

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5790-14T1

NEW JERSEY DIVISION OF CHILD
PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

A.V.,

Defendant-Appellant,

and

M.G., E.S., R.W., Sr., M.Q.,
and C.F.,

Defendants.

IN THE MATTER OF R.W., Jr.
and C.S., minors.

Submitted February 7, 2017 – Decided March 15, 2017

Before Judges Fasciale and Gilson.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Hudson County,
Docket No. FN-09-284-13.

Joseph E. Krakora, Public Defender, attorney
for appellant (Kimmo Z. H. Abbasi, Designated
Counsel, on the briefs).

Christopher S. Porrino, Attorney General, attorney for respondent (Andrea M. Silkowitz, Assistant Attorney General, of counsel; Julie B. Colonna, Deputy Attorney General, on the brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minors R.W. Jr., and C.S. (Charles Ouslander, Designated Counsel, of counsel and on the brief).

PER CURIAM

Defendant A.V. appeals from an August 6, 2013 order finding that he abused C.S., the infant daughter of his girlfriend. We affirm because the finding of abuse was supported by substantial, credible evidence and the Family Part judge correctly applied the traditional *res ipsa loquitur* principles.

I.

There is no dispute that the child suffered abuse. The question at the fact-finding hearing was who inflicted the abuse.

C.S.¹ was born in August 2011, and is the biological child of M.G. (the mother) and E.S. (the father). The mother also has another child, R.W., Jr., a son born in January 2005.

A.V. began dating the mother in the fall of 2012, and by January 2013, he was living with the mother and C.S. A.V. has a

¹ To protect confidentiality, we use initials or generic titles for the victim, parties, and witnesses. R. 1:38-3(d)(2).

child from another relationship, but that child was not living with A.V.

Sometime between the evening of January 22, 2013, and 10 p.m. on January 23, 2013, C.S. suffered injuries that included two bite marks, burns to her buttocks, genital area, left foot and left knee, and bruises. At the time that C.S. suffered those injuries, she was seventeen months old.

The injuries were first reported on January 24, 2013, by C.S.'s maternal grandmother (the grandmother). Two workers from the Division of Child Protection and Permanency (the Division) responded and met with the grandmother and examined the child. The grandmother reported that the child had been in her care on January 22, 2013, but at that time the child did not have any injuries, except a mark on her cheek from a prior fall. The grandmother went on to relate that the mother picked C.S. up from her house on the evening of January 22, 2013.

The following evening, on January 23, 2013, a cousin of the mother (the cousin) brought the child to the grandmother's house sometime after 10 p.m. At that time, the grandmother observed burns and bruises on the child. The grandmother tried to contact the mother, but she did not hear from the mother until the next day. The grandmother also explained that she did not take the child to the hospital on January 23, 2013, nor did she contact the

police or the Division until the next day because she was waiting for the mother to come to her home.

The Division workers who examined the child on January 24, 2013, noted and took pictures of a number of injuries, including bruises, scratches, burns, and blisters. The workers then took the child, accompanied by the grandmother, to the hospital. After the child was examined at the hospital, the Division removed the child from the mother's custody.

Thereafter, the Division continued its investigation. At some point during the discussions with the grandmother, the grandmother informed Division workers that C.S. attended daycare and was sometimes in the care of a babysitter. A Division worker spoke with the daycare facility and no concerns were reported. The Division did not investigate or make contact with the cousin or the babysitter.

As part of its investigation, the Division interviewed the mother's other child, R.W., Jr., who was then eight years old. R.W., Jr. denied biting his sister, but he did explain that he would sometimes pretend to bite her and instead blow on her cheek.

A Division worker also met with and questioned the mother. The mother denied knowing how C.S. sustained her injuries, except for the burn on the child's foot. In that regard, the mother stated that she had been frying food and oil had splashed on to

the child's foot. The mother could not recall when that incident occurred. The mother also could not explain how the child got any of her other injuries.

With regard to events on January 23, 2013, the mother explained that at approximately 4:45 p.m., she had gone to the hospital because she was seven weeks pregnant even though she told her family she had a stomach virus. Thus, the child was left in the care of her boyfriend, A.V. The mother stayed at the hospital until approximately 1 a.m. on January 24, 2013.

On January 25, 2013, Dr. Paulett Diah at the Audrey Hepburn Children's House evaluated the child. Dr. Diah identified seventeen injuries to the child, including healing scalding burns to her buttocks and genital area, a triangular-shaped burn to her left knee, a circular-shaped healing burn on her left foot, an injury to the child's back consistent with a healing bite mark, a fading bite mark to the child's cheek, a healing forehead contusion, facial bruises and abrasions, and a healing rash to the child's neck.

Dr. Diah opined that in the absence of any explanations or history, the child's injuries were consistent with non-accidental trauma and abuse. With regard to the bite marks, Dr. Diah determined to a reasonable degree of medical certainty that they were human in nature, but she could not determine whether they

were bite marks from an adult or a child. Dr. Diah went on to opine that the burns were scalding burns from hot liquid, as opposed to emersion burns. Dr. Diah also opined that all of the child's injuries were healing and that they had probably occurred at least twenty-four hours before she examined the child.

A fact-finding hearing was held on August 13 and 16, 2013, to address the Division's allegations of abuse and neglect against the mother, A.V., and the grandmother. The Division contended that the mother and A.V. had medically neglected and physically abused C.S. and the grandmother had medically neglected C.S. At the hearing, the Division presented testimony from a Division worker and expert testimony from Dr. Diah. The Division also submitted documentation.

After the Division rested its case, the Family Part judge shifted the burden of persuasion to defendants in accordance with our decision in New Jersey Division of Youth & Family Services v. J.L. and T.L., 400 N.J. Super. 454 (App. Div. 2008). Thereafter, A.V. testified and the mother elected not to testify, but her counsel submitted documentation regarding her hospitalization on January 23, 2013.

During his testimony, A.V. explained that he had been living with the mother and C.S. for a few months and he often cared for C.S. when the mother was working. He acknowledged that he was

caring for C.S. on January 23, 2013, and he went on to explain that the mother had picked the child up sometime after 3 p.m. that day and brought her home. Approximately two hours later, the mother left the child in his care when she went to the hospital because she felt ill.

A.V. testified that he was alone with the child for thirty to forty-five minutes. During that time, the child fell off a bed, which caused the bruise and bump on her forehead. A.V. denied causing any other injuries to the child while she was in his care. He also explained that the cousin and a friend came to the home at approximately 6 p.m. on January 23, 2013, and he left C.S. in their care so he could go to the hospital to be with the mother. A.V. was with the mother until she was discharged from the hospital at approximately 1 a.m. or 2 a.m. on January 24, 2013, and he did not see the child thereafter.

After considering the evidence presented at the fact-finding hearing, and after listening to arguments of counsel, the judge found that C.S. had suffered abuse and that the Division had presented a prima facie case that the child's injuries would not have been sustained other than by abuse. In reaching that conclusion, the judge relied on the unrebutted testimony of Dr. Diah. The judge then shifted the burden of persuasion to the mother and A.V. to explain what had occurred to C.S. In making

that ruling, the court explained that it was not shifting the burden of proof because there was not a finite group of people that took care of C.S. Thus, the court distinguished this case from our decision in In re D.T., 229 N.J. Super. 509 (App. Div. 1988). Instead, the judge applied the burden shifting identified in J.L., supra, 400 N.J. Super. at 470.

The court then made findings of fact and conclusions of law. The court found that the Division had established that C.S. had suffered several unexplained injuries that were not caused by accident and were not self-inflicted. The court also found that the mother and A.V. could only explain some of the injuries that the child had suffered. In that regard, the court noted that A.V. had accounted for the child's injury to her head, explaining that she had fallen off the bed. The court also noted that the mother had explained to the Division worker that the child's burn on her foot were the result of splashed oil while the mother was cooking.

The court found, however, that neither the mother nor A.V. could offer an explanation for C.S.'s other injuries, which included bite marks to the child's face and back and burns to the child's buttocks and genital area. The court then found that the mother and A.V. had abused C.S. by engaging in excessive corporal punishment in violation of N.J.S.A. 9:6-8.21(c). The court also found that the Division had not sustained its burden of proving

that the mother, A.V., or the grandmother had medically neglected the child.

Following the fact-finding hearing, A.V. was dismissed from the litigation. Thereafter, the Division provided services to the mother and, in April 2015, C.S. was returned to the custody of the mother. The litigation was then terminated.

A.V. now appeals the finding of abuse. The mother has not appealed.

II.

On appeal, A.V. argues that there was insufficient evidence to prove that he abused C.S. The Law Guardian, who represents C.S., supports A.V.'s position and argues that the Division conducted a poor investigation and it failed to prove who injured C.S.

As noted earlier, there is no dispute that C.S. was abused. Relying on the unrebutted testimony of Dr. Diah, the family judge found that C.S. suffered injuries that would not have been sustained other than by acts or omissions constituting abuse or neglect. Thus, this case turns on the burden of persuasion and whether the Division satisfied its burden of proof. To put that issue in context, we will summarize our standard of review and then discuss the law on burden shifting in cases involving child abuse or neglect.

Our scope of review of a trial court's factual findings is limited. N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 278-79 (2007). We defer to the fact findings of the Family Part if those findings are "supported by adequate, substantial, and credible evidence" in the record. N.J. Div. of Youth & Family Servs. v. R.G., 217 N.J. 527, 552 (2014). A decision should be reversed or modified on appeal only if the findings were "so wholly un-supportable as to result in a denial of justice[.]" Colca v. Anson, 413 N.J. Super. 405, 413 (App. Div. 2010) (alternation in original) (quoting Meshinsky v. Nichols Yacht Sales, Inc., 110 N.J. 464, 475 (1988)). We review de novo a trial court's legal conclusions. N.J. Div. of Youth & Family Servs. v. S.I., 437 N.J. Super. 142, 152 (App. Div. 2014).

Title Nine was adopted by the New Jersey Legislature out of a "paramount concern" for the "health and safety" of children. N.J.S.A. 9:6-8.8(a) and (b). Abuse or neglect occurs when

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 [or her] parent or guardian . . . to exercise a minimum degree of care (a) in supplying the child with adequate food, clothing, shelter . . . 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, including the infliction of excessive corporal punishment; 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)(a) and (b).]

The Division bears the burden of proving a child is abused or neglected by a preponderance of the evidence. N.J.S.A. 9:6-8.46(b); N.J. Div. of Youth & Family Servs. v. P.W.R., 205 N.J. 17, 32 (2011). The trial court determines whether the child is abused or neglected by considering "the totality of the circumstances." Dep't of Children & Families v. G.R., 435 N.J. Super. 392, 401 (App. Div. 2014).

In appropriate situations, the Division is entitled to a presumption of abuse or neglect as set forth in N.J.S.A. 9:6-8.46(a)(2). That statutory provision 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.

[N.J.S.A. 9:6-8.46(a)(2).]

The issue in this case is what burden shifted to A.V., as the guardian of C.S., once the Division established a prima facie case of child abuse under N.J.S.A. 9:6-8.46(a)(2).

We have identified two types of burden shifting. See D.T., supra, 229 N.J. Super. at 517; J.L., supra, 400 N.J. Super. at 470. In D.T., supra, 229 N.J. Super. at 517, we held:

[Where] a limited number of persons, each having access or custody of a [child] during the time frame when [the] abuse concededly occurred, no one else having such contact and the [child] being then and now helpless to identify her abuser . . . [t]he burden would then be shifted, and such defendants would be required to come forward and give their evidence to establish non-culpability.

The condition for application of the burden-shifting rule requires that a defined number of people have access to the child at the time the abuse definitively occurred. This burden-shifting rule has been referred to as conditional *res ipsa loquitur*. J.L., supra, 400 N.J. Super. at 469.

In J.L., we held that the D.T. burden-shifting principle does not always apply when the Division has established a *prima facie* case of abuse. Thus, in J.L., supra, 400 N.J. Super. at 470, we used traditional *res ipsa loquitur* principles explaining:

[W]here the child is exposed to a number of unidentified individuals over a period of time, and it is unclear as to exactly where and when the child's injuries took place, traditional *res ipsa loquitur* principles apply. This means that once the Division establishes a *prima facie* case of abuse or neglect under N.J.S.A. 9:6-8.46[(a)](2), the burden will shift to the parents [or guardian] to come forward with evidence to rebut the presumption of abuse or neglect. Unlike the

rule set forth in D.T., the burden of proof will not shift to the parents [or guardian] to prove their non-culpability by a preponderance of the evidence. The burden of proof will remain on the Division.

Here, the family judge correctly applied the traditional res ipsa loquitur principles identified in J.L. The court found that the mother and A.V. could only explain the bump and bruise on C.S.'s head and the burn on C.S.'s foot. The mother (as the parent) and A.V. (as the guardian) could not, however, explain how C.S. came to be injured with bite marks and second-degree burns.

We are satisfied that the judge properly applied the statutory presumption and traditional res ipsa loquitur principles to the injuries C.S. suffered on January 23, 2013. Obviously, the seventeen-month-old child was unable to identify her abuser. The Legislature recognizes such situations would arise and enacted the presumption contained in N.J.S.A. 9:6-8.46(a)(2). The record at the fact-finding hearing was sufficient to establish that C.S.'s injuries occurred during an approximately twenty-four-hour period between the evening of January 22, 2013, and the evening of January 23, 2013. During that time, the child was in the care of both the mother and A.V. Neither offered any proof that the child came to them with any injuries, nor did they offer any proof that the child suffered the injuries after they went to the hospital.

The Law Guardian points out that the Division's investigation was sloppy. Indeed, the family judge noted his concern regarding the Division's investigation. The record was not clear in establishing whether C.S. attended daycare or was in the care of a babysitter on January 23, 2013. The Division also failed to specifically identify and investigate the cousin who took C.S. from A.V. and brought her to the grandmother. While it is troubling that the Division failed to conduct a better investigation, these gaps, viewed in the totality of the circumstances of this case, did not rebut the presumption of abuse or neglect.

Here, A.V. did not rebut the presumption. Thus, this case is distinguishable from the outcome in J.L. where the parents successfully presented evidence showing that the child's injuries could have occurred while medical professionals were treating the child. Moreover, this case is distinguishable from our more recent decision in New Jersey Division of Child Protection & Permanency v. K.F., 444 N.J. Super. 191 (App. Div. 2016). In K.F., we reversed a finding of abuse or neglect involving a twenty-five-day old infant who suffered a fractured skull. Id. at 194-95. The family judge in that case shifted the burden to the parents because the judge found the mother's explanation that she had placed the child near the edge of the bed unconvincing. Id. at

199. We held, under those circumstances, it was inappropriate to apply the burden-shifting principles of D.T. Id. at 203.

As already noted, here the trial court did not use the D.T. burden-shifting principles. In affirming the Family Part, we rely on the specific fact-findings made in this case and the goals of Title Nine. Title Nine is designed "to assure that the lives of innocent children are immediately safeguarded from further injury and possible death and that the legal rights of the children are fully protected." N.J.S.A. 9:6-8.8(a). The traditional res ipsa loquitur principles applied in J.L., supra, 400 N.J. Super. at 469-70, are designed to protect children and hold the parent or guardian accountable.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION