STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2022AP001090

In re the termination of parental rights to E.T.S., person under the age of 18:
PORTAGE COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Petitioner-Respondent,

v.

C.S.,

Respondent-Appellant-Petitioner.

On Appeal from an Order Terminating C.S.'s Parental Rights to E.T.S. and an Order Denying C.S.'s Postdisposition Motion Entered in the Portage County Circuit Court, the Honorable Michael D. Zell, Presiding

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PETITION FOR REVIEW

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ISSUE PRESENTED

In *Steven V. v. Kelley H.*,[1] this Court held that due process does not prohibit the use of summary judgment at the parental fitness stage in TPR proceedings. In doing so, the court explained that summary judgment will "ordinarily be inappropriate" in TPR cases premised on "fact-intensive grounds for parental unfitness." The court did not, however, outright bar application of summary judgment to these non-paper grounds, stating in a footnote that the "propriety of summary judgment is determined case-by-case."

In the two decades since *Steven V. v. Kelley H.*, the court of appeals has elevated the case-by-case footnote as a means to ignore the distinction between fact-intensive and "paper grounds." Furthermore, under its case-by-case framework, the court has unlawfully shifted the burden from the county to the parent to prove why they are fit to parent their child.

The time has come to reconsider *Steven V. v. Kelley H.* and decide whether summary judgment is ever appropriate in cases premised on the fact-intensive TPR ground known as "continuing CHIPS."

Below, the circuit court granted the county's motion for summary judgment and denied C.S.'s postdisposition motion challenging that decision

[1] *Steven V. v. Kelley H.*, 2004 WI 47, ¶¶4-5, 271 Wis. 2d 1, 678 N.W.2d 856.

through the lens of ineffective assistance of counsel. The court of appeals affirmed. *See Portage County DH & HS v. C.S.*, No. 2022AP1090 unpublished slip op., (WI App Feb. 23, 2023). (Pet. App. 3-19).

CRITERIA SUPPORTING REVIEW

In *Steven V. v. Kelley H.*, this Court held that due process did not completely prohibited the use of summary judgment in TPR proceedings. 2004 WI 47, ¶¶4-5, 271 Wis. 2d 1, 678 N.W.2d 856. In so holding, the court affirmed a summary judgment order in which the grounds for parental unfitness were "continuing denial of periods of physical placement or visitation," which is "expressly provable by evidence of a court order. *Id.*, ¶39.

While the court explained in a footnote that it was not creating a categorical rule about which grounds are or are not appropriate for summary judgment, the court's holding was substantively premised on the important distinctions between "fact-intensive" and "paper grounds" of parental fitness. *Id.*, ¶¶36-39.

On one hand, the court noted that "[i]n many TPR cases, the determination of parental unfitness will require the resolution of factual disputes by a court or jury at the fact-finding hearing because the alleged grounds for unfitness involve the adjudication of parental conduct vis-à-vis the child." *Id.*, ¶36. The court cited continuing CHIPS as one of the fact-intensive for which summary judgment will "ordinarily be inappropriate." *Id.*

On the other hand, the court contrasted these fact-intensive grounds with the others that are "expressly provable with documentary evidence." *Id.*, ¶¶37-39. The court noted the legislature had recently adopted additional paper grounds, which undercut the complete prohibition on the use of summary judgment in TPR cases. *Id.* The court explained that these paper grounds "evince[] the legislature's manifest intent to enable unfitness determinations to conclusively flow from certain existing court orders that satisfy the statutory requirements." *Id.*, ¶39. Further, the court commented that "[w]e fail to see how this intent is furthered by requiring the empanelment of a jury to receive evidence of the existence of a court order or judgment about which there is no dispute." *Id.*

It is indeed hard to imagine the purpose served by requiring jury trials in TPR cases determined by undisputed court orders. The contrast, however, between these paper grounds and the fact-intensive grounds, such as continuing CHIPS, is stark. The continuing CHIPS ground requires the county to prove not only that the parent failed to meet the conditions of return of the child set by court in the CHIPS order, but that the county made a "reasonable effort" to provide services to assist the parent meet those conditions. Wis. Stat. § 48.415(2)(a)2.b.

Moreover, "reasonable efforts" is defined as: "an earnest and conscientious effort to take good faith steps to provide the services ordered by the court which takes into consideration the characteristics of the parent or child or of the expectant mother or child, the level of cooperation of the parent or expectant mother and other relevant circumstances of the case." Wis. Stat. § 48.415(2)(a)2.a. Aside from the fact that

"reasonable efforts" cannot be proven by court order, it is the type of evidentiary question inherently designed to be answered by a jury. *See Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶2, 241 Wis. 2d 804, 623 N.W.2d 751 (reversing a summary judgment order in a tort case based on a claim of negligence based on the fact that a court must be able to say that no reasonable jury could conclude that the non-moving party's actions were not reasonable).

Nevertheless, in C.S.'s case and a published decision upon which the decisions below rest, the court of appeals has disregarded the fact-intensive nature of non-paper grounds cases and unlawfully placed the burden on the parent to affirmatively prove they are fit to parent. *See Brown County v. B.P.*, 2019 WI App 18, 386 Wis. 2d 557, 927 N.W.2d 560 (affirming a summary judgment order against parent despite an asserted "good cause" defense to abandonment).

Instead of recognizing the fundamental rights at issue and the fact-intensive grounds alleged by the county, the court of appeals has used the "case-by-case" rule to affirm summary judgment orders that should have been tried to a jury of the parents' peers. Moreover, whether a parent's cause of "good," or whether the county's effort to provide services was "reasonable" are unquestionably matters to be decided by a jury, not by a court.

Absent an outright and unambiguous concession of unfitness by the parent, summary judgment is not appropriate when the grounds alleged are the fact-intensive type highlighted by this Court in *Steven V. v. Kelley H.* Because the court of appeals' application of summary judgment in fact-intensive TPR cases has

drifted well off course from *Steven V. v. Kelley H.*, review is warranted in this case. *See* Wis. Stat. § (Rule) 809.62(1)(d).

STATEMENT OF THE CASE AND FACTS

On February 10, 2021, Portage County petitioned to terminate C.S.'s parental rights to his son, E.T.S. (3). The county's petition alleged that grounds existed to terminate C.S.'s parental rights under Wis. Stat. § 48.415(2)(a): that E.T.S. is in continuing need of protection or services, also known as "continuing CHIPS." (3:1, 11-13).

The initial hearing on the county's petition was held on March 9, 2021. (110:2). C.S. appeared by phone from the Winnebago County Jail. (110:2). Prior to addressing the county's petition, the court asked C.S. whether he disagreed with anything in a recently filed permanency plan review in the underlying CHIPS case. (110:8). C.S. responded:

> I've been incarcerated most of the time and *they say that I blame the department and my probation officer for my actions; and that's what's got me here, which is sort of the truth, that the system has failed me.* I had a private investigator do work with my alternative to revocation, and he came back with, I never had an opportunity to get my mental health addressed or even get treatment for my ongoing AODA issues…*I'm sitting in this spot because I haven't had the opportunity to address what needs to be addressed.*

(110:9) (emphasis added).

In line with the circuit court's pre-trial scheduling order, the county filed a motion for

summary judgment on November 17, 2021. (69). The county argued that no issues of genuine fact existed and that the county was entitled to judgment as a matter of law that grounds existed to terminate C.S.'s parental rights under Wis. Stat. § 48.415(2)(a).

As relevant here, the county asserted that it provided services to C.S. as ordered by the court "through reasonable efforts:"

> These efforts include parenting education, classes, AODA services, mental health services, visitation between [C.S.] and [E.T.S.], ongoing case management through CPS, and foster care placement for [E.T.S.]. Through his own admission, during the brief time that [C.S.] was not incarcerated, any services or efforts made to assist him in following the court order were dismissed or ignored by [C.S.].
>
> Similarly, *because of [C.S.'s] continued incarceration throughout almost the entirety of this order, there were no further efforts that could have been put forth to provide the services ordered by the court*. Therefore, unless otherwise put forth by [C.S.], there are no further efforts that could have been made by the department to ensure he was following through with the court order.

(69:9) (emphasis added).

In terms of specific examples of its "reasonable efforts," the county alleged that it offered AODA services, but C.S. declined information about Narcotics Anonymous," by explaining that "those were good places to score drugs." (69:5, 57). The county also explained that C.S.'s incarceration for the vast majority of the dispositional order meant that he was

unable to participate in the services the county offered. (69:4-5).

C.S.'s appointed trial counsel filed no response to the county's motion for summary judgment. Trial counsel also failed to respond to the county's subsequent letter, which asked the court to sanction C.S. for failing to comply with the court's scheduling order. (73).

On January 5, 2022, the court held a hearing on the county's motion for summary judgment. (107; Pet. App. 20-33). C.S. appeared in person and his counsel failed to appear in person, but received permission from the court to appear by Zoom. (107:2; Pet. App. 21). Immediately, the court took up the county's motion for summary judgment and asked trial counsel if he had "a comment?" (107:3; Pet. App. 22). Counsel responded:

> I did, Your Honor. Concerning the summary judgment, I want to indicate for the record that I had the opportunity to review discovery in this matter. I've had the opportunity to investigate [the] procedural course this matter took, and I have not been able to identify any issues of material fact, and I have not, intentionally, filed an affidavit as a result.

(107:3; Pet. App. 22).

Thereafter, the county reaffirmed its position that it was entitled to judgment as a matter of law that grounds existed to terminate C.S.'s parental rights to E.T.S. (107:3-4; Pet. App. 22-23). The court then summarized the county's uncontested motion and granted summary judgment on grounds. (107:7-11; Pet. App. 26-30).

A dispositional hearing was held on February 2, 2022. (108). The county called two witnesses and the court entered an order terminating C.S.'s parental rights to E.T.S. (88; 108; Pet. App. 34-39).

On June 30, 2022, C.S. filed a notice of appeal and then on August 4, 2022, a motion for remand of the case to the circuit court pursuant to Wis. Stat. § (Rule) 809.107(6)(am). The court of appeals granted C.S.'s motion for remand on August 24, 2022. (127). C.S. filed a postdisposition motion on September 8, 2022. (129; Pet. App. 40-53).

As anticipated in C.S.'s motion for remand, C.S.'s postdisposition motion alleged that his trial counsel provided constitutionally ineffective assistance of counsel by failing to substantively oppose the county's motion for summary judgment. (129; Pet. App. 40-53). C.S. argued that multiple substantive bases existed from which trial counsel could have and should have opposed the county's motion for summary judgment and demonstrate that genuine issues of material fact existed as to whether the county made a "reasonable effort" to provide services to C.S. as ordered by the court. (129:5-12; Pet. App. 44-51).

First, C.S. argued that trial counsel was ineffective for not opposing the county's assertion of "reasonable efforts" in the face of the county's implicit assertions that it was under less of an obligation to provide services or make "reasonable efforts" to assist C.S. when he was incarcerated. (129:8-9; 69:4-5, 9; Pet. App. 47-48). As affirmatively alleged by the county, C.S. was incarcerated for all but four to five months between the removal of E.T.S. from his care to the filing of the

TPR petition. (129:8-9; 69:4-5; Pet. App. 47-48). For this reason, the county asserted that C.S. was unable to participate in any services and implicitly conceded that it made no effort to ensure that C.S. obtained services ordered by the court that would have assisted him address his AODA and mental health issues. (129:8-9; 69:4-5; Pet. App. 47-48).

Second, C.S. alleged that trial counsel failed to utilize C.S.'s responses to the county's requests for admissions to argue that the efforts the county made to provide services to C.S. were not "reasonable" under the circumstances. (129:9; 69:56-58; Pet. App. 49). While C.S. admitted that the county made "an effort," and did provide some services, he affirmatively disputed that the county's efforts were "reasonable." For example, asked to admit that he engaged in all AODA services available to him at Racine Youthful Offender Correctional Facility, C.S. entered a "partial admit," noting that "he was not offered AODA because there was no facilitator." (69:56; 129:9; Pet. App. 49). Also, C.S. noted that his position throughout the dispositional order was that he "blamed the system" and that he was "sick of the system and that [the county was] not helping him get [E.T.S.] back." (69:58; 129:9; Pet. App. 49).

Third, C.S. argued that trial counsel was ineffective in not utilizing an AODA and mental health evaluation conducted on C.S. in August 18, 2020, as support for C.S.'s position that the county's efforts were not reasonable. (129:9-10; 133; Pet. App. 49-50). C.S. relied on and cited to the evaluation, which was included in discovery provided to trial counsel, for the position that:

> [O]ur system has been unsuccessful in providing [C.S.] with these necessary services to address his misuse of marijuana and methamphetamine. It is evident [C.S.] was showing signs and symptoms he was spiraling out of control since 2020, a month after his release from the Wisconsin State Prison System where he did not receive any AODA treatment services in the 24 months he spent incarcerated, yet minimal, if any, interventions or services were offered to him other than sanctioned jail time where again no treatment services were available or offered. In fact, based on [C.S.'] reports he was only subject to an AODA assessment and has yet to engage any AODA programming/treatment. It is unrealistic to expect [C.S.] to achieve sobriety without adequate treatment.

(129:9-10; 133:6-7; Pet. App. 49-50).

In summary, C.S. argued that trial counsel provided constitutionally ineffective assistance of counsel because had he utilized the evidence and record available to him, the county's motion for summary judgment would have been denied because there is a genuine issue of material fact as to whether the county made a "reasonable effort" to provide services to C.S. that would have assisted him in meeting the court ordered conditions for the return of C.S. (129; Pet. App. 40-53).

The county filed a response to C.S.'s motion and the court held an evidentiary hearing. (134; 148:1; Pet. App. 54). Trial counsel testified regarding his failure, on behalf of C.S., to file any response or otherwise oppose the county's motion for summary judgment. (148:4-18). Trial counsel's testimony was consistent with his "comment" offered at the January 5, 2022,

hearing: he simply failed to identify "any issues of material fact" and his failure to oppose the county's motion for summary judgment was not based on any other reasonable strategic decision. (148:4-5, 12-18).

After argument from the parties, the court issued its decision denying C.S.'s postdisposition motion. (148:38-48; Pet. App. 55-65). First, the court summarized its understanding of the law on summary judgment as applied to a case like C.S.'s:

> And so, the question again is what is reasonable? Who should decide what is reasonable? Is that a community decision or a decision that the Court can make based on undisputed facts?
>
> And so, I had a law professor who once told me that negligence equals jury, and I think that is exactly what he was talking about.
>
> And that's what *Steven V.*[2] was talking about, that there are grounds that are such that they require a jury decision. That's the argument that [C.S.] is making here today, and I agree with all of that. But that's not the way the law has developed in this area.

(148:43-44; Pet. App. 60-61).

Second, the court relied on a court of appeals decision in a TPR case concerning summary judgment as applied to the affirmative good cause defense to the abandonment ground for parental unfitness:

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[2] *Steven V. v. Kelley H.*, 2004 WI 47, 271 Wis. 2d 1, 678 N.W.2d 856

> And so, looking at the B.P.[3] case, the -- very interestingly, two different parents and two different decisions on the good cause defense in that case. Even though this seems to be something that would require a community decision -- is the cause good or not -- the Court of Appeals said that one of the parents did establish good cause and the other didn't.
>
> And so, the courts -- the Court of Appeals and possibly the Supreme Court, although I'm not familiar with any specific decision -- have allowed summary judgment in these fact-intensive grounds on certain circumstances based upon the law that's really abundantly clear about summary judgment that's been provided in numerous civil cases, including summary judgment in TPR cases.

(148:44; Pet. App. 61). The court then expressed concern about what it understood to be the "way the law has developed in this area:"

> I question whether that's right -- whether that's the right process to engage in in these cases because it does seem like the Court of Appeals is doing a very thorough review of the facts, which the cases on summary judgment say is not supposed to occur.
>
> If the moving party makes an assertion of facts that is sufficient or is sufficient or not, the Court is not a fact finder in a summary judgment motion, and that seems in some ways what the Court of Appeals is doing in the B.P. case.

(148:45; Pet. App. 62). The court then addressed a Wisconsin Supreme Court case concerning summary judgment in a negligence case:

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[3] *See Brown County v. B.P.*, 2019 WI App 18, 386 Wis. 2d 557, 927 N.W.2d 560.

> Turning to *Kaczmarczyk*[4]…[t]he Court in that case points out that negligence has this reasonable person standard and that summary judgment should be incredibly rare and -- because there would have to be no way that a fact finder could draw any other possible inference from the facts before they could grant summary judgment.
>
> And so, I think that's really where it leaves us. The law on summary judgment is not very clear, but it is out there.
>
> The bottom line is that in these community-fact situations, summary judgment is authorized. It would probably be easier if courts would draw a line and say that in these situations, it's never appropriate.
>
> It would certainly eliminate a lot of these questions and this kind of hearing because then there would be a trial every time the County filed a TPR with continuing need or abandonment or failure to assume grounds. But that's not -- that doesn't seem to be the law. And so, summary judgment is authorized.

(148:45-46; Pet. App. 62-63). Finally, the court reviewed the circuit court's[5] original decision granting summary judgment and relied on Wis. Stat. § (Rule) 809.107 to deny C.S.'s motion:

> And that's essentially what Judge Eagon's decision was, that there was no possible inference

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[4] *See Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, 241 Wis. 2d 804, 623 N.W.2d 751.

[5] The Honorable Judge Thomas B. Eagon presided over C.S.'s case through disposition. By the time of C.S.'s postdisposition motion hearing, the Honorable Michael D. Zell had been appointed as Portage County Circuit Court Judge in Branch 1.

> based on the facts that the jury could have found there were not reasonable efforts by the County.
>
> And so, I think the most generous argument or summary of [C.S.'s argument] that I can make is that he is asserting that [trial counsel] should have asserted that there were other potential inferences based on the facts.
>
> And based on 809.107, I don't believe that it's my duty or role at this point to re-judge Judge Eagon's decision. Judge Eagon applied the law, as I've stated it today, and concluded that the County had established beyond any alternative inference that the County had provided reasonable efforts.
>
> And so, I don't believe [trial counsel] is deficient for failing to argue that there were other inferences that could have been drawn.
>
> I don't believe [trial counsel] is deficient for not asserting additional facts or pointing out that [C.S.] disagreed with the County providing reasonable efforts because those assertions are not specific enough to rise to the level of the bar that was set by the ***B.P.*** case which are specific assertions about what additional services could have been provided.

(148:47-48; Pet. App. 64-65).

The court of appeals affirmed. (Pet. App. 3-19). Specifically, the court rejected C.S.'s arguments that his trial counsel was ineffective for not contesting the county's motion for summary judgment. (Pet. App 4). In doing so, the court rejected each of C.S.'s asserted bases upon which trial counsel should have contested the county's motion. (Pet. App 14-19). First, the court rejected C.S.'s reliance on the county's "implicit

concession," which concerned whether the county made a "reasonable effort" to provide services to C.S. while he was incarcerated, which accounted for the vast majority of the time between the removal of C.S.'s child and the filing of the TPR petition. (Pet. App 14-15). Second, the court rejected C.S.'s reliance on his own responses to the county's requests for admissions and interrogatories. (Pet. App 16-18). The court held that these statements "reflect C.S.'s opinions rather than a failure on the part of the County to make a reasonable effort."). (Pet. App 17). Third, the court rejected C.S.'s reliance on a third-party evaluation that concluded that the "system" had failed C.S. (Pet. App. 18-19). In doing so, the court weighed the credibility and methodology of the author of the report and held that the report failed to create a "genuine issue of material fact as to whether the County made reasonable efforts." (Pet. App. 18-19).

Having concluded that none of the evidence cited and relied upon by C.S. created an issue for a jury to decide as to whether the county made a "reasonable effort" to provide services to C.S., the court affirmed the denial of C.S.'s postdisposition motion and the circuit court's order terminating his parental rights. (Pet. App 19).

C.S. now seeks review by the Wisconsin Supreme Court.

ARGUMENT

This Court should accept review to reconsider *Steven V. v. Kelley H.* and consider whether summary judgment is ever appropriate in fact-intensive TPR cases based on "continuing CHIPS."

As this Court is well-aware, "[p]arental rights termination adjudications are among the most consequential of judicial acts, involving as they do 'the awesome authority of the State to destroy permanently all legal recognition of the parental relationship.'" *Steven V. v. Kelley H.*, 271 Wis. 2d 1, ¶21.

A parent's interest in the parent-child relationship is a fundamental liberty interest under the due process clause of the Fourteenth Amendment. *Brown County v. Shannon R.,* 2005 WI 160, ¶59, 286 Wis. 2d 278, 706 N.W.2d 269. "When the State seeks to terminate familial bonds, it must provide a fair procedure to the parents, even when the parents have been derelict in their parental duties." *Id.*, ¶¶18-19.

As such, "[a]lthough they are civil proceedings, termination of parental rights proceedings deserve heightened protections because they implicate a parent's fundamental liberty interest." *Id.*, ¶59. "The protection of a parent's interests in termination of parental rights proceedings is particularly important in light of the 'vast disparity in an involuntary termination case between the ability of the state to prosecute and the ability of the parent to defend.'" *Id.,* ¶62.

Nevertheless, this Court held in *Steven V. v. Kelley H.* that due process does not prohibit the use of summary judgment in some TPR cases. While drawing a clear distinction between fact-intensive and paper grounds, the court refrained from creating a "categorical" rule. The time has come to do so. A necessary and obvious place to start is with TPR petitions based on "continuing CHIPS." *See* Wis. Stat. § 48.415(2)(a).

Every continuing CHIPS petition requires the county to prove, by clear and convincing evidence, that it made a "reasonable effort" to provide services to the parent that would have assisted the parent meet the conditions of return set by the circuit court. Whether the county's efforts were "reasonable" must be decided by a jury of the parent's peers.

In C.S.'s case, the postdisposition court correctly framed the issue: "And so, the question again is what is reasonable? Who should decide what is reasonable? Is that a community decision or a decision that the Court can make based on undisputed facts?" (148:43; Pet. App. 60). The court went on to recount what a law professor had once said: "that negligence equals jury." (148:43; Pet. App. 60). The court explained, "that's what *Steven V.* was talking about, that there are grounds that are such that require a jury decision. That's the argument that [C.S.] is making here today, and I agree with all of that." (148:43-44; Pet. App. 60-61).

Nonetheless, the court then confronted the court of appeals' recent application of *Steven V. v. Kelley H.*, noting that in the court's view, "that's not the way the law has developed in this area." (148:44; Pet. App. 61).

The court noted that in *Brown County v. B.P.*, 2019 WI App 18, 386 Wis. 2d 557, 927 N.W.2d 560, the court of appeals affirmed a summary judgment order against a father alleged to have abandoned his child. (148:44-45; Pet. App. 61-62).

In *Brown County v. B.P.*, the father asserted a "good cause" defense to the allegation of abandonment. 386 Wis. 2d 557, ¶¶43-49. Despite the fact that the father asserted a number of causes for his failure to maintain contact with his child, the court determined that his causes were not "good" enough to have a trial. *Id.* For example, the court held that the father's claims that his mental health issues and tragic deaths in his family were not sufficient to create a genuine issue of material fact about whether he had "good cause." *Id.*, ¶¶44-49. The court not only discounted the father's alleged "good causes," but it held that he needed to present expert testimony to create an issue for the jury to decide. *Id.*

In general, the postdisposition court below was correct to be concerned that the court of appeals has acted as fact-finder with respect to its review of summary judgment orders in fact-intensive TPR cases. Frustrated by this perceived development in the law since this Court's decision in *Steven V. v. Kelley H.*, the court noted the bottom line, "that in these community-fact situations, summary judgment is authorized." (148:45-46; Pet. App. 62-63). The court further opined that "[i]t would probably be easier if courts would draw a line and say that in these situations, it's never appropriate." (148:46; Pet. App. 63).

Unfortunately, the court of appeals decision that followed the postdisposition court's comments only magnified the drift in the court of appeals' application of summary judgment to fact-intensive TPR cases since this Court's decision in *Steven V. v. Kelley H.*

First, the court relegated to a dismissive footnote *Steven V. v. Kelley H.'s* focus on the distinction between fact-intensive TPR cases and paper grounds. (*See* Pet. App. 12). Instead, the court responded by ignoring the substantive difference between C.S.'s case and a paper grounds case and relied on *Steven V. v. Kelley H.'s* footnote that the propriety of summary judgment is determined "case-by-case." (Pet. App. 12).

Second, and more importantly, in analyzing the propriety of summary judgment in C.S.'s case, the court acted as a fact-finder, not as a court seeking to determine whether any genuine issue of material fact existed that should have been decided by a jury. Rather than construing all facts in favor of C.S. as the non-moving party, the court of appeals systematically weighed and critiqued the evidence relied upon by C.S. regarding the county's reasonable efforts.

For example, C.S. argued that the county "implicitly conceded" that it provided less services to C.S. while he was incarcerated and that a jury could have reasonably found that the county's efforts were therefore not reasonable. In response, the court of appeals cites the county's competing evidence that the county provided some services while C.S. was incarcerated. (Pet. App. 14-15). At the summary judgment stage, the question is not which party's evidence is stronger. The only question is whether a

factual dispute exists for a jury to decide. Reasonableness of the county's efforts is a near-textbook example of an issue of fact for the jury to decide.

Another example is the court's critique of C.S.'s reliance on his own admissions and denials made during the discovery process. (*See* Pet. App. 16-18). C.S. relied on multiple statements made during discovery to demonstrate that a genuine issue of material fact existed over whether the county's efforts were reasonable. In response, the court again attacked the strength of C.S.'s evidence instead of construing the evidence in C.S.'s favor.

Specifically, C.S. criticized the county's effort to provide AODA services by recommending he Narcotics Anonymous (NA) meetings. C.S. believed that this "service" was not reasonable because in his experience those meetings were good places to "score drugs." Again, instead of construing the facts in C.S.'s favor, the court weighed the facts and concluded that the county's recommendation that C.S. attend NA meetings was evidence of the county's efforts were reasonable. (Pet. App. 16-17). The court's analysis missed the point. A jury might have agreed with the county, but a reasonable jury could have also agreed with C.S. that recommending NA meetings was not a "reasonable effort" under the circumstances.

Yet another example is the court's dismissal of C.S.'s statements that the county wasn't helping him get his child back as mere "opinions rather than a failure on the part of the County to make reasonable efforts." (Pet. App. 17-18). C.S.'s "opinions" about the county's efforts are based on his personal and first

hand experience as the intended recipient of services required under the CHIPS order and about which the county has the complete burden to prove were reasonable under the circumstances. C.S. has no burden or obligation, at the summary judgment stage or at trial, to show a "failure on the part of the County." (*contra* Pet. App. 17). Instead, the county maintains the burden to prove, by clear and convincing evidence that they made a reasonable effort to provide C.S. with services that would help him meet the conditions he had to meet to get his child back.

Finally, faced with a third-party evaluation that opined that the "system" failed C.S. by not ensuring that he receive alcohol and drug and mental health treatment while he was incarcerated, the court again weighed the evidence and attacked the conclusion of the report and the credibility of the report's author. (Pet. App. 18-19).

The court of appeals' decision below is evidence that this Court should take the opportunity to reconsider *Steven V. v. Kelley H.* and hold that summary judgement is not appropriate in continuing CHIPS cases because whether the county has a made a reasonable effort to provide services to the parent subject to a CHIPS order is a factual question to be decided by a jury.

CONCLUSION

For the foregoing reasons, C.S. respectfully requests that this Court accept review and thereafter reverse the court of appeals decision and remand this case to the circuit court with instructions to vacate the order terminating C.S.'s parental rights.

Dated this 16th day of March, 2023.

Respectfully submitted,

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Attorney for C.S.

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and (bm) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 5,270 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition, including the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated this 16th day of March, 2023.

Signed:

JEREMY A. NEWMAN
Assistant State Public Defender