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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RESPONSE TO PETITION FOR REVIEW

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ISSUE PRESENTED

Was C.S. deprived effective assistance of counsel in this termination of parental rights case when C.S. refused to speak with his counsel, counsel reviewed all discovery, and counsel did not identify any genuine issues of material fact to oppose summary judgment?

C.S. raised this issue in a postdisposition motion to the circuit court and then in his brief before the Court of Appeals.

The Court of Appeals concluded that C.S. failed to establish his counsel was ineffective in not arguing that genuine issues of material fact exist as to whether the County made reasonable efforts.

CRITERIA FOR REVIEW

Petitioner frames his issue for review as a question of whether this court should reexamine its holding in *Steven V. v. Kelley H.*, 2004 WI 47, 4-5, 271 Wis. 2d 1, 678 N.W.2d 856, and requests a bright-line rule that summary judgment is never appropriate in continuing need, abandonment, and failure to assume termination of parental rights cases. However, Petitioner fails to explain how this request satisfies any of the criteria for review under Wis. Stat. § 809.62(1r). Petitioner's critiques of *Steven V.* amount to little more than the original arguments that were rejected at the time *Steven V.* was decided. Accordingly, Petitioner fails to demonstrate a substantial or compelling need for this court to consider changing a policy within its authority.[1]

[1] The petition for review incorrectly cites to Wis. Stat. § 809.62(1)(d) for the criteria for review and does not identify which of the criteria under Wis. Stat. § 809.62(1r) he believes warrants review. The County acknowledges that § 809.62(2)(c) allows for a concise statement of other substantial and compelling reasons for review. However, C.S. fails to put forth any new compelling or substantial reasons for review other than his general allegation that *Steven V.* was wrong to leave summary judgment to be determined a case-by-case basis, for reasons previously rejected in *Steven V.*

STATEMENT OF THE CASE

Procedural History

This case involves an involuntary termination of parental rights case brought by Portage County Health and Human Services (hereinafter "the County") pursuant to Wis. Stat. § 48.415(2)(a) against C.S. on the ground that his child, E.T.S., was in continuing need of protection or services. After discovery had been exchanged, the County filed a motion for summary judgment arguing that there were no genuine issues of material fact on the issue of whether C.S. was an unfit parent under Wis. Stat. 48.415(2)(a), and that the County was entitled to summary judgement on that issue as a matter of law.

Counsel for C.S. attempted to speak with him on five occasions to discuss summary judgment, but C.S. refused to speak with his counsel. Counsel was unable to identify any genuine issue of material fact based on the existing discovery to oppose the summary judgment motion. A response to the summary judgment was not filed. A hearing was held for the summary judgment motion. The circuit court determined that the undisputed facts set forth in the County's summary judgment motion demonstrated that there were no genuine issues of material fact and that the County was entitled to summary judgment as a matter of law. A dispositional hearing was later held, following which the circuit court entered an order terminating C.S.'s parental rights to E.T.S.

C.S. appealed that order and upon remand filed a postdisposition motion alleging that his counsel had been ineffective for failing to respond to the County's motion for summary judgment. C.S.'s only argument was that his counsel was ineffective in not responding to the summary judgment

motion – based on the information of record then available in the discovery to his counsel – that there were genuine issues of material fact concerning whether the County had made reasonable efforts.

An evidentiary hearing was held on C.S.'s postdisposition motion. After testimony from C.S.'s counsel and argument from the attorneys, the circuit court denied the postdisposition motion. Relying on *Brown Cnty Human Servs. v. B.P.*, 2019 WI App 18, 386 Wis. 2d 557, 927 N.W.2d 560, the circuit court concluded that the information C.S. relied upon in support of his ineffective assistance claim were not sufficiently specific to be a genuine issue of material fact, and accordingly, counsel was not ineffective for failing to make those arguments to oppose summary judgment.

Upon appeal, C.S. continued his argument that counsel was ineffective for failing to use the information available in discovery to respond to the summary judgment motion and allege there were genuine issues of material facts as to whether the County provided reasonable efforts to assist C.S. in completing his court ordered conditions.

The Court of Appeals affirmed the circuit court, agreeing that C.S. failed to establish his trial counsel was ineffective in not arguing, based on evidence included in the discovery, that genuine issues of material fact existed as to whether the County made reasonable efforts.[2] C.S. timely petitioned for review, but changed his issue from whether there was ineffective assistance of counsel to an allegation that continuing need TPR cases are

[2] *Portage County DH&HS v. C.S.*, 2020AP1090, unpublished opinion dated February 23, 2023 at ¶ 35.

never appropriate for summary judgment so long as the parent contests the allegation.[3]

Statement of Facts

On February 10, 2021, Portage County Department of Health and Human Services petitioned to terminate C.S.'s parental rights to his son, E.T.S. (R: 3). The county moved to terminate C.S.'s parental rights under Wis. Stat. §48.415(2)(a), alleging that E.T.S. was in a continuing need of protection or services. (R: 3, 1, 11-13). It was undisputed that E.T.S. had been placed outside of the parental home for over 27 months pursuant to an October 30, 3018 dispositional order. It was also undisputed that C.S. failed to meet the conditions of return to have E.T.S. returned to his home.

Portage County submited "Petitioner's First Set of Requests for Admissions & Interrogatories" to all parties on May 5, 2021. (R: 33). C.S. submit responses to these requests by his attorney, Karen Lueschow, on Monday, May 17, 2021. (R: 69, 54-63).

On June 11, 2021, C.S. submitted a letter to the court requesting that Attorney Lueschow withdraw as counsel and to void all of his answers that were filed related to the discovery requests made by the county. (R: 39). Attorney Lueschow's motion to withdraw was granted. (*R.* 111 at 9.).

On September 9, 2021, Attorney William Lennon was appointed by the State Public Defender's Office to represent C.S. in this matter. (R: 51). Attorney Lennon filed a discovery demand with the county on September 13, 2021. (R: 52). Based upon

[3] *See* Petition for Review, pages 1-6.

C.S.'s previous request to extend discovery deadlines, Portage County, by Corporation Counsel, submitted a letter to the court on September 15, 2021, requesting that deadlines be extended to allow for C.S. to submit updated answers to the county's discovery requests. (R: 56).

At a hearing on October 12, 2021, C.S., by counsel, withdrew his request to void previous discovery responses filed with the court. (R: 106, 4). Additionally, Attorney Lennon requested that the jury trial that was scheduled for November 30, 2021, be adjourned to allow him time to review the discovery in this case. (R: 106, 3). Attorney Lennon's request was granted, and the jury trial was scheduled for February 2 and 3, 2022. (R: 106, 8-9). A scheduling order was set that required the county to submit any dispositive motions by November 17, 2021, with C.S.'s response to any motions due on December 17, 2021. (R: 106, 8, 10; 63). The dispositive motion hearing date was scheduled for January 5, 2022 at 9 a.m. (R: 106, 10; 63).

Portage County moved the court for summary judgment on November 17, 2021. (R: 69). The county's motion was supported by C.S.'s responses to interrogatories and responses to requests to admit, as well as, a supporting affidavit from one of the social workers assigned to the case. (*Id.*) The county argued that due to the lack of disputed material fact for the jury to decide, the county was entitled to partial summary judgment in this case, finding that C.S. was "unfit" as required by Wis. Stat. §48.415(2)(a). (*Id.*). The county argued for summary judgment based upon its analysis that there was no question of fact for the jury. (*Id.*).

A hearing was held in front of the Honorable Judge Thomas Eagon regarding the summary judgment motion on January 5, 2022. (R: 107). The court took up the county's summary judgment motion first. (*Id.* at 3). Judge Eagon asked Attorney Lennon if he had any comment related to the motion for summary judgment filed by the county. (*Id.*) Attorney Lennon did state:

> I did, Your Honor. Concerning the summary judgment, I want to indicate for this record that I had the opportunity to review discovery in this matter. I've had the opportunity to investigate 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.

(*Id.*). The county thereby asserted that due to there being no disputed facts in the case, partial summary judgment finding C.S. to be unfit would be appropriate in this case. (*Id.* at 4). Attorney Lennon then requested an opportunity to speak with his client related to possibly the possibility of voluntarily terminating his parental rights and the legal repercussions associated with that versus an unfitness finding. (*Id.*). The county was willing to accommodate Attorney Lennon's request to speak further with his client and suggested setting a plea and dispositional hearing in two weeks to allow C.S. to discuss matters with his attorney. (*Id.* at 5). C.S. stated he was unwilling to have this conversation with his attorney, so the court proceeded with the summary judgment motion. (*Id.*).

Judge Eagon found that E.T.S had been out of the parental home for a period of greater than six months pursuant to court orders that provided the required notice of termination of parental rights. (*Id.* at 6). Further, the court found that C.S. had not completed his conditions for safe return of E.T.S. (*Id.*). Judge Eagon then found that the county made reasonable efforts to provide the services court ordered for C.S. to complete. (*Id.* at 10).

> Specifically, the Court found as to reasonable efforts:
>
> With regard to the County, whether Portage County Department of Health & Human Services made a reasonable effort to provide the services ordered by the Court, the Court would find from the undisputed facts that the County had made reasonable efforts to provide the services ordered by the Court, and those -- and that is, this court finding is supported by Fact Nos. 14, 23, 24, 25, 26, 27, and 28 of the undisputed facts.

(R: 107, 10). The specific facts that the Court cites are summarized as follows:

1. Fact No. 14: Following C.S.'s release from a probation hold on March 18, 2020, he had only one contact with Portage County or Winnebago County HHS, despite numerous attempts to contact him by both departments, until April 17, 2020. (R: 69, 58 – Req. 33).
2. Fact 23: C.S. was provided a number of services and referrals by both departments during the pendency of this order. C.S. was unable to participate in many of those services and referrals because he was incarcerated all but 4.5 months during the dispositional order. (R: 69, 13).
3. Fact 24: The Department provided supervised visitation between C.S. and his son. (*Id.*)
4. Fact 25: The Department provided parenting and education services. (R: 69, 13, 57 – Req. 27).
5. Fact 26: The Department offered mental health services through Winnebago County. C.S.'s social worker provided him with a list of over 10 providers to obtain a mental health assessment. C.S. admits he did not follow through with this. (R: 69, 13, 57 – Req. 23).
6. Fact 27: The Department offered AODA services. C.S. did participate in an AODA assessment but did not follow through with recommendations from the AODA assessment. He also admitted to declining information from the social worker about Narcotics Anonymous. (R: 69, 13, 57 – Req. 24, 25).
7. Fact 28: The Department also offered ongoing case management to C.S. through Winnebago County while

> he was residing there, and through Portage County when he resided there. (R: 69, 13, 57 – Req. 21, 22).

Due to the above findings, the court found that the county had sufficiently presented a prima facie case relying upon pleadings and evidentiary submissions to find C.S. unfit in the TPR case. (R: 107, 8). None of the county's evidentiary submissions were contradicted by any pleadings, depositions, interrogatories, admissions or affidavits from C.S. (*Id.*). The court found that C.S. had not established a genuine issue of material fact for a jury to decide. (*Id.* at 9). Judge Eagon then granted the county's motion and granted partial summary judgment finding C.S. to be an unfit parent. (*Id.* at 11).

A dispositional hearing was held on February 2, 2022. (R: 108). The court entered an order following testimony terminating C.S.'s parental rights to E.T.S. (R: 88; 108, 31). C.S. filed an intent to pursue post-disposition relief. (R: 100). C.S., by counsel, then filed a notice of appeal on June 30, 2022. (R: 115). On August 4, 2022, C.S. moved for the case to be remanded to the circuit court pursuant to Wis. Stat. §809.107(6)(am). (R: 124; 125). This motion was granted by the Court of Appeals on August 24, 2022. (R: 127).

C.S.'s post-disposition motion alleged that Attorney Lennon had provided ineffective assistance of counsel by not responding to the county's motion for summary judgment. (R: 129). C.S. argued that had Attorney Lennon responded the court would have ruled that there was a genuine issue of material fact that overcame the county's summary judgment motion as to whether the County provided reasonable efforts. (R: 129, 5-12).

C.S. first claimed an "implicitly conceded" point that the county failed to provide services to C.S. while he was incarcerated. (*Id.* at 8-9). The county disagreed with this assertion and argued that statements made regarding C.S.'s failure to utilize offered services during the periods he was not incarcerated were to counter any argument he may have alleged using *Kenosha Cty. vs. Jodie W,* 2006 WI 93, 293 Wis.2d 530, 716 N.W.2d 845, that the conditions of return were allegedly impossible for C.S. to meet because of his incarceration. (R: 134, 6). At no point did Portage County concede implicitly or expressly that it made no efforts to assist C.S. while he was incarcerated.

Second, C.S. then alleged that Attorney Lennon ignored certain discovery responses made by C.S. he alleged created genuine issues of material fact as to the reasonable efforts element. (R: 129, 9). The initial allegation of Attorney Lennon's deficiency in regards to these admissions related to C.S.'s partial admission where he noted that an AODA facilitator was unavailable during a specific period of time while C.S. was incarcerated during the pendency of the underlying CHIPS case. (R: 129, 9; 69, 56).

The County responded, noting that C.S.'s admission he was offered AODA services while incarcerated undercut his argument that the county conceded it did not provide him services while he was incarcerated. (R: 134, 7). The county continued that the fact that a facilitator was unavailable at an institution they did not control cannot create a genuine issue of material fact related to whether they made reasonable efforts to provide services to C.S. (R: 134, 7). Additionally, there were facts laid out by the county related to the many AODA services offered to C.S. which he refused to participate in, this included recommendations for Narcotics Anonymous which C.S. admitted to dismissing

outright, and an AODA assessment which C.S. admits to failing to follow through with its recommendations. (R: 134, 8; 69, 57 – Req. 24-25).

C.S. asserted that Attorney Lennon was ineffective for not relying on his response to a request to admit wherein C.S. "blamed the system" and that he believed the system was not helping C.S. get E.T.S. back as a basis to argue there was a genuine issue of material fact as to reasonable efforts. (R: 129, 9). The county's responded that these statements made by C.S. were merely lay opinions that did not rise to the level required to contest a summary judgment motion under Wis. Stat. § 802.08(3), and therefore did not identify a genuine issue of a material fact. (R:134, 7). The County then argued that these statements viewed in their entirety with all of C.S.'s admissions in the discovery responses showed more than just C.S.'s lay opinion of how the "system failed him," but also C.S.'s continued unwillingness to work with the department and service providers. (*Id.*). C.S.'s statements related to the department and system on their own did not rise to the level of creating a genuine issue of material fact. (*Id.*).

Finally, C.S. argued that Attorney Lennon was deficient because he failed to use an AODA and mental health assessment that was provided in discovery as a basis to argue there was a genuine issue of material fact as to reasonable efforts. (R: 129, 9). It was C.S.'s assertion that this evaluation performed in relation to his criminal cases, not his CHIPS case, was enough to create a question as to whether the county's efforts were reasonable. (*Id.*).

The County pointed out that this assessment was performed completely outside of the realm of the CHIPS case, by an individual who relied solely upon C.S.'s self-reporting and who did not reach out to the department to determine what efforts were made. (R: 134, 9). The County also pointed out that the report provided no reference to what services were provided to C.S. by the county. (*Id.*). The report was largely critical of the department of corrections and C.S.'s probation agent, but did not specifically mention the Department in failing to provide services for C.S. in his CHIPS case. (*Id.*). Finally, the county pointed out that this report was not admissible in response to a summary judgment motion pursuant to Wis. Stat. §802.08(3), as it was not a sworn affidavit nor a sworn discovery response. (*Id.*).

On October 4, 2022, an evidentiary hearing was held in front of the Honorable Judge Michael Zell on C.S.'s post-dispositional motion for ineffective counsel. (R: 130). Attorney Lennon testified regarding his representation of C.S. at this hearing. (R: 148, 4-18).

Attorney Lennon testified that he was appointed to represent C.S. in case 21TP1. (R: 148, 4). Attorney Lennon stated that he did not file a response to the county's motion for summary judgment. (*Id.* at 5). He further testified that he has been practicing TPR defense as a licensed attorney for 35 years, 15 of those years taking public defender appointments. (*Id.* at 6-7). Attorney Lennon continued that during his representation of C.S., he filed a discovery demand, interrogatories, and requests for production of documents for C.S. (R: 52; 148, 8-9). Attorney Lennon testified that he had a discussion with C.S. related to C.S.'s *pro se* motion related to his discovery responses. (R: 148, 11). Per Attorney Lennon's testimony, he and C.S. had agreed to rely upon his initial responses that were submitted by Attorney

Lueschow for the case going forward. (*Id.*) Attorney Lennon testified that this was a strategic decision between he and C.S. (*Id.*) Attorney Lennon further testified that he submitted a witness list, motions *in limine*, and proposed jury instructions prior to the scheduling deadline laid out in the scheduling order. (R: 148, 12; 66-68).

Attorney Lennon continued that he had an opportunity to review the discovery in this case, and that he had investigated any procedural course this matter could take. (R: 148, 12). This is conceded by C.S. in his attorney's argument. (R: 148, 25). Attorney Lennon testified he concluded that there were no genuine issues of material fact that he could argue to oppose summary judgment based on his analysis. (*Id.*) Attorney Lennon further clarified for the court that he was unable to draw any alternative inferences to the idea that the county had met its burden in showing they had provided reasonable efforts to C.S. in arguing summary judgment. (*Id.* at 15). Attorney Lennon then testified that C.S. was unwilling to communicate with him after their first meeting. (*Id.* at 16). He continued that he attempted on six separate occasions to speak with C.S. but that C.S. was unwilling to provide Attorney Lennon with any input after their first conversation. (*Id.* at 15-16). Attorney Lennon continued that C.S. refused to speak with him about the case on at least the last five communications Attorney Lennon attempted. (*Id.* at 18). Due to this, he was unable to discuss the summary judgment motion nor any alternative facts or inferences that could be presented to the court to challenge the county's motion for summary judgment. (*Id.* at 18). Attorney Lennon stated that due to his client's unwillingness to talk with him he was only able to rely upon the discovery provided to him. (*Id.*) Using his experience and strategic reasoning as an experienced TPR attorney, he was

unable to find any genuine issues of material fact sufficient for the jury to decide upon. (*Id.*)

Judge Michael Zell made a record related to the underlying summary judgment facts and found that in TPR cases, based upon his reading of the current case law, specifically citing *Brown County v. B.P.*, 2019 WI App. 18, 368 Wis. 2d 557, 927 N.W.2d 560, summary judgment is allowed in cases that include fact-intensive grounds in certain circumstances. (*Id.* at 44). Judge Zell noted, Judge Eagon found that there were no alternative inferences to the county's assertion that they had made reasonable efforts as required under Wis. Stat. § 48.415(2)(a), and there were no additional facts presented to Attorney Lennon that could have been used to raise a genuine issue of material fact regarding the reasonable efforts element. (*Id.* at 46-47). Judge Zell explained that his role under Wis. Stat. § 809.107 was to determine if Attorney Lennon was deficient in his representation of C.S. and if C.S. was prejudiced by the deficiency. (*Id.*)

Following testimony and arguments, Judge Zell denied C.S.'s postdisposition motion and found that Attorney Lennon had not provided ineffective assistance of counsel to C.S. by not responding to the summary judgment motion submitted by the county. (*Id.* at 47-48). It was Judge Zell's ruling that Attorney Lennon was not deficient for analyzing the information he had and coming to the conclusion there were no competing inferences to what was alleged and put forth by the county. (*Id.*). Judge Zell also ruled that Attorney Lennon was not deficient because he did not find any additional facts in the record that differed from the County's assertions in their affidavit in support of summary judgment. (*Id.*) Judge Zell continued his ruling that C.S.'s mere disagreement with how the county provided reasonable efforts

did not create a genuine issue of material fact. (*Id.*) Further, Judge Zell pointed out that neither Attorney Lennon, nor Judge Eagon believed there were any alternative inferences that could be made related to reasonable efforts in the record at the time. (*Id.*) The only opposition were not any specific "non-opinion facts" that could have been asserted, thereby, the evidence cited by C.S. in his post-dispositional motion was not sufficient to overcome the motion submitted by the county. (*Id.*)

The court signed a written order denying C.S.'s post-disposition motion and the record was transmitted back to the Court of Appeals for review. (R: 144). The Court of Appeals affirmed in an unpublished slip opinion, dated February 23, 2023. This petition for review followed.

REASONS FOR DENYING THE PETITION

I. The Issue Presented Does Not Meet the Criteria for Review

C.S.'s petition alleges that it is time to reconsider this court's holding in *Steven V. v. Kelley H.*, 2004 WI 47, 4-5, 271 Wis. 2d 1, 678 N.W.2d 856.[4] Pet. for Review at 2. However, in his multi-page explanation of the criteria for review, C.S. does not explain how this request satisfies any of the criteria for review under Wis. Stat. § 809.62(1r). Petitioner's critiques of *Steven V.* amount to little more than the original arguments that were rejected at the time *Steven V.* was decided. Accordingly, Petitioner fails to demonstrate a substantial or compelling need for this court to consider changing a policy within its authority.

A. *C.S. Fails to Demonstrate Substantial or Compelling Reasons for Review*

C.S.'s petition advocates for a bright-line rule that summary judgment is never appropriate in certain TPR cases, including TPR cases based on continuing need grounds pursuant to Wis. Stat. § 48.415(2). However, this type of bright-line rule was previously rejected by this Court in *Steven V. v. Kelley H.*, 2004 WI 47, 36, 271 Wis. 2d 1, 678 N.W.2d 856. *Steven V.* explained that many times, "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 ground for unfitness involve the adjudication of parental conduct vis-à-vis the child." *Id.* at ¶ 36. However, this Court clarified that it was not making a bright-line rule that only certain grounds for appropriate for summary judgment. Instead, *Steven V.* stated

[4] Pet. for Review at 2.

that "[t]he propriety of summary judgement [on any ground] is determined [on a] case-by-case basis. *Id.* at ¶ 37 n.4, ¶ 44. As a result, *Steven V.* overruled the previous broad prohibition against the use of summary judgment in TPR cases, stating:

> The jury trial right in TPR cases is statutory only, and is therefore subject to the provisions of the code of civil procedure, including summary judgment procedure as specified in Wis. Stat. § 802.08. Due process requires a hearing ... and clear and convincing proof of unfitness, and summary judgment procedure under Wis. Stat. § 802.08 accommodates both. *Elizabeth W.'s* broad prohibition against the use of summary judgment in the unfitness of a TPR case was statutorily and constitutionally unwarranted, and we therefore overrule it.

Steven V., at ¶ 44 (internal citations omitted).

By advocating for a bright-line rule that summary judgment is never appropriate in TPR cases based on continuing need, abandonment, or failure to assume, C.S. is advocating for a return for cases under those grounds to the position they were under *Walworth County Dep't of Human Servs. v. Elizabeth W.* 189 Wis. 2d 432, 525 N.W.2d 384 (Ct. App. 1994) (concluding "summary judgment is inappropriate in TPR cases where a parent contests the termination") *overruled by Steven V.*, 2004 WI 47, ¶ 44.

C.S. presents no new arguments for returning those "fact intensive" cases to the broad prohibition under *Elizabeth W.*. Just as was noted in *Steven V.*, making that bright-line rule would be contrary to Wis. Stat. § 801.01(2), which provides the general rule that the civil procedure code applies to all civil actions, including TPR cases, unless a different procedure is prescribed. *See* Wis. Stat. § 801.01(2).

The availability of partial summary judgment in the grounds phase of a TPR action where the proof of unfitness under the statute is undisputed furthers the legislatures' purpose and is consistent with the general rule that the provisions of the code of civil procedure apply to all civil actions and proceedings. If the legislature had intended to enact a right to a jury trial in TPR cases based on grounds such as continuing need, failure to assume, and abandonment, equivalent to the constitutional criminal jury trial right, it would have expressly done so, as it did in Chapter 980.[5] In the nearly twenty years since *Steven V.* was decided, the legislature has not amended Chapter 48 to include any alternative procedures to summary judgment under Wis. Stat. § 802.08 for any TPR ground.

In sum, C.S. presents no substantial or compelling reason for this court to overrule its previous holding in *Steven V.* that was not already rejected by this court in that decision. This failure warrants denial of the petition for review.

B. *Methodology for Summary Judgment and Ineffective Assistance of Counsel Are Well Established.*

Examining the facts of this case would not offer any further development of the requirements for summary judgment in TPR cases because the Court of Appeals decision is based on sound application of the undisputed facts to well-established principles, namely the methodology for identifying a material issue of fact. The Court of Appeals correctly found that contrary to C.S.'s assertion, this case was not analogous to *Brown County Human*

[5] As discussed in *Steven V.*, 2004 WI 47, fn. 5, under Wis. Stats. §§ 980.03 and 980.05(1m), the legislature expressly created the statutory equivalent of a criminal jury trial right in a civil proceeding.

Services v. B.P., 2019 WI App 18, 386 Wis. 2d 557, 927 N.W.2d 560. Unlike C.S.'s vague allegations here that the county did not do enough to help him, the mother in *B.P.* alleged very specific facts in opposition to summary judgment. Specifically, she argued that a genuine issue of material fact existed as to whether there was good cause for her not visiting her child, namely, that her lack of transportation prevented her from traveling the over 100 mile distance between her place of residence and the child's placement. *Portage County DH&HS v. C.S.*, 2020AP1090 at ¶ 32, fn. 5; App. 18.

The Court of Appeals decision addressed the issue in this case relying on well-settled principles and an adept contrast between the facts of C.S.'s case versus those presented in *B.P.* The Court of Appeals examined the three types of evidence C.S. alleged created a factual dispute as to whether the County made reasonable efforts and rejected each in turn.

First, the Court of Appeals rejected C.S.'s argument that the County's motion for summary judgment contained an "implicit concession" it failed to provide AODA services while he was incarcerated. The Court of Appeals stated:

> C.S. provides no explanation, argument, or legal support for the proposition that the County has the authority or ability to require the Department of Corrections or any other non-county entity to provide AODA treatment. Thus, even assuming that C.S. is correct that the County did not provide AODA services to him while he was incarcerated, his argument on this point is undeveloped and I therefore do not consider it.

Portage Cnty DH&HS v. C.S., 2020AP1090, unpublished slip op. (Feb. 23, 2023) at ¶ 28; App.15.

Next, the Court of Appeals addressed C.S.'s argument that counsel was ineffective in failing to utilize three of his responses to the County's requests for admissions to allege that genuine issues of material fact existed as to whether the County made reasonable efforts. The Court of Appeals noted that none of these discovery responses created an issue of material fact, stating:

> To the extent that he was not provided AODA treatment while at the Racine [DOC] facility because of the lack of a facilitator, C.S. fails to show how this demonstrates that the County ... failed to make reasonable efforts to make AODA treatment available.
> ...
> C.S.'s [discovery] response shows that the County provided C.S. information about local AODA support meetings such as Narcotics Anonymous. That C.S. refused to take advantage of such treatment, allegedly due to a belief that such services "were a good place to 'score drugs,'" does not create a genuine issue of material fact as to whether the County made reasonable efforts.
> ...
> Likewise, C.S.'s statements that he was "sick of the system" and that the County "was not helping him get [E.T.S.] back," do not raise genuine issues of material fact. These statements reflect C.S.'s opinion rather than a failure on the part of the County to make reasonable efforts.

