STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2024AP001071

In the Interest of F.R.W., a person under the age of 18:

A.M.D.,

Petitioner-Respondent,

v.

G.R.B., JR.

Respondent-Appellant.

On Appeal from an Order Terminating Parental Rights,
entered in the Fond du Lac County Circuit Court,
The Honorable Douglas Edelstein, Presiding

PETITIONER-RESPONDENT'S RESPONSE TO RESPONDENT-APPELLANT'S BRIEF-IN-CHIEF

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STATEMENT ON ORAL ARUGMENT AND PUBLICATION

Counsel does not request oral argument. Respondent-Appellant raises issues already decided in Wisconsin. Counsel does not request publication and publication is not permitted in a one-judge appeal, pursuant to Wis. Stat. §809.23(4)(b).

ARGUMENT

Mr. Bartel raises three issues for review: whether the circuit court erred in denying Mr. Bartel's motion for judgment notwithstanding the verdict; whether the circuit court denied Mr. Bartel's motion to dismiss the case on the basis of the "clean-hands" doctrine and; whether the circuit court erred in denying Mr. Bartel's motion to dismiss on the grounds that the abandonment statutes, as applied to Mr. Bartel violated substantive due process. For the reasons stated below, the circuit court's orders denying Mr. Bartel's three motions was not an erroneous application and this court must affirm.

A. Standard of Review

It is well established that on appeal a circuit court's decision to deny a motion for judgment notwithstanding the verdict will not be reversed absent a showing of a clear abuse of discretion or an erroneous application of the law. *DeGroff v. Schmude*, 71 Wis.2d 554, 238 N.W.2d 730, 735 (Wis. 1976). A trial court has the discretion to grant such a motion if it determines that the jury's

findings are contrary to the "great weight and clear preponderance of the evidence" even when the findings are supported by credible evidence. (*Id*.) A motion for judgment notwithstanding the verdict challenges whether the facts found are sufficient to permit recovery as a matter of law. *Logterman v. Dawson*, 190 Wis.2d 90, 101, 529 N.W.2d 768, 771 (Wis. App. 1994). The trial court has the authority to enter such a judgment. (*Id*.).

The statutes set forth timing in which to file motions to dismiss. Motions to dismiss are limited to the initial pleadings and if not raised in a responsive pleading are waived. (Wis. Stat. §802.06 and 802.08). Wis. Stat. §48.427 gives the trial court discretion to dismiss a petition at the dispositional phase if it finds the evidence does not warrant the termination of parental rights. After a jury has found that grounds exist for termination and the court finds the parent unfit, the focus of the trial court shifts to the best interest of the child. *In re the Termination of Parental rights to Prestin T.B., a person under the Age of 18: Sheboygan County Department of Health and Human Services v. Julie A.B.*, 2002 WI 95, ¶4, 225 Wis.2d 179, 648 N.W.2d 402. Once a basis for termination has been found by the jury and the court finds a parent unfit, the court transitions to the dispositional phase at which point the prevailing factor is the best interest of the child. (*Id*. at ¶37). A trial court should not dismiss a petition for the termination of parental rights at the dispositional phase "unless it can reconcile dismissal with the best interest of the child." (*Id*. at ¶38).

The Court in *Rhonda R.D. v. Franklin R.D.*, 191 Wis.2d 680, 704, 530 N.W.2d 34, 43 (Wis. App. 1995) found that the phrase in Wis. Stat. §48.415(1)(a) "left by a parent" to be ambiguous which required an analysis of its context and legislative intend. That Court found that "left by" could apply in cases where the parent knows *or could discover* the whereabouts of the child and the parent has failed to visit or communicate with the child. (emphasis added). (*Id.* at 706).

It is true that under the clean-hands doctrine a party who "has been guilty of substantial misconduct" of matters in litigation shall not be afforded relief when they come to court. *State v. Kaczmarski*, 2009 WI App 117, ¶15,772 N.W.2d 702, 708, 320 Wis. 2d 811 (Wis. App. 2009), quoting *Timm v. Portage County Drainage Dist.*, 145 Wis.2d 743, 753, 429 N.W.2d 512 (Wis. App. 1988). The Court in *Kaczmarski* found that the clean-hands argument failed, in part, because the conduct that the State asserted supported the application of clean-hands was not related to the harm from which Kaczmarski sought relief. (*Id*. ¶16). The trial court does have discretion to grant relief under the clean-hands doctrine and the court abuses its discretion if it "relies upon an erroneous view of the law or bases its decision upon irrelevant factors". *Timm* at 752.

B. The circuit court properly exercised its discretion when it denied Mr. Bartel's motion for judgment notwithstanding the verdict, for denying Mr. Bartel's motion to dismiss on the

basis of "clean-hands" doctrine and on the grounds that the jury instructions violated substantive due process.

Following verdicts, Mr. Bartel moved the court for a judgment notwithstanding the verdict alleging that the record established sufficient evidence to overcome the claim that Mr. Bartel abandoned the child. (R. 162: p 133). Mr. Bartel asserted that because Ms. Daniel moved 9 times and blocked Mr. Bartel on social media that that prevented Mr. Bartel from communicating or visiting with Franny (R. 162: p 133-134).

Ms. Daniel acknowledged that for a short period during the pregnancy she blocked Mr. Bartel's phone number, but halfway through the pregnancy she had unblocked him, and he remained unblocked thereafter. (R. 161: p 80-81). Ms. Daniel acknowledged that she had blocked Mr. Bartel on social media shortly after Franny was born in January 2014, because he would question her about her personal life. (R. 161: p 81). Ms. Daniel did not have Mr. Bartel's phone number blocked so he could still communicate with her. (R. 161: p 81-82). Ms. Daniel explained that when Mr. Bartel exercised his placement of Franny that he would either call or text Ms. Daniel and was able to have his placement. (R. 161: p 84). Throughout this time, Ms. Daniel still had Mr. Bartel blocked on social media, which never interfered with Mr. Bartel communicating via telephone for visits. (R. 161: p 84-85). Ms. Daniel resided with her parents when Franny was born and moved into an apartment on her own in December 2014. (R. 161: p 86). Between

December 2014 and February 2018, Ms. Daniel moved several times during which times Mr. Bartel would exercise placement by communicating via phone with Ms. Daniel (R. 161: p 86-88). The last time Mr. Bartel saw Franny was February 10, 2018. (R. 161: p 91). Mr. Bartel contacted Ms. Daniel in March 2018 and threatened to take her to court after she told him that she had moved to Milwaukee. (R. 161: p 93). Mr. Bartel contacted Ms. Daniel in August 2018 to coordinate a visit with Franny, but he never confirmed his availability, so a visit did not take place. Ms. Daniel informed Mr. Bartel that she had moved to Waukesha. (R. 161: p 93-94). The last time Mr. Bartel communicated with Ms. Daniel was in September 2018. (R. 161: p 94). Ms. Daniel confirmed that her moves up to that point were within the 150-mile radius which did not require her to notify Mr. Bartel. (R 161: p 94-95). Ms. Daniel moved 3 times from November 2018 until February 2021, each move being within the 150-mile radius and during which time Mr. Bartel never communicated with Ms. Daniel. (R. 161: p 96-98). There were four 6-month periods during which Mr. Bartel failed to communicate with Ms. Daniel from September 2018 to September 2020. (R. 161: p 98-99). Ms. Daniel has had the same phone number since 2008. (R. 161: p 104). Ms. Daniel produced her phone records, none of which show a phone call from Mr. Bartel's phone number at the time he was exercising placement or the phone number he listed on mediation paperwork. (R. 161: p105-106). The phone records also did not contain any phone records from any witness of Mr. Bartel. (R. 161: p 107-108). Mr. Bartel did not produce any phone records to show his efforts to

communicate with Ms. Daniel. (R. 161: p 229). Mr. Bartel admitted to having stopped calling Ms. Daniel. (R. 161: p 230). Mr. Bartel admitted that his phone numbers did not appear on the phone call logs produced by Ms. Daniel and further admitted that when he called from a private number, he would not leave a voicemail. (R. 161: p 238).

The trial court concluded, after considering the credible evidence with reasonable inferences, in light most favorable to the petitioner, that it could not find there was no credible evidence to support the jury's verdict. (R. 162: p 135). The trial court further decided that the jury was not outside the application of the law to reach a "reasonable and just verdict." (R. 162: p 135). The trial court also addressed whether Ms. Daniel had unclean hands, which the court was satisfied that the jury had considered when it deliberated. (R. 162: p 136).

At the Disposition hearing Mr. Bartel moved to dismiss the petition on the basis of the "clean hands" doctrine and that the statute as applied violated substantive due process. The trial court determined that the jury "considered all of these facts and the jury felt there was a basis as for grounds". (R. 163: p 8-15). The trial court found that the motions ultimately were made untimely and were unpersuasive in that it sought to "rehash a number of prior arguments, to include that of summary judgment, to include that of evidence which was presented during the trial which the jury did consider." (R. 163: p 14). At the conclusion of the jury trial, the trial court set deadlines for submissions prior to the disposition hearing

and, although, Mr. Bartel did not submit anything until well after the deadline the trial court still considered the motions. (R. 127: p 10; R. 163: p 14). The record is silent on any request to extend deadlines for submissions prior to disposition by Mr. Bartel.

Mr. Bartel asserts that because of the clean-hands doctrine, Ms. Daniel should be unable to prevail on her petition for the termination of parental rights. Mr. Bartel asserts that Ms. Daniel violated of Wis. Stat. §767.481(1)(a) by failing to update her address when she moved 9 times. Mr. Bartel connects her violation of that to his not having contact with Franny. Wis. Stat. §767.481(1)(a) requires the parent intending to relocate with the child *100 miles or more from the other parent* to notify the other parent and the court. (emphasis added).

Ms. Daniel acknowledged that she did not notify Mr. Bartel or the Court prior to moving out of state and beyond the 150 miles as required in the Order. (R 161: p 94-95). However, Ms. Daniel also explained that her moves from February 2018 through February 2021 were all within the radius requiring notification. (R 161: p 94-95). Further, Ms. Daniel also explained that from February 2018 through February 2021, the time in which she moved within that radius, that Mr. Bartel never communicated with her. (R. 161: p 96-98). Also during that time there were four 6 month periods of no communication. (R. 161: p 96-98). Mr. Bartel's claim of "clean-hands" because Ms. Daniel did not provide her address being related to his not communicating or visiting Franny fails because the

conduct and the harm are not related. For three years Ms. Daniel did not have to notify Mr. Bartel or the Court pursuant to §767.481(1)(a) because her moves were within the radius. When Ms. Daniel relocated out of state, beyond the mile radius, four six month periods of abandonment occurred. Further, Mr. Bartel did not show how not knowing Ms. Daniel's address prevented him from discovering Franny's whereabouts, communicating with or visiting Franny. By his own admission, Mr. Bartel stopped communicating and he would not leave voicemails. (R. 161: p 230 and p 238). Mr. Bartel has failed to show how Ms. Daniel's not updating her address when she moved beyond the 100- or 150-mile radius affected his ability to contact her by phone and to visit or communicate with Franny and why for three years prior to Ms. Daniel's relocation he did not have communication with Franny or Ms. Daniel. Ms. Daniel produced her phone records which showed all her calls incoming, whether numbers were blocked or not. (R. 161: p105-106). Ms. Daniel admitted to blocking Mr. Bartel's phone number during the pregnancy only. (R. 161: p 80-81). However, Mr. Bartel continues to advance the argument that he was blocked and that he had attempted to call, without being able to produce those phone records. (R. 161: p 229). Mr. Bartel offered that he did try calling from different numbers but was unable to either produce his own phone records or identify phone numbers that appeared on Ms. Daniels phone records. (R. 161: p 229; (R. 161: p 238). Mr. Bartel advanced his defense that he had good cause for not communicating with or visiting Franny. All of that information was presented to and considered by the jury.

During a lengthy conference to review the proposed jury instructions the trial court considered Mr. Bartel's request to have jury instruction 2168 for interference with child custody, a criminal violation, included in the instructions. (R. 162: p 79). After consideration and using its discretion and explaining its reasoning, the trial court declined to include it. (R. 162: p 73-78). The jury instructions asked the jury to determine whether Mr. Bartel abandoned Franny (R. 129: p 13 – 18). The jury instruction also provided an explanation as to whether Mr. Bartel has good cause for having failed to visit or communicate with Franny. (R. 129: p 13-18). The jury returned a unanimous verdict finding that Mr. Bartel abandoned Franny and did not have good cause for doing so.

The trial court exercised its sound discretion in denying Mr. Bartel's motion for judgment notwithstanding the verdict and Mr. Bartel's motions to dismiss.

CONCLUSION

WHEREFORE, for the foregoing reasons, Ms. Daniel, through the undersigned counsel, respectfully requests that this court deny Mr. Bartel's request to reverse the order terminating his parental rights of Franny.

Dated and filed August 2, 2024.

Respectfully submitted,

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CERTIFICATE OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b), (bm), and (c) for a brief produced with a 13-point proportionately spaced serif fond. The length of this brief is 2,321 words.

Dated and filed August 2, 2024.

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CERTIFICATE BY ATTORNEY

I hereby certify that filed with this brief is an appendix that complies with Wis. Stat. §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 Wis. Stat. §809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings 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 of an administrative decision, the appendix contains the findings of facts 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: August 2, 2024.

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