

**RECORD IMPOUNDED**

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Although it is posted on the internet, this opinion is binding only on the  
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0058-16T2

NEW JERSEY DIVISION OF CHILD  
PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

M.M.M., JR.,

Defendant-Appellant,

and

R.W.,

Defendant.

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IN THE MATTER OF M.M.M., III,  
S.N.A.M, and A.T.M.,

Minors.

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Argued April 26, 2018 – Decided May 4, 2018

Before Judges Simonelli, Haas and Rothstadt.

On appeal from Superior Court of New Jersey,  
Chancery Division, Family Part, Essex County,  
Docket No. FN-07-0314-14.

Deric Wu, Assistant Deputy Public Defender,  
argued the cause for appellant (Joseph E.

Krakora, Public Defender, attorney; Deric Wu, of counsel and on the brief).

Lisa J. Rusciano, Deputy Attorney General, argued the cause for respondent (Gubir S. Grewal, Attorney General, attorney; Jason W. Rockwell, Assistant Attorney General, of counsel; Erin O'Leary, Assistant Attorney General, on the brief).

James J. Gross, Designated Counsel, argued the cause for minors (Joseph E. Krakora, Public Defender, Law Guardian, attorney; James J. Gross, on the brief).

PER CURIAM

Defendant M.M.M., Jr.<sup>1</sup> appeals from a September 30, 2014 Family Part order<sup>2</sup> determining that he abused or neglected his infant daughter, S.N.A.M. (Sally), within the meaning of N.J.S.A. 9:6-8.21(c)(4) by failing to provide adequate medical care for her following the child's birth. Sally's Law Guardian supports the trial judge's finding that the Division of Child Protection and Permanency (Division) met its burden of proving abuse or neglect by a preponderance of the evidence. Based upon our review of the record and applicable law, we affirm.

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<sup>1</sup> Pursuant to Rule 1:38-3(d), we use initials and fictitious names to protect the confidentiality of the participants in these proceedings.

<sup>2</sup> This order became appealable as of right after the trial court entered a final order terminating the litigation on July 25, 2016.

At the September 30, 2014 fact-finding hearing, defendant entered into the following voluntary stipulations of fact.<sup>3</sup> R.W. gave birth to Sally at University Hospital on August 15, 2013. Sally was premature at thirty-four weeks gestation, and weighed 5 pounds, 1.2 ounces at birth. She remained until August 24, 2013. When she was released, she weighed 4 pounds, 14.7 ounces.

Before her discharge, the hospital staff scheduled appointments for Sally with a pediatrician on August 27, 2013, and with the hospital's high-risk clinic on October 20, 2013. The record is not clear whether either parent took Sally to the August 27, 2013 appointment, but it is undisputed that all subsequent hospital appointments, including the October 20 clinic appointment and an October 30, 2013 appointment at the hospital, were missed.<sup>4</sup> Defendant was aware of the high-risk nature of Sally's condition.

Following Sally's discharge from the hospital, R.W. and the baby lived for three or four weeks with maternal relatives in

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<sup>3</sup> Sally's mother, defendant R.W., also agreed to similar stipulations. However, unlike defendant, R.W. admitted that her conduct in failing to provide care for Sally constituted abuse or neglect under N.J.S.A. 9:6-8.21(c)(4). Based on that stipulation, the trial judge entered an order on September 30, 2014, finding that R.W. abused or neglected the child. R.W. has not appealed from that order and, therefore, she is not a party to the present appeal.

<sup>4</sup> When the parents missed the October 30 appointment, it was rescheduled for November 2, 2013.

Passaic County. Defendant remained at the couple's home in Newark, where he cared for their other child, M.M.M., III (Martin), who was one year old.

When R.W. and Sally returned to the family home, she told defendant that a doctor had examined Sally while she was in Passaic County, and had no concerns about her condition. However, R.W. did not reveal the date of the examination or the doctor's name, and the record does not otherwise show that this visit actually occurred. Between the date in September 2013, when Sally returned to defendant's care, and October 30, 2013, defendant did not seek any medical attention for Sally despite her premature status, her failure to gain weight, and her high-risk condition.

Defendant did not take Sally to her scheduled hospital appointment on October 30, 2013. During the day, defendant observed that Sally was warm, lethargic, not eating, and having trouble breathing.

After observing Sally's condition for several hours, defendant eventually called 911 after midnight and traveled with the infant by ambulance to Newark Beth Israel Medical Center. At the time of admission, Sally was unresponsive and experiencing respiratory arrest. She weighed 4 pounds, 1 ounce, reflecting a reduction in weight of almost a full pound, or twenty percent of her body weight, since leaving the hospital after birth.

The hospital staff suspected that Sally had broken ribs and notified the Division. A subsequent x-ray revealed that her ribs were not broken. However, photographs taken at the time of admission, and on November 5, 2013, which were entered into evidence, showed that Sally was severely emaciated, and that the baby's ribs were showing through her extremely loose skin.

Sally was released from the hospital on November 14, 2013, weighