**RECORD IMPOUNDED**



SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2797-15T2

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

P.T.,[1]

Defendant-Appellant.

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IN THE MATTER OF L.E., A.D., and S.B., minors.

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Submitted December 6, 2017 – Decided January 26, 2018

Before Judges Fuentes, Koblitz and Manahan.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Union County, Docket No. FN-20-0105-12.

Joseph E. Krakora, Public Defender, attorney for appellant (Laura M. Kalik, Designated Counsel, on the briefs).

Christopher S. Porrino, Attorney General, attorney for respondent (Andrea M. Silkowitz, Assistant Attorney General, of counsel; Andrea

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[1] We use pseudonyms and initials to refer to the parties pursuant to Rule 1:38-3(d)(12).

M. Barilli, Deputy Attorney General, on the brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minors (David B. Valentin, Assistant Deputy Public Defender, on the brief).

PER CURIAM

Defendant P.T. appeals from a September 13, 2012 order finding that she abused or neglected her then fifteen-year-old daughter, L.E. (Lisa), by failing to obtain proper psychiatric help for Lisa after removing the child from Trinitas Regional Medical Center (Trinitas) against medical advice. P.T. argues that her conduct was not reckless or grossly negligent. We agree and reverse.

P.T. has two other children and lives with the father of her youngest. On December 6, 2011, Lisa reported to her school counselor that she felt guilty about a sexual encounter with a classmate the prior year. Over the course of the following week, Lisa grew increasingly paranoid and became despondent. On December 9, 2011, P.T. took Lisa to her family medicine physician, Dr. Omobola Oji, who recommended in-patient hospitalization. Two days later, P.T. admitted Lisa to Trinitas in a catatonic state.

Trinitas staff reported that during the initial five days of Lisa's stay, P.T. helped administer medication to Lisa. P.T. told the Division of Child Protection and Permanency (Division) worker that Lisa had been diagnosed as borderline schizophrenic.

On December 19, 2011, P.T. again met with a Division worker. P.T. was concerned about Lisa's lack of progress. She reported that Lisa said she saw dead people, but when asked who, Lisa named three people who were alive. P.T. began to cry when she related that Lisa asked her "mommy can I go with you" after a visit. During this conversation, P.T. revealed that she had been raped when she was eighteen and Lisa was the result of that rape. P.T. reported having been psychiatrically hospitalized herself. P.T. expressed concern about Lisa's treatment, noting that she was conducting research on the medication prescribed to Lisa and was hesitant to allow her to take it due to its potential side effects.

On December 29, 2011, the Division received a report that P.T., who was visiting Lisa daily at Trinitas, was demanding that Lisa be discharged. The reporter also stated concerns about P.T.'s mental stability, remarking that P.T. "appears disorganized and goes from topic to topic in a flighty manner at times." The following day, the Division spoke with a nurse, who reported that Lisa "remains quiet but is eating, active in groups and individual sessions." The nurse said that P.T. was "supportive" but "does not believe [Lisa] is sick."

During a meeting with the Division, P.T. stated that Trinitas was recommending long-term inpatient treatment. When P.T. expressed disagreement with that plan, the Division worker

recommended that P.T. "seek alternative mental health programs." The Division supported P.T.'s decision to remove Lisa from the hospital, noting P.T "had many valid complaints against Trinitas Hospital regarding her and [Lisa's] treatment." With the Division's support, P.T. removed Lisa from Trinitas against medical advice on February 2, 2012.

Six days later, P.T. brought Lisa to an appointment with Dr. Oji. The doctor stated Lisa "seemed cognitively much better." She issued a note stating that Lisa was "medically cleared to return to school at this point. She did not demonstrate any cognitive impairment." Dr. Oji "emphasized to [P.T] the importance of making sure that [Lisa] continues her medication."

Thirteen days after Lisa left the hospital, P.T. was herself hospitalized at Trinitas for her own mental breakdown, which she attributed to stress. During the thirteen days between Lisa's release and P.T.'s hospitalization, P.T. had not secured an appropriate psychiatric program for Lisa, although P.T. did fill Lisa's prescription, take her to see Dr. Oji and contact several outpatient psychiatric programs, all of which were unable to service children. The week after P.T. was hospitalized, the

Division visited P.T.'s home and found Lisa in a deteriorated state; Lisa was subsequently hospitalized and treated.[2]

The trial judge acknowledged that the case was a "difficult case" because P.T. was a loving mother who had not overtly abused her daughter and was "not morally . . . blameworthy." The judge found, however, that P.T. medically neglected Lisa, finding she "failed to get appropriate psychiatric help for the child . . . resulting in [the] child's decompensation and psychiatric hospitalization." The judge found that, although "it was against medical advice and appeared to be perhaps not the best decision," P.T's removal of Lisa from Trinitas on February 2 was "within her right[s]" and did not constitute abuse or neglect. The judge found, however, that what happened following that removal caused Lisa to become "an abused or neglected child . . . within the meaning of the law." The judge found:

> What occurred here was that [Lisa] was removed from that hospital before she was fully well and not brought to another hospital, not brought to a psychiatrist, not brought to any kind of place where she could be treated. And, of course, within two weeks, she had quickly decompensated back into a state which resulted in her spending additional substantial time inpatient at a psychiatric hospital.

[2] After her release from this hospitalization, Lisa was hospitalized again, in August 2013, after being placed in a foster home. On April 17, 2014, Lisa turned eighteen, signed herself out of the Division's custody and returned to reside with her mother.

Our review of the totality of the record demonstrates that, as a matter of law, P.T.'s conduct did not rise to the level of gross negligence or recklessness. "[F]indings by the trial judge are considered binding on appeal when supported by adequate, substantial and credible evidence." N.J. Div. of Child Prot. & Permanency v. K.N.S., 441 N.J. Super. 392, 397 (App. Div. 2015) (quoting N.J. Div. of Youth & Family Servs. v. Z.P.R., 351 N.J. Super. 427, 433 (App. Div. 2002)). An appellate court accords deference "to fact findings of the family court because it has the superior ability to gauge the credibility of the witnesses who testify before it and because it possesses special expertise in matters related to the family." N.J. Div. of Youth & Family Servs. v. F.M, 211 N.J. 420, 448 (2012). "Indeed, we defer to family part judges 'unless they are so wide of the mark that our intervention is required to avert an injustice.'" New Jersey Division of Child Protection and Permanency v. A.B., ___ N.J. ___, ___ (2017) (slip op. at 14) (quoting F.M., 211 N.J. at 427).

A trial judge's legal conclusions and the application of those conclusions, however, are subject to plenary review. Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). The conclusion that P.T. was reckless or grossly negligent rather than merely negligent is a question of law and

not afforded deference. N.J. Div. of Youth & Family Servs. v. T.B., 207 N.J. 294, 308 (2011).

Abuse or neglect proceedings are brought forth pursuant to Title 9 of the New Jersey Statutes, N.J.S.A. 9:6-8.21 to -8.73. "The main goal of Title 9 is to protect children 'from acts or conditions which threaten their welfare.'" G.S. v. Dep't of Human Servs., 157 N.J. 161, 176 (1999) (quoting State v. Demarest, 252 N.J. Super. 323, 331 (1991)).

The statute sets forth seven definitions of the term "abused or neglected child." N.J.S.A. 9:6-8.21(c). It states in relevant part:

> "Abused or neglected child" means . . .
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> (4) [A] child whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of the failure of his parent . . . to exercise a minimum degree of care (a) in supplying the child with adequate . . . medical or surgical care though financially able to do so . . . or (b) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof. . . .
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> [N.J.S.A. 9:6-8.21(c)(4) (emphasis added).]

The State has the burden of proof of demonstrating "by a preponderance of the competent, material and relevant evidence the probability of present or future harm." N.J. Div. of Youth &

Family Servs. v. I.Y.A., 400 N.J. Super. 77, 87 (App. Div. 2008) (quoting N.J. Div. of Youth & Family Servs. v. S.S., 372 N.J. Super. 13, 24 (App. Div. 2004)).

Our Supreme Court requires two statutory elements to be met in order to prove abuse or neglect: "(1) that a parent unreasonably inflicted harm" and (2) "did so, at least, by acting with gross negligence or recklessness." N.J. Div of Child Prot. & Permanency v. Y.N., 220 N.J. 165, 169 (2014).

Our Supreme Court held in Y.N., that:

> The plain language of N.J.S.A. 9:6-8.21(c)(4)(b) requires proof that the child was impaired or in imminent danger of becoming impaired because the parent (1) failed to exercise a minimum degree of care and (2) unreasonably inflicted or allowed to be inflicted harm, or created a substantial risk of inflicting harm, on the child. The statute makes clear that parental fault is an essential element for a finding of abuse or neglect under N.J.S.A. 9:6-8.21(c)(4)(b). The Division must establish that a parent failed "to exercise a minimum degree of care" in a prosecution under N.J.S.A. 9:6-8.21(c)(4)(b).
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> At the very least, a minimum degree of care means that a parent's conduct must be "grossly negligent or reckless." In contrast, a parent's negligent conduct is not sufficient to justify a finding of abuse or neglect under N.J.S.A. 9:6-8.21(c)(4)(b).
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> [Y.N., 220 N.J. at 180 (citations omitted).]

"Whether a parent exercised a minimum degree of care must 'be analyzed in light of the dangers and risks associated with the

situation.'" Id. at 184 (quoting G.S., 157 N.J. at 181-82). "Negligence falls on a continuum of conduct from ordinary to gross based on the level of risk created, and it is determined on a case-by-case basis." K.N.S., 441 N.J. Super. at 399. "[G]ross negligence [occurs]: 'Where an ordinary reasonable person would understand that a situation poses dangerous risks and acts without regard for the potentially serious consequences.'" Id. at 398-99 (quoting N.J. Div. of Youth & Family Servs. v. A.R., 419 N.J. Super. 538, 544 (App. Div. 2011)) (emphasis added). Harm alone to the child is not enough to make a finding of abuse or neglect, but the court must consider the circumstances that led to the child's harm. Y.N., 220 N.J. at 181.

P.T. argues that the record shows she spent "countless hours in the hospital ministering to her daughter" and "[a]ll of the witnesses who testified at the fact-finding [hearing] described [her] proactive efforts to find out what had to happen at school, to get the correct treatment for her daughter, and to return her to school." P.T. also points out that the Division supported her decision to remove Lisa from Trinitas.

P.T. maintains her "failure to procure all of the services necessary for her daughter's treatment within two weeks of her discharge, was not conduct that was reckless or grossly negligent." She did not have the resources to obtain all of the services that

Lisa needed; while trying to find treatment for Lisa she was also simultaneously dealing with the care of her other special needs daughter, the well-being of her young son who she believed was being bullied at school, and her own mental health issues.

P.T. did attempt to care for Lisa, making sure her prescription was filled, and calling a number of service providers, as well as bringing Lisa to Dr. Oji. P.T. claims that any errors in judgment did not amount "to anything more than mere negligence," which is insufficient to establish neglect under the Title 9 standard.

The Division responds that although it supported P.T.'s decision to discharge Lisa from Trinitas, it did so only if P.T. sought the appropriate aftercare. The Division also argues that the trial judge did not err in noting that removing Lisa from Trinitas "was not the best decision," and that the trial judge's finding of abuse or neglect was based only on P.T.'s subsequent failure to obtain psychiatric services for Lisa.

In T.B., our Supreme Court overturned the abuse or neglect determination against "a mother who left her four-year-old child unsupervised for two hours under the mistaken belief that his grandmother was home." T.B., 207 N.J. at 306. In that case, the Court found the mother negligent, but not grossly negligent or reckless. Id. at 309-310. The Division argues that the present

case is distinguishable because P.T., unlike the mother in T.B., was on notice of the risks to Lisa.

Not all cases where the Division asserts medical neglect rise to the level of gross negligence. See N.J. Div. of Youth & Family Servs. v. S.I., 437 N.J. Super. 142, 146 (App. Div. 2014) (finding no medical abuse where the custodial grandmother failed to take the child to the hospital for an immediate psychiatric evaluation, in a situation involving no actual harm). A finding of gross negligence depends on the totality of the circumstances. For example, in K.N.S., 441 N.J. Super. at 399-400, we affirmed a finding of abuse or neglect based in part on the mother's delay in seeking medical attention when the child exhibited signs of illness after being left in the mother's boyfriend's care. In relaying her conclusions, the judge stated the delay in medical care alone was insufficient for a finding of gross negligence:

> Defendant's delay in seeking medical attention may not have been sufficient to warrant a finding of gross negligence if viewed in isolation. She attempted to warm the child herself, then returned to her job to report to her manager, and finally called a taxi instead of an ambulance. These mistakes might not rise to the level of gross negligence. But in conjunction with the precipitating act of leaving the child in the boyfriend's care, they were evidence of grossly inadequate attention to the child's safety and health.
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> [Ibid.]

P.T.'s conduct, as reflected in the record, does not rise to the level of recklessness or gross negligence. Without doubt, "the question of whether a particular event is to be classified as merely negligent, grossly negligent, or reckless can be a difficult one." T.B., 207 N.J. at 309. P.T., however, took several steps toward securing treatment for Lisa. P.T. testified that she made calls to various programs and spoke to her reverend and family physician about P.T.'s care. Lisa's subsequent hospitalization on February 21 was six days after P.T. had her breakdown and was no longer present in the home. P.T. also filled Lisa's fifteen-day prescription the day after Lisa's release, and the majority of pills were no longer present when the Division caseworker located the bottle on February 21. P.T. testified that she made sure Lisa took her medication up until P.T.'s breakdown on February 15.

In addition, it is undisputed that a Division caseworker visited P.T. the day of P.T.'s breakdown and was working with her on a plan for Lisa and the family. P.T. was receptive to the plan, and the worker intended to return the next day to speak with the entire family. P.T. left her children in the care of the father of her son, and P.T.'s mother. Unlike the mother in K.N.S., 441 N.J. Super. at 399-400, P.T. had no reason to distrust her son's father.

While P.T. perhaps should have called every care provider on the list supplied by Trinitas, P.T.'s failure to find psychiatric treatment for Lisa in the two weeks between Lisa's release and P.T.'s own hospital admittance does not rise to the level of gross negligence or recklessness. The Division should take appropriate steps to remove P.T.'s name from the Child Abuse Registry, N.J.S.A. 9:6-8.11.

Reversed.