COURT OF APPEALS
DECISION
DATED AND FILED

March 26, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2722 **Cir. Ct. No. 99 JC 253940**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

IN THE INTEREST OF KYLE R.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

KEVIN R.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MARSHALL B. MURRAY, Judge.[1] *Reversed and cause remanded.*

[1] The juvenile court proceedings at issue in this appeal were before Judge Murray; the criminal court proceedings, which also play a prominent role in this opinion, were before Judge Mel Flanagan.

¶1 SCHUDSON, J.[2] Kevin R. appeals from the juvenile court's dispositional order, following summary judgment proceedings, finding his son, Kyle, to be a child in need of protection or services (CHIPS). Kevin argues that the court committed reversible errors in: (1) granting the State's motion for summary judgment despite the existence of what, he says, were genuine issues of material fact; (2) excluding evidence regarding the appropriateness of the child's caretaker; and (3) excluding evidence regarding whether an alternative placement might be in Kyle's best interest.

¶2 This court concludes that the record fails to establish the factual and statutory bases on which the court found jurisdiction and, even assuming that the court did so under WIS. STAT. § 48.13(3), the record does not establish the absence of genuine issues of material fact.[3] Accordingly, this court reverses and remands.

I. BACKGROUND

¶3 This case has a lengthy and complicated history dating from 1993, when Kyle first was found to be in need of protection or services, to April 16, 1999, and June 30, 2000, when the State, on Kyle's behalf, filed the CHIPS petition and amended CHIPS petition underlying this appeal. On July 7, 1999, while the CHIPS action was pending in the juvenile court, Kevin, in a Milwaukee County criminal court, pursuant to his plea under ***North Carolina v. Alford***, 400

[2] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e), (3) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise indicated.

[3] Resolving the appeal on this basis obviates the need to address Kevin's other arguments. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issue need be addressed).

U.S. 25 (1970), was found guilty of felony child abuse—intentionally causing harm, involving Kyle.[4]

¶4 On August 4, 1999, at the sentencing hearing, Kevin, responding to the court's questions, said that some of the conduct mentioned at the hearing came in the context of teaching Kyle and Kyle's half sister, both of whom were approximately nine years old at the time, about sex. Toward the end of his explanation, the following colloquy occurred:

> THE COURT: Well, sir, was it during this educational session that you had with your children that you ejaculated on your hand and showed them what sperm looked like[?]
>
> THE DEFENDANT: Yes, it was, but that was three days later.
>
> THE COURT: And that was still educational?
>
> THE DEFENDANT: Yes, ma'am. And when I was explaining to them about the sperm going into—I says the sperm entered the female and swims up to the egg.
>
> THE COURT: So you ejaculated for them and showed it to them. You thought that this was necessary, they needed this graphic demonstration—
>
> THE DEFENDANT: No, I didn't—
>
> THE COURT: —for educational purposes?
>
> THE DEFENDANT: No, ma'am, I did not do that.
>
> THE COURT: In your own words, sir, in the presentence, this is not from the State, this is not from anybody else, this isn't from anything except your words, you stated, you ejaculated on your hand and showed both children what sperm looks like. Your words, sir.
>
> THE DEFENDANT: Yes, ma'am, I did that. That was five days later. I had to—They kept asking me what it looked like ….

[4] On July 7, 1999, Kevin also pled guilty to misdemeanor possession of drug paraphernalia.

¶5 Based, in substantial part, on Kevin's comments at the sentencing hearing, the State moved for summary judgment in the CHIPS action. At the hearing on the State's motion, the juvenile court considered the arguments of counsel, as well as Kevin's account of his conduct with the children, and his characterization of the sentencing:

> THE COURT: I want to remind you that there was a pre-sentence report that the judge referred to.
>
> [KEVIN]: Yes, Your Honor.
>
> THE COURT: Maybe you remember that too? That you talked to someone in your pre-sentence report and you may not have told the judge but did you tell someone in your pre-sentence report that you ejaculated into your hand and showed it to both of your children?
>
> [KEVIN]: Yes, I told them I had showed them sperm on my hand but my children did not see this ejaculation. It was not in front of them. I didn't say see what daddy can do. I was—it wasn't to gratify myself in front of my children. This was not the case whatsoever. This was—this was done inappropriately because it was done in the same room. All I wanted to do is show them sperm, so what I did is okay, I said, okay, you guys may ask me this question, they wanted to see what the white stuff looked like because I had told them about these tadpoles but I said you can't see the tadpoles unless it's under a microscope. Well, this didn't happen during this period.
>
> For three separate days they kept asking me, dad, you said that you would show us the white stuff. I kept trying to put them off because I didn't know how to do this. If I would be at home—
>
> ….
>
> … If I would have been home, I would have done this and I would have in the privacy of my home, I would have put it in a little vial and I would have put it on a slide and put in [sic] on a microscope.
>
> THE COURT: You have a microscope in your home?
>
> [KEVIN]: Yes, I do. So this is what I would have done but since I wasn't—it was out of my means, I was in Florida. There was nothing there I could do. See, I'm very open with my children. I don't think of anything sexual

> with my children but I wanted to get them off of this sex—this sex thing and move on with this vacation. We were down in Florida, so I did.
>
> ….
>
> So I showed them what sperm could look like so they couldn't see the tadpoles. The vacation moved on for them then but they did not see me ejaculate and I did not do this in front of them. I showed them what the white stuff looked like on my hand. I was completely covered up and I was behind them. The only thing was that I was in the same room. They started to turn around and I said, no turn back around and I was under a sheet.

¶6 In an awkward and, at one point, internally inconsistent pronouncement, the court granted the State's summary judgment motion, concluding that Kyle was a child in need of protection or services under WIS. STAT. § 48.13(3), which provides the juvenile court "exclusive original jurisdiction over a child alleged to be in need of protection or services which can be ordered by the court" and "[w]ho has been the victim of abuse as defined in [WIS. STAT. §] 48.02(1)(a), (b), (c), (d), (e) or (f)." The convoluted record, however, exposes some of the difficulties for this case on appeal.

¶7 When the court first pronounced its finding of jurisdiction, it did so under two statutory provisions:

> [PROSECUTOR]: Do you wish to find jurisdiction under—are you talking about inability to provide necessary care [pursuant to WIS. STAT. § 48.13(10)] based on his impaired judgment? Are you talking about 48.13(3) the sexual abuse, which indicates arousal and gratification in the presence of his children[,] or both?
>
> THE COURT: Both.

The prosecutor then asked the court whether its finding under § 48.13(3) related to "the element of the forced viewing, which was the fact that he was in the room with them, turned around and ejaculated," or to another aspect of Kevin's

conduct—showing the children a videotaped movie portraying sex—which also had been mentioned at the hearing.

¶8 Then, after the prosecutor and court sorted out some additional confusion involving the distinction between WIS. STAT. § 48.13(3) and (3m), the following discussion occurred:

> [PROSECUTOR]: … Your Honor, so you want just Sub (3).
>
> THE COURT: Right, Sub (3).
>
> [DEFENSE COUNSEL]: So, Your Honor, that's what the Court is finding jurisdiction under?
>
> THE COURT: One moment please. That one is clear to the Court.
>
> [PROSECUTOR]: Actually Your Honor, Chapter 48 only requires the finding generally under 48.13(3). These are elements of Sub (3), so you could find one or both. It doesn't matter because it's a general 48.13(3) finding and these are some of the acts that would be under it. We only need one act.
>
> THE COURT: Counsel, that's under 48.13(3).
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> [DEFENSE COUNSEL]: No, I understand that. I didn't know if you were also finding summary judgment under Sub (10) as well?
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> THE COURT: I was reading that and I was going to go back and look at the State's motion. I mean in the Court's eyes, Sub (10) says whose parent, guardian or legal custodian neglects, refuses or is unable for reasons other than poverty to provide the necessary care, food, clothing medical, dental, shelter so as to seriously endanger the physical health of the child.
>
> I don't have a psychological report to say that [Kevin] is unable because of his psychological makeup. Clearly what I heard today that there is some issues [sic] there that I think needs to be addressed before any child would be in his care but I don't have any—I'm not a psychologist. I'm not an expert. I can't speak to that, so I believe Sub (3) would be the jurisdictional finding.

¶9 Thus, as best as this court can discern from the record, the juvenile court, in its pronouncement at the summary judgment hearing: (1) failed to finalize any jurisdictional finding under WIS. STAT. § 48.13(10);[5] and (2) failed to specify the factual basis for its jurisdictional finding under § 48.13(3).[6] The summary judgment order, however, states:

> It appearing to the Court that no material fact is at issue to contest that Kevin … exposed his genitals or pubic area to a child for the purpose of sexual arousal or gratification; and it further appearing to the Court that no material fact is at issue to contest that Kevin … forced his child to view sexually explicit conduct by use or threat of force and that sexually explicit conduct involved either actual or simulated sexual intercourse, masturbation, or lewd exhibition of genitals or pubic area, the Court grants the State's Summary Judgment Motion and Orders a finding of Jurisdiction … under Wis. Stats. Sec. 48.13(3), sexual abuse.

¶10 While the dispositional order provides some possible clarification, it also contributes confusion. It makes no reference to any finding under WIS. STAT. § 48.13(10). Complicating matters, however, it also specifies that Kyle "is in need of protection or services in that he has been the victim(s) of sexual abuse, as defined in s. 48.02(1) (a) (b) (c) (d) (e) or (f), including injury that is inflicted by another, pursuant to s. 48. 13(3), stats." Paragraphs (a) through (e), however, seem to have no relevance to the case. The only theory, under § 48.13(3), on which the State seems to have relied (and on which the State primarily relies on appeal), is that Kyle was the victim of Kevin's abuse, under WIS. STAT. § 48.02(1)(f), which refers to WIS. STAT. § 948.10(1), which provides, in relevant

[5] In its brief to this court, the State concludes that the juvenile court "granted the Summary Judgment pursuant to Section 48.13(3) sexual abuse, only."

[6] Further complicating the record is the assistant district attorney's affidavit in support of the State's motion for summary judgment. It purports to support jurisdiction "pursuant to [WIS. STAT.] § 48.13(3), Physical Abuse, and § 48.13(3), Sexual Abuse and § 48.13.(10)." [sic]

part, "Whoever, for purposes of sexual arousal or sexual gratification, causes a child to expose genitals or pubic area or exposes genitals or pubic area to a child is guilty of a Class A misdemeanor."

¶11 Thus the State, on appeal, has concentrated on the theory that Kyle was the "victim of abuse" under WIS. STAT. § 48.02(1)(f), by virtue of having been exposed to Kevin's masturbation.[7] Accordingly, the State and Kevin debate whether his statements—from the sentencing hearing and, perhaps, from the summary judgment hearing—established the absence of any genuine issue of material fact. The State asserts that the record is clear—that Kevin admitted, as required by WIS. STAT. § 948.10(1), "putting [Kyle] in a forced position of having to watch him masturbate and witness sexual arousal and gratification upon ejaculation." Kevin, however, insists that although he may have exhibited poor

[7] The State also argues that jurisdiction could be based on Kevin's conduct in exposing Kyle to a videotape. On this point, the State's entire argument is brief:

> During both [the sentencing and summary judgment] hearings, Kevin … admits … that he went out and got a videotape of two people making love and brought it back and showed it to his two children …. [Kyle] was put in a position by his father of being "educated" by his father about people having sex. Kevin[]'s act of going out and getting a sex videotape for the express purpose of "education" demonstrates that his children were compelled by intellectual means and caused through natural and logical necessity to view it, which the children did. There is no evidence, no genuine issue of material fact, that his child was given a choice not to participate in this so-called educational session conducted by Kevin[].

The State, however, has offered no record reference or argument to counter Kevin's position, supported by ample and accurate references to the record: that he explained, at sentencing, that the movie he showed the children was for educational purposes, in response to their inquiries about sex; and that the movie was not X-rated and did not include graphic "descriptions" of sexual acts. Moreover, as this opinion explains, it does not appear that the juvenile court made any jurisdictional finding based on Kevin's conduct involving the video.

judgment, he concealed his genitals from the children, and he masturbated and displayed the semen for educational purposes.

II. DISCUSSION

¶12 Summary judgment may be appropriate for the resolution of a CHIPS case. *See* ***N.Q. v. Milwaukee County Dep't of Soc. Servs.***, 162 Wis. 2d 607, 612, 470 N.W.2d 1 (Ct. App. 1991). Reviewing a challenge to a juvenile court's grant of summary judgment, this court utilizes "the same methodology in the same manner as the [juvenile] court." ***State v. Courtney E.***, 184 Wis. 2d 592, 599, 516 N.W.2d 422 (1994). Although, generally, summary judgment methodology is well known, the record here causes concern over whether the juvenile court appreciated the need for proper summary judgment submissions and precise summary judgment rulings.

¶13 Without detailing all the aspects of summary judgment methodology, it is important to remember: (1) summary judgment must be entered only if "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); and (2) this court reviews a challenge to summary judgment *de novo*, applying the methodology set forth in § 802.08(2), ***Garcia v. Regent Ins. Co.***, 167 Wis. 2d 287, 294, 481 N.W.2d 660 (Ct. App. 1992).

¶14 As preposterous as Kevin's explanation for his conduct may seem to the State, the record simply does not support summary judgment. To recognize why, it is important to review "the rest of the story" of this sorry record; and it is helpful to appreciate how haste can rob a record of its factual and legal essentials.

¶15 First, at Kevin's sentencing, just before the portion quoted in this opinion, *see* ¶4 above, Kevin was attempting to explain why he had masturbated and shown his semen to the children. The court interrupted him:

> Sir, you don't have to give me the verbatim recount of this. You can tell me the shorter version, here. It's twelve o'clock. We've all been here quite a while. We have a full day. We can't go through our entire lunch hearing the verbatim response, so tell me the short version.

There followed the previously quoted colloquy. Notably, just after Kevin's comments as quoted in this opinion, *see* ¶4 above, the court added: "Fine. Let's get beyond education. I don't need to hear anymore about Florida. Clearly, by your own words, I've understood what you did and why you did it, and we'll move on to what we're here for."

¶16 Next, at the summary judgment proceedings, Kevin again experienced a truncated proceeding. Immediately following the portion of the summary judgment proceedings quoted in this opinion, *see* ¶5 above, the court stated, "I really don't want you to say anything more because I think you'll hurt your case." Ironically, however, given the dispute on appeal, the court continued:

> *It's clear to me [Kevin] that you don't understand what trauma and damage that you caused to your kids. It's clear to me that[,] and you said it yourself, I don't see—I don't see any problem with it.* I'm open with my kids about everything and with a nine-year-old, the fact that you don't understand that could be traumatic, that could be damaging to the psyche because they are nine years old, the fact that you don't understand that means—
>
> [KEVIN]: I do understand it, Your Honor.
>
> THE COURT: —means that if your kids were with you, they would be at risk.
>
> [KEVIN]: I do understand it, Your Honor, and I would not—
>
> THE COURT: Sir, I am speaking.
>
> [KEVIN]: I would not do that again and that's what I have said.

> THE COURT: Now you wouldn't. That day you did it.
>
> [KEVIN]: Yes, Sir, I did.
>
> THE COURT: You turned around with your clothes on.
>
> [KEVIN]: That was a mistake.
>
> THE COURT: Are you going to let me finish? You turned around with your clothes on fully clothed and jacked off. Now you and I both know that you just don't jack off without thinking about some things. Let's be realistic here. *Don't think I fell out of a turnip truck and I don't understand what was going on with you at the time you jacked off in the same room with your kids and you believe that it was appropriate to show them what happened. You thought it was appropriate. You told me that*.

(Emphases added.)

¶17 The issue, however, certainly is not whether the juvenile court was naive—that is, whether the judge "fell out of a turnip truck." Given Kevin's attempt to explain that his conduct was for educational purposes, and his insistence that it was not for sexual arousal or gratification, a fact finder may have to determine whether Kevin had fallen from a vegetable vehicle. Indeed, on appeal, the State really does not dispute the existence of material factual issues; instead, the State argues that Kevin's factual issues "are not genuine, but spurious and adulterated." That, however, is for a jury to determine.

¶18 Thus, Kevin correctly argues that the summary judgment record of his conduct does not establish the absence of genuine issues of material fact. The record, while reflecting considerable confusion in many respects, establishes Kevin's continuing efforts to dispute two critical components of what the juvenile court seems to have utilized as its factual basis for finding that, under WIS. STAT. § 48.13(3), Kyle was in need of protection or services because he was the "victim of abuse" under WIS. STAT. § 48.02(1)(f). First, unquestionably, the record

demonstrates that Kevin denies that he exposed his "genitals or pubic area" to Kyle. And second, just as clearly, Kevin denies that the State presented any evidence that any such exposure was "for purposes of sexual arousal or sexual gratification."[8]

¶19 Thus, although it is possible to wrench some of Kevin's words from the context of the sentencing proceedings and interpret them, in isolation, to concede what could be the basis for summary judgment, the full record on appeal

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[8] Kevin has disputed these elements throughout the proceedings. His counsel's brief in support of his objection to summary judgment states, in part:

> The act in question here involves the father displaying what sperm looked like to his children. The father acknowledges in retrospect that this was not the way he should have shown his children what the sperm looked like. The father strongly denies, and asserts the evidence does not show that this demonstration was done for his own personal arousal or gratification. No evidence exists to show that the father had any pedophiliac tendencies or had ever had any sexual contact with a minor. The evidence also does not show that the children were exposed to the father's genitals or pubic area. The father indicates that he did not do this activity in front of the children, but did it away from the children and only displayed the result.

Indeed, this incident was, at most, tangential to the underlying conduct leading to Kevin's plea and sentencing in the criminal case. At the sentencing, Kevin's counsel summarized, "What [Kevin] acknowledged [at the plea hearing was] that there was sufficient evidence to find … that he spanked his child on at least one occasion to bare buttocks and several episodes of striking the child as well as several episodes of flicking his child's ears …." Regarding the incident of masturbation, counsel commented:

> [Kevin will] address the Florida situation in his comments, although I really think it's irrelevant to whether or not he showed any material—videotape tape of a sexual nature in Florida or whether he did. I don't think it's really directly on point to an allegation of physical abuse of a child, but if the Court does find that it was marginally relevant or should be considered in rendering its sentence, [Kevin] in his own words will explain to the Court what happened in Florida.

And, as noted, the sentencing court interrupted Kevin's explanation, stating that it did not "need to hear anymore about Florida"; instead, it sought to "move on to what we're here for." *See* ¶15, above.

establishes the unfairness of doing so. While one might be skeptical of his explanation, Kevin has the right to present it to a jury. As the supreme court clarified:

> On summary judgment, the court does not decide the issue of fact; it decides whether there is a genuine issue of fact. A summary judgment should not be granted unless the moving party demonstrates a right to a judgment with such clarity as to leave no room for controversy; some courts have said that summary judgment must be denied unless the moving party demonstrates his [or her] entitlement to it beyond a reasonable doubt. Doubts as to the existence of a genuine issue of material fact should be resolved against the party moving for summary judgment.

Grams v. Boss , 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980). Clearly, in this case, genuine issues of material factual dispute remain and, therefore, the juvenile court erred in granting summary judgment.

By the Court.—Order reversed and cause remanded.

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