STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2022AP001289

In re the termination of parental rights to B.K.,
a person under the age of 18:
C.K. and A.K.

Petitioners-Respondents,

v.

K.L.,

Respondent-Appellant-Petitioner.

PETITION FOR REVIEW

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ISSUE PRESENTED

Whether Kate's[1] fear of interacting with her daughter under April's supervision, after April filed baseless police and child protective services "CPS" complaints against Kate, and Kate's persistent efforts through erroneously dismissed and encumbered *pro se* litigation to see her daughter without April's interfering supervision, created a factual basis to establish a "good cause" issue for a jury to resolve at a trial sufficient to defeat summary judgment.

The circuit court ruled: no.

The court of appeals ruled: no.

CRITERIA FOR REVIEW

This court should grant review to clarify and harmonize the law surrounding summary judgment in cases involving inherently fact-intensive grounds like abandonment or failure to assume parental responsibility when government action is invoked to permanently destroy a family via termination of parental rights litigation. Specifically, the court should grant review to clarify that only in exceedingly rare circumstances when no factual basis exists upon which a trier of fact, at a full trial, could possibly rule in the non-moving party's favor at the grounds stage

[1] Pursuant to Wis. Stat. § 809.19(1g), K.L., her daughter, and other family members are referred to by pseudonyms.

of the proceeding, is summary judgment appropriate. The court should also grant review to clarify what viewing facts in a light favorable to the non-moving party means; that it does not involve weighing and judging competing or disputed facts, or including only the moving party's view as a basis for a decision. Wis. Stat. §§ 809.62(1r)(c) & (d).

STATEMENT OF FACTS

On January 20, 2020, paternal grandparents, April and Charles, filed a petition to terminate Kate's parental rights to her daughter, Beth. (4). The petition alleged Kate abandoned Beth. (20). Specifically, the grandparent's petition alleged Kate failed to visit or communicate with her daughter for over six months between December 19, 2018, and December 19, 2019.

Kate gave birth to her daughter Beth on December 19, 2012. (4:1) (App. 46). Beth lived with Kate and her father for about four months. (85:11). Kate was already a mother to three older daughters, and later a son. (4:3-4) (App. 48-49).

In August 2013, Beth was placed with her paternal grandparents, April and Charles, as part of a child in need of protections and services order. (4:3) (App. 48). A Portage County circuit court appointed April and Charles as Beth's guardians in 2015. (4:3).

Initially, Kate spent time unsupervised with Beth. (46:1) (App. 62). A few months later, after Kate pled to a charge involving discharging a gun in her house and was placed on probation, Charles and April petitioned the court to require Kate's visits with Beth be supervised. (4:3) (App. 48). The visits were initially supervised by Kate's aunt. (4:3). In 2016, April began supervising the visits with April unilaterally imposing conditions such as requiring such visits take place in public, and precluding visits if Beth's siblings or Kate's husband was present. (4:3; 51:3).

In 2017, Kate filed a motion to enforce placement. The court allowed twice monthly visits. Kate's parents were initially authorized to provide supervision for the visits. When Kate's parents were unable to supervise visits, Kate's visits with Beth occurred under April's supervision. (4:4) (App. 49). Kate explained that April was unreasonably controlling and never allowed visits beyond what was court ordered. (34:26; 49:2; 86:46) (App. 65).

In December 2018, April supervised a visit between Kate, Beth, and Kate's three older daughters. During the visit, Kate and her daughters were being playful and laughing. (49:1) (App. 64). Their interaction included "playfully biting each other and laughing." (49:1). During the visit, April heard someone say "you bit me." April, though, claimed Kate disciplined one of the older girls by biting her. (4:4) (App. 49). April did not raise any concern with Kate about the visit. (49:1). Instead, she reported the matter to police and child protective services. (4:4; 46:2)

(App. 49, 63). The police after contacting Kate did not take any further action based upon April's report. (49:1). Nor did social services take any action. (45:7).

Later that month, Kate contacted April and was allowed to speak with Beth to wish her a happy birthday. (45:4; 46:2) (App. 54, 63).

Once Kate learned from police that April reported her after the early December 2018 visit, Kate felt she could no longer expose her children or herself to visits supervised by April. (4:4; 49:1) (App. 49, 64). Kate felt attacked, especially because she did not know April had any concerns about the visit. (49:1). Kate felt "appalled that this playful interaction with [her] daughters was perceived as anything other than the five of [them] having fun at a visit." (49:1).

Kate wanted to see her daughter throughout the time alleged in the petition. (49:1) (App. 64). However, after the false police and child protective services report incidents Kate was no longer comfortable exposing her children to April with April supervising visits. (49:1). Kate's aunt and mother were no longer available supervisors. (49:1). The summary judgment motion acknowledges after the police incident "[Kate's] excuses for not visiting with [Beth] were, that she was afraid of [April]." (45:2) (App. 52).

At this point, Kate felt April had "complete control over access to [her] daughter" and that April was "unreasonable in her decisions about access to [her] daughter." (49:2) (App. 65).

The next month, in January of 2019, to gain safe access to her daughter, Kate filed a petition to terminate April and Charles's guardianship of Beth. (4:4) (App. 49). However, Kate did not receive notice of the hearing on her motion to vacate guardianship as it was sent to an old and incorrect address. (49:2) (App. 65).

In the spring of 2019, April and Kate communicated three times to arrange visits with Beth. (45:2) (App. 52). Kate felt she could not agree to visits because they were to be supervised by April. (46:2) (App. 63).

Kate went to the courthouse to follow up on the petition she filed and learned it had been dismissed for non-appearance. (49:2) (App. 65). Kate was told that she could not file anything further in the guardianship case until she paid Guardian Ad Litem and attorney fees that amounted to $1500. (49:2). Kate could not afford to pay these fees. (49:2). Still, Kate wrote to the court trying to address the "issues and conflicts that were occurring" between her and April that were "preventing contact with [Beth]." (49:2).

Kate said it was not until speaking with social workers who were working with her and her son that she learned April could not prevent her from seeing her daughter. (34:51; 86:67). Kate stated that prior to that, she did not know that she had a legal right to see and communicate with Beth if April did not allow it. (34:51; 86:77).

On December 19, 2019, Beth's seventh birthday, Kate requested a telephone call with Beth to wish her a happy birthday. April denied the request for a phone call saying that too much time had passed and communication now would be confusing for Beth. (45:4) (App. 54).

During the last few years, Kate explained she had spoken with Beth's dad multiple times to get pictures of Beth or find out how she is doing. (34:47, 65-66). Kate reached out to April to get pictures of Beth, to follow what was going on with her in 2019. (46:2) (App. 63).

After the grandparents filed their January 20, 2020, petition to terminate Kate's parental rights to Beth, Kate contested the petition and requested a jury trial. (90:6). On August 19, 2021, April and Charles moved for partial summary judgment. (45). Kate responded alleging she had good cause for not seeing or communicating with Beth during the abandonment period alleged in the petition. (51:2).

The grandparents' attorney at the summary judgment hearing argued: "All she had to do is communicate with the child" and "She failed to – she never sent [Beth] a note, a card, a Christmas card, birthday card, Easter card, postcard, letter and [Beth] is eight at the time. She's now nine. So she was an eight year old who could very well read a letter, a communication from her mother." (84:4) (App. 23). Beth, though, was born on 12-19-2012, and she turned

six on 12-19-2018, not eight, and was in Kindergarten. (34:67).

Following arguments, the court entered an order granting partial summary judgment, finding Kate an unfit parent. (75) (App. 71). The circuit court ruled "...the Court finds by clear and convincing evidence that [Kate] failed to visit or communicate with [Beth] for a period of six months or more and; the respondent mother, [Kate], failed to prove by a preponderance that she had good cause for her failure to visit or communicate with the child, [Beth]." (75) (App. 71).

The parties returned to court for a disposition hearing on January 19 and January 27, 2022. (85; 86).[2] The court heard testimony from a psychologist, April, Charles, and Kate. At the hearing, Kate explained she and her husband had utilized the resources provided by social services over the years and now had a very fun and safe home. (86:81). She described her children as thriving, explaining they were all in sports and doing well academically. (86:81). Despite this, Kate acknowledged she did not want to upend Beth's life by removing her from her Charles and April's home. (86:45). However, she explained she still contested the petition to terminate her parental rights because given the history with April and Charles, she did not believe she would be allowed to have contact with her

[2] At this hearing, Beth's father consented to the termination of his parental rights to Beth. (86:86).

daughter again if her rights were terminated. (86:45-47).

Following testimony and arguments from the parties, the court terminated Kate's parental rights to Beth. (73:1-2; 86:104) (App. 72-73).

On appeal Kate challenged the grant of summary judgment on the basis genuine disputed issues of material fact existed from which a jury could find good cause for Kate not seeing or communicating with her daughter during the alleged abandonment period. Though Kate's response and affidavit established the false police report incident which triggered the disruption in visitation stemmed from Kate and her daughters "playfully biting each other and laughing," the court of appeals' decision states "[t]here is no dispute" that during the December 2018 incident "Kate had disciplined one of Kate's children other than Beth by biting that child on the neck." (49:1); (COA opinion ¶¶ 2, 6) (App. 4-5). The court of appeals discounted "events outside the applicable time period of December 2018 to December 2019" and ruled Kate not being "comfortable" with April's supervision and her not visiting "calling or sending a letter" to her Kindergarten-aged daughter meant "no reasonable jury could return a verdict in Kate's favor." (COA Op. ¶¶ 22 n. 10, 24) (App. 13-14). Accordingly, the court of appeals affirmed the lower court's judgment. (COA Op. ¶ 31) (App. 19).

Kate now seeks review in this court.

ARGUMENT

The circuit court erred by granting summary judgment on the ground of abandonment when genuine issues of disputed material fact existed from which a jury could have found good cause, and the court of appeals affirmed after impermissibly weighing facts, and failing to view the facts of record in a light favorable to the non-moving party, Kate.

A. General legal principles.

In summary judgment matters, the non-moving party is entitled to the benefit of all favorable facts and reasonable inferences drawn in her favor, and should facts presented on the motion be subject to conflicting interpretations, summary judgment must be denied. *Steven V. v. Kelley H.*, 2004 WI 47, 271 Wis. 2d 1, 678 N.W.2d 856; *Oddsen v. Henry*, 2016 WI App 30, ¶ 26, 368 Wis. 2d 318, 878 N.W.2d 720. In TPR cases abandonment is a particularly fact-intensive ground for which summary judgment will "ordinarily be inappropriate." *Steven V., Id.* at ¶ 36.

Abandonment cannot be proven unless the moving party at summary judgment would be able to show the non-moving parent would not be able to prove by a preponderance of the evidence that she had "good cause" for failing to visit or communicate with her child throughout the time period of the alleged abandonment, and failing to communicate about her child with the persons who had physical custody of the

child throughout the pertinent time period. *See* Wis. Stat. § 48.415(1)(c).

While the statute does not define "good cause," jury instructions establish jurors may consider a number of factors, including whether a parent had a reasonable opportunity to visit or communicate with the child; whether the persons with physical custody prevented or interfered with efforts by the parent to visit or communicate with the child; and whether any other factors beyond the parent's control prevented or interfered with visitation or communication. *See* Wis. JI-Children 313 & 314.

B. Kate had "good cause" defenses to the alleged abandonment that could not be resolved by summary judgment.

The facts, appropriately viewed in a light most favorable to Kate, establish after April's false police and child protective services reports Kate no longer felt safe exposing herself or her children to April and to visits with Beth under April's supervision. The facts viewed in a light most favorable to Kate establish when Kate and April spoke in March and June 2019 about visits without April supervising, April refused. (46:2) (App. 63). The facts establish Kate sought photos of Beth from April in 2019 to track what was going on with her. (46:2). The facts viewed in a light most favorable to Kate establish when Kate tried to speak with Beth by phone, April refused. (45:4) (App. 55). The facts viewed in a light most favorable to Kate establish Kate undertook the daunting task of

attempting *pro se* litigation to try to see Beth during the alleged abandonment period, but was rebuffed by court error in failing to provide notice of a hearing, and giving false information about refiling. (49:3) (App. 67). Had the issue been addressed by the lower courts under the correct legal standard, or standard of review, this was not a close case. The pleadings established viable triable issues Kate had the right to have a jury resolve. Summary judgment was not appropriate.

The grandparents, in their summary judgment motion, acknowledge Kate was "afraid" of April after the false reports to police and CPS. (45:2, 6) (App. 52, 56). Yet the lower courts seized on Kate's response referencing that she "didn't feel comfortable" with April supervising visits to diminish or discard that as a legitimate "good cause" factor. (84:23; COA Op. ¶ 22) (App. 13). It is true that the not "feeling comfortable" can in some contexts reference the trivial—e.g. discomfort from sitting on a too hard chair. But it would also cause discomfort or be uncomfortable to accidently slice one's finger off with a band saw. Here Kate legitimately believed it not safe to continue to expose herself or her children to April, and therefore to protect all of her children Kate no longer felt comfortable with visits in April's presence. To diminish the significance of this factor in this manner by minimizing the term "comfortable" is to ignore the requirement that facts be viewed in a light most favorable to the non-moving party.

It is too easy for persons in power, with privilege, including courts sometimes, to diminish or overlook the trauma police contact, or threat of police or other government contact or intervention, can have on the powerless. The grandparents acknowledge Kate established the false police and CPS report caused Kate and Kate's children to fear April, such that Kate took the extraordinary step of trying to seek court action to protect all her kids, including Beth. (45:5, 7) (App. 55, 57). The court of appeals, though, ruled that because Kate did not further explain why this "single [in Kate's view, false] report", it could not be a "reasonable basis" for suspending visitation, or continuing visitation under what Kate believed were unsafe circumstances or conditions. (COA Op. ¶ 24) (App. 14). Such detail did come out in Kate's deposition and would, no doubt, be expanded and further developed at a trial. (34:32-33, 37, 46-47). But doing so is not or should not be necessary at summary judgment, where facts and inferences therefrom are to be construed in favor of the non-moving party.

The grandparents concede that throughout the period of alleged abandonment Kate wanted to see her daughter Beth. The grandparents acknowledge Kate and April talked about visits in March and June, but April refused unless she supervised. (46:2) (App. 63). The grandparents acknowledge Kate contacted April in October to get pictures to keep up with what Beth was doing. (46:2). Moreover, it is beyond dispute that Kate tried to act via the courts to see Beth under safe circumstances throughout the winter and spring of 2019, but was stymied by obstacles which viewed in

the relevant favorable light were not Kate's fault. (46:2; 49:2) (App. 63, 66). Thus, there was no six-month period during the alleged term of abandonment when Kate did to try to see Beth or inquire from the grandparents about Beth.

The grandparents and lower courts focus on Kate not writing to Beth or "sending a letter" or birthday or Christmas card. (COA Op. ¶ 24) (App. 15). Setting aside this boomer-era form of communication is not a practical or effective way of communicating with a child, Kate did communicate with Beth directly on her birthday in 2018, a few days before Christmas, and April refused to let Kate speak with Beth on her birthday near Christmas in 2019. (46:2) (App. 63). Moreover, this whole issue is grounded in the grandparents' attorney's false argument at summary judgment that Beth was "eight at the time" and "now nine ... [s]o she was an eight-year-old who could very well read a letter, a communication from her mother." (84:4) (App. 23). Beth turned six on 12-19-2018, was in Kindergarten, and likely would have just been learning to read as 12-19-2019 approached. The "letter" issue or argument is a red herring.

Regarding phone calls, the grandparents' summary judgment motion concedes "Petitioners do not contest that [April] did not allow a phone call with [Beth]" when Kate asked in December 2019. (45:4) (App. 54). Viewing this incident in a light favorable to Kate creates a fair inference phone contact by Kate with her very young daughter was not an option because of April. April's hostility toward Kate in this

regard is shown by April's extraordinarily hyperbolic and toxic statement to Kate that "I [April] will not allow you to destroy this child or confuse her with a random contact," in reference to Kate trying to call Beth on her birthday. (45:2) (App. 52). April had no right to bar Kate from phone contact with Beth, no right to insist visits occur outside the presence of Kate's other kids and husband, and be in a public place. Yet those are the barriers April imposed which, with the false police and CPS reports, lead Kate to seek access to Beth through the courts.

When this court first opened the door to summary judgment in TPR cases, a procedure created or applied generally for matters where mere money rather than a fundamental liberty interest is at stake, Justice Prosser's well-reasoned dissent was balanced by this court noting "[s]ummary judgment will ordinarily be inappropriate in TPR case premised on fact-intensive grounds for parental unfitness," presumably meaning abandonment or failure to assume. *Steven V. v. Kelley H.*, 2004 WI 47, ¶ 36, 271 Wis. 2d 1, 678 N.W.2d 856. Summary judgment, though, is now "ordinary" in abandonment and failure to assume TPR cases, and is routinely applied without what should be an expansive embrace of viewing facts in a light most favorable to the non-moving party, and without weighing competing facts to render a judgment that permanently destroys a family and parent-child bond. This court should grant review to appropriately narrow the applicability of summary judgment in fact-intensive cases such as that at bar, where far from abandoning Beth, Kate took

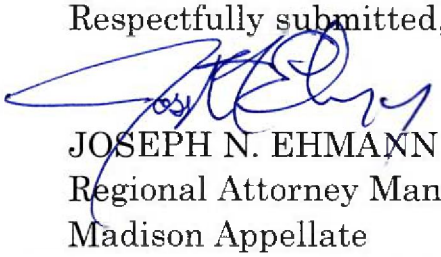
extraordinary steps to try to see and be present for Beth in a safe setting for Kate and Beth's siblings.

CONCLUSION

For the above-stated reasons, Kate asks that this court grant review, reverse the decision of the court of appeals, and remand the case to the circuit court with instructions to vacate its order terminating Kate's parental rights to Beth, and to reinstate Kate's right to a jury trial on the petition to terminate parental rights initiated by Kate's daughter's paternal grandparents.

Dated this 23rd day of January, 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 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 3,420 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

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

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

Dated this 23rd day of January, 2023.

Signed:

JOSEPH N. EHMANN
Regional Attorney Manager-
Madison Appellate

SIGNATURE OF PETITIONER

IN SUPPORT OF PETITION FOR REVIEW[1]

[1] The parent's signature has been redacted in order to comply with the confidentiality requirements of cases involving children.