STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

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

A.M.D.,
Petitioner-Respondent,

v. Appeal No. 2024AP001071

G.R.B., JR,
Respondent-Appellant.

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

BRIEF OF THE GUARDIAN AD LITEM

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I. STATEMENTS ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary and the appeal should be decided on the briefs. Pursuant to Wis. Stat. §809.23(4)(b), publication is not permitted in a one-judge appeal.

II. ARGUMENT

A. THE CIRCUIT COURT DID NOT ERR IN DENYING MR. BARTEL'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE THERE WAS SUFFICIENT CREDIBLE EVIDENCE IN THE RECORD TO SUPPORT THE JURY'S DECISION AS A MATTER OF LAW.

a. Standard of Review.

A motion for judgment notwithstanding the verdict challenges whether the facts at trial are sufficient to permit recovery as a matter of law. *Logterman v. Dawson*, 190 Wis. 2d 90, 101, 559 N. W. 2d 768, 771 (Wis. App. 1994). A circuit court has the authority to grant judgment notwithstanding the verdict if it determines the facts established at trial are not sufficient to establish a claim as a matter of law. *Id.*

The appellate court will not reverse a trial court's decision to deny a motion for judgment notwithstanding the verdict 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).

b. The circuit court properly denied Mr. Bartel's motion for judgment notwithstanding the verdict.

At the fact-finding hearing, the jury was asked to determine whether Mr. Bartel abandoned Franny. The abandonment statute requires the Petitioner prove that "the child has been left by the parent with any person, the parent knows or could discover the whereabouts of the child and the parent has failed to visit or communicate with the child for a period of 6 months or longer." Wis. Stat. §48.415(1)(a)(3).

The statute also contains a good cause defense, which was presented to the jury by Mr. Bartel.[1] Wis. Stat. §48.415 (1)(c). In order to prevail, Mr. Bartel needed to prove all of the following by a preponderance of the evidence:

(1) That he had good cause for having failed to visit with Franny through the relevant time period[2];

(2) That he had good cause for having failed to communicate with Franny through the relevant time period; and

(3) If the parent proves good cause under subd. 2., including good cause based on evidence that the child's age or condition would have rendered any

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[1] Wisconsin JI-Children 314 was read and presented to the jury for consideration.

[2] The relevant time period here is contained in Wis. Stat. 48.415(1)(a)(3) ("…the parent has failed to visit or communicate with the child for a period of 6 months or longer.").

> communication with the child meaningless, that one of the following occurred:
>
> a. The parent communicated about the child with the person or persons who had physical custody of the child during the time period specified in par. (a) 2. or 3., whichever is applicable, or, if par. (a) 2. is applicable, with the agency responsible for the care of the child during the time period specified in par. (a) 2.
>
> b. The parent had good cause for having failed to communicate about the child with the person or persons who had physical custody of the child or the agency responsible for the care of the child throughout the time period specified in par. (a) 2. or 3., whichever is applicable.

Wis. Stat. §48.415(1)(c).

After deliberations, the jury found that Franny was left by Mr. Bartel with a relative or another person. R. 162: 379. The jury found that Mr. Bartel knew or could have discovered Franny's whereabouts. *Id*. The jury found that Mr. Bartel failed to visit or communicate with Franny for a period of six months or longer, and that Mr. Bartel did not have good cause for having failed to visit Franny during the relevant time period. *Id.*

Following the verdict, Mr. Bartel moved for judgment notwithstanding the verdict. *Id.*, 381, 385. The trial court denied the motion and stated "considering all the evidence and considering that credible evidence with reasonable inferences, in light of the most favorable to the petitioner, I

cannot conclude that there was no credible evidence that would support the jury's verdict." *Id.,* 386. The trial court noted that the jury considered Ms. Daniel's unclean hands and failure to update her address, placed weight on those facts, and did not feel there was a basis in law to conclude the jury erroneously reached a verdict. *Id.* 386-387. The trial court was "satisfied that the facts as presented, as a matter of law, do not allow the Court to override the jury's verdict." *Id.*, 386.

The trial court was correct and its decision should be affirmed because there were sufficient credible facts to support the jury's conclusion that Mr. Bartel abandoned Franny as a matter of law.

First, it is undisputed that Mr. Bartel failed to visit or communicate with Franny for a period of six months or longer. R. 162: 379, R. 161: 98-99.

Second, the Court of Appeals has clarified the ambiguity in the term "left by a parent" in Wis. Stat. 48.415(1)(a)(3). *Rhonda R.D. v. Franklin R.D.,* 191 Wis. 2d 680, 704, 530 N.W. 2d 34, 43 (Wis. App. 1995). The Court stated that "a parent does not abandon a child simply because the child lives with the other parent, pursuant to a custody order or otherwise. The focus, rather, is on the respondent parent's conduct once the child is living with the other parent." *Id.,* 45.

Here, Franny was living with Ms. Daniel pursuant to a placement order, which Mr. Bartel agreed to. R. 77: 2, R. 161: 232-233. The jury heard evidence regarding Mr. Bartel's conduct following the entry of the placement order. Most notably, the jury heard that when Mr. Bartel had visits with Franny, they were coordinated with Ms. Daniels by telephone

call or text message. R. 161: 84. The jury heard that Ms. Daniel's telephone number never changed and Ms. Daniel did not have Mr. Bartel blocked following Franny's birth. *Id.,* 95. The jury also heard that the last time Mr. Bartel saw Franny was February 10, 2018 and that he eventually stopped calling Ms. Daniel. *Id.,* 91, 230. The jury heard evidence on Ms. Daniel's residential moves, but also heard that Ms. Daniel's initial moves did not impact Mr. Bartel's ability to coordinate visits when he was calling. *Id.,* 86. The jury also heard that Mr. Bartel did not call the police or file any contempt or enforcement motions in court. R. 161: 212, 240. Therefore, there were sufficient facts for a jury to determine Franny was left by Mr. Bartel with Ms. Daniel as a matter of law.

There were also sufficient facts for the jury to conclude Mr. Bartel could have discovered Franny's whereabouts. Mr. Bartel knew Franny was with Ms. Daniel, knew Ms. Daniel's telephone number, acknowledged that he did not leave voicemails, and eventually stopped calling. R. 161: 230. Ms. Daniel produced phone records, which did not show any telephone calls from Mr. Bartel's telephone number. *Id.,* 105-106. Additionally, Mr. Bartel did not point out any telephone calls initiated by him or anyone on his behalf in the records presented by Ms. Daniel or produce any telephone records of his own. *Id.,* 229.

There were sufficient credible facts to support the jury's decision that Mr. Bartel did not have good cause for failing to visit or communicate with Franny. The jury heard and considered Ms. Daniel's nine moves, including those out of state, and failure to advise Mr. Bartel of the same. R. 161: 91-102. Given the facts, such as Mr. Bartel always having Ms. Daniel's telephone number, it was reasonable for the jury to reach the verdict that it did.

There is no legal basis to override the jury's verdict based upon the evidence presented at trial. Therefore, the trial court's decision to deny Mr. Bartel's motion was an appropriate application of the law and was not an abuse of discretion. The denial of the Respondent's motion for judgment notwithstanding the verdict should be affirmed

B. THE TRIAL COURT DID NOT ERR IN DENYING MR. BARTEL'S MOTION TO DISMISS ON THE BASIS OF THE "CLEAN HANDS" DOCTRINE.

a. Standard of Review.

Whether to grant relief under the clean hand's doctrine is within the discretion of the trial court. *Timm v. Portage County Drainage Dist.*, 145 Wis. 2d 743, 752, 429 N. W. 2d 512 (Ct. App. 1988)). The appellate court will affirm the use of discretion "if it examined the relevant facts, applied the correct standard of law, and using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *Randall v. Randall*, 2000 WI App 98 ¶7, 235 Wis. 2d 1, 612 N.W. 2d 737.

b. The trial court appropriately assessed Mr. Bartel's motion to dismiss and reached a conclusion that a reasonable judge could reach.

At the March 18, 2024 dispositional hearing, the trial court addressed Mr. Bartel's motion to dismiss. R. 163: 3-15.

In his brief, Mr. Bartel appears to argue that the trial court did not apply the correct legal standard in a reasonable manner because it emphasized the jury's consideration of Ms. Daniel's moves instead of applying the clean hands doctrine in its exercise of discretion.

The trial court did appropriately assess the clean hands doctrine utilizing its discretion. First, the trial court noted Mr. Bartel's motion to dismiss was untimely as it was not filed in accordance with the court's motion deadline of December 15, 2023. R. 163: 14. It could have stopped its analysis there and denied the motion, but it did not. The trial court then summarized the times in which the clean hands argument was advanced during the procedural history of this case and the result of the same, which included reference to the jury. *Id.,* 7-15. The trial court ultimately concluded "I do believe there is unclean hands here, but to the extend that that, alone, would merit *the Court to make a finding* in favor of one party, I don't think that is completely established. I think I can make an argument as to why both parties bear some form of responsibility here which is supported by the record. Nonetheless, *as for a judicial remedy, I do not find* that there is sufficient factual basis to grand relief for [Mr. Bartel] following the doctrines of unclean hands." *Id.,* 14-15 (emphasis added). The court appropriately examined relevant facts, demonstrated a rational process, and concluded in its own discretion that there was not a

basis to grant relief under the clean hands doctrine. This decision should be affirmed.

C. THE TRIAL COURT DID NOT ERR IN DENYING MR. BARTEL'S MOTION TO DISMISS ON GROUNDS THAT THE ABANDONMENT STATUTE, AS APPLIED TO MR. BARTEL, IS A VIOLATION OF SUBSTANTIVE DUE PROCESS.

a. Standard of Review

The court reviews a constitutional challenge to a statute de novo. *State v. Wood*, 2010 WI 17 ¶15, 323 Wis. 2d 321, 780 N. W. 2d 63. The party bringing the challenge bears the burden to prove "beyond a reasonable doubt" the statute is constitutional. *Id.*

b. As applied to Mr. Bartel, the abandonment statute does not violate substantive due process.

In determining compliance with due process, the court "evaluate[s] the particular facts and circumstances relevant to the parent and child involved in the proceeding." *Kenosha County DHS v. Jodie W.*, 2006 WI 93, 293 Wis. 2d 530 ¶49-50, 716 N.W.2d 845.

In Jodie W., the Court found a violation of substantive due process as applied to Jodie. *Id.* This determination was made because the lower court's finding of unfitness was based upon

Jodie's failure to meet an impossible condition of return - that she maintain a residence for her child, but she was incarcerated. *Id.*, ¶6, 56.

Unlike Jodie W., Mr. Bartel's situation was not impossible. Although Ms. Daniel moved nine different times, the visits were not arranged by mail nor did they occur at Ms. Daniel's home. R. 91:3, 161: 84. Rather, Mr. Bartel and Ms. Daniel arranged visits by telephone. R. 161: 84. Ms. Daniel has had the same telephone number since 2008, but Mr. Bartel stopped calling. *Id.*, 104, 230.

The trial court appropriately denied Mr. Bartel's motion to dismiss because the abandonment statute, as applied to Mr. Bartel, was not a violation of substantive due process.

D. THERE WAS SUFFICIENT EVIDENCE TO DETERMINE THAT TERMINATION OF MR. BARTEL'S PARENTAL RIGHTS WAS IN FRANNY'S BEST INTEREST.

When the court decides the appropriate disposition, it is to consider the factors outlined in Wis. Stat. §48.426(3), with the prevailing standard being the best interest of the child. The trial court addressed all factors and appropriately determined the termination was in Franny's best interest. R. 163: 50-53.

III. CONCLUSION

For the reasons stated above, the undersigned requests that the Court affirm the circuit court's order terminating Mr. Bartel's parental rights.

Respectfully submitted,

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III. CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c), for a brief produced using proportional serif font. The length of this response (comprising the statement, argument and conclusion) is 2,127 words.

Dated 5th day of August, 2024.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this response, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated 5th day of August, 2024.

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