Portage Cnty DH&HS v. C.S., 2020AP1090, unpublished slip op. (Feb. 23, 2023) at ¶¶ 30, 31, 32; App.16.

The Court of Appeals then rejected C.S.'s final argument that counsel provided ineffective assistance by failing to identify and utilize an AODA evaluation to show that the County failed to provide reasonable services. This AODA assessment was undisputedly completed for C.S. for purposes of his criminal cases, specifically, the possibility of revocation of his extended supervision. The Court of Appeals found that the critiques within the evaluation, when read in context, reflect critiques of the corrections system, not the County. It then held, "C.S. has failed to show that counsel was deficient in failing to argue that this evaluation creates a genuine issue of material fact as to

whether the County made reasonable efforts." *Portage Cnty DH&HS v. C.S.*, 2020AP1090, unpublished slip op. (Feb. 23, 2023) at ¶¶ 33-34; App.15-16.

In this case, the Court of Appeals found that C.S. did not establish that his counsel was ineffective in not arguing, based on the evidence discussed above, that genuine issues of material fact exist as to whether the County made reasonable efforts, because the evidence asserted by C.S. on appeal do not rise to the level of genuine issues of material fact. This case does not call for application of a new doctrine but is instead an example of the Court of Appeals applying well-settled principles to a factual situation. Nor is this a novel case. It is a case simply challenging summary judgment to a specific set of facts. As such, review by this Court under Wis. Stat. § 809.62(1r)(c)1. or 2. is not warranted. Respectfully, the County would request that the Petition for Review be denied.

II. *C.S.'s Failure to Address Prejudice Under the Strickland Test is Alternate Grounds to Support the Result in the Court of Appeals*

C.S., rather than attacking the validity of the summary judgment motion directly, has consistently framed his argument that there were material issues of fact and therefore his counsel was ineffective in failing to identify those factual issues and utilize them in a response to the summary judgment motion. Ineffective assistance of counsel claims in TPR matters are reviewed under the same test as criminal cases, set forth in *Strickland v. Washington*, 466 U.S. 668 (1984); *see Nicole W.*, 299 Wis. 2d 637, ¶ 33. Under *Strickland*, to show that counsel was ineffective, a parent must demonstrate two prongs: (1) counsel

was deficient; and (2) counsel's deficiency prejudiced the parent. *Strickland*, 466 U.S. at 687.

Applying the *Strickland* test to the question of ineffective assistance of counsel, the circuit court found that C.S. failed both prongs of the test, *i.e*, that counsel was not ineffective and there was no prejudice. App. 65. However, C.S. only addressed the deficiency prong in his appellate brief. The Court of Appeals addressed the second prong, stating, "[a]s to prejudice, implicit in C.S.'s ineffective assistance claim is the assumption that, had counsel made such arguments, there would have been a reasonable probability that the circuit court would not have granted partial summary judgment to the County." *Portage Cnty DH&HS v. C.S.*, 2020AP1090, unpublished slip op. (Feb. 23, 2023) at ¶ 23; App.14. After finding that C.S. failed to establish the first prong of the *Strickland* test, the Court of Appeals did not address the County's argument that C.S. also failed to establish prejudice. *Id.* citing *Strickland* at 697.

C.S.'s failure to develop a full and distinct argument as the prejudice prong of the *Strickland* test is clear alternative grounds for which the Court of Appeals could have ruled against C.S. on that issue. Wis. Stat. § 809.62(3)(d); *see also State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (finding the court of appeals need not address undeveloped arguments).

CONCLUSION

For these reasons, the County respectfully requests that this Court deny the petition for review.

Dated this 6th day of April, 2023.

Respectfully Submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in 809.19(8)(b) and (bm) and (8g) as to form, pagination, and certification. This response to petition for review is produced with a proportional serif font. The length of this petition is 6,356 words.

CERTIFICATE OF COMPLIANT 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 6th day of April, 2023.

Tiffany R. Wunderlin
Assistant Corporation Counsel – Portage County