

**STATE OF MICHIGAN  
COURT OF APPEALS**

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JOHN C. SPRENGER,

Plaintiff-Appellant,

v

EMILY R. BICKLE,

Defendant-Appellee.

FOR PUBLICATION

September 10, 2013

No. 310599

Benzie Circuit Court

LC No. 11-009301-DP

Advance Sheets Version

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Before: RONAYNE KRAUSE, P.J., and GLEICHER and BOONSTRA, JJ.

BOONSTRA, J. (*dissenting*).

At a time when too many fathers are running *from* their parental responsibilities, plaintiff in this case is running *toward* his.<sup>1</sup> He seeks to affirm, under the Paternity Act, MCL 722.711 *et seq.*, his parentage of the minor child. Specifically, he requests genetic testing to establish paternity, joint physical custody of the child (including specified parenting time for plaintiff and defendant), and a determination of support in accordance with the Michigan Child Support Formula.

The trial court dismissed plaintiff’s complaint for lack of standing, and the majority affirms. I agree with the majority generally as to the standard for seeking relief under the Paternity Act. However, I disagree, on the unique facts of this case and the current record, that plaintiff lacks standing under the Paternity Act to seek to affirm his parentage of the minor child. More specifically, I believe that the presumption of Adam Bickle’s paternity of the child was sufficiently and effectively rebutted in a prior legal proceeding between defendant and Mr. Bickle to require further proceedings in the trial court.<sup>2</sup> I would, however, refrain from making a

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<sup>1</sup> The majority cites *Spielmaker v Lee*, 205 Mich App 51; 517 NW2d 558 (1994), as echoing a similar sentiment, but as nonetheless interpreting and applying the law as written. Notably, however, *Spielmaker* did not present the issues raised in this appeal, or address the same statutory language or pertinent case law. With due respect to the majority, my analysis and conclusion do not “contort the law,” but rather interpret and apply it in a new and unusual factual context.

<sup>2</sup> With due respect to the concurrence, its assertion that this conclusion of the dissent “rel[ies] on statements attributed to Emily Bickle regarding the date of the involved minor child’s conception” is simply false. As the discerning reader no doubt will recognize, the concurrence hyperbolically mischaracterizes the dissent’s positions in many respects, and then challenges positions that the dissent has not taken, while ignoring those that it has. But this familiar straw-

conclusive finding of whether plaintiff rebutted the presumption without the development of a further evidentiary record in the trial court. Accordingly, I dissent from the majority opinion, and would reverse and remand for further proceedings consistent with the reasoning set forth below.

## I. BACKGROUND

The facts of this case are unusual and unique.<sup>3</sup> Defendant is now married for the third time to Mr. Bickle. Their second divorce was final on April 8, 2011. Prior to the Bickles' second divorce judgment, plaintiff and defendant entered into a relationship that plaintiff maintains resulted in the conception and subsequent birth of the minor child at issue in this case, with whom plaintiff seeks to have a father-son relationship. On April 11, 2011, three days after the final hearing in defendant's second divorce proceeding with Mr. Bickle, defendant told her mother that she was pregnant with plaintiff's child. Defendant also advised others that she was pregnant with plaintiff's child on the basis of the "confirmation" supplied by a pregnancy test taken by plaintiff in the bathroom of a Meijer's store. The date of that pregnancy test is not reflected in the current record, nor is there any evidence in the record as to when defendant began to suspect that she might be pregnant.

Record evidence reflects that Mr. Bickle had a vasectomy after the birth of defendant's third unplanned child in 2009 (prior to his second divorce from defendant), and that he therefore likely could not have conceived the minor child at issue.<sup>4</sup> Plaintiff has sought paternity testing,

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man technique merely serves to substitute misleading rhetorical flair for the intellectually honest debate for which the important issues raised on this appeal cry out, relative to the proper interpretation of the Paternity Act and the case law.

<sup>3</sup> To further its purposes, the concurrence even disputes that the facts of this case are unique, and posits that they "merely echo[]" those of other cases. Really? As the concurrence acknowledges, defendant and Mr. Bickle have "divorced each other twice and married thrice." Between the Bickles' second divorce and third marriage, defendant became engaged to plaintiff. She apparently was carrying plaintiff's child. Mr. Bickle reportedly had a vasectomy years prior to the conception of that child, the fact of which the Bickles were well aware at the time of their second divorce. Before the child's birth, defendant broke off the engagement with plaintiff and instead again remarried Mr. Bickle, just four months after she had divorced Mr. Bickle (for the second time). Defendant's own mother has observed that "[u]nplanned babies seem to encourage unplanned marriages to Adam Bickle which also brings dependency on the welfare system." Defendant denied her own mother (her children's grandmother) further contact with defendant's children. For reasons that are obvious, the concurrence does not explain which of the cited or uncited cases purportedly reflect facts akin to these, or similarly present a situation in which intervening vasectomies, divorces, engagements, and remarriages—in contrast to an out-of-wedlock pregnancy occurring during a single, continuous, procreative marriage—occurred during the course of a pregnancy. The concurrence thus ignores reality to impugn plaintiff as "seek[ing] to invade a marriage" and to falsely characterize this dissent as seeking to "provide him the tools to accomplish that invasion." The law does not require that we wear such blinders.

<sup>4</sup> The concurrence seeks to marginalize the evidence of Mr. Bickle's vasectomy as "pure hearsay," and thus even characterizes the vasectomy as a "putative" one. Of course, no one has

but it has not been conducted because of the determination below that plaintiff lacked standing under the Paternity Act. Although the evidence suggests that defendant has openly acknowledged plaintiff's paternity of the child, defendant has formally neither admitted nor denied plaintiff's claim of paternity in the course of this litigation.<sup>5</sup>

After defendant's second divorce from Mr. Bickle in April 2011, plaintiff and defendant became engaged, and planned to be married. That marriage did not, however, occur. Instead, defendant and Mr. Bickle married, for a third time, in August 2011. The minor child was born on November 16, 2011, while defendant and Mr. Bickle were again married. The child was born five weeks premature.

Plaintiff's complaint initially alleged—on information and belief—that the minor child was conceived after the April 8, 2011 divorce judgment, and while plaintiff and defendant were engaged. Plaintiff now maintains, however, that the conception occurred prior to the April 8, 2011 divorce judgment, as in fact now appears likely.

It appears that defendant may also have shifted her position with regard to the date of conception. The April 8, 2011 Default Judgment of Divorce, which was prepared by defendant's counsel and entered at defendant's request, provides in part that defendant shall have primary physical custody of the parties' three minor children (not including the then-unborn child at issue in this case), and that defendant and Mr. Bickle shall have joint legal custody of those three minor children. The Judgment of Divorce identifies those three other minor children by name and birthdate, and expressly describes them as "*the* minor children of the parties." (Emphasis added.) This language reflects and constitutes a representation and finding that there were *no other* children of the marriage. See *Afshar v Zamarron*, 209 Mich App 86, 92; 530 NW2d 490 (1995). The parties agree that the Judgment of Divorce is silent with respect to any other children, including any conception of, or pregnancy with, the minor child here at issue. The Judgment of Divorce reflects that it was premised in part on defendant's "testimony taken in open Court," which testimony is not before us and appears not to have been before the trial court below. We therefore do not currently have a record of the representations, if any, by defendant at the April 8, 2011 hearing, as to any pregnancy, or lack thereof, as of that date.<sup>6</sup>

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disputed the fact of the vasectomy, the concurrence's characterizations notwithstanding. The concurrence then pads its blindfold by inconsistently denying the very discovery that would definitively answer the question that the concurrence clearly wishes to leave unanswered.

<sup>5</sup> In lieu of answering plaintiff's complaint in this matter, defendant filed a motion to dismiss pursuant to MCR 2.116(C)(5).

<sup>6</sup> MCL 552.45 provides that every complaint for divorce "shall set forth the names and ages of all children of the marriage." Generally, the proofs taken by the trial court at a divorce hearing should include a determination of whether any of the parties is pregnant at the time of the hearing. See *Tyler v Tyler*, 348 Mich 169, 172; 82 NW2d 448 (1957) (holding that the trial court was empowered to vacate a *pro confesso* divorce decree when it became aware that the complainant was pregnant at the time the default judgment was entered and no provision had been made for the child in the judgment); *Allen v Allen*, 341 Mich 543, 551; 67 NW2d 805

Also not before us is evidence of defendant's current position relative to the date of conception. However, plaintiff's counsel has represented, as an officer of this Court, that defendant has submitted evidence in a related proceeding that the conception could only have occurred prior to the April 8, 2011 Judgment of Divorce and, in fact, that the window of conception was from March 27, 2011 to April 3, 2011. Also not in the current record is any evidence of whether defendant knew of, or had reason to suspect, her pregnancy with the child at issue as of the date of the divorce judgment.

## II. STANDARD OF REVIEW

Whether a party has legal standing to assert a claim is a question of law which this Court reviews de novo. *Heltzel v Heltzel*, 248 Mich App 1, 28; 638 NW2d 123 (2001). This Court also reviews de novo a trial court's ruling on a motion for summary disposition, including one brought pursuant to MCR 2.116(C)(5). *Aichele v Hodge*, 259 Mich App 146, 152; 673 NW2d 452 (2003). "In reviewing a motion for summary disposition pursuant to MCR 2.116(C)(5), this Court must consider the pleadings, depositions, admissions, affidavits, and other documentary evidence submitted by the parties." *Id.*, quoting *Jones v Slick*, 242 Mich App 715, 718; 619 NW2d 733 (2000). Our de novo review requires drawing all inferences in the light most favorable to the plaintiff, and then determining if the plaintiff established facts that would give him standing to sue. *McHone v Sosnowski*, 239 Mich App 674, 676; 609 NW2d 844 (2000).

## III. HISTORICAL BACKGROUND

As our United States Supreme Court has recognized, the presumption of legitimacy, as well as its rebuttable nature, have long been recognized:

The presumption of legitimacy was a fundamental principle of the common law. H. Nicholas, *Adulterine Bastardy* 1 (1836). *Traditionally, that presumption could be rebutted only by proof that a husband was incapable of procreation or had had no access to his wife during the relevant period.* (citing Bracton, *De Legibus et Consuetudinibus Angliae*, bk i, ch 9, p 6; bk ii, ch 29, p 63, ch 32, p 70 (1569)). [*Michael H v Gerald D*, 491 US 110, 124; 109 S Ct 2333; 105 L Ed 2d 91 (1989) (emphasis added).]

Subsequent to Bracton's description (in 1569) of the nature of the proofs required to rebut the presumption of legitimacy, Lord Mansfield's Rule was announced (as dicta in an ejectment action) in *Goodright v Moss*, 2 Cowp 591-594; 98 Eng Rep 1257-1258 (1777). See *Serafin v Serafin*, 401 Mich 629; 258 NW2d 461 (1977). Lord Mansfield's Rule<sup>7</sup> was an evidentiary rule

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(1954) (holding that the complainant's failure to inform the trial court of her pregnancy by a man other than her husband was "a fraud on the court" that justified setting aside the divorce decree).

<sup>7</sup> Quoting from *Goodright*, 2 Cowp at 592-594, the *Serafin* court, 401 Mich at 633, set forth Lord Mansfield's Rule:

"[T]he law of England is clear, that the declarations of a father or mother, cannot be admitted to bastardize the issue born after marriage.

prohibiting a husband and wife from testifying about “nonaccess” to prove the husband’s lack of paternity of a child born during the marriage. That rule was “judicially incorporated into the law of this state in *Egbert v Greenwalt*, 44 Mich 245, 248; 6 NW 654; 38 Am Rep 260 (1880).” *Serafin*, 401 Mich at 633. Nearly a century later, our Supreme Court abrogated Lord Mansfield’s Rule in *Serafin*. *Id.* at 634 (“We agree that the rule has outlived the policy reasons initially advanced to support it and, finding none others persuasive, we hold that a husband and wife may testify concerning nonaccess to each other.”). The Court reiterated, however, that the presumption of legitimacy remained “viable and strong,” as well as rebuttable, and held that “clear and convincing evidence” was required to rebut the presumption. *Id.* at 636.

I note, parenthetically, that even the restrictions of Lord Mansfield’s Rule did not address or undermine the alternative basis traditionally recognized for rebutting the presumption of legitimacy, i.e., “proof that a husband was incapable of procreation.” *Michael H*, 491 US at 124 (indirectly citing Bracton). Since the Court in *Serafin* reiterated the rebuttable nature of the presumption, that basis for rebutting the presumption not only has always been a viable one, but it remains so. In addition to abrogating Lord Mansfield’s Rule, however, the Court in *Serafin* established a “clear and convincing” standard of proof for rebutting the presumption; therefore, any such rebuttal of the presumption by way of evidence that a husband was “incapable of procreation” is subject to *Serafin*’s “clear and convincing” standard of proof.

While these principles reflect the presumption of legitimacy and its rebuttable nature, they do not establish *who* is entitled to rebut the presumption, i.e., who has “standing” to contest paternity. The answer to that question instead requires our statutory interpretation of the Paternity Act itself. These long-standing principles nonetheless inform my analysis.

#### IV. STANDING

Our Supreme Court has stated that

[t]he purpose of the standing doctrine is to assess whether a litigant’s interest in the issue is sufficient to “ensure sincere and vigorous advocacy.” Thus, the standing inquiry focuses on whether a litigant “is a proper party to request adjudication of a particular issue and not whether the issue itself is justiciable.” [*Lansing Sch Ed Ass’n v Lansing Bd of Ed*, 487 Mich 349, 355; 792 NW2d 686 (2010) (citations omitted).]

A real party in interest is the one who is vested with the right of action on a given claim. *Id.*, citing *Hoffman v Auto Club Ins Ass’n*, 211 Mich App 55, 96; 535 NW2d 529 (1995). “Standing does not address the ultimate merits of the substantive claims of the parties.” *Id.* at

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As to the time of the birth, the father and mother are the most proper witnesses to prove it. But it is a rule, founded in decency, morality, and policy that they shall not be permitted to say after marriage, that they have had no connection, and therefore that the offspring is spurious.”

357, quoting *Detroit Fire Fighters Ass'n v Detroit*, 449 Mich 629, 633; 537 NW2d 436 (1995) (opinion by WEAVER, J.).

A plaintiff has standing “whenever there is a legal cause of action.” *Lansing Sch Ed Ass'n*, 487 Mich at 372. “Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing.” *Id.* Standing may be found if “the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant.” *Id.*

“A putative father may maintain an action under the Paternity Act only if the child is born out of wedlock.” *Afshar*, 209 Mich App at 90. The act defines “child born out of wedlock” as either (1) “a child begotten and born to a woman who was not married from the conception to the date of birth of the child”; or (2) “a child that the court has determined to be a child born or conceived during a marriage but not the issue of that marriage.” MCL 722.711(a) (emphasis added). The first prong of this definition is not applicable in this case; rather, plaintiff has standing, if at all, under the second prong.

## V. APPLICATION

In applying these principles to the circumstances before us, I conclude that plaintiff likely has standing under the Paternity Act, and would reverse and remand for further proceedings relative to the question of standing. Specifically, I would remand for discovery and an evidentiary *Serafin* hearing to determine: (a) the date of conception of the minor child; (b) whether Mr. Bickle was “incapable of procreation” at that time; (c) defendant’s and Mr. Bickle’s knowledge of that incapability; (d) the representations to and findings of the trial court in the second divorce proceeding between defendant and Mr. Bickle; and (e) appropriate testing regarding the actual paternity of the child.<sup>8</sup> Further, if those proceedings demonstrate that Mr.

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<sup>8</sup> The majority concludes that because plaintiff does not (in the majority’s view) have standing to bring an action under the Paternity Act, he did not have standing to conduct discovery. The majority cites no authority for this conclusion (apart from a bare reference to the discovery subchapter of the Michigan Court Rules), but instead deems it “axiomatic.” I would find, to the contrary, that in determining whether plaintiff has standing, plaintiff is first entitled to discovery on the issues that relate to whether he has standing. Generally, a motion for summary disposition is premature when discovery on a disputed issue has not been completed, unless there is no reasonable chance that further discovery will result in factual support for the nonmoving party. *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). Here, I would find that discovery on issues related to standing would have at least a reasonable chance of resulting in factual support for plaintiff, in light of *Afshar* and Justice MARKMAN’s reasoning in *Barnes v Jeudevine*, 475 Mich 696, 714-727; 718 NW2d 311 (2006) (MARKMAN, J., dissenting). As outlined herein, those issues include the date of conception of the minor child, Mr. Bickle’s incapability of procreation as of that date, defendant’s and Mr. Bickle’s knowledge of that incapability, the representations to, and findings of, the trial court in the divorce proceeding between defendant and Mr. Bickle, and appropriate testing to determine the paternity of the child.

Bickle could not have fathered the child in question and/or that defendant was less than fully forthright with the trial court in the divorce proceeding relative to her pregnancy or possible pregnancy, then plaintiff should be found to have standing under the Paternity Act, and his claim should be allowed to proceed.

#### A. PRIOR JUDICIAL DETERMINATION

Our Supreme Court determined in *Girard v Wagenmaker*, 437 Mich 231; 470 NW2d 372 (1991), that the judicial determination referred to in the statute was a *prior* determination: “For a putative father to be able to file a proper complaint in a circuit court, . . . a circuit court must have made a determination that the child was not the issue of the *marriage at the time of filing the complaint*.” *Id.* at 242-243. The requirement of a prior judicial determination was recently reaffirmed in *Pecoraro v Rostagno-Wallat*, 291 Mich App 303; 805 NW2d 226 (2011).<sup>9</sup>

I conclude, under the unique circumstances presented, that plaintiff should be afforded the opportunity to demonstrate that defendant’s second divorce judgment from Mr. Bickle satisfies this requirement.<sup>10</sup> The record evidence to date reflects that (a) Mr. Bickle had a vasectomy after the birth of defendant’s third child in 2009, and he therefore likely was “incapable of procreation” at the time of the conception of the minor child in question;<sup>11</sup> (b) the trial court in the divorce proceeding made the affirmative determination that three specifically identified children were “the” children of defendant’s marriage to Mr. Bickle; (c) this determination was made on the basis of representations by defendant; (d) those representations

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<sup>9</sup> The majority relies on *Pecoraro* in maintaining that plaintiff lacks standing “until defendant and her husband ask a court to declare that the child was born out of wedlock.” But there are two problems with this expansive reading of *Pecoraro*. First, while *Pecoraro* indeed contains language suggesting that the plaintiff in that case lacked standing because “[the mother] and [her husband] have not asked a court to declare that the child was born out of wedlock,” *Pecoraro*, 291 Mich App at 313, the majority’s literal reading of that language would require that the mother and her husband have acted *jointly* to request a declaration as to paternity. Second, and more importantly, the point of *Pecoraro* was that the prior proceeding (which there was brought in a New York court for an order of filiation, and to which the legal father was not a party) was not a proceeding *between* the mother and the legal father. It therefore did not satisfy *Girard*’s requirement of a prior judicial proceeding between the mother and legal father. Because the proceeding was between defendant and Mr. Bickle, the Bickles’ second divorce proceeding does not suffer that deficiency. *Pecoraro* is therefore inapposite.

<sup>10</sup> Notwithstanding the clarity of this language, the concurrence chooses to distort the dissent as if it somehow “misapprehends the law” regarding the prior judicial determination requirement, and is instead seeking a “substitute for a prior legal proceeding.” The plain language of the dissent demonstrates otherwise.

<sup>11</sup> The concurrence goes so far as to sweepingly assert that Mr. Bickle’s likely incapability of procreation “possesses no relevance whatsoever.” This flies in the face of the indisputable fact, as noted, that “incapability of procreation” is one of the two bases for rebutting the presumption of legitimacy that have been recognized in the law from time immemorial, and the one that retained its viability even while Lord Mansfield’s Rule prevailed.

were not denied by Mr. Bickle; and (e) that determination constitutes a further affirmative determination that there were no other children, born or unborn, of the marriage.<sup>12</sup>

## B. AFSHAR v ZAMARRON

Of all of the cases cited by either the majority, the concurrence, or this dissent, only *Afshar* analogously involved the assessment of a putative father's standing under the Paternity Act where a prior judicial proceeding between the mother and the legal father had in fact made a determination of the issue of the marriage. In *Afshar*, this Court recognized that a biological father could have standing under the Paternity Act when, as here, the divorce judgment was specific as to the paternity of one child and silent as to the paternity of another child, and that the divorce judgment may be deemed—in a proceeding brought by the biological father—to be a determination that the unmentioned child was not the issue of the marriage. *Afshar*, 209 Mich App at 92. Similarly, under the unique circumstances of this case, I conclude that the divorce judgment between defendant and Mr. Bickle may properly be deemed a determination that the child in question was not the issue of their marriage.

The majority distinguishes *Afshar* on the ground that the mother and legal father in that case had acknowledged that the unmentioned child was not the issue of the marriage, and that the trial court in the divorce proceedings was expressly aware of the child and of that acknowledgment. See *id.* Indisputably, *Afshar* is not on all fours with this case; however, it is difficult to imagine a case which would be, and I find *Afshar* nonetheless instructive. To me, the controlling consideration is not whether the parties to the divorce proceeding expressly made the court aware of the fact that the child was not the issue of the marriage. To place controlling weight on that factor would, in my mind, potentially reward a lack of candor to the tribunal and exalt form over substance.

Rather, the controlling consideration to me is whether the legal father was in fact “incapable of procreation” at the time of the child's conception, coupled with the parties' knowledge and representations at the time of the prior divorce proceeding. In this case, the evidence reflects that Mr. Bickle had a vasectomy after the 2009 birth of another child and therefore likely was “incapable of procreation” at the time of conception of the minor child in

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<sup>12</sup> In addition to *Pecoraro*, the majority relies on *People v Zajackowski*, 293 Mich App 370, 378; 810 NW2d 627 (2011), vacated 493 Mich 6 (2012), and *Aichele*, 259 Mich App at 148, 162; neither is persuasive of the majority's position. Not only did *Zajackowski* involve a criminal proceeding, and not only has it been vacated by our Supreme Court, but the prior judicial proceeding in that case had affirmatively determined that the defendant *was* the issue of the marriage in question. That determination stands in stark contrast to the Bickles' second divorce judgment, which expressly did *not* include the unborn child at issue as among “the” children of the Bickles' marriage. The majority's reliance on *Aichele* is also less than compelling. Not only did *Aichele* assess standing under the Child Custody Act, MCL 722.21 *et seq.*, rather than the Paternity Act, but its holding importantly was premised on the absence of *any* prior judicial proceeding whatsoever regarding a determination of paternity. It therefore again stands in stark contrast to this case, where the Bickles' second divorce judgment made an express determination of “the” children of the marriage, and the unborn child was not included in that description.

question. Also relevant to that consideration, as noted, is whether the parties to the divorce proceeding were aware of that incapability at the time of their representations to the court during that proceeding. The evidence here suggests that defendant likely was aware of Mr. Bickle's incapability at the time of her representations to the court in the divorce proceeding, and it was on the basis of those representations that the court affirmatively found that three specifically identified children (not including the child at issue) were "the" issue of the marriage between defendant and Mr. Bickle. Coupled with the fact of the vasectomy itself (of which Mr. Bickle undoubtedly also had knowledge), Mr. Bickle further confirmed that child's status as "non-issue" of the marriage by failing to refute defendant's representations to the court in the divorce proceeding. Accordingly, defendant's and Mr. Bickle's knowledge—at the time of their divorce—of Mr. Bickle's vasectomy and likely incapability of procreation effectively equates to the stipulation in *Afshar* that the child in question was not the issue of the marriage.<sup>13</sup>

### C. BARNES v JEDEVINE

I also agree with the logic of Justice MARKMAN's observation in *Barnes v Jeudevine*, 475 Mich 696, 718; 718 NW2d 311 (2006) (MARKMAN, J., dissenting): "The trial court thus concluded, not unreasonably, that no children were born of the marriage of Charles and [the] defendant. As such, the child later born to defendant must, for purposes of the Paternity Act, MCL 722.711(a), have necessarily been a 'child born out of wedlock.'" Similarly, in this case, the trial court's conclusion in granting defendant her second divorce judgment from Mr. Bickle, that the three children specifically identified in the divorce judgment were "the" children of the marriage, necessarily means that any other child later born to defendant was a "child born out of wedlock" under the second prong of the statutory definition. This is particularly true given Mr. Bickle's likely incapability of procreation, and defendant's and Mr. Bickle's knowledge thereof at the time of their second divorce judgment.

I recognize, of course, that Justice MARKMAN's observation was made in the dissent in *Barnes*. However, I also find *Barnes* to be distinguishable and, therefore, its majority opinion unpersuasive and nonbinding, in at least two important respects. First, the *Barnes* majority stressed the fact that "[t]he circuit court stated in the judgment of divorce merely that it *appeared* no children were born or expected of the marriage," and that under the clear and convincing evidence standard, "the court's statement that it *appeared* that no children were born or expected of the marriage is not a sufficient court determination that there was a child conceived during the marriage that was not an issue of the marriage." *Barnes*, 475 Mich at 706 (emphasis added). The same cannot be said in this case, because the trial court here affirmatively found three specific children to be "the" children of the marriage between defendant and Mr. Bickle, to the exclusion of any others.

Second, a critical factor exists here that did not exist in *Barnes*, i.e., there is evidence in this case that Mr. Bickle was "incapable of procreation" at the time of the conception of the minor child. Although I would remand for the development of further evidence regarding that factor, I find it hard to conceive of evidence that is more "clear and convincing" of whether a

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<sup>13</sup> Amidst all its hyperbole and distortion, the concurrence nowhere addresses the substance of this or any other of the dissent's conclusions; nor does the majority.

minor child could be the issue of a marriage. In short, while the presumption of legitimacy remains strong, it fails when “common sense and reason are outraged by a holding that it abides.” *Serafin*, 401 Mich at 639 (COLEMAN, J., concurring) (quotation marks and citation omitted).

#### D. KNOWLEDGE OF OR REASON TO SUSPECT PREGNANCY

I note parenthetically that my conclusion does not depend on defendant or Mr. Bickle having made misrepresentations to the trial court in the divorce proceeding.<sup>14</sup> That is, if Mr. Bickle indeed was incapable of procreation at the time of conception, and if defendant and Mr. Bickle had reason to know of his incapability at the time of the divorce, I would find that sufficient to deem the divorce judgment to have affirmatively found that the minor child in question was not the issue of the marriage, and thus to afford plaintiff standing, as noted above.

However, my conclusion would find further support in any evidence that might reflect that defendant knew of, or had reason to suspect at the time of her April 8, 2011 *pro confesso* hearing, that she was pregnant with the minor child in question. A complaint for divorce is required to identify the children of the marriage and to state “whether a party is pregnant.” MCL 552.45; MCR 3.206(A)(5). Even if a party is not pregnant at the time she files her complaint for divorce, she is obliged to inform the trial court (in the divorce proceedings) of her pregnancy once she becomes aware of it. See *Allen*, 341 Mich at 551. Further, a trial court, even in the context of a default divorce proceeding, has a duty to make findings of fact, see *Koy v Koy*, 274 Mich App 653, 660; 735 NW2d 665 (2007), as well as provide for the care and support of the children of the marriage, *Remus v Remus*, 325 Mich 641, 643; 39 NW2d 211 (1949). To that end, courts routinely inquire into whether a party to a divorce is pregnant or has reason to believe she may be pregnant at the time of a *pro confesso* hearing, in order to satisfy these duties. See, e.g., *Allen*, 341 Mich at 551; *Tyler*, 348 Mich at 172; *DeHaan v DeHaan*, 348 Mich 199, 200; 82 NW2d 432 (1957); *Dep’t of Social Servs v Carter*, 201 Mich App 643, 644; 506 NW2d 603 (1993).

In this case, this Court has the benefit of neither defendant’s complaint for divorce nor a record of the proceedings before the trial court in the divorce action. Presumably, given the routine nature of the inquiries at a *pro confesso* hearing, the trial court made these inquiries of defendant, prior to granting the divorce judgment, including by inquiring into whether she was or may have been pregnant as of the April 8, 2011 hearing date. Although the record of that proceeding is not available to this Court, existing evidence does reflect defendant’s knowledge of her pregnancy within no more than three days of her divorce judgment, and further suggests the possibility of her knowledge of, or reason to suspect, her pregnancy prior to the divorce judgment.

In my view, discovery as to defendant’s knowledge and representations with regard to her pregnancy is potentially relevant to the question of plaintiff’s standing. For example, if defendant did in fact allege or represent to the trial court, prior to its grant of divorce, that she

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<sup>14</sup> Again, the concurrence premises its critique of the dissent on it supposedly saying the opposite of what it actually says.

was pregnant, then this case is even more definitively analogous to the circumstances of *Afshar* and its finding that “a divorce judgment that is specific with regard to the question of custody and support of one minor child of the marriage and that is silent with regard to another child may . . . be deemed to have determined the issue of paternity.” *Afshar*, 209 Mich App at 91-92.

Alternatively, in the event that discovery were to reveal that defendant was not fully forthright in the divorce proceedings with regard to her pregnancy or possible pregnancy, then I believe that she should not be rewarded by a finding that, as a consequence, plaintiff lacks standing under the Paternity Act.<sup>15</sup> This does not require a finding that plaintiff, as a third-party to the divorce proceedings, has standing to challenge or to seek a modification of the divorce decree.<sup>16</sup> Rather, a lack of candor to the tribunal should serve to estop defendant from denying the accuracy of her representations to the trial court in the divorce proceedings. Under those circumstances, if shown, a representation that she was not pregnant thus may also essentially equate to the stipulation in *Afshar*, thereby deeming the divorce judgment to be a finding that the unborn child was not the issue of the marriage, and further supporting a finding that plaintiff has standing under the Paternity Act.

I therefore would further afford plaintiff a right of discovery into those issues relating to the divorce proceeding, as they further may bear on the issue of plaintiff’s standing, under the unique circumstances of this case and the Paternity Act. I reiterate, however, that if the evidence demonstrates that Mr. Bickle was incapable of procreation at the time of conception, and that defendant and Mr. Bickle had reason to know of his incapability at the time of the divorce, then I would find that evidence sufficient, without regard to whether defendant knew of or suspected her pregnancy as of the date of the divorce judgment, to deem the divorce judgment to have affirmatively found that the minor child in question was not the issue of the marriage, and thus to afford plaintiff standing.<sup>17</sup>

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<sup>15</sup> Our courts have set aside divorce judgments in the past because of fraud perpetrated on the court. See *Allen*, 341 Mich at 551; *DeHaan*, 348 Mich at 200; *Tyler*, 348 Mich at 172. Others faced with a lack of candor have relied on the doctrines of estoppel and unclean hands. See *Sands v Sands*, 192 Mich App 698, 704; 482 NW2d 203 (1992), aff’d, 442 Mich 30 (1993). Although the majority finds *Allen* and *DeHaan* to be “inapplicable on this issue” because of “substantial changes in divorce law since the 1950s,” the majority does not identify those changes, or why those changes render the cases inapplicable. But in any event, plaintiff’s standing under the Paternity Act does not require that the Bickles’ second divorce judgment be set aside or modified. It need only be interpreted, according to its plain language, as identifying only three particular children (not including the unborn child at issue) as “the” children of the marriage.

<sup>16</sup> Again, the concurrence wrongly attacks the dissent for purportedly affording plaintiff standing to “challenge the validity of the Bickles’ earlier divorce.” The dissent, of course, does nothing of the kind.

<sup>17</sup> The concurrence attacks the dissent for providing “no details concerning the appropriate scope of discovery,” and rolls out a parade of the horrors that the concurrence postulates will occur if any discovery is allowed. Of course, the concurrence not only ignores the parameters that the

## VI. CONCLUSION

The confluence of the above-discussed factors leads me to conclude that plaintiff likely has standing under the Paternity Act, and that he should be allowed to demonstrate his standing in further trial court proceedings on remand. Specifically, he should be allowed discovery and the opportunity to present proofs at a *Serafin* hearing relative to Mr. Bickle's incapability of procreation at the time of conception, as to defendant's and Mr. Bickle's knowledge of that incapability, and as to the divorce proceedings and the representations of defendant and Mr. Bickle relative to defendant's pregnancy or reason to suspect pregnancy at the time of the divorce. I further would afford to plaintiff, particularly in light of Mr. Bickle's likely incapability of procreation, an opportunity for appropriate testing to determine the actual paternity of the child.

If after such discovery the evidence demonstrates that Mr. Bickle could not have fathered the child in question or that defendant was less than fully forthright with the trial court in the divorce proceeding relative to her pregnancy or possible pregnancy, then I would find that plaintiff has standing under the Paternity Act, and that his claim should be allowed to proceed.<sup>18</sup>

I therefore respectfully dissent, and would reverse and remand for further proceedings consistent with the reasoning expressed above.

/s/ Mark T. Boonstra

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dissent in fact has placed on the discovery that it would allow, but it further ignores the existence of an elaborate set of court rules controlling the conduct of discovery, and the trial court's authority to exercise its discretion in applying and enforcing those rules.

<sup>18</sup> The concurrence finds it "chilling" that the dissent would open the door to judicial "disrupt[ion of] this family," including by "ultimately removing the child from his home." To the contrary, the dissent would merely afford plaintiff the opportunity to demonstrate his standing to pursue what his complaint seeks: parenting time and a child support determination.