

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MARQUETTE
FAMILY DIVISION**

IN THE MATTER OF: JACOB STIELER, d.o.b. 09/23/2001

**FILE NO. 11-9410-NA
HON. THOMS L. SOLKA**

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**MOTION FOR RECONSIDERATION AND OFFER OF PROOF HAD
THE CASE BEEN PERMITTED TO PROCEED TO TRIAL**

NOW COMES Dianne M. Heitman, special prosecuting attorney, and pursuant to MCR 3.900 et seq. and MCR 2.119(F), hereby moves this honorable court to reconsider its Decision and Order Regarding Motion To Dismiss and in support thereof states as follows:

1. A petition requesting that the court take jurisdiction over the minor child Jacob Stieler was filed on September 7, 2011.
2. A preliminary hearing was held on September 7, 2011 at which time the petition was authorized by Judge Anderegg.
3. The preliminary hearing was resumed on September 19, 2011 and the case

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was then set for a pretrial conference on October 13, 2011.

4. Respondents filed a Motion for Summary Disposition on or about November 23, 2011, pursuant to MCR 2.116(C)(8) and (C)(10).

5. A responsive pleading was filed by special prosecutor on behalf of Department of Human Services and the motions were heard on December 15, 2011.

6. After the hearing on all motions the court denied the Respondent's motion to dismiss pursuant to MCR 2.116(C)(8).

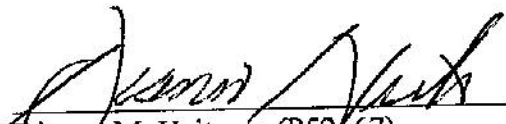
7. The court did grant the motion to dismiss pursuant MCR 2.116(C)(10) on December 21, 2011. It is the granting of this motion that the special prosecutor seeks to have the court to reconsider and change its decision so that this case be allowed to be presented to a jury.

8. Special prosecutor seeks this relief due to the fact that a Motion for Summary Disposition pursuant to MCR 2.116(C)(10) is not permissible for child protection proceedings.

9. Department of Human Services has been deprived of the opportunity to fully present and examine witnesses, cross examine witnesses, and present evidence to a jury. Special prosecutor submits an offer of proof as to additional information and witnesses that would have been utilized had the case been permitted to go to trial.

WHEREFORE special prosecutor, Dianne M. Heitman requests that this honorable court reconsider its decision and reverse and/or deny the previous decision so that this case may be presented to a jury.

Respectfully submitted by:



Dianne M. Heitman (P52667)
Heitman Law Office
Special Prosecuting Attorney

Date 1/11/12

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**BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION AND OFFER OF
PROOF HAD THE CASE BEEN PERMITTED TO PROCEED TO TRIAL**

On December 21, 2011, the court granted Respondents' Motion for Summary Disposition pursuant to MCR 2.116(C)(10). It is the special prosecutor's contention that said motion is not available for child protection proceedings and therefore should be reversed and/or denied and this case be allowed to proceed to a jury.

Pursuant to Subchapter 3.900 Proceedings Involving Juveniles, the applicability of the rules is laid out under 3.901 and reads in relevant part as follows:

“(A) Scope.

(1) The rules of this subchapter, in subchapter 1.100 and MCR 5.113, govern practice and procedure in the family division of the circuit court in all cases under the Juvenile Code.

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(2) Other Michigan Court Rules apply to juvenile cases in the family division of the circuit court only when this subchapter specifically provides. (*emphasis added*) ...

(B) Application. Unless the context otherwise indicates:

(1) MCR 3.901 - 3.930 and 3.991 - 3.992 apply to delinquency proceedings and child protection proceedings; ...

(4) MCR 3.961 - 3.979 apply only to child protection proceedings; ...”

In accordance with the scope and application of the court rules to child protection proceedings, there is no provision for summary disposition pursuant to MCR 2.116(C)(10). Given that the motion is not authorized under the court rules, the granting of summary disposition should be reversed and/or denied.

When considering how a court rule should be interpreted, Hopkins v Parole Board, 237 Mich. App. 629, 604 NW2d 686 (2000), gives us guidance in that, the same rules governing statutory interpretation are also applied to interpretation of court rules. Additionally, when a court rule is clear and unambiguous, such as we have in our case, courts are bound to apply the clear meaning of the court rule pursuant to Meyer Jewelry Company v. Johnson, 229 Mich App 177, 581 NW2d 734 (1998). Given that the court rules governing child protective proceedings do not provide for a summary disposition motion under MCR 2.116(C)(10) the decision granting said motion should be reversed and/or denied.

This argument is supported in In the Matter of PAP, Minor, 247 Mich App 148, 640 NW2d 880 (2001). In PAP, the court held that the trial court erred in concluding that MCR 2.116(C)(10) applies to child protective proceedings, PAP at 153. The PAP court went on to add that: “at no place in subchapter 5.900 is MCR 2.116 applied to child

protective proceedings.” PAP at 154. Also, the court stated that: “...the trial court’s disregard of proper procedure warrants vacation of the court’s order and remand for an adjudicative trial.” PAP at 155.¹

Additionally, an unpublished opinion of the Michigan Court of Appeals case regarding discovery in a juvenile proceedings lends support. In the Matter of Max Unger and Tyler Unger; 2006 WL 1330217 Mich App. (See attached exhibit “A”) The court held in part; “ The rules of civil procedure only apply to child protection proceedings if specified in MCR 3.900 et seq. See MCR 3.901(A)(2).”

The special prosecutor seeks relief under MCR 2.119(F) which is specifically authorized for delinquency and child protection proceedings under MCR 3.922(C) which reads: “Motion practice in juvenile proceedings is governed by MCR 2.119.”

Pursuant to MCR 2.119(F) a motion for reconsideration is available as follows:

“(1) Unless another rule provides a different procedure of reconsideration of a decision (see, e.g., MCR 2.604(A), 2.612), a motion for rehearing or reconsideration of the decision on a motion must be served and filed not later than 21 days after the entry of an order deciding the motion.

(2) No response to the motion may be filed, and there is no oral argument, unless the court otherwise directs.

(3) 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 misled and show that a different disposition of the motion must result from correction of the error.”

In application of this court rule, the palpable error is clear in that the motion itself is not

¹ In the matter of: PAP, Minor, 247 Mich App 148, 640 NW2d 880 was decided under the old law, the numbering of the court rules has changed but the law remains substantially the same.

available under the court rules. To correct said error the granting of the motion must be reversed and/or denied.

In addition, special prosecutor contends that by granting the motion for summary disposition the court has deprived the Department of Human Services (DHS) the right to fully inform the jury and /or court of the evidence in this case for the protection of the minor child. Had this case been permitted to proceed to trial DHS would have presented additional testimony to supplement that of Dr. Kurt the treating oncologist. DHS would have also presented the testimony of either Dr. Axtel or Dr. Fahner also of Helen DeVos Children's Hospital. Both of these pediatric oncologists have been involved in the treatment of Jacob Stieler and would support the diagnosis, and the course of appropriate treatment for Jacob Stieler.

Also, DHS was in the process of seeking an independent additional pediatric oncologist from the University of Michigan to review the medical records and offer support for the testimony of Dr. Kurt. This was suggested by the court to the parents of Jacob Stieler in its decision. This is critical testimony that the jury did not hear.

Not only would Dr. Kurt's testimony be supported, but the arguments or reasoning of the parents for not seeking life saving treatment for their child would be shown to be based on inaccurate information. For example, the parents contend that a PET scan shows no visible signs of cancer and therefore they believe that their child no longer has cancer. This is not true and if the case were to go to trial, DHS could fully present the correct evidence to the jury.

The parents are refusing treatment because the medications are not FDA approved for the treatment of Ewing Sarcoma or pediatric patients. Counsel for DHS was

presented with an affidavit of the pharmacist the day before the motion for summary disposition and was not able to fully contradict and / or supplement its responsive pleading. The parents attach a great amount of significance to whether a drug has FDA approval. While all of the drugs recommended here do, they do not have information on the packaging inserts for approval for the treatment in pediatric patients or for the treatment of Ewing Sarcoma. Therefore the parents are misguided in the belief that they can't be used or shouldn't be used for the treatment of Ewing Sarcoma.

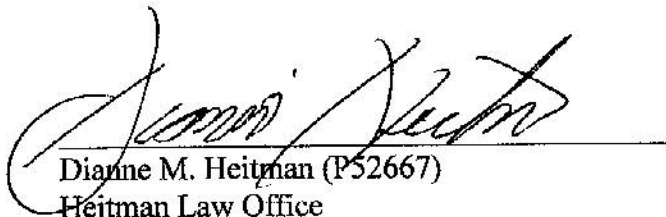
According to the American Academy of Pediatrics, Vol. 110 No. 1 July 2002, The FDA does not regulate the use of drugs, it is only responsible for the regulation of the manufacture, labeling, and promotion of drugs. It does not regulate its use. Doctors are responsible for how a drug is prescribed. Many drugs are not originally tested in pediatric populations and the FDA may never even be informed of potential uses that do develop through studies. (See attached Exhibit "B") The current treatment protocol as developed through the Children's Oncology Group has studied the medications in question. The current protocol is the very best available treatment for Ewing Sarcoma, and without the prescribed treatment the child's chances of survival are dismal.

Also, the parents believe that they can simply monitor their child's cancer through the use of the PET scan which also, is not accurate. While the PET scan may be clean, if they wait until the cancer becomes visible again, the chances of his survival are almost nil.

In conclusion, it is very clear that the court rules do not authorize a motion for summary disposition for child protective proceedings. Therefore, the granting of the motion in this case is not proper under the law and should be reversed and /or denied.

Also, the parents are deciding not to treat their child for Ewing Sarcoma in a fashion consistent of the appropriate standard of care for his condition. Their reasoning for not obtaining the standard treatment protocol is misguided. If the standard treatment is not received it is potentially fatal for Jacob. A jury should be able to hear this case with all of the information so that this child's life may be saved.

Respectfully submitted by:



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Date 1/11/12