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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2023AP001382

In re the Termination of Parental Rights to S.L., a person under the age of 18:

SHEBOYGAN COUNTY D.H. & H.S.,

Petitioner-Respondent,

v.

A.P.,

Respondent-Appellant-Petitioner.

PETITION FOR REVIEW

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TABLE OF CONTENTS

ISSUE PRESENTED

> Whether A.P.'s trial counsel provided ineffective assistance of counsel when she failed to file any affidavit (or any other evidence) in opposition to Sheboygan County Department of Health and Human Services' motion for summary judgment, as required pursuant to Wis. Stat. § 802.08(3).

The circuit court[1] granted partial summary judgment on the ground of abandonment. The postdisposition court denied A.P.'s motion. The court of appeals affirmed, holding that partial summary judgment was appropriate, and that A.P.'s did not establish that her trial counsel made a serious enough error that she was not functioning as counsel, "largely because A.P. herself hindered her trial counsel's ability to act on her behalf in regard to responding to the summary judgment motion." *Sheboygan Cnty. Dept. of Health and Human Servs. v. A.P.*, No. 2023AP1382, unpublished slip op. ¶23 (WI App Feb. 7, 2024). (App. 19).

[1] To differentiate, this petition will refer to the court that decided the summary judgment motion and issued the order terminating A.P.'s parental rights as "the circuit court," and the court that heard A.P.'s postdisposition motion as the "postdisposition court."

CRITERIA FOR REVIEW

The circuit court granted the Government's motion for partial summary judgment on the termination of parental rights ground of abandonment under Wis. Stat. § 48.415(1)(a)2. In the circuit court and on appeal, A.P. argued that this partial summary judgment violated her substantive due process rights because her trial attorney provided ineffective assistance in a number of ways, including failing to comply with the statutory requirement to file a statutorily sufficient response to a summary judgment motion. Counsel incorrectly believed, and advised A.P., that she had a strong likelihood of defeating the summary judgment motion on the inadequate response.

This court should accept review and hold that it is a violation of a parent's substantive due process rights when the parent's attorney fails to present relevant facts in a response to a partial summary judgment motion "in TPR cases premised on [a] fact-intensive ground[ ] for parental unfitness" such as abandonment. *See Steven V. v. Kelley H.*, 2004 WI 47, ¶36, 271 Wis. 2d 1, 678 N.W.2d 856.

The court of appeals in this case held that it was "not persuaded that A.P.'s counsel in failing to submit an affidavit in opposition to the Department's summary judgment motion,"—a statutory requirement—made an error so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment given the

circumstances of this case." *A.P.*, No. 2023AP1382, ¶23 (internal citation omitted). (App. 19). The court made this conclusion due to what it identified to be A.P.'s failures, concluding that she hindered counsel by not staying in good contact and failing to provide the relevant information to counsel. *Id.* The court of appeals made this determination without citation to any law as to the requirements on parents in TPR actions or litigants generally, thus inventing new requirements in violation of A.P.'s due process rights.

A ruling on this issue will help clarify and harmonize the law in termination of parental rights cases, which are increasingly being decided on summary judgment rather than a fact-finding hearing before a court of jury. Wis. Stat. § (Rule) 809.62(1r)(c). Because this claim raises an issue of constitutional due process, a decision also implicates real and significant questions of constitutional law. Wis. Stat. § (Rule) 809.62(1r)(a).

STATEMENT OF FACTS

This is an appeal from an order terminating A.P.'s parental rights to her daughter, S.L.[2] (R.90:1-3; 123:1-4; App. 29-31). A.P. gave birth to S.L. on December 21, 2018. (R.4:3). S.L. was born drug-affected, and was placed with her maternal grandmother under a protective plan when she was

[2] Because the record in this case is required by law to be confidential, this brief refers to the parties by their initials. *See* Wis. Stat. § 809.19(1)(g).

discharged from the hospital two days after her birth. (R.4:11; 110:27). When S.L. was four and a half weeks old, Sheboygan County Department of Health and Human Services took custody of her and placed her in the home of her maternal great aunt (R.110:27-28, 37). S.L. remained at this placement from then on. (R.110:28).

The Government filed a child in need of protection or services (CHIPS) petition shortly after S.L.'s birth. (R.4:3). The circuit court entered a CHIPS dispositional order continuing the out of home placement on September 16, 2019. (R.4:4).

A.P. and J.L., S.L.'s father, participated in supervised visitation with their daughter until August 4, 2021, when the county social worker "put their in-person visitation on hold." (R.4:9). In a letter to A.P. and J.L., the social worker wrote:

> I am placing your visits with [S.L.] on hold effective today, (August 04, 2021), until you meet with me at the Sheboygan County Department of Health and Human Services. I advised [foster mother] of this. If you show up at her residence, I have advised [foster mother] not to allow you into her home.
>
> If you cause a disturbance, I have instructed [foster mother] to call law enforcement. At this time I am not aware of any of your current circumstances including your current living arrangements, employment, AODA status, overall day to day functioning, etc. due to your lack of cooperation with the Department. Once

> you meet with me to discuss these things, visits can be re-established.

(R.77:7). The social worker did not, at any point prior to the termination of A.P.'s parental rights, allow A.P.'s visitation with S.L. to resume. (R.110:24).

On June 16, 2022, the Sheboygan County Department of Health and Human Services ("the Government" or "the Department") filed a petition to terminate the parental rights of A.P. and J.L. to S.L. (R.4:1). As to each parent, the petition alleged three grounds for termination: abandonment as defined in Wis. Stat. § 48.415(1)(a)2., continuing need of protection and services as defined in Wis. Stat. § 48.415(2)(a), and failure to assume parental responsibility as grounds for termination as defined in Wis. Stat. § 48.415(6)(a). (R.4:1, 3-11).

Both parents contested the petition, and the Government filed a motion for partial summary judgment as to unfitness. (R.55). In its motion, the Government argued that there was no material dispute as to one ground for termination, abandonment, and filed affidavits in support of the motion. (R.56:1; 57; 58; 59; 60).

The Government's brief in support of summary judgment alleged that: (1) S.L. had been placed outside A.P.'s home by a CHIPS order containing the required notice concerning grounds to terminate parental rights; and (2) the parents had not visited S.L. since August 1, 2021, and their last communication with S.L. was on August 25, 2021, when A.P. texted the foster mother asking her to tell

S.L. "we love her." (R.56:1-2). The Government also asserted that A.P. and J.L. were not prohibited "by any judicial order from visiting or communicating with [S.L.]." (R.56:2). Finally, the Government argued that it did not believe there was "anything near 'Good Cause'" for A.P.'s failure to visit and communicate with S.L. (R.56:6).

In support of its motion for summary judgment as to abandonment during the period of time beginning on August 25, 2021, and ending on June 13, 2022, the Government filed affidavits from the foster mother, the foster father, the social worker in charge of S.L.'s case, and the Juvenile Court Clerk. (R.56:1, 57; 58; 59; 60).

J.L. stipulated as to his parental unfitness and waived his right to a trial on the issue. (R.67:1-2). A.P. opposed the Government's motion for partial summary judgment, arguing good cause, and attaching two exhibits in support of her response. (R.63; 64; 65). A.P.'s response claimed that the social worker prevented her from visiting S.L. and there was additional evidence of her communication with S.L.'s foster mother. (R.65:1-5). A.P.'s response therefore argued both that she had good cause for failing to visit or communicate with S.L. and that telephone communication would have been meaningless due to S.L.'s age. (R.65:1-5). A.P.'s trial counsel filed two "exhibits" to the response brief—two pages that appeared to be Facebook messages, and two pages from the eWiSACWIS notes. (R.63; 64).

The Government filed a reply brief, along with supplemental affidavits, in support of its motion for partial summary judgment. (R.74; 75; 76; 77). In its reply brief, the Government argued that A.P. failed to set forth facts showing a genuine issue of material fact because her response was not supported by affidavits or other evidence, and asserted that there was no issue of material fact as to good cause, as supported by the additional affidavits. (R.74; 75:2-10; 76; 77). Two of the affidavits attached portions of the eWiSACWIS notes. (R.76; 77).

Specifically, the Government argued in its reply that it had not denied A.P. visitation despite the social worker's decision to put her visits on hold because A.P. did not "present[] any evidence that there were factors beyond her control that prevented her from" meeting the social worker's requirements. (R.75:3-9). The Government also argued that A.P. had not proven that communication with S.L. would have been meaningless due to S.L.'s age and asserted that A.P. could have communicated or sent messages to S.L. (R.75:10).

On February 10, 2023, the circuit court held a hearing on the motion, and found that A.P. had not demonstrated a material issue of fact as to good cause. (R.111:15-17; App. 26-28). The circuit court granted partial summary judgment as to A.P., and accepted J.L.'s stipulation. (R.82; 111:17, 26; App. 28).

Following a dispositional hearing, the circuit court entered an order terminating both A.P.'s and J.L.'s parental rights to S.L. on May 1, 2023. (R.90; 110:1-96; App. 29-31).

A.P. filed a timely notice of intent to seek postdisposition relief pursuant to Wis. Stat. § 809.107(2)(bm), and counsel was appointed to represent her on appeal. (R.90; 105; App. 29-31). On July 31, 2023, A.P. filed a timely notice of appeal pursuant to § 809.107(5)(a). On September 14, 2023, A.P. filed a motion to remand the case to the circuit court for the purpose of postdisposition fact finding, pursuant to Wis. Stat. § (Rule) 809.107(6)(am). On September 18, 2023, the Court of Appeals granted the motion for remand.

On September 25, 2023, A.P. filed a postdisposition motion alleging that her trial attorney provided ineffective assistance when counsel failed to file an affidavit in opposition to the Government's summary judgment motion and failed to advise A.P. of the need to do so. (R.138:6-11; App. 37-42). The circuit court held evidentiary hearings on October 17, 2023, in person, and on October 19, 2023, remotely by video. (R.166:1-3; 167:2).

A.P. called her trial counsel, Attorney Kate Seifert, to testify at the hearing on October 17, 2023. (R.166:2, 5-41). Attorney Seifert testified that she had reviewed the discovery in A.P.'s case, including the eWiSACWIS notes, and that she had filed two pages from those notes as an "exhibit" to her summary judgment response. (R.166:7-8). Attorney Seifert

testified that she did not include any other notes from the discovery because she did not have an opportunity to communicate with A.P. and get her "perspective" on the discovery. (R.166:15). However, from trial counsel's recollection, there were other notes containing information about contacts A.P. had with the social worker, and counsel did not have any reason to doubt that there were other notes containing evidence of contacts A.P. had with the social worker and S.L.'s foster mother regarding S.L. (R.166:16-21).

Trial counsel testified that she believed A.P. had a strong chance of prevailing on summary judgment "because of the letter that [the social worker] had issued," and counsel's belief that A.P. "took that as a suspension of her visitation, and I don't think [A.P.] could differentiate between a directive from a social worker and a court order." (R.166:22). This was because trial counsel "th[ought] the letter itself established the good cause." (R.166:22).

Trial counsel also testified that prior to filing the summary judgment response, A.P. had told her about a visit she had with S.L. on or around Christmas in 2021. (R.166:22-23). A.P. instructed counsel not to use that evidence, because she "didn't want to alienate [the foster mother] or throw her under the bus because she knew that [the foster mother] was instructed not to let her see [S.L.]." (R.166:23). After that conversation, A.P. emailed counsel to provide photographs of her Christmas 2021 visit with S.L. (R.166:23-24). Attorney Seifert testified that she did not advise A.P. to provide the information and

photographs to the circuit court in response to the summary judgment motion, despite sending her an email a couple of days prior to filing the response. (R.166:25).

Attorney Seifert testified that she did not, at any time, and despite having multiple contacts with A.P. to discuss the Government's summary judgment motion, inform A.P. of the need to provide an affidavit to oppose summary judgment. (R.166:28-29). She further testified that she was aware at the time of the requirements of Wis. Stat. § 802.08(3), to file an affidavit, deposition, or answer to interrogatories. (R.166:29). Despite that knowledge, trial counsel did not present evidence in the form of an affidavit, deposition or answer to interrogatories. (R.166:29-30). Also despite that knowledge, counsel believed that her response to the Government's summary judgment motion was sufficient. (R.166:30).

Counsel claimed that she did not ask A.P. for an affidavit because she did not have time to do so, despite talking to A.P. on the phone and emailing A.P. prior to filing the response. (R.166:30-31). Counsel also testified that she was aware that she could have moved for a continuance under Wis. Stat. §§ 48.315(2) and 802.08(4), but that she did not do so. (R.166:31).

A.P. testified at the hearing on October 19, 2023. (R.167:2, 4-5). She testified that she "briefly" spoke with Attorney Seifert on the phone about the Government's summary judgment motion, at which time she told her trial attorney that she had visited S.L. at least once during the alleged abandonment

period. (R.167:6). A.P. then emailed photographs she had of S.L. during that visit and screenshots of some Facebook messages between herself and the foster mother. (R.167:6-7). A.P.'s trial attorney never told her that she had to sign an affidavit, or she would lose the summary judgment motion. (R.167:9). Further, A.P. would have signed an affidavit in opposition to the Government's summary judgment motion if trial counsel had informed her she had to. (R.167:9).

A.P. also testified that she spoke with S.L. on the phone during the time period when the social worker was not allowing her to visit. (R.167:7). A.P. believed she had good cause for any period of time when she did not visit or communicate with S.L. during the alleged abandonment period, as she was experiencing many struggles in her life during that time and did not believe the social worker would allow her to resume visits with S.L. if A.P. simply met with the social worker. (R.167:7).

A.P. further testified that the social worker did not give her a specific list of things that she would have to do in order to resume visits with S.L. (R.167:17). A.P. did not believe that if she simply met with the social worker, as it stated in the letter, that she would be allowed to visit with S.L. because the social worker would not guarantee that she would be able to see S.L. (R.167:13). The social worker specifically told A.P. that simply meeting with her was not going to get A.P. visits with S.L. (R.167:17).

A.P.'s postdisposition counsel argued that had A.P. been properly advised by Attorney Seifert, she would have been able to demonstrate a genuine issue of material fact, and the Government's summary judgment motion would have been denied. (R.167:25). The Government argued in response that A.P. demonstrated a "consistent lack of accountability for her own actions" and that the trial court had considered "nearly all of the evidence and arguments" A.P. later raised postdisposition. (R.167:26).

The postdisposition court found that Attorney Seifert "was aware of the requirements of Wisconsin Statute 802.08 to file an affidavit in response to the summary judgment motion." and she "did not inform her client of the requirement." (R.167:32; App. 45). Further, A.P.:

> missed an in-person meeting sometime in November [20]22, after that court date where the [briefing] schedule was provided, without calling prior to that meeting to cancel and that she also did not respond to phone calls and correspondence from Attorney Seifert's office until January of 2023, immediately before the response was due.

(R.167:32-33; App. 45-46). Attorney Seifert did not warn A.P. "that the affidavit was required, and she did not request a continuance in order to attempt to have more time to establish contact with [A.P.]." (R.167:33; App. 46). However, trial counsel was ultimately in contact with A.P. prior to filing her summary judgment response. (R.167:33; App. 46).

As to the photos of the Christmas 2021 visit, the postdisposition court found that trial counsel did not include the information or photographs in her summary judgment response as part of her "trial strategy; [because] that was at the request of [A.P.]." (R.167:33; App. 46). The circuit court concluded that A.P. had not demonstrated prejudice, reasoning as follows:

> it's clear that Judge Hoffman considered [A.P.]'s arguments and made a decision that -- and specifically her arguments that there was good cause for her to not visit her child, which are the arguments that she indicates should have been included in affidavit, it's clear that the Court considered those arguments even without the affidavit.

(R.167:34; App. 47). The postdisposition court further concluded that despite considering Attorney Seifert's good cause arguments, the circuit court had not found the arguments "credible" and ruled that A.P. had "not demonstrate[d] a material issue of fact and dispute as the visits were put on hold until [A.P.] met with the social worker, not put on hold indefinitely." (R.167:34; App. 47).

Finally, the postdisposition court concluded that it could not find that there is a reasonable probability that the results of the proceeding would have been different had trial counsel filed an affidavit, because "[t]he fact that the affidavit was not filed did not prevent the Court from ruling on the arguments that [A.P.] indicated should have been included in the affidavit" and that "the omission of the filing of the

affidavit was not outside the range of professionally competent assistance." (R.167:35; App. 48). Accordingly, the postdisposition court denied A.P.'s motion. (R.157; 167:35; App. 48, 50).

A.P. appealed from the summary judgment and grounds order, and the denial of her postdisposition motion. The court of appeals affirmed. *A.P.*, No. 2023AP1382, ¶1. (App. 5). After a lengthy summary of the facts, the court of appeals concluded that A.P.'s trial counsel did not provide constitutionally ineffective assistance because A.P. failed to communicate with counsel until the day before the summary judgment response was due, and failed to provide information relevant to abandonment and good cause. *Id.*, ¶¶23-26. (App. 19-21). The court of appeals also addressed prejudice, concluding that counsel's failure to file an affidavit was not prejudicial because the circuit court "fully considered A.P.'s argument as to good cause at the grounds stage despite [counsel] not having filed an affidavit." *Id.*, ¶27. (App. 21-22).

A.P. then filed a motion for reconsideration, arguing that the court of appeals made several factual and legal errors. The court of appeals denied A.P.'s motion, stating that the motion did "not persuade [it] that reconsideration is warranted." (App. 3).

A.P. petitions from the court of appeals' decision.

ARGUMENT

This court should accept review and hold that partial summary judgment was not appropriate in A.P.'s case because trial counsel provided constitutionally ineffective assistance by failing to present genuine issues of material fact relevant to abandonment.

A. Introduction and standard of review.

A.P. was found to be an unfit parent based upon the circuit court's conclusion that the Government was entitled to summary judgment on the abandonment ground. (82:1). That determination cannot stand. The Government would not have been entitled to partial summary judgment had A.P.'s trial counsel provided adequate assistance. Therefore, terminating her parental rights on this basis violated her right to substantive due process. *See* Fourteenth Amendment and Article 1, Sections 1 and 8 of the Wisconsin Constitution. Because A.P. is entitled to a trial on the abandonment ground and good cause, this court should reverse the summary judgment order.

"Parental 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.*, 2004 WI 47, ¶21, 271 Wis. 2d 1, 678 N.W.2d 856.

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.

"Wisconsin has a two-part statutory procedure for the involuntary termination of parental rights." *Steven V.*, 271 Wis. 2d 1, ¶24. In the grounds phase, "the petitioner must prove by clear and convincing evidence that one or more of the statutorily enumerated grounds" for parental unfitness exists. *Id.* At this stage in the proceedings, "the parent's rights are paramount." *State v. Bobby G.*, 2007 WI 77, ¶1 n.2, 301 Wis. 2d 531, 734 N.W.2d 81. If the petitioner meets its burden of proving grounds and the circuit court makes a finding of parental unfitness, then the case proceeds to the dispositional phase, at

which time the circuit court must decide whether termination of parental rights is in the best interests of the child. *Steven V.*, 271 Wis. 2d 1, ¶26.

This appeal involves only the grounds phase and only one of the statutorily enumerated grounds: abandonment. Wisconsin Stat. § 48.415(1)(a) provides five ways to prove abandonment. Relevant here is Wis. Stat. § 48.415(1)(a)2., which states that abandonment is established by proof of the following:

> That the child has been placed, or continued in a placement, outside the parent's home by a court order containing the notice required by s. 48.356(2) or 938.356(2) and the parent has failed to visit or communicate with the child for a period of 3 months or longer.

Importantly, even if the elements of abandonment are proven, abandonment is not established if the parent demonstrates by a preponderance of the evidence both: (1) that she had good cause for failing to visit or communicate with the child, and (2) that if she proves good cause for failing to communicate with the child based on evidence that the child's age or condition would have rendered communication with the child meaningless, that she either communicated about the child with the person(s) who had physical custody of the child or the agency responsible for the care of the child, or had good cause for failing to do so. Wis. Stat. § 48.415(1)(c). This is referred to as the "good cause" exception.

B. Summary judgment.

Appellate courts will independently review the circuit court's decision granting partial summary judgment, "applying the same methodology as the circuit court but benefiting from the circuit court's analysis." *State v. Bobby G.*, 2007 WI 77, ¶36, 301 Wis. 2d 531, 734 N.W.2d 81.

The petitioner in a termination of parental rights proceeding must ordinarily carry its burden of proving abandonment—or another statutory ground for parental unfitness—at a fact-finding hearing. Wis. Stat. § 48.424. However, "[p]artial summary judgment at the grounds phase of a termination of parental rights proceeding is permitted." *Bobby G.*, 301 Wis. 2d 531, ¶39. In this context, as in other civil proceedings, "[s]ummary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Id.*, ¶36; Wis. Stat. § 802.08(2).

Therefore, partial summary judgment is appropriate in the unfitness phase of a TPR case only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Wis. Stat. § 802.08(2); *Steven V.*, 271 Wis. 2d 1, ¶6. "The court takes evidentiary facts in the record as true if not contradicted by opposing proof." *Lambrecht v.*

Estate of Kaczmarczyk, 2001 WI 25, ¶23, 241 Wis. 2d 804, 623 N.W.2d 751.

The movant has the burden of establishing the absence of a genuine issue as to any material fact. *Batz v. Montgomery Estates, Inc.*, 163 Wis. 2d 973, 984, 473 N.W.2d 506 (Ct. App. 1991). Once the movant establishes a prima facie case for summary judgment, however, the burden shifts to the opposing party to set forth facts showing a genuine issue for trial. *Id.* The circuit court must resolve any reasonable doubt as to the existence of a genuine issue of material fact against the moving party. *Clay v. Horton Mfg. Co., Inc.*, 172 Wis. 2d 349, 354, 493 N.W.2d 379 (Ct. App. 1992).

As the Wisconsin Supreme Court has explained, determining parental unfitness often "require[s] the resolution of factual disputes by a court or jury at [a] fact-finding hearing, because the alleged grounds for unfitness involve the adjudication of parental conduct vis-à-vis the child." *Steven V.*, 271 Wis. 2d 1, ¶36. Thus, summary judgment is generally "inappropriate in TPR cases premised on these fact-intensive grounds for parental unfitness"—such as abandonment. *Id.*

C. Ineffective assistance of counsel.

A parent's statutory right to counsel in a termination proceeding, as guaranteed by Wis. Stat. § 48.23(2), includes the right to effective assistance of counsel. *State v. Shirley E.*, 2006 WI 129, ¶38, 298 Wis. 2d 1, 724 N.W.2d 623. Counsel "has a duty to

provide his [or her] client with zealous, competent and independent representation." *Id.*

When a parent alleges that she was denied effective assistance of counsel, she must show that counsel's performance was deficient and that the deficient performance was prejudicial. *R.A. v. State*, 168 Wis. 2d 995, 1005, 485 N.W.2d 52 (1992), (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). Prejudice is shown where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Questions of ineffective assistance of counsel present a mixed question of law and fact. *Id.*, ¶21 (citing *State v. Trawitzki*, 2001 WI 77, ¶19, 244 Wis. 2d 523, 628 N.W.2d 801). The reviewing court will defer to the circuit court's findings of fact unless clearly erroneous. *Id.* Whether trial counsel's performance was deficient as a matter of law is a question the court reviews de novo. *Id.*

D. A.P.'s trial counsel performed deficiently when she failed to obtain and file an affidavit in response to the Government's summary judgment motion.

It is undisputed that A.P.'s trial counsel failed to meet the statutory requirement to file an affidavit or other evidence in opposition to the Government's motion for summary judgment. (R.65; 166:29-30). Both

the postdisposition court and court of appeals gloss over counsel's failure, focusing instead on failures attributed to A.P. However, trial counsel's failure constitutes per se deficient performance because Wis. Stat. § 802.08(3) requires more than a bare assertion of one or more genuine issue of material fact for trial. Further, trial counsel provided no strategic reason to allege the existence of genuine issues of material fact in a responsive brief, but fail to properly support those allegations by affidavit or other evidence.

Wis. Stat. § 802.08(3) provides that "when a motion for summary judgment is made and supported" by affidavits "made on personal knowledge . . . set[ting] forth such evidentiary facts as would be admissible in evidence. . . . [,]" to oppose the motion, "an adverse party *may not rest upon the mere allegations or denials of the pleadings* but the adverse party's response, *by affidavits or as otherwise provided in this section*, must set forth specific facts showing that there is a genuine issue for trial." (Emphasis added). The statute also explains, unequivocally, that "[i]f the adverse party does not so respond, summary judgment, if appropriate, shall be entered against such party." Wis. Stat. § 802.08(3).

The Government's motion for summary judgment set out facts, with supporting affidavits and documentation, as to the elements of abandonment. (R.55; 56; 57; 58; 59; 60). The summary judgment motion argued that A.P. had abandoned S.L. during a period beginning on

August 25, 2021, and ending on June 13, 2022. (R.56:1). Specifically, the motion and supporting affidavits alleged that A.P. had not visited S.L. since August 1, 2021, that the last communication A.P. had had with S.L. was on August 25, 2021, and that A.P. was not prohibited from visiting or communicating with S.L. "by any judicial order." (R.56:2).

Trial counsel's brief in opposition to the Government's motion for summary judgment alleged that there were genuine issues of material fact on abandonment and attached two documents, which counsel referred to as exhibits. (R.63; 64; 65:1). Counsel's brief argued that A.P. had communicated with S.L.'s placement provider during the alleged abandonment period and attached "Exhibit 1," an image that appeared to show messages between A.P. and the placement provider, and "Exhibit 2," a social worker's note containing the contents of a letter instructing A.P. on August 4, 2021, that her visits were on hold. (R.63; 64; 65:1). A.P.'s brief also *asserted* that she had good cause for failing to communicate or visit with S.L., but did not point to any evidence on good cause. (R.65:2).

Despite testifying that she was aware of the requirements of Wis. Stat. § 802.08(3), trial counsel did not file an affidavit, deposition or answer to an interrogatory as required by § 802.08(3). (*See* R.63; 64; 65; 166:29-30). Nor did trial counsel advise A.P. that she had to sign an affidavit in order to oppose the summary judgment motion, despite having multiple opportunities to do so. (R.166:28-29). A.P. testified

that she would have provided an affidavit with the facts that she testified to had counsel told her it was necessary to avoid being found unfit. (R.167:9). Further, despite counsel testifying that she was aware she could have requested a continuance under Wis. Stat. §§ 48.315(2) or 802.08(4), to obtain the necessary affidavit, counsel did not do so. (R.166:31).

In addition, counsel testified that she advised A.P. that she had a strong chance of prevailing on summary judgment, and at no point, despite multiple contacts with A.P. related to the Government's summary judgment motion, by phone, letter and email, did counsel inform A.P. of the need to provide an affidavit. (R.166:22, 25). Instead, in her testimony, counsel blamed her failure to advise A.P. of the law and to file a legally adequate response on her inability to meet and confer with A.P. In short, counsel blamed A.P. for her deficient performance.

Without citation to any authority, the court of appeals concluded that counsel did not perform deficiently "largely because A.P. herself hindered her trial counsel's ability to act on her behalf in regard to responding to the summary judgment motion because she failed to attend meetings and failed to remain in contact with her attorney until the day prior to her deadline to respond." *A.P.*, No. 2023AP1382, ¶23. Yet this does not explain why counsel failed to advise A.P. as to the legal requirements when A.P. did call, and later email, counsel leading up to the deadline for the summary judgment response. In fact, both A.P. and trial counsel testified that they communicated

multiple times prior to the filing of the summary judgment response. (166:28; 167:6).

By failing to comply with the statutory requirements for opposing a summary judgment motion, A.P.'s counsel performed deficiently as a matter of law. Counsel's summary judgment response was legally deficient because summary judgment "shall be entered against [a] party" that "rest[s] upon the mere allegations or denials of the pleadings" rather than filing an affidavit, deposition, or answer to interrogatories. *See* Wis. Stat. § 802.08(3). A competent attorney would have understood what was required under the summary judgment standard, and followed through on the requirement. If she was not able to produce an affidavit, at the very least, a competent attorney would have informed the client of the necessity of an affidavit to oppose summary judgment, and requested a continuance.

In addition, counsel should have argued that A.P. had good cause for failing to visit or communicate with S.L.—during any period in which she actually failed to do so—on the basis of the social worker's letter failed to clearly communicate the conditions for visitation. the Department wanted A.P. to meet unknown requirements before she renewed visits with S.L., but that it failed to both advise her of what was required and provide services so that A.P. could attempt meet those unknown requirements. *See, e.g.*, *Brown County v. B.P.*, 2019 WI App 18, ¶36, 386 Wis. 2d 557, 927 N.W.2d 560 (reversing grant of

summary judgment in part because "the record is also unclear as to what services the Department wanted [the mother] to complete before she would be permitted to visit the child, and if [the mother] had the opportunity to complete those services").

Counsel could have, and should have, supported this good cause argument with an affidavit from A.P. A.P. testified that she received the letter from the department and that she had reached out to the social worker to set up meetings, but knew that there would be more requirements because the social worker would not allow her to visit S.L. immediately after the scheduled meetings. (R.167:8, 13-14).

The court of appeals concluded that counsel's failure to present this evidence did not constitute deficient performance because it was "A.P. who failed to provide trial counsel with relevant information regarding the alleged communication with [S.L.] that was alluded to in her summary judgment response brief." However, it is not A.P.'s burden to demonstrate that she knew what information would be relevant under the law, and provided it to trial counsel without being asked. It is the attorney's duty to investigate, especially as here, the issue of good cause was a basic and obvious issue for counsel to ask her client about. *See State v. Thiel*, 2003 WI 111, ¶¶44-46, 264 Wis. 2d 571, 665 N.W.2d 305.

As in *Thiel*, the issue here that counsel failed to investigate was "paramount to th[e] case" and counsel should have, at bare minimum, asked A.P.

basic questions about what was going on in her life that might go to good cause. *See id.*, ¶46. While an attorney asking his or her client questions may hardly count as an investigation, it is the bare minimum that counsel should have done here. To attribute the failure to A.P., despite the fact that she communicated with her counsel multiple times, is contrary to the law.

In denying A.P.'s postdeposition motion, the postdisposition court found that the circuit court "considered [A.P.'s] arguments even without the affidavit." (R.167:34; App. 47). However, the circuit court began its summary judgment ruling by citing the summary judgment standard—"And to defeat a motion for summary judgment, the opposing party must set forth facts showing there is a genuine issue for trial." (R.111:12; App. 23).

The circuit court then specifically found that the Government met its burden with respect to abandonment "through its affidavits and submissions" to demonstrate "that there is no material fact in dispute as to that prong." (R.111:14; App. 25). Further, the circuit court held that A.P. had not met her burden to establish a genuine issue of material fact as to good cause on the basis of the arguments and attachments alone. (R.111:15-16; App. 26-27). Therefore, even if it could be argued that the circuit court considered some of A.P.'s arguments, unlike the postconviction court's ruling, counsel's deficient performance was not cured.

E. A.P. was prejudiced by her trial counsel's deficient performance because had counsel filed an affidavit, she would have demonstrated genuine issues of material fact as to abandonment and good cause.

A.P. was prejudiced by trial counsel's failure because she would have been able to demonstrate a genuine issue of material fact as to abandonment, and would have created a genuine issue of material fact as to good cause, had trial counsel advised her that an affidavit was needed to defeat the summary judgment motion. First, the evidence from the fact-finding hearings demonstrates that A.P. would have been able to demonstrate a genuine issue of material fact as to abandonment for a number of reasons.

Both Attorney Seifert and A.P. testified that they had evidence that A.P. had visited S.L. during the abandonment period; specifically, around Christmas in 2021. (R.166:23-24; 167:6). A.P. provided photographs of her Christmas 2021 visit with S.L. to Attorney Seifert and testified that although she was not in the two pictures, she was present when they were taken. (R.164:1-3; 167:6). A.P. also testified that she spoke with S.L. during the abandonment period. (R.167:7). In addition, there were numerous instances of contact between A.P. and the foster mother, and A.P. and the social worker, about S.L. in the eWiSACWIS notes. These included:

- On August 25, 2021, the social worker called A.P. and the two set up a meeting to resume visits with S.L. (R.139:2).

- On August 27, 2021, the foster mother reported that A.P. tried to have a visit "last Thursday." (R.139:3).

- On September 15, 2021, A.P. called the social worker and asked when she could see S.L. again. (R.139:3).

- On September 16, 2021, the foster mother told the social worker that she had had communication with A.P. She reported that she told A.P. that she could not visit S.L. unless A.P. went through the social worker, and A.P. accused the foster mother of stealing S.L. from her. The foster mother also shared that A.P. calls "to reem her . . . out" because A.P. thinks that she is keeping S.L. from A.P. Also, A.P. calls the foster mother about visiting S.L. (R.139:4).

- On October 11, 2021, A.P. called the social worker and informed her that she and S.L.'s father were breaking up (one of the CHIPS conditions was that the two maintained separate residences). (R.139:5, 6)

- On November 1, 2021, A.P. called the social worker and agreed to meet with the social worker. (R.139:7).

- Also on November 1, 2021, the foster mother reported to the social worker that A.P. requested a Halloween picture of S.L. the night before, and on 10/29/21.[3] The foster mother provided A.P. pictures on both dates. (R.139:7).

- On November 18, 2021, the foster mother reported that she had sent a picture of S.L. to A.P. "a few days ago." (R.139:8).

- On December 17, 2021, A.P. attempted to attend a permanency plan hearing in the CHIPS case, but was left in the Zoom waiting room. (R.139:10-11).

- On December 21, 2021, the foster mother stated that A.P. planned to drop off presents for S.L. on Christmas Eve. (R.139:11).

- On February 9, 2022, the foster mother reported that "last week" A.P. reached out to her to request that S.L. attend a funeral for her father's stepmother. (R.139:11).

[3] The note states it was on "11/29/21," however, that is unlikely as the note was written on November 1, 2021.

- On February 25, 2022, it is noted that A.P. and the father had requested a meeting with the social worker. (R.139:14).

- On March 7, 2022, S.L.'s father called the social worker and asked if he and A.P. could meet with S.L. immediately after their upcoming meeting with the social worker. The social worker told him that she would consult with her supervisor. (R.139:15).

- A.P. texted the foster mother and requested a picture of S.L. on March 29, 2022. (R.139:18).

- On June 1, 2022, the social worker called A.P. about the permanency plan hearing that day. A.P. provided information and stated that she wanted to participate in the hearing. She later attended the permanency plan hearing. (R.139:22-23).

A.P.'s visit with S.L., her testimony that she had telephone contact with S.L. during the alleged abandonment period, and the examples of contact between A.P. and the foster mother, as well as the social worker, documented in the eWiSACWIS notes, all refute the affidavits on which the Government's motion relied. The information about and photographs from the Christmas 2021 visit alone call into question the affidavits of the foster parents, who both claimed that A.P. had failed to visit or communicate with S.L. between August 25, 2021 and June 13, 2022.

(R.57:1-2; 59:1-2). Therefore, had counsel advised A.P. to provide this information in an affidavit, A.P. would have been able to create a genuine issue of material fact as to abandonment.

In addition, A.P. would have been able to raise a genuine issue of material fact as to good cause. A.P. testified that she believed she had good cause for any period during which she failed to visit or communicate with S.L. (R.167:7). At the time the social worker suspended A.P.'s visits with S.L., A.P. was experiencing many struggles in her life. (R.167:7). These struggles included housing instability, as A.P. was attempting to move to a residence that would be approved by the social worker, financial instability, insufficient support, and A.P. did not have a driver's license. (R.167:7-8).

Had A.P.'s trial counsel asked A.P. about good cause, A.P. would have provided this information. (R.167:9). Had counsel advised A.P. as to the importance of providing an affidavit containing that information, A.P. would have done so. (R.167:9). Filing such an affidavit would have created a genuine issue of material fact as to good cause for any amount of time within the alleged abandonment period that A.P. failed to visit or communicate with S.L. Therefore, A.P. would have been entitled to a jury trial as to grounds. Having demonstrated a dispute of fact, the circuit court could not have ruled as to the merits of A.P.'s good cause claim. As such, the postdisposition court should have concluded that A.P. was prejudiced by trial counsel's deficient performance when she

failed to adequately advise A.P., and failed to file an affidavit, related to good cause.

In addition, A.P. is entitled to reversal because she was prejudiced by trial counsel's failure to adequately support her argument that the discovery established A.P.'s good cause for failing to visit or communicate with S.L. The social worker's letter that trial counsel included as an exhibit to the motion (from the eWiSACWIS notes) shows that the Department told A.P. that her visits with S.L. were "on hold" until she met with the assigned social worker. (R.64:1-2). The eWiSACWIS notes also demonstrate that the Department later informed the parents that visits would not resume upon their meeting with the social worker. (R.139:14-15).

As to the visits being suspended, A.P. testified that the social worker did not inform her that she had a right to communicate with S.L. and the foster family over the phone and by mail. (R.167:8). She stated that she continued to buy gifts and necessities for S.L. despite not being allowed to visit her. A.P. contacted the social worker after receiving the letter suspending her visits in order to set up meetings so that she could resume visits with S.L. (R.167:8). However, A.P. knew that the social worker would not allow her to resume visits with S.L. if she simply met with the social worker. (R.167:8). A.P. knew that there would be other requirements to come after meeting with the social worker. (R.167:8).

Given the above, counsel should have argued that the department failed to show that it clearly communicated the conditions for visitation to A.P. *See Brown County v. B.P.*, 386 Wis. 2d 557, ¶36. In *B.P.*, the court of appeals reversed a grant of summary judgment in part because "the record is also unclear as to what services the Department wanted [the mother] to complete before she would be permitted to visit the child, and if [the mother] had the opportunity to complete those services." *Id.*, ¶36. Therefore, counsel should have argued that the Department failed to both advise A.P. of what was required for her to resume visits with S.L. and provide services so that A.P. could attempt meet those unknown requirements. Had counsel made that argument and filed an affidavit from A.P. as to that information, A.P. would have shown a genuine dispute as to good cause.

The court of appeals rejected A.P.'s prejudice arguments, concluding that the circuit court "fully considered A.P.'s argument as to good cause at the grounds stage despite A.P. not having filed an affidavit." *A.P.*, No. 2023AP1382, ¶27. This is factually inaccurate, and the court of appeals should not have relied on the postdisposition court's conclusion as to that point. The circuit court could not have "fully considered" A.P.'s arguments in her postdisposition motion because her trial counsel failed to raise them. The very basis of A.P.'s ineffective assistance of counsel claim is that her trial counsel failed to present the facts she raised in the postdisposition motion and make arguments based

on these facts. In addition, the circuit court did not and could not have found that A.P. raised a genuine issue of material fact in response to the county's summary judgment motion because counsel failed to present any facts.

In addressing prejudice, the court of appeals also concluded that A.P. could not succeed on appeal by asserting the Christmas 2021 photographs should have been submitted because she chose not to use them at the summary judgment phase. *A.P.*, No. 2023AP1382, ¶27. This conclusion failed to consider A.P.'s argument on appeal that she was not adequately advised by her trial counsel with regard to the photos. It also ignores all of the other instances of contact referenced in A.P.'s brief, which counsel also failed to highlight in her argument.

Ultimately, court of appeals' opinion does not actually address the alleged prejudice—that the summary judgment motion would have been denied had counsel adequately advised A.P. of the legal standards and requirements when she had the opportunity to do so. Thus, the court of appeals did not consider whether there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *See State v. Breitzman*, 2017 WI 100, ¶39, 378 Wis. 2d 431, 904 N.W.2d 93 (citing *Thiel*, 264 Wis. 2d 571, ¶20).

CONCLUSION

For the reasons set forth above, A.P. respectfully requests that this Court grant the petition for review.

Dated this 29th day of March, 2024.

Respectfully submitted,

Electronically signed by Laura M. Force

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in s. 809.19(8)(b), (bm) and 809.62(4). The length of this petition is 7,811 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this petition is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 29th day of March, 2024.

Signed:
Electronically signed by
Laura M. Force
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