

CASE NO. A-11-336

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STATE OF MINNESOTA  
IN COURT OF APPEALS

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County of Dakota and  
Victoria Louise Reily,  
A/k/a Victoria Louise Darnell,

Plaintiffs,

Respondents

v.

Edward Lee Blackwell,

Defendant,

Appellant

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RESPONDENT VICTORIA LOUISE REILY'S  
BRIEF

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## LEGAL ISSUES

### **I. SUMMARY JUDGMENT IS APPROPRIATE WHEN COMPETING PRESUMPTIONS OF PARENTAGE ARE REVIEWED AND A DECISION IS MADE.**

Uncontested facts in a parentage case allowed the district court to apply the law regarding competing presumptions and decide on a Summary Judgment motion.

#### Apposite Authority

Dorman v. Steffen, 666 N.W.2d 409, 411 (Minn. App. 2003)

In re Welfare of C.M.G., 516 N.W.2d 555, 559 (Minn. App. 1994)

Kelly v. Cataldo, 488 N.W.2d 822, 827 (Minn. App. 1992)

State v. Thomas, 584 N.W.2d 421, 422-423, 425 (Minn. App. 1998)

Minn. Stat. §257.55 subd. 1(a).

Minn. Stat. §257.55 subd. 2.

Minn. Stat. §257.62 subd. 5(b).

### **A. SUMMARY JUDGMENT IS APPROPRIATE WHEN NO GENUINE ISSUES OF MATERIAL FACT EXIST.**

The salient facts of this case are undisputed and disposition prior to trial is proper when there are no genuine issues of material fact and the district court ruled accordingly.

#### Apposite Authority

STAR Ctrs., Inc. v. Faegre & Benson, L.L.P., 644 N.W.2d 72, 77 (Minn. 2002).

State v. Thomas, 584 N.W.2d 421, 425 (Minn. App. 1998)

### **B. THE NONMOVING PARTY CANNOT RELY ON MERE AVERMENTS AND DENIALS TO DEFEAT SUMMARY JUDGMENT.**

The district court properly discounted the averments and denials tendered by the Respondent.

Apposite Authority

DLH Inc. v. Russ, 566 N.W.2d 60, 71 (Minn. 1997).

Minn. R. Civ. P. 56.05.

**II. JOINDER MUST OCCUR SO AS NOT TO DELAY THE PROCEEDING.**

When the Appellant attempts to use joinder as means to defeat summary judgment, the district court did not grant the motion.

Apposite Authority

State v. D.E.A., No. WL1816471 (Minn. App. June 28, 2007).

Zentz v. Graber, 760 N.W.2d 1, 4 (Minn. App. 2009).

Minn. Stat. §257.60.

- A. FAILING TO DECLARE THE NONEXISTANCE OF PARENTAGE DOES NOT BAR DENIAL OF PARENTAGE OR CHILD SUPPORT.

The district court did not view the ex-spouse as the only possible obligor of child support because when a parent has not declared the nonexistence of parentage, under the statute, they still retain the ability to deny the responsibility of child support.

Apposite Authority

Miller v. Miller, 458 N.W.2d 103, 105 (Minn. 1990).

Minn. Stat. §257.57.

- B. FAILURE TO JOIN A STATUTORY PARTY CANNOT FORSTALL ADJUDICATION.

The district court chose not to delay adjudication when the Appellant had not joined all presumptive parents prior to summary judgment.

Apposite Authority

State v. Waddell, 191 Minn. 475, 476 (Minn. 1934).

**III. VERBATIM ADOPTION OF ONE PARTY'S FINDINGS OF FACT AND CONCLUSIONS OF LAW IS A COMMON, ACCEPTED PRACTICE.**

Minnesota Rules of Court allow verbatim adoption and the district court adopted the findings of fact and conclusions of law submitted by one party.

Apposite Authority

Bliss v. Bliss, 493 N.W.2d 583, 590 (Minn. App. 1992)

Schallinger v. Schallinger, 699 N.W.2d 15, 23 (Minn. App. 2005)

Minn. R. Civ. P. 52.01

**IV. APPELLANT'S ACTIONS JUSTIFY AN AWARD OF FEES AND COSTS TO THE RESPONDENT MOTHER.**

Minn. Stat. §518.14 along with Minn. R. Civ. App. P. 139.06 allow this Court to award attorney fees and reasonable expenses to Respondent Reily.

Apposite Authority

Geske v. Marcolina, 624 N.W.2d 813, 816-18 (Minn. App. 2001)

Pitkin v. Gross, 385 N.W.2d 367, 371 (Minn. App. 1986).

Minn. Stat. §518.14 subd. 1

Minn. App. Prac. R. 128.02 subd. 1(c).

Minn. App. Prac. R. 128.02 subd, 1(e).

Minn. App. Prac. R. 139.06.

## STATEMENT OF FACTS

Respondent Reily was married on March 23, 1991. [App. A-26]. The subject minor child was born on March 22, 1999. [App. A-26]. Respondent Reily was divorced in March of 2006. [App. A-52]. The child is not included with the parties' joint children. [App. A-41 and also A-42].

For an approximate period of time between June of 1998 and July of 1998 Respondent Riley had sexual intercourse with the Appellant. [App. R-6]. During a period of six weeks before and after the conception of the child, Respondent Reily had sexual intercourse with no other man. [App. R-6, and also R-10 and R-52]. And the Appellant is the father of the child. [App. R-6]. Genetic (DNA) testing confirms the Appellant is the father of the child. [App. R-15]. The Appellant does not deny he is the father of the child. [App. A-16].

For longer than a year Respondent Reily and the child lived with the Appellant. [App. A-17]. From a period beginning in 2006 the Appellant voluntarily maintained health insurance for the child. [App. A-17]. And since 2008 the Appellant has voluntarily paid \$400.00 per month to Respondent Reily. [App. A-17]. Appellant has held himself out to be the father of the child. [App. R-52 and also R-57].

On September 15, 2010 Dakota County initiated a paternity proceeding. [App. R-8]. On October 7, 2010 Appellant answered the Complaint. [App. A-16]. On October 19, 2010 Appellant contacted the County Attorney and discussed joinder of the ex-spouse. [App. A-24]. Dakota County was able to ascertain that

the Respondent earns \$7,298.00 per month and Respondent Reily earns \$2,157.00 per month. [App. R-21]. On November 29, 2010 the County Attorney initiated a motion for summary judgment. [App. R-13]. On December 15, 2010 Appellant initiated a response to the motion and requested a motion to join the ex-spouse. [App. A-3 and also A-4]. These documents also included Appellant's Affidavit. [App. A-16, et seq.]. On January 5, 2011 Judge Michael Sovis heard arguments on the motions. [App. R-56]. The judge requested that the parties submit proposed findings no later than the following Wednesday. [App. R-58]. On January 20, 2011 the County Attorney submitted proposed findings of fact, conclusions of law, orders, and judgments. [App. A-56].

### ARGUMENT

**I. SUMMARY JUDGMENT IS APPROPRIATE WHEN COMPETING PRESUMPTIONS OF PATERNITY ARE REVIEWED AND A DECISION IS MADE.**

Because Respondent Reily was married when the child was conceived a presumption exists indicating her ex-spouse is the biological parent of the child. Minn. Stat. §257.55 subd. 1(a). Because Appellant Blackwell has been genetically matched to the child with DNA testing, he is presumed to be the evidentiary biological parent. Minn. Stat. §257.62 subd. 5(b). The district court, in summary judgment, applied the undisputed facts of this case to the law and found the Appellant was the father of this child.

“When the district court grants summary judgment based on the application

of a statute to undisputed facts, the result is a legal conclusion that we review de novo” Weston v. McWilliams & Assocs., Inc., 716 N.W.2d 634, 638 (Minn. 2006) (citing Lefto v. Hoggsbreath Enters, Inc., 581 N.W.2d 855, 856 (Minn. 1998)). And “interpretation of the Minnesota Parentage Act (MPA) is a question of law this court reviews de novo.” Dorman v. Steffen, 666 N.W.2d 409, 411, (Minn. App. 2003).

When competing presumptions of parentage exist Minn. Stat. §257.55 subd. 2 outlines the proper resolution.

A presumption under this section may be rebutted in an appropriate action only by clear and convincing evidence. If two or more presumptions arise which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls.

Minn. Stat. §257.55 subd. 2.

State v. Thomas and this case are analogous. In both cases the mother is married, becomes pregnant by a man not her husband, and the mother’s paramour, whom genetic testing reveals as the biological father, resists adjudication of parentage. State v. Thomas, 584 N.W.2d 421, 422-423 (Minn. App. 1998). Like this case, the mother becomes divorced and the ex-spouse disavows parentage during the dissolution proceedings. Id. Also like this case, the district court in State v. Thomas, is presented with two presumptive parents. Id. The ex-spouse is a presumed father. Id. See also Minn. Stat, §257.55 subd. 1(a). The paramour is an evidentiary presumed father. State v. Heiges, 779 N.W.2d 904, 916 (Minn. App. 2010). See also Minn. Stat, §257.62 subd. 5(b).

The State v. Thomas court held that summary judgment is appropriate for a parentage action. Id. at 423. (citing In re Welfare of C.M.G., 516 N.W.2d 555, 559 (Minn. App. 1994)). The Court noted that the Minnesota Parentage Act lays down a “functional set of rules that point to a likely father” and no one presumption is conclusive. Id. at 424. (citing Kelly v. Cataldo, 488 N.W.2d 822, 827 (Minn. App, 1992)). The Court went on to acknowledge the importance of blood relationships. Id. Continuing, the Court recognized that a child would want to know the identity of his genetic parents and would benefit by developing a relationship with them. Id. (citing B.J.H., 573 N.W. 2d 99, 101(Minn. App. 1998)). Ultimately the Court held that balancing the competing presumptions of parentage and adjudicating the genetic parent was “consistent with the better considerations of policy and is logically based on the facts presented in this case.” Id. at 425.

Because these facts are nearly identical to the facts in this case we can unreservedly apply the holding to this case. When reviewing de novo, it is clear that the district court did not err when it resolved the presumptions of parentage and adjudicated the Appellant as parent. This Court should affirm the district court’s judgment.

A. SUMMARY JUDGMENT IS APPROPRIATE WHEN NO GENUINE ISSUES OF MATERIAL FACT EXIST.

Appellant freely admits he is the genetic parent of this child.

Appellant also admits the child lived with him for over a year.

Appellant also admits that since he has lived with the child he has voluntarily paid child support. And the Appellant admits he has obtained health insurance through his employer for the child. Lastly, the Appellant admits he has had visits with the child subsequent to their living together.

On appeal from summary judgment this Court reviews de novo whether a genuine issue of material fact exists. STAR Ctrs., Inc. v. Faegre & Benson, L.L.P., 644 N.W.2d 72, 77 (Minn. 2002).

As we see in State v. Thomas, simply the one fact regarding genetic parenthood is significant enough to adjudicate parentage.

State v. Thomas, 584 N.W.2d at 425.

The salient facts of this case are undisputed and disposition prior to trial is proper when there are no genuine issues of material fact. The decision of the district court should be affirmed.

**B. THE NONMOVING PARTY CANNOT RELY ON MERE AVERMENTS AND DENIALS TO DEFEAT SUMMARY JUDGMENT.**

The Appellant cannot rest on denials and averments to defeat summary judgment.

When we look for a genuine issue of material fact, the nonmoving party must present evidence more substantial than mere averments. Minn. R. Civ. P. 56.05. Further under the rules, the

nonmoving party must do more than simply deny the pleadings of the moving party. Minn. R. Civ. P. 56.05. The rules offer the parties a laundry list of methods to supply the court with facts including certified copies, deposition testimony, or additional affidavits. Minn. R. Civ. P. 56.05. If, through these means the nonmoving party cannot present genuine issues of material fact, summary judgment is appropriate. Minn. R. Civ. P. 56.05.

“[T]here is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party’s case to permit reasonable persons to draw different conclusions” DLH Inc. v. Russ, 566 N.W.2d 60, 71 (Minn. 1997).

The Appellant has provided an affidavit dated December 15, 2010 which contains sixteen paragraphs and appears to support his Notice of Motion and Motion to deny plaintiff’s motion for summary judgment. None of these paragraphs provide the district court with genuine issues of material fact. The affidavit alludes to Appellant Reily’s ex-spouse as a presumptive parent but the district court openly acknowledges this presumption and hence this is not probative. The Appellant offers no genuine issues of fact beyond the existence of the ex-spouse and the presumption. These averments are not meaty

enough to defeat summary judgment. The affidavit does deny the Appellant has held the child out as his own. But when confronted with holding the child out as his own to his employer for the purpose of obtaining health insurance the Appellant makes no objection.

The district court is correct in granting summary judgment as there are no genuine issues of material fact, just mere averments and denials. The decision of the district court should be affirmed.

## **II. JOINDER MUST OCCUR SO AS NOT TO DELAY THE PROCEEDING.**

The Minnesota Parentage Act contemplates multiple parties. Minn. Stat. §257.60. An interpretation of the law is a question reviewed de novo. Zentz v. Graber, 760 N.W.2d 1, 4 (Minn. App. 2009).

The statute clearly states the biological mother and each presumptive parent should be joined in the case. Minn. Stat. §257.60. (see also Zentz, 760 N.W.2d at 5). In fact, the Appellants unpublished case specifically declares it is the presumptive parent's responsibility to modify the pleadings to add the other presumptive parent. State v. D.E.A., No. WL1816471 (Minn. App. June 28, 2007). D.E.A., the genetic parent brought a third-party action against the ex-spouse. Id.

Here the Appellant included the motion to join with his motion to defeat summary judgment. His memorandum of law to the district court did not refer in any way to the statute. Requesting joinder at this point in the procedure was

simply an ill-used tool to keep from being found to be the parent of the child.

Statutory joinder cannot be used as a whip to stave off adjudication. The denial of the motion must be affirmed.

A. FAILING TO DECLARE THE NONEXISTENCE OF PARENTAGE DOES NOT BAR DENIAL OF PARENTAGE OR CHILD SUPPORT.

The Minnesota Parentage Act allows a presumptive parent of the child to ask the court to declare the nonexistence of the parent-child relationship. Minn. Stat. §257.57. The statute limits this relief to a period of three years after the child is born. Minn. Stat. §257.57. Somehow the Appellant construes this to mean that because the ex-spouse is now outside the time limits of the statute he should be joined.

Miller v. Miller addresses this statute of limitations issue, “The general rule is that the statute of limitations may be used as a shield, not as a sword, and that the statute of limitations does not bar a party from raising a pure defense.” Miller v. Miller, 458 N.W.2d 103, 105 (Minn. 1990).

Here, even if the ex-spouse had been joined he could deny parentage and child support obligations. Minn. Stat. §257.57 does not alter the reasoning and decision of the district court. The district court judgment should be affirmed.

**B. FAILURE TO JOIN A STATUTORY PARTY CANNOT FORSTALL ADJUDICATION.**

It has long been held “in civil cases as a matter of policy a period should be set at some point where the rights of the parties are finally determined and there is no opportunity for either to prolong the litigation.” State v. Waddell, 191 Minn. 475, 476 (Minn. 1934).

Here the Appellant contemplated the third-party action in October but took no action until he responds to the summary judgment motion. Ostensibly allowing joinder at this juncture would have delayed the proceedings allowing the third-party to answer, conduct discovery, and respond anew to a summary judgment motion. Without delaying the procedure, the district court judge denied the joinder.

In reviewing the statute de novo, surely this court cannot find that joinder is allowable at summary judgment.

**III. VERBATIM ADOPTION OF ONE PARTY’S FINDINGS OF FACT AND CONCLUSIONS OF LAW IS A COMMON, ACCEPTED PRACTICE.**

Despite verbatim adoption of the Dakota County Attorney’s proposed findings of fact and conclusions of law, the findings of fact follow the material facts of this case and are not clearly erroneous.

Minn. R. Civ. P. 52.01 indicates that “findings of fact, whether based on oral or documentary evidence shall not be set aside unless clearly erroneous, and

due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” And, “adoption of a party’s proposed findings by a district court is generally an accepted practice.” Schallinger v. Schallinger, 699 N.W.2d 15, 23 (Minn. App. 2005) (citing Bliss v. Bliss, 493 N.W.2d 583, 590 (Minn. App. 1992)).

When there is an appellate review of Minn. R. Civ. P. 52.01 “we view the record in the light most favorable to the judgment of the district court.” Rogers v. Moore, 603 N.W.2d 650, 656 (Minn. 1999).

Here the Appellant asserts broad sweeping generalizations regarding the sufficiency of the district court’s findings of facts. Narrowing the discussion the Appellant boldly maintains that there was no evidence introduced via testimony or affidavit setting out that “Ms. Reily and Mr. Reily did not have a sexual relationship when the child was conceived.” This is patently false. Respondent Reily is specific in paragraph 5 of her verified complaint, dated September 14, 2010, “Victoria Louise Reily a/k/a Victoria Louise Darnell, did not have sexual relations with any other man [other than the Appellant] six weeks before or six weeks after the alleged date of conception.” In paragraph 4 of an affidavit with the same date Appellant Reily states, “I did not have sexual intercourse with any other man during the period of time that conception could have occurred, and no man other than Edward Lee Blackwell could be the father of the child.” Later in another affidavit, dated October 14, 2010, Respondent Reily continues these same facts with paragraph 8, “I had no sexual relationship with my husband during the

period of conception.”

Next the Appellant contends that “the ‘fact’ that Appellant held the minor child out as his own is unsupported by the record”. This is also patently false. Respondent Reily, in paragraph 9 of her affidavit dated September 14, 2010, is unequivocal in declaring the Appellant has held the child out to her as his own, “Edward Lee Blackwell has admitted to me that he is the father of the child.” Accordingly the Appellant voluntarily paid child support for the child. Also during the oral arguments on the summary judgment motion the Dakota County Attorney pointed out that Appellant Blackwell held the child out as his own to his employer for the purpose of obtaining health insurance for the child.

Appellant made no objection.

Minnesota Rules of Court allow verbatim adoption of one party’s proposed findings of fact and conclusions of law. Here the district court correctly used the facts presented by the Dakota County Attorney. The Appellant should not be rewarded for his misrepresentations of the record to this Court. This Court should affirm the district court judgment.

**IV. RESPONDENT REILY HAS A NEED FOR ASSISTANCE WITH ATTORNEY FEES AND APPELLANT’S ACTIONS JUSTIFY AN AWARD OF FEES AND COSTS TO RESPONDENT REILY.**

By separate motion as required by the rules of this Court, Respondent Reily asks that the Appellant be ordered to pay the reasonable fees and expenses she has incurred in defending this appeal. Minn. App. Prac. R. 139.06.

In Geske v. Marcolina, this Court held that need-based awards were discretionary in both the district and appellate courts. Geske v. Marcolina, 624 N.W.2d 813, 816-18 (Minn. App. 2001).

Respondent Reily requests awards of fees and expenses through two theories.

First, parties in actions involving the Minnesota Parentage Act have the ability to seek need-based awards under Minn. Stat. §518.14 subd. 1 because child support under the Act is derived under the dissolution statutes. Pitkin v. Gross. 385 N.W.2d 367, 371 (Minn. App. 1986).

Respondent Reily has very limited income and little assets. She has no way to pay fees and expenses. On the other hand Appellant has significant income. In the interest of fairness this Court should award Respondent Reily fees and expenses.

Second, under the same statute parties can seek conduct-based awards. Minn. Stat. §518.14 subd. 1. Respondent Reily makes her request here because the Appellant has acted in bad faith by misrepresenting the facts to this tribunal. The Appellant has also acted in bad faith by unnecessarily prolonging this process and making the entire process far more difficult than it should be.

As this Court reviews these issues de novo it is of utmost importance that a true picture be presented. The Appellant has blatantly misrepresented the facts of this case to this tribunal. Minn. App. Prac. R. 128.02 subd. 1(c). Then Appellant has chosen to bypass any post-adjudication remedies at the district court level and

instead files his appeal immediately. The Appellant does not provide either of the tribunals with accurate statutes or case law. The Appellant does not provide this Court with the proper standards of review. But most telling is that Appellant does not ask for any relief from this Court. Minn. App. Prac. R. 128.02 subd, 1(e).

Which leads us to the only possible conclusion that this appeal was for the purpose of harassing the Respondents.

Minn. Stat. §518 .14 along with Minn. R. Civ. App. P. 139.06 allow this Court to award fees and expenses to Respondent Reily. Respondent Reily asks for complete relief and an award of reasonable attorney fees and expenses.

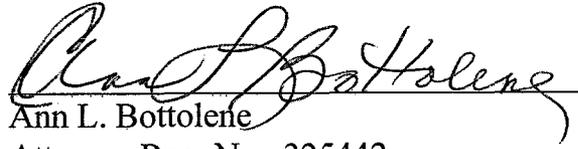
### **CONCLUSION**

The district court reviewed undisputed facts and aptly applied them to the law. Where conflicting presumptions of parentage exist the tribunal weighs policy and logic here finding those policies and that logic weighed in favor of the genetic parent. Because this appeal is largely without merit the district court's order must be affirmed. Respondent Riley should be granted the relief she seeks and be awarded attorney fees and expenses in accordance with the Motion and accompanying documents filed separately with this Court.

Dated: May 10, 2011

Respectfully Submitted:

LAKELAND LAW OFFICE

A handwritten signature in cursive script, appearing to read "Ann L. Bottolene", written over a horizontal line.

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