

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 4, 2004

Cornelia G. Clark
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. 03-3188

Cir. Ct. No. 02TP000090

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO
TALYA L. B.-P., A PERSON UNDER THE AGE OF 18:**

THERESA L. C.,

PETITIONER-APPELLANT,

V.

JEREMY C. P.,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Portage County:
JOHN V. FINN, Judge. *Reversed and cause remanded with directions.*

¶1 DYKMAN, J.¹ Theresa L.C. appeals from an order dismissing her petition to terminate the parental rights of Jeremy C.P. Theresa asserts: (1) that

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

the trial court erroneously exercised its discretion by not ordering a new trial or changing the verdict answer, (2) that the jury's verdict was perverse, and (3) that the jury instructions did not adequately explain the law. Because there was no credible evidence to support the jury's verdict, we reverse and remand for a new trial.

BACKGROUND

¶2 Theresa petitioned to terminate Jeremy's parental rights of their daughter, Talya, who is now about five years old. She alleged that Jeremy abandoned Talya by not visiting or communicating with Talya from June 20, 1999, to December 23, 1999, and that he failed to assume parental responsibility for Talya. At trial, Jeremy testified that he did not contact his daughter because he was not getting along with Theresa. However, he contacted the family court commissioner about getting visitation. Information from the commissioner prompted Jeremy to seek mediation. The mediation with Theresa was not successful. Jeremy then wrote to Judge Fleishauer for help scheduling visitation. The judge informed Jeremy that he needed to file a motion. Jeremy asserted that these attempts at visitation should preclude a finding that he did not visit or communicate with Talya.

¶3 The record does not contain a verdict and instruction conference.² At the close of evidence, the trial court instructed the jury by reading WIS II—

² For a discussion of the hazards of failing to request an on-the-record verdict and instructions conference, see *Steinberg v. Jensen*, 204 Wis. 2d 115, 120-21, 553 N.W.2d 820 (Ct. App. 1996). See also WIS. STAT. § 805.13(3).

CHILDREN 314. The jury answered the special verdict form from WIS JI—

CHILDREN 314. The question, and the jury’s answers were:

1. Was Talya left by [Jeremy] with a relative or other person? Answer—yes.
2. If you have answered Question No. 1 “yes,” then answer this question: Did [Jeremy] know, or could he have discovered, Talya’s whereabouts? Answer—yes.
3. If you have answered Question No. 2 “yes,” then answer this question: Did [Jeremy] fail to visit or communicate with Talya for a period of six (6) months or longer? Answer—no.
4. If you have answered Question No. 3 “yes,” then answer this question: Did [Jeremy] have good cause for having failed to visit with [Talya] during that period?—Not answered.

¶4 At motions after verdict, Theresa moved for a new trial or to change the jury’s answer to special verdict question number three. The trial court reasoned that:

[W]hat the jury had to consider was the fact that, that there was no—that in fact the telephone records showed and pretty much the admissions of the parties showed that there was no contact or communication between [Jeremy] and Talya

....

... there was a failure to visit or communicate, but here’s the reasons why he didn’t do it. They weren’t getting along. He thought that communicating with the family court commissioner was a good way to do it and communicating with the judge to try and find a, get a visitation schedule. I think the jury could just as easily answered that question no and then gone on to answer the good cause questions in the favor of the, of the father.

I know a suggestion was made that the Court do that, and I don’t think that that’s appropriate to do that There was ample evidence here to find that he was not lacking, he was not absent; that in his mind communicating with the family court commissioner to try and get periods

of physical placement was an appropriate communication to the mother that he wanted visitation.

Accordingly, the trial court denied both motions and dismissed Theresa's petition to terminate parental rights. Theresa appeals.

DISCUSSION

¶5 This appeal requires us to review the jury's finding that Jeremy did not abandon Talya. We will sustain the verdict if there is any credible evidence to support it, especially in light of the fact that the trial court approved it. *Fehring v. Republic Ins. Co.*, 118 Wis. 2d 299, 305-06, 347 N.W.2d 595 (1984) (citations omitted).

¶6 Theresa contends that the trial court erred by not ordering a new trial or changing the verdict answer to question number three. She asserts that the record does not support an inference that Jeremy visited or communicated with Talya for six months. She argues that the trial court interpreted WIS. STAT. § 48.415(1)(a)(3) to mean that Jeremy merely had to communicate with any third party about his desire to visit Talya to avoid a claim of abandonment. She claims this interpretation leads to absurd results.

¶7 We agree with Theresa that the record does not support the jury's finding that Jeremy visited or communicated with Talya. Jeremy and the trial court also agree that Jeremy did not visit or communicate with Talya, at least in the usual meaning of those two words. We need not address Theresa's assertion that the jury verdict was perverse because we reverse on other grounds.

¶8 However, we cannot conclude that, as a matter of law, Jeremy abandoned Talya. Abandonment is not proven if a parent shows that he or she had

good cause for having failed to visit or communicate. WIS. STAT. § 48.415(1)(c).³ This is a jury question, but the jury did not answer whether Jeremy had good cause for his conduct pursuant to WIS. STAT. § 48.415(1)(c). The pattern jury instruction did not require it to do so.

¶9 We therefore reverse the order dismissing Theresa's petition because the evidence did not support the jury's answer to question number three. We remand for a new trial. If evidence at the new trial remains the same, it will then be necessary to determine whether Jeremy had good cause for his failure to visit or communicate with Talya. The trial court will determine, in its discretion, whether or which issues decided by the first jury will again be litigated.⁴

3 The pertinent portions of WIS. STAT. § 48.415(1) provide:

ABANDONMENT. (a) Abandonment, which, subject to par. (c), shall be established by proving any of the following:

....

3. 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.

....

(c) Abandonment is not established under par. (a) 2. or 3. if the parent proves all of the following by a preponderance of the evidence:

1. That the parent had good cause for having failed to visit

2. That the parent had good cause for having failed to communicate

⁴ Of course, the issue on which we have reversed must be resolved on the facts of the new trial, by stipulation, or, if the facts on this issue remain the same, by the trial court.

¶10 No costs to either party.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports. *See* WIS.
STAT. RULE 809.23(1)(b)4.

