

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1083-15T2

NEW JERSEY DIVISION OF CHILD
PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

L.C.,

Defendant-Appellant,

and

J.B. and D.M.,

Defendants.

IN THE MATTER OF J.C. and D.M.,

Minors.

Submitted March 7, 2017 – Decided March 31, 2017

Before Judges Yannotti and Sapp-Peterson.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Essex County,
Docket No. FN-07-0115-15.

Joseph E. Krakora, Public Defender, attorney for appellant (Adrienne Kalosieh, Designated Counsel, on the briefs).

Christopher S. Porrino, Attorney General, attorney for respondent (Andrea M. Silkowitz, Assistant Attorney General, of counsel; Patricia L. Parker, Deputy Attorney General, on the brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minors (Lisa M. Black, Designated Counsel, on the brief).

PER CURIAM

L.C. appeals from an order entered by the Family Part on May 27, 2015, finding that he abused or neglected the minor child, J.C. We affirm.

I.

This appeal arises from the following facts. L.C. and J.B. are J.C.'s birth parents. In July 2014, J.C. was five weeks old and he was living with L.C., J.B., and J.B.'s older son, D.M. in Newark. On July 13, 2014, J.B. left J.C. at home with L.C., while she went out with her mother. At the time, L.C. also was taking care of his daughter, Linda, who was eighteen months old.¹ L.C. took Linda out of her playpen, and sat her next to him on the sofa. L.C. was holding J.C.

¹ Since L.C.'s daughter's initials are the same as L.C.'s initials, we refer to the child by a fictitious name.

According to L.C., Linda lunged at J.C. in an attempt to hug him. Linda's head struck J.C.'s head. J.C. began to cry. L.C. placed him in his bassinet and returned Linda to her playpen. J.C. showed some swelling in the area where he was hit, but Linda showed no symptoms of injury. L.C. then gave J.C. a bath and dressed him. When J.B. returned home, L.C. told her what had happened. J.B. noted that J.C. had some swelling where Linda struck his head. J.C. was crying and cranky. J.B. phoned relatives, who told her to place a warm compress on the injured area.

J.B. also called J.C.'s pediatrician, but he was unavailable. J.B. and L.C. gave J.C. a small dose of acetaminophen and put him to bed. The following morning, J.B. noted that the swelling on J.C.'s head had gone down, but she noticed that blood vessels in his eye had popped. L.C. took J.B. and J.C. to the emergency room of Newark Beth Israel Medical Center (NBIMC), where doctors examined the child, took a CAT scan, and performed a skeletal survey.

J.B. reported that the day before, L.C. told her that Linda had head-butted J.C. The child woke the following morning with popped blood vessels in his left eye and some swelling of his head. The doctors at NBIMC determined that the child's injuries were not consistent with the explanation that J.B. had provided, and they contacted the Division of Child Protection and Permanency

(Division) to report the incident as one involving possible physical abuse. The Division's investigator, Nadia Johnson, responded to the hospital to investigate the report. She spoke with the doctors and then interviewed J.B. and L.C.

L.C. told Johnson that J.C. was sitting up on his left leg, and leaning on him, with his back on his chest. L.C. took Linda out of her playpen and seated her "on his right side." After Linda was seated, she lunged at J.C. as if she was going to hug J.C. According to L.C., Linda's head struck J.C. on "the right rear side of his head."

Johnson questioned L.C. about his prior history with the Division. He told her that previously he had been charged with child endangerment and unlawful possession of a weapon. He also admitted that he had smoked marijuana to celebrate J.C.'s "upcoming birth." Johnson reported the matter to the Essex County Prosecutor's Office (ECPO).

Investigators from the Newark Police Department and the ECPO interviewed L.C. He told them that Linda had been in her playpen, but because she was complaining about a skin irritation on her arm, L.C. took her out of the playpen and allowed her to sit on the sofa, next to him. L.C. said he had positioned J.C. so that the back of J.C.'s left shoulder was facing Linda, and Linda was seated to his and J.C.'s right. He told the investigators that

Linda likes to give hugs. He said she "stood up on the couch and charged at [J.C.] or ran into the space between [J.C.'s] left side and [L.C.'s] chest." Linda had lowered her head in the motion, and her head collided with J.C.'s head, just above and behind his left ear.

The Division removed D.M. from J.B.'s and L.C.'s home on an emergency basis, and placed D.M. in the care of J.B.'s mother. J.C. was in the hospital at that time. On July 16, 2016, the Division filed a verified complaint in the trial court, naming J.B. and L.C. as defendants. The Division claimed that defendants abused or neglected J.C., and it sought the issuance of an order continuing the children in its care, custody, and supervision.

The parties appeared in court that day, and the judge granted the Division's application. The judge further ordered that D.M. would remain with J.B.'s mother, and that when J.C. is discharged from the hospital, he should also be placed with her. The judge ordered defendants to show cause why the children should not remain in the Division's care, custody, and supervision.

The parties returned to court on July 28, 2014, as required by the order to show cause. By that time, J.C. had been discharged from the hospital, and he was in the custody of J.B.'s mother. The court permitted the Division to place D.M. in the custody of his birth father, with visitation available to J.B. The court later

held three compliance review hearings, and J.C. remained with J.B.'s mother.

The trial court later conducted a fact-finding hearing to determine whether defendants abused or neglected J.C. Dr. Monica Weiner of NBIMC and caseworker Johnson testified for the Division. Dr. Weiner was qualified as an expert in child abuse pediatrics. Dr. Weiner had issued a report on the incident after personally examining J.C., reviewing the hospital's records, consulting with the treating physicians, and reviewing the child's test results. She was not, however, able to speak directly with defendants.

Dr. Weiner testified that a CAT scan of J.C.'s head "revealed two fractures in the left side of his skull with some overlying bleeding and swelling into the scalp above those fractures." The doctor said that the skeletal survey revealed the same fractures, as well as a healing fracture in J.C.'s right hand.

Dr. Weiner stated that an MRI confirmed the skull fractures and also showed areas of possible contusion in J.C.'s brain tissue. The eye exam showed that J.C. had subconjunctival hemorrhages in the left eye. The doctor's physical exam revealed some swelling in the scalp. The doctor also observed the child's left-eye hemorrhages.

Dr. Weiner testified that J.C.'s hand injury was at least seven to ten days old, and he could not have caused this injury

to himself because he was not yet mobile. She also noted that J.C.'s x-rays revealed a "bowing injury" to his left tibia. The doctor was concerned that this was a sign of a healing injury.

Dr. Weiner further testified that after reviewing J.C.'s medical records, the explanation that J.B. provided to the child's attending physicians, and the statement that L.C. gave to the investigators, she had concluded that the amount of injury to the child's skull and brain were "unusual" for the kind of accident described. She stated, however, that it was possible that the accident as described was the cause of the child's injuries.

Defendants presented testimony from J.B.'s mother regarding J.B.'s parenting. They also presented testimony from Dr. Jack Levenbrown, who was qualified as an expert in pediatrics, radiology, and pediatric radiology.

Dr. Levenbrown testified "absolutely and without reservation" that the injuries to J.C.'s skull appeared "to be consistent with a history of an infant head-butting, [that is] being head-butted by a one-and-a-half-year-old" child. The doctor also said that J.C.'s hand injury was not an injury he would associate with abuse. He also saw an elevation in the child's left tibia, but he interpreted this as a normal appositional new bone, not a fracture.

On cross-examination, Dr. Levenbrown acknowledged that he had not been told that L.C. initially reported that Linda had been

sitting next to him and leaned over, hitting J.C. on the right side. He also had not been aware that J.B. initially reported that L.C. told her the child had been lying on his stomach when Linda's head struck J.C.'s head.

Dr. Levenbrown stated that his opinion regarding J.C.'s skull fractures may have changed if he knew that L.C. had provided different explanations for the incident. He opined, however, that J.C. was injured as a result of accidental direct trauma.

L.C. offered the video recording of his statement to the law enforcement investigators. The judge admitted the recording into evidence.

On May 26, 2015, the judge placed her oral decision on the record. The judge found that the Division had not established by a preponderance of the evidence that J.C. suffered an injury to his leg that was caused by an act or omission by either L.C. or J.B. The judge also found that the Division had not met its burden of proof to show that an act or omission by either L.C. or J.B. caused the injury to J.C.'s hand.

The judge found, however, that the Division had established by a preponderance of the evidence, that L.C. neglected J.C. while in his care, and L.C.'s neglect resulted in J.C. sustaining two skull fractures, hemorrhages in the eye, and bruising and bleeding in the skull.

The judge noted that L.C. had provided different explanations as to how J.C. sustained the head injuries. The judge stated that L.C. had changed his description of the position he was holding J.C. at the time of the injury. L.C. also had changed his description of the speed at which Linda approached J.C. when she went to hug him. The judge found that because L.C.'s explanations were not consistent with each other, his account of how the injuries occurred was not credible.

The judge also considered the testimony of Dr. Weiner and Dr. Levenbrown in light of the information that had been provided to them. The judge noted that Dr. Levenbrown's opinion regarding J.C.'s head injuries had been based on one version of the incident, whereas Dr. Weiner's opinion was based on all of the versions that had been reported.

The judge found that there was no "evidence to show that [L.C.] intentionally caused injury to [J.C.]," but the evidence showed that L.C. "failed to exercise a minimum degree of care by failing to provide proper supervision or guardianship by allowing the infant to befall harm. The judge found L.C.'s actions were deliberate and went beyond "mere negligence."

The judge stated that L.C. "failed to exercise a cautionary act" to prevent J.C. from sustaining a "very serious and traumatic injury." The judge found that the "resulting injury may have been

accidental," but L.C.'s "failure to adequately supervise his child [was] a deliberate act, which amount[ed] to willful and wanton conduct."

The judge memorialized her decision in an order dated May 27, 2015. The judge conducted a final compliance hearing on October 1, 2015. The judge dismissed the matter on the Division's recommendation, and the children were reunified with J.B. This appeal followed.

On appeal, L.C. argues that the trial judge erred by finding that he neglected J.C. He contends the judge erroneously found that he gave conflicting stories as to how the injuries occurred. He also contends that the judge erred by misinterpreting the expert testimony, and by discrediting Dr. Levenbrown's testimony based on the erroneous assumption he had reported "multiple versions" of how J.C. was injured.

II.

"New Jersey's scheme for the protection of children against abuse or neglect is codified in Title Nine of the New Jersey Statutes." N.J. Div. of Youth & Family Servs. v. R.D., 207 N.J. 88, 108 (2011) (citations omitted). Title Nine aims to protect "children from serious harm, whether emotional or physical, as well as the threat of harm." N.J. Div. of Youth & Family Servs.

v. S.N.W., 428 N.J. Super. 247, 253 (App. Div. 2012) (citing N.J.S.A. 9:6-8.8).

"Abuse and neglect cases are generally fact sensitive," and require "careful, individual scrutiny." N.J. Div. of Youth & Family Servs. v. P.W.R., 205 N.J. 17, 33 (2011). Accordingly, "determining whether a parent's action constitutes abuse or neglect requires close scrutiny of the totality of the circumstances." N.J. Div. of Prot. and Permanency v. K.F., 444 N.J. Super. 191, 200 (App. Div. 2016) (citations omitted).

Under Title Nine, the term "abused or neglected child" is defined to include

a child whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or guardian . . . to exercise a minimum degree of care . . . (b) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof[;] . . . or by any other acts of a similarly serious nature requiring the aid of the court[.]

[N.J.S.A. 9:6-8.21(c)(4).]

The court's determination that a child is abused or neglected must be based on a preponderance of the evidence, and the court may only admit "competent, material and relevant evidence" at the fact-finding hearing. N.J.S.A. 9:6-8.46(b).

"Whether a parent or guardian has failed to exercise a minimum degree of care' in protecting a child is determined on a case-by-case basis and 'analyzed in light of the dangers and risks associated with the situation.'" N.J. Div. of Youth & Family Servs. v. N.S., 412 N.J. Super. 593, 614 (App. Div. 2010) (quoting G.S. v. Dep't of Human Servs., 157 N.J. 161, 181-82 (1999)). "'[M]inimum degree of care' refers to conduct that is grossly or wantonly negligent, but not necessarily intentional." G.S., supra, 157 N.J. at 178.

We have observed that "[w]anton and willful behavior is 'an intermediary position between simple negligence and the intentional infliction of harm[,] and 'can apply to situations ranging from slight inadvertence to malicious purpose to inflict injury.'" N.S., supra, 412 N.J. Super. at 615-16 (quoting G.S., supra, 157 N.J. at 178-79) (internal citations omitted). We have also noted that, "non-intentional conduct is sufficient to warrant a finding of abuse if injury to the child is demonstrated." Id. at 616 (quoting N.J. Div. of Youth and Family Servs. v. S.S., 372 N.J. Super. 13, 24 (App. Div. 2004), certif. denied, 182 N.J. 426 (2005)).

In making a determination as to whether a parent or guardian exercises the minimum degree of care, the court "should focus on the harm to the child and whether that harm could have been

prevented had the guardian performed some act to remedy the situation or remove the danger." G.S., supra, 157 N.J. at 182. "When a cautionary act by the guardian would prevent a child from having his or her physical, mental or emotional condition impaired, that guardian has failed to exercise a minimum degree of care as a matter of law." Ibid.

The scope of our review of the factual findings of the trial court is strictly limited. N.J. Div. of Youth & Family Servs. v. I.H.C., 415 N.J. Super. 551, 577 (App. Div. 2010). The court's fact-findings should not be disturbed "if they are supported by 'adequate, substantial, and credible evidence' on the record." N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 279 (2007) (quoting In re Guardianship of J.T., 269 N.J. Super. 172, 188 (App. Div. 1993)).

Moreover, our deference to the trial court's fact-findings is "especially appropriate 'when the evidence is largely testimonial and involves questions of credibility.'" Cesare v. Cesare, 154 N.J. 394, 412 (1998) (quoting In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997)). We also give considerable deference to the factual findings of the Family Part, due to its "special jurisdiction and expertise in family matters[.]" Id. at 413.

Here, the trial court found that the Division had established a prima facie case of abuse or neglect under N.J.S.A. 9:6-8.46(2), which states that

proof of injuries sustained by a child or of the condition of a child of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent or guardian shall be prima facie evidence that a child of, or who is the responsibility of such person is an abused or neglected child[.]

At the fact-finding hearing, the Division presented evidence showing that L.C. was the sole caretaker for J.C. when the child suffered the injuries to his head and eyes. At the hearing, L.C. had the opportunity to rebut the Division's prima facie case by showing that J.C.'s injuries "could reasonably have occurred accidentally, with or without any acts or omissions on [his] part." N.J. Div. of Youth & Family Servs. v. J.L., 400 N.J. Super. 454, 472 (App. Div. 2008).

The court found that the Division had carried its ultimate burden of proving that L.C. abused or neglected J.C. by a preponderance of the evidence. There is sufficient credible evidence in the record to support the court's determination. As the judge noted in her decision, on July 13, 2014, L.C. was the sole caretaker for J.C., who was then five weeks old. At that

time, L.C. also was taking care of his other child, Linda, who was eighteen months old.

L.C. was seated on the sofa and he was holding J.C. According to L.C., Linda had complained about an irritating skin condition, so he removed her from her playpen and placed her alongside him on the sofa. Linda lunged at J.C., apparently attempting to hug him, and her head struck J.C.'s head, causing J.C. to sustain the skull fractures and eye hemorrhages.

The record supports the trial court's finding that L.C. did not intend to harm J.C., but he failed to exercise the minimum degree of care required in the circumstances. The judge found that L.C. did not take the cautionary act required to protect him from the injury caused when Linda lunged at and struck J.C. with her head.

There is sufficient credible evidence in the record to support the court's determination that L.C.'s actions were deliberate and did not constitute mere negligence. The record supports the court's finding that L.C.'s failure to adequately supervise the children amounted to willful and wanton conduct.

III.

L.C. argues, however, that the trial judge erred by finding that there were inconsistencies in the versions of the incident that he provided to the Division's caseworker and the law

enforcement investigators. He contends there was no difference between these accounts.

L.C. argues that for the judge to have found an inconsistency in his explanations, the judge must have relied upon the caseworker's testimony as to what L.C. told J.B. about the incident. L.C. therefore argues that the court improperly relied on inadmissible hearsay for her conclusion that L.C.'s testimony as to how the child was injured was not credible.

We note that during the trial, L.C.'s attorney did not object to caseworker Johnson's testimony about what L.C. told J.B. Indeed, L.C.'s attorney cross-examined Johnson about her interview with J.B. A party who acquiesces in an alleged error may not cite that error as a basis for objection on appeal. Spedick v. Murphy, 266 N.J. Super. 573, 593 (App. Div.), certif. denied, 134 N.J. 567 (1993); N.J. Div. of Youth and Family Servs. v. M.C. III, 201 N.J. 328, 341 (2010).

In any event, there is sufficient credible evidence in the record to support the court's finding that L.C. gave inconsistent explanations for how the child came to be injured, wholly aside from Johnson's testimony about what L.C. said to J.B. about the incident.

As we have explained, Johnson interviewed L.C. She testified that he told her that J.C. had been sitting on his left leg, "with

his back on [L.C.]" According to L.C., Linda was on his right side and lunged at J.C. to hug him. L.C. said Linda head-butted J.C. "on the right rear side" of his head.

However, L.C. told the law enforcement investigators that J.C. had been positioned "so that the back of [J.C.]'s left shoulder was facing [Linda]." L.C. said that Linda "stood up on the couch and charged at [J.C.] or ran into the space between [J.C.'s] left side and [L.C.'s] chest." Linda's head collided with J.C.'s head.

Thus, the record supports the judge's finding that L.C. gave materially different versions of the incident to Johnson and the law enforcement investigators. L.C. described different positions in which he held J.C. and different areas where Linda struck J.C. The judge found that L.C.'s description of the incident was not credible in view of these inconsistent statements. The record supports that finding.

L.C. also contends that the judge erred by misinterpreting and discrediting the expert testimony. He asserts that Dr. Levenbrown found the injuries to J.C.'s skull were consistent with the explanation that J.C. had been head-butted by an eighteen-month-old child. He notes that Dr. Weiner stated that, although such an injury would be unusual, it is possible that the child was injured as a result of the reported head-butting. L.C. argues that

the judge disregarded the opinions of the experts, and erroneously gave more weight to the testimony of caseworker Johnson.

We find no merit in these arguments. Here, the judge found that the experts were credible. The judge noted that Dr. Levenbrown's opinion had been based on one version of the incident, while Dr. Weiner's testimony was based on differing descriptions of the event. However, the judge's ultimate conclusion that L.C. failed to exercise the minimal degree of care for J.C. was essentially based on the facts as described by L.C., even though his statements about the incident were in some respects inconsistent.


The judge did not find that L.C. purposely and intentionally caused J.C. to sustain the injuries. Instead, the judge found that L.C. failed to take the cautionary act required in the circumstances, to protect J.C. from the potential for serious injury that could result if Linda lunged at and attempted to hug J.C. In reaching that decision, the judge took all of the evidence into account, including the testimony of the experts.

We therefore conclude that the trial judge properly reached her decision based on the totality of the circumstances. The record supports the judge's finding that J.C. was an abused or neglected child, as defined in N.J.S.A. 9:6-8.21(c)(4)(b), and that L.C.

failed to exercise the minimum degree of care required when he was
the child's caretaker.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION