudice, for failure to name Christopher Foster, the Defendant-Appellant's husband and the presumed/legal father of the subject minor child, a necessary party, within the prescribed statute of limitations. On July 29, 2013, the Plaintiff-Appellee filed a Response to the Motion for Summary Disposition; and thereafter on August 14, 2013, a Motion for Genetic Testing.³ The Defendant-Appellant responded to the

¹ MCL 722.1443 §13 (12) allows the court to extend the time for filing an action or motion under the act, but the request must be supported by an affidavit which alleges that the delay was caused by (a) mistake of fact; (b) newly discovered evidence that by due diligence could not have been found earlier; (c) fraud; (d) misrepresentation or misconduct; or (e) duress.

² The Defendant-Appellant amended its Motion for Summary Disposition on the record to add MCR 2.116(C)(7) as a basis for the motion.

³ The Plaintiff-Appellee also filed a Motion to Set Aside EIC Sanctions, and a Motion for Protective Order, neither of which is at issue in this appeal.

Motion for Genetic Testing arguing that the Plaintiff-Appellee's standing under the RPA had not yet been established by the Court, and therefore any genetic testing was premature and an infringement on the parental rights of the presumed/legal father.

On August 21, 2013, the lower court entered an order denying Defendant-Appellant's Motion for Summary Disposition on the grounds that the Defendant-Appellant's husband, and presumed/legal father of the minor child, was not a necessary party to this action and therefore did not have to be named as a Defendant. On August 28, 2013, Defendant-Appellant filed a Motion for Reconsideration of the court's denial of the Motion for Summary Disposition. The lower court denied the Defendant-Appellant's Motion for Reconsideration on September 13, 2013.

The Defendant-Appellant timely filed an appeal to the Michigan Court of Appeals on October 5, 2013. At no point prior to the filing of the October 5, 2013, appeal did the Plaintiff-Appellee ever seek to add Christopher Foster as a party to the lawsuit. The Defendant-Appellant sought review of the lower court's findings, and on June 16, 2015, the Michigan Court of Appeals issues its Order and Opinion. That Order and Opinion held that while Christopher Foster was indeed a necessary party to the actions, and despite the lapsing of the statute of limitations, the Plaintiff-Appellee could to add Christopher Foster to his lawsuit.

Defendant-Appellant seeks an appeal of the lower court's finding that Plaintiff-Appellee should be allowed to circumvent the statute of limitations and add Christopher Foster to this action.

Argument

I. *The Plaintiff-Appellee's case must be dismissed for failure to name the presumed/legal father of a minor child is a necessary party to a paternity action brought pursuant to the Revocation of Paternity Act, MCL 722.1431et seq., before the expiration of the statute of limitations. The Plaintiff is prohibited from amending his complaint to add the presumed/legal father because such an amendment is futile.*

As noted by the lower court, under MCR 2.118(A)(2) leave to amend pleadings should be freely granted when justice so requires. Michigan courts have held that leave to amend should be denied only for particularized reasons, such as undue delay, bad faith or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party or where amendment would be futile. *Ben [P] Fyke & Sons, Inc. v. Gunter [Co]*, 390 Mich 649, 213 N.W.2d 134 (1973); *Employers Mutual Casualty Co. v. Petroleum Equipment, Inc.*, 190 Mich App 57, 63; 475 N.W.2d 418 (1991).

The lower court focused its analysis solely on the general principle that amendments should be freely granted, however, the proper legal analysis would have also examined the basis to deny the amendment. In its June 16, 2015, Opinion and Order, the Court of Appeals relies on *Amer v. Clarence A. Durbin Associates*, 87 Mich App 62; 273 N.W.2d 588 (1978), in support of its determination that because the "plaintiff properly named defendant in his timely-filed lawsuit, and now Foster will merely be added as a necessary party ...the statute of limitations does not bar plaintiff's claim." The Plaintiff-Appellant believes the lower court's reliance on *Amer* is misplaced. The factual scenario and legal findings in *Amer* are clearly distinguishable from the case at bar. In *Amer*, the Plaintiff timely filed his lawsuit naming the Defendant and the then unknown John Doe Corporation, the manufacturer and seller of the alleged defective construction material. During the course of discovery and before the lapse of the statute of limitations, the Plaintiff discovered the exact identity of the John Doe Corporation. The Plaintiff

filed a motion to add necessary party defendant and the trial court entered an order allowing for that amendment prior to the lapse of the statute of limitation. Less than two weeks after the statute of limitations expired the Plaintiff filed an amended complaint replacing the John Doe Corporation designation with the exact name of the corporation, that amended complaint was served one week later.

The clear distinction between the holding of Amer and the facts of the case at bar is that in the instant litigation, the Plaintiff knew the name and status of Christopher Foster as the minor child's presumed/legal father prior to the filing of the subject lawsuit. As noted previously, on September 22, 2010, the Plaintiff filed a paternity action under the prior statute and on February 3, 2011, received a ruling from the Wayne County Circuit Court that Christopher Foster was the minor child's legal father. In the case at bar, the undisputed facts reveal that the Plaintiff knew exactly who Christopher Foster was and what role he plays in the minor child's life. This is not a case where the Court should engage in a due diligence determination, weighing whether the Plaintiff-Appellee acted reasonably and swiftly upon the discovery of the identity of the presumed/legal father. In this case, allowing the Plaintiff-Appellee to amend the complaint to add Christopher Foster to the case more than two years after the expiration of the statute of limitation would not only be futile but would also constitute undue prejudice to the Defendant-Appellant and Christopher Foster. Miller v. Chapman Construction, 477 Mich 102, 730 N.W.2d 462, 2007 Mich. LEXIS 836 (April 25, 2007).

The Defendant-Appellee argues that the holding in Cussans v. Harris, 118 Mich App 567, 325 N.W.2d 793, 1982 Mich. App. LEXIS 3385 (August 23, 1982) is more instructive on the issues presented in this case. In Cussans, the Plaintiff was injured in an automobile accident. Thereafter the Plaintiff entered into a settlement agreement with the other driver that caused his

injuries. Thereafter, the Plaintiff filed a dramshop action against the bar that illegally furnished intoxicating liquor to the other driver. The defendant moved to dismiss the complaint for failure to name the driver/alleged intoxicated person as a party to the lawsuit. The trial court ordered the plaintiff to add the driver/alleged intoxicated person as a party defendant, which the plaintiff finally did two weeks after the statute of limitations expired. There, the appellate court held the Plaintiff case was properly dismissed for failure to name the necessary party prior to the expiration of the statute of limitations. Based on the legal analysis and precedent of Cussans, the Defendant-Appellee requests that this Court find that any amendment to the Plaintiff-Appellee's Complaint is prohibited as unduly prejudicial and futile.

Conclusion

The Plaintiff-Appellee is prohibited from amending its complaint to add Christopher Foster. Such an untimely amendment is not only futile but would also cause undue prejudice to both the Defendant-Appellant as well as Christopher Foster.

Relief Requested

The Defendant-Appellant requests that this Court dismiss the Plaintiff-Appellant's case in its entirety. The Defendant-Appellant requests that the Court reverse the order of the lower court allowing for the amendment of the Plaintiff-Appellee's complaint to add Christopher Foster after the expiration of the statute of limitations. Finally, the Defendant-Appellant also requests that the Court strike the order of the lower court granting Plaintiff-Appellee's Motion for Genetic Testing.

Constitutional Provisions, Statutes, and Court Rules Cited

MCL 722.711 et seq.

MCL 722.1431 et seq.

MCR 2.116 (C) (7), (8) and (10)

MCR 2.205 (A) and (B)

MCR 2.118(A)(2)

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July 27, 2015

PROOF OF SERVICE

On July 27, 2015, I served via e-file and regular mail a copy of the Appellant's Brief, and Proof of Service upon the attorneys of record and/or parties in this case on. I declare the foregoing statement to be true to the best of my information, knowledge and belief.

 /s/Tammy Daniels
Tammy Daniels