

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 20, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP1654

Cir. Ct. No. 2006TP10B

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO
DIMITRI P., A PERSON UNDER THE AGE OF 18:**

GRANT COUNTY DEPARTMENT OF SOCIAL SERVICES,

PETITIONER-RESPONDENT,

v.

ROBERT L. L.,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Grant County:
ROBERT P. VANDEHEY, Judge. *Reversed.*

¶1 BRIDGE, J.¹ Robert L.L. appeals a circuit court's judgment terminating his parental rights to Dimitri P. Robert argues that the circuit court

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

lost competency to set aside a jury verdict in his favor with respect to the termination of his parental rights and order a new trial in the interest of justice, because the court's *sua sponte* motion was not timely. We agree and therefore reverse and remand the cause to the circuit court with directions to reinstate the jury's verdict.

BACKGROUND

¶2 Dimitri P. was born on January 14, 2002. Robert L.L., who has been adjudicated Dimitri's father, was not living with Dimitri's mother at the time and has never lived with her. On October 13, 2006, the Grant County Department of Social Services filed a petition for termination of Robert's parental rights to Dimitri for failure to assume parental responsibility. The petition also sought termination of the rights of Cherry A., Dimitri's mother, alleging as grounds continuing CHIPS² as well as failure to assume parental responsibility. As to Robert, the petition alleged that he was currently incarcerated at Fox Lake Correctional Facility, and would participate in supervised visits with Dimitri when he was out of jail. It stated further that Robert wrote a letter to Dimitri in June of that year. It also stated that Robert would voluntarily terminate his parental rights if Cherry's parental rights were terminated.

¶3 A jury trial was held on February 1-2, 2007. The case was tried jointly with cases seeking termination of the parental rights of Cherry to Dimitri, as well as her other son, Blake, and of the parental rights of Blake's father to Blake.

² CHIPS is an acronym for "child in need of protection or services." See WIS. STAT. § 48.13.

¶4 At the conclusion of the first day of trial, the court noted that the County had submitted proposed jury instructions. The jury instructions included Wisconsin Jury Instruction—Children 346. All of the other parties indicated that they had no objections to the proposed instructions. It was later determined that WIS JI—CHILDREN 346 was based on a statute that had since been amended. The new version of the statute became effective in April 2006, but new corresponding jury instructions had not yet become available.³

¶5 The earlier version of the statute, WIS. STAT. § 48.415(6)(a) and (b), provided as follows:

48.415(6)(a) Failure to assume parental responsibility, which shall be established by proving that the parent or the person or persons who may be the parent of the child have not had a substantial parental relationship with the child.

(b) In this subsection, “substantial parental relationship” means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has ever expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has ever expressed concern for or interest in the support, care or well-being of the mother during her pregnancy. (Emphasis added.)

Following the amendment by 2005 Wis. Act 293, § 21, the statute provided as follows:

³ The new jury instructions were included in the 2007 edition of WIS JI—CHILDREN published in February 2007.

48.415(6)(a) Failure to assume parental responsibility, which shall be established by proving that the parent or the person or persons who may be the parent of the child have not had a substantial parental relationship with the child.

(b) In this subsection, “substantial parental relationship” means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has expressed concern for or interest in the support, care or well-being of the mother during her pregnancy. (Emphasis supplied.)

At the start of the second day of trial, the court again addressed the parties regarding the proposed instructions, and the parties again indicated that they had no objection.

¶6 After the County put on its evidence, the guardian ad litem (GAL) moved for a directed verdict as to Robert, Cherry, and Blake’s father. Cherry also moved for a directed verdict in her favor. The court denied the motions, but indicated that it would revisit them “once all of the evidence is in.” At the close of all of the evidence, the court stated that it assumed that all prior motions were being renewed. At that time, Robert also moved for a directed verdict. The court denied the motions and indicated that the case would go to the jury.

¶7 During deliberations, the jury sent out two questions. The first was, “Is assumed parental responsibilities ... [defined] ... the same as substantial parental relationship?” The second was “how much weight does the word [‘]never[’] have in the definition of parental relationship?” Following discussion, the parties all agreed that the court should respond in writing that, “You have all of

the instructions you need to decide on your verdicts,” and the court so responded. The jury subsequently returned a verdict that Robert had not failed to assume parental responsibility for Dimitri. The jury also returned a verdict that Blake’s father had failed to assume parental responsibility for Blake, and that Cherry had not failed to assume parental responsibility for either Blake or Dimitri.⁴

¶8 A scheduling conference was held on February 13 prior to a dispositional hearing with respect to the cases involving Cherry and Blake’s father as to which the jury found grounds for termination. Neither Robert nor his attorney appeared.⁵ Counsel for the County appeared in person, and a legal assistant appeared telephonically as a substitute for the GAL. The court expressed its belief that there were still motions pending that were taken under advisement at the close of testimony. The court stated that, “I know [the GAL] had filed a motion for a directed verdict, and I denied it at that time, then at the conclusion of testimony, just to keep matters moving forward, I said all other motions would be renewed and taken under advisement, I think.” The court went on to state that, “So I don’t know if [Cherry’s attorney] or someone else plans on pursuing that motion, but we will schedule it for the disposition.” Counsel for Cherry indicated that she would be renewing her motion. The court noted that that would be “within 45 days, so we are good on the time limits.” The GAL, by the legal assistant, did not participate in the discussion regarding the motions.

⁴ The jury found against Cherry with respect to the continuing CHIPS allegation as to Blake and Dimitri.

⁵ Counsel for the County advised the court that Robert’s attorney was likely not appearing because the County had lost the first phase of the proceeding.

¶9 The dispositional hearing was held on March 8, and all attorneys were present. At that time, the GAL asked that the court reconsider its earlier motion for a directed verdict and asked that it be considered a motion for judgment notwithstanding the verdict. In support of the motion, the GAL argued that the case law, along with the newly revised jury instruction “require[] something more than a past substantial relationship.” In essence, the GAL argued that although Robert may have had a substantial relationship with Dimitri in the past, that subsequent behavior on his part, including limited contact between Robert and Dimitri, could still be grounds for termination of parental rights. The County supported the motion, and Robert and Cherry opposed it. Robert’s counsel argued that had the jury instructions been different, he would have proceeded differently in putting on a defense.

¶10 The court ruled that because there was no objection to the jury instruction and the jury found insufficient evidence to uphold the County’s termination of parental rights (TPR) petition as to Robert, there was no reason to overturn the jury’s determination. Accordingly, the court denied the motion for judgment notwithstanding the verdict. However, it determined that in light of the incorrect jury instruction, a new trial should be ordered in the interest of justice because “the controversy wasn’t tried.”

¶11 A retrial was held, and the jury was instructed consistent with the change in WIS. STAT. § 48.415(6)(a) and (b). The jury found grounds to terminate Robert’s parental rights to Dimitri based upon failure to establish parental responsibility. The court entered an order terminating Robert’s parental rights on March 23, 2007. Robert appeals.

DISCUSSION

¶12 Robert argues that the County waived any error in instructing the jury by failing to object to the instruction at trial. He also argues that once the court denied the GAL's motion for judgment notwithstanding the verdict, it was obligated under WIS. STAT. § 805.14(5)(a) to enter judgment on the verdict.⁶ In addition, he contends that the circuit court lost competency to order a new trial because the court issued its order after the time for filing a motion for a new trial under WIS. STAT. § 805.16(1) expired without extension. We begin by addressing Robert's argument regarding the circuit court's competency to order a new trial.

¶13 WISCONSIN STAT. § 801.01(2) provides that chapters 801 to 847 govern procedure and practice in all civil actions and special proceedings except where a different procedure is prescribed by statute or rule. Termination of parental rights proceedings are brought pursuant to WIS. STAT. ch. 48, and do not specify a different procedure with respect to filing a motion for a new trial. Hence, chapters 801 to 847 govern the applicable procedure and time limits at issue in this matter.

¶14 The relevant statutes relating to motions for a new trial provide as follows:

WIS. STAT. § 805.15 **New trials.** (1) **Motion:** A party may move to set aside a verdict and for a new trial because of errors in the trial, or because the verdict is contrary to law or to the weight of evidence, or because of excessive or inadequate damages, or because of newly-discovered evidence, or in the interest of justice. Motions under this subsection may be heard as prescribed in s. 807.13. Orders

⁶ WISCONSIN STAT. § 805.14(5)(a) provides in relevant part that “[i]f a motion after verdict is timely filed, judgment on the verdict shall be entered upon denial of the motion.”

granting a new trial on grounds other than in the interest of justice, need not include a finding that granting a new trial is also in the interest of justice.

WIS. STAT. § 805.16 **Time for motions after verdict** (1): Motions after verdict shall be filed and served within 20 days after the verdict is rendered, unless the court, within 20 days after the verdict is rendered, sets a longer time by an order specifying the dates for filing motions, briefs or other documents.

The interpretation of a statute presents a question of law subject to de novo review. *Village of Lannon v. Wood-Land Contractors, Inc.*, 2003 WI 150, ¶12, 267 Wis. 2d 158, 672 N.W.2d 275.

¶15 In addition to the parties' opportunity to move for a new trial, the circuit court may grant a new trial in the interest of justice on its own motion. *See Behning v. Star Fireworks Mfg. Co.*, 57 Wis. 2d 183, 188, 203 N.W.2d 655 (1973); *Schmidt v. Smith*, 162 Wis. 2d 363, 368, 469 N.W.2d 855 (Ct. App. 1991). However, a circuit court's authority to *sua sponte* grant a new trial "is subject to statutory time limits governing the parties' motions." *Schmidt*, 162 Wis. 2d at 368-69. Here, the circuit court did not act within the twenty-day time period that would otherwise govern a motion for a new trial if made by a party. Accordingly, under the holding in *Schmidt*, the court was without authority to proceed.

¶16 The GAL appears to argue that its timely motion for judgment notwithstanding the verdict was still pending on March 8, and that motion tolled the twenty-day deadline for filing a motion for a new trial under WIS. STAT. § 805.15(1). However, the GAL offers no authority in support of this argument, and we are aware of none. To the extent that the GAL's motion was pending on March 8, it was a motion based on the sufficiency of the evidence in the first trial; it was not a motion asking the court to order a new trial. Even if a motion for

judgment notwithstanding the verdict was timely brought, a motion for a new trial was not.

¶17 The County argues that the circuit court had a valid equitable reason for ordering a new trial, apparently notwithstanding the time constraints in the statute. Citing *General Telephone Co. v. Auto-Owners Insurance Co.*, 140 Wis. 2d 10, 18, 409 N.W.2d 133 (Ct. App. 1987), the County asserts that a circuit court may grant a new trial at any time when an order or judgment was obtained by fraud or a similar violation of equity, without being subject to statutory time limits. However, the circumstances of the present case are not comparable to “fraud or a similar violation of equity” as existed in *General Telephone*. Instead, the circuit court determined that a new trial was warranted in the present case because the true controversy had not been tried. “Where ... the trial court orders a new trial because the real issues have not been fully tried, its decision is subject to the time limits imposed by statute.” *Id.* at 18.

¶18 For the above reasons, we conclude that the circuit court lost competency to order a new trial in the matter, and reverse the judgment terminating Robert’s parental rights to Dimitri P.

By the Court.—Judgment reversed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

