# STATE OF MICHIGAN

# COURT OF APPEALS

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EILEEN M. POHL,

Plaintiff-Appellee

v

ALLEN M. PEISNER,

Defendant-Appellant

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UNPUBLISHED
April 2, 1999

No. 199474
Wayne Circuit Court
LC No. 95-568172 DP

Before: Markey, P.J., and Sawyer and Whitbeck, JJ.

PER CURIAM.

Defendant-appellant Allen M. Peisner ("Peisner") appealed by right an order of filiation entered by the trial court. In an unpublished opinion, we affirmed. Peisner filed a motion for rehearing. We deny that motion and remand for further proceedings consistent with this opinion.[1]

## I. Procedural History

The trial court found that Peisner was the father of the child of plaintiff-appellee Eileen M. Pohl ("Pohl"). At the time of trial, Pohl was a twenty-nine year old unmarried woman. Specifically, the trial court concluded that the results of the second blood test[2] would be dispositive of paternity unless Peisner could demonstrate that the results had been intentionally faked. The trial court found that Dr. Gershowitz had no motivation to fake the report and that there was no evidence that Pohl had conspired with Dr. Gershowitz. In addition, the trial court stated that a mistake in the results of the second test was essentially impossible because it would require that Peisner's blood had been mistakenly switched with the blood of an unknown third party who was the actual father. Therefore, the trial court concluded that the results of the test created a presumption that Peisner was the father and that Peisner had failed to rebut that presumption.

Peisner filed a number of post-trial motions, but these were all denied by the trial court, with the express finding that the motions were frivolous. The trial court subsequently entered the final order of filiation which provided for custody, visitation and support of the child.

Peisner then appealed to this Court. We first found that the trial court had improperly failed to advise Peisner of the right to counsel in paternity proceedings but held that this error was harmless. We further held that the trial court did not abuse its discretion by failing to compel certain pretrial discovery and that the trial judge was not required to disqualify himself from presiding over the case. We also held that the trial court did not err by striking Peisner's jury demand moments before the trial began, that the trial court did not err in admitting the original and the revised results of the second blood test, that the verdict was not against the great weight of the evidence and that the trial court did not err by awarding attorney fees and costs of confinement to Pohl. Then, on our own initiative, we remanded this case to the trial court for a determination of Pohl's actual and punitive damages and expenses incurred as a result of the appeal—which we termed "vexatious"—and entry of an award against Peisner and in favor of Pohl for that amount. We observed:

> In our view, defendant [Peisner] raised frivolous defenses to plaintiff's [Pohl's] paternity claim below, has pursued the vexatious and cumbersome appeal at hand, and is an attorney who has abused his familiarity with the legal process to plaintiff's detriment. An award of punitive damages in favor of plaintiff is therefore warranted to deter similarly situated fathers from pursuing such vexatious appeals and to deter attorneys from abusing the legal process. Further, we find that this appeal was taken without reasonable basis for belief that there was a meritorious issue to be determined on appeal. MCR 7.216(C)(1)(a).

Peisner then timely filed his motion for rehearing.

## II. Motions For Rehearing

MCR 7.215(G)(1) provides that motions for rehearing are subject to the restrictions contained in MCR 2.119(F)(3). MCR 2.119(F)(3) provides:

> Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration *which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted.* The moving party *must* demonstrate a *palpable error* by which the court and the parties have been *mislead* and show that a *different disposition of the motion must result from correction of the error*. [Emphasis supplied.]

Here, Peisner has made no attempt whatever to demonstrate palpable error by this Court. Rather, he quite literally presents the same issues upon which we have previously ruled, either expressly or by reasonable implication, and proceeds, in large part, simply to reargue them. We therefore deny his motion. We would be remiss, however, if we did not comment further upon several of Peisner's statements in his motion and respond appropriately to them.

## III. Notice Of Right To Counsel

In our prior opinion we held that, while the failure to advise defendant of the right to counsel for indigent defendants in paternity proceedings was error, MCR 3.217(D)(1) and (D)(2), the error was harmless. We cited *Covington v Cox*, 82 Mich App 644, 651; 267 NW2d 469 (1978) for the proposition that a defendant in a paternity action may not challenge the verdict on the ground that he was denied effective assistance of counsel. Peisner, however, asserts that "notice of the right to counsel is jurisdictional." He states that MCR 3.217(D)(1) provides that the return of service must indicate that a paternity suit defendant was advised of his right to counsel and that, "The court does not have jurisdiction where the service does not comport with due process."

The plain language of MCR 3.217(D) does not indicate what remedy is required if the rule is violated. Thus, we must undertake additional construction and analysis of the purpose of the rule to determine what remedy, if any, should be afforded when the trial court and the plaintiff do not comply with it. The basic rules of statutory construction also apply to court rules. *Michigan Basic Property Ins Ass'n v Hackert Furniture Distributing Co*, 194 Mich App 230, 234; 486 NW2d 68 (1992).

The case law establishing the right to counsel in paternity proceedings justifies that right as a matter of fundamental fairness. *Artibee v Cheboygan Circuit Judge*, 397 Mich 54, 59; 243 NW2d 248 (1976). Mothers are often represented by attorneys provided by the state and, therefore, the Michigan Supreme Court concluded that it would be unfair to deprive defendants of similar representation. *Id.* at 59. The right was also based on the complexity of the issues presented and the importance of the right at stake. *Id.* at 57-58. Given these purposes, Peisner's rights were sufficiently protected despite the lack of compliance with MCR. 3.217(D). Peisner is an attorney and, as we noted in our opinion, he represented himself in these proceedings and there was not evidence that he was indigent; consequently, he could not avail himself of appointed counsel.

Further, the trial court's failure to inform Peisner personally of his right to counsel was excusable given Peisner's prior filing of his own appearance on the record. Once an attorney-defendant has elected to serve as his own counsel—despite the age-old adages about the mental characteristics of lawyers who choose to represent themselves—prudence alone dictates that such attorney-defendants review the court rules and discover the existence of a right to counsel prior to trial. There was no fundamental unfairness because plaintiff, a non-indigent, was not represented in this paternity action by state-appointed counsel. Therefore, as we held in our prior opinion, Peisner's right to representation in a paternity hearing was sufficiently satisfied by his self-representation, as foolish as that self-representation may have been. The trial court, as a circuit court, had subject matter jurisdiction over this paternity action. *Morrison v Richerson*, 198 Mich App 202, 206; 497 NW2d 506 (1992). Nothing in MCR 3.217(D) provides that a failure to comply with its provisions deprives a trial court of jurisdiction. Thus, we hold that the trial court had jurisdiction over this case.

## IV. Averaging Of The First And Second Blood Test

Peisner makes the following argument:

> The combined or average paternity indexes of the first test and the second test was 49.99%. The trial court's determination that the 99% had been established to

> reach the presumption of paternity under MCL 722.716(5); MSA 25.496(5) ignored the first blood test. Both tests were admitted into evidence. As such, it was error to establish this presumption given the conflicting nature of the paternity tests.

While giving Peisner every possible bit of credit for creativity, we find this argument to be almost breathtakingly absurd. Peisner appears seriously to contend that the trial court, or perhaps this Court, should *average* a test that the trial court found to be erroneous with a test that the trial court found to be accurate and thereby overcome the presumption of paternity under MCL 722.716(5); MSA 25.496(5). Simply put, we know of no legal or logical construct under which such a procedure could be conceived of, let alone adopted.

## V. Award Of Attorney Fees

Peisner contends that the award of attorney fees in this matter "is based upon judicial legislation." In his brief on appeal, he essentially argued that this Court should disregard the holding in *Bessmertnaja v Schwager*, 191 Mich App 151; 477 NW2d 126 (1991) in favor of the holding in *Baumgardner v Balmer*, 157 Mich App 159; 403 NW2d 525 (1987). However, nowhere in his brief did Peisner acknowledge that this Court is required to follow the rule of law established by a prior published decision of the Court issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court or by a special conflict panel of this Court. MCR 7.215(H). Therefore, unless *Bessmertnaja* is inapplicable, it is binding, while *Baumgardner* is not.

Peisner argued in his brief that:

> Bessmertnaja is sharply contrasted to the case at bar. In Bessmertnaja the court assessed attorneys fees under MCR 2.114(E) sanctions because the Defendant's defense was that a Swedish Court's determination of paternity while declining to order child support was *res judicata*. The Defendant, Rainer Schwager had been found to be the child's father but the Swedish Court declined to order child support because there had been no investigation into his finances. The Court of Appeals affirmed the trial court's imposition of attorney fees. The Court of Appeals limited its holding, to the facts of that case, in imposing attorney fees in a paternity action.
>
> In this case, the court determined not to impose costs under MCR 2.114. . . . Indeed he determined that they would not be imposed as a penalty but rather that Plaintiff should not have to bear the costs of these proceedings. . . .

This argument might be persuasive if it were accurate. Peisner, however, completely misrepresented the holding in *Bessmertnaja*. In fact, this Court held that in *Bessmertnaja* the trial court *erred* when it granted attorney fees under MCR 2.114(E). *Bessmertnaja, supra* at 157. Nevertheless, this Court then justified the award of attorney fees under the Paternity Act:

> Attorney fees ordinarily are not recoverable in common law, but may be recoverable where a statute specifically so provides. *Matras v Amoco Oil Co*, 424

> Mich 675, 695; 385 NW2d 586 (1986). Section 7 of the Paternity Act, MCL 722.717; MSA 25.497, provides payment for "expenses in connection . . . with the proceedings." Two panels of this Court have found that this language authorizes payment of attorney fees. *Oviedo v Ozierey*, 104 Mich App 428, 430; 304 NW2d 596 (1981), and *Houfek v Shafer*, 7 Mich App 161, 171; 151 NW2d 385 (1967). However, two panels reached a contrary holding in *Baumgardner*[, *supra at 161*] and *Kenner v Watha*, 115 Mich App 521; 323 NW2d 8 (1982). We interpret the language in § 7 to encompass an award of attorney fees. The order of attorney fees in the present case is analogous to an award of attorney fees in a divorce proceeding. In divorce proceedings, MCL 552.13; MSA 25.93 authorizes the court to "require either party . . . to pay any sums necessary to enable an adverse party to carry on or defend the action." This language has been used to award attorney fees. *Kurz v Kurz*, 178 Mich App 284, 297-298; 443 NW2d 782 (1989). If the language in MCL 552.13; MSA 25.93 is sufficiently specific to authorize an award of attorney fees, then the language in the Paternity Act encompasses attorney fees as well. Thus, we hold that attorney fees may be awarded under the Paternity Act. Under the facts of the present case, we hold that the award of attorney fees was proper under § 7 of the Paternity Act. [*Id.* at 157-158.]

*Bessmertnaja* is squarely on point and holds that attorney fees may be awarded under the Paternity Act. That is precisely what the trial court did here and its action was not an abuse of discretion.

## VI. MCR 7.216(C)(1)(a)

In his motion for rehearing, Peisner states:

> a. The opinion [of this Court] then goes on to make its only finding of fact in contravention of that of the trial court where it holds that the defenses below were frivolous despite Judge Giovan's ruling to the contrary. This reflects a judicial temperment [sic] or bias and not an analysis based upon the facts of this case. Judge Giovan made detailed findings of fact to the contrary. This appellate court has not found them clearly erroneous. As such, it appears the award is based upon personal rather than legal reasons. While the panel is entitled to its personal opinions, when it decides a case it is supposed to set those opinions aside and follow the law.
>
> b. Further, such an award has the opposite effect intended.
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> c. The award also is intended to harm appellants [sic] reputation as an attorney. There is no justification for this. Given this court's indifference to the matters addressed in this appeal, appellant regrets not going public with this case. There is no doubt that the television and newspapers would jump at the chance to report on this case not only because the lab involved was the official lab of the Friend of the Court but also because if [sic] shows how DNA testing is not as accurate is [sic] it is widely claimed to be.

Peisner is correct that the trial court did not assess attorney fees based upon a finding that Peisner had made a frivolous defense. However, while our view was otherwise, our remand to the trial court was not based upon the defenses that Peisner asserted at trial. Rather, we remanded for a determination of Pohl's actual and punitive damages based upon MCR 7.216(C). Specifically, we found that the appeal was taken without a reasonable basis for belief that there was a meritorious issue to be determined on appeal, in violation of MCR 7.216(C)(1)(a). We repeat the observation in our prior opinion that an award of punitive damages in favor of Pohl is warranted to deter similarly situated fathers from pursuing such vexatious appeals and to deter attorneys from abusing the legal process. As requested by Pohl, we find that Peisner filed the motion for rehearing without a reasonable basis for belief that there was a meritorious issue to be determined.

We further find that Peisner's claims of bias, personal animosity and intention to harm his reputation as an attorney are without any redeeming merit. With regard to these claims and with regard to his totally erroneous statement of this Court's holding in *Bessmertnaja*, we remind Mr. Peisner of his responsibilities under Rule 8.4 and Rule 3.3(a)(1), respectively, of the Michigan Rules of Professional Conduct.

We deny the motion for rehearing and remand for a determination of Pohl's actual and punitive damages and expenses pursuant to MCR 7.216(C), including her damages and expenses in responding to Peisner's vexatious motion for rehearing. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ William C. Whitbeck

[1] While we generally address such motions in this Court in more summary orders, we address this motion in a more formal and detailed opinion. See MCR 7.216(A)(7) (this Court may "enter any judgment . . . as the case may require").

[2] The parties agreed to submit to blood testing to determine paternity. The results of the first blood test excluded Peisner from being the father. Pohl made a number of inquiries regarding the test results, requested a second test to confirm parentage and Peisner agreed to additional testing. The second test concluded that there was a greater than 99.99 percent probability that Peisner was the father. Peisner objected to the results of this second test because it was conducted in violation of the parties' escrow agreement regarding the payment for the second test and because of a lack of foundation establishing the authenticity and accuracy of the test results. The laboratory that conducted the tests issued revised results for the second test, but the revised calculations did not alter the conclusion that there was a greater than 99.99 percent probability that Peisner was the father.

Pohl filed a motion for a third blood test in the hopes that another test would assist in resolving the matter without the need for a trial. The trial court approved the request for a third blood test and directed the parties to contact the court if they could not reach an agreement on the laboratory to be used. The third test never occurred, however, because Peisner selected a laboratory that could not complete the testing prior to the date for trial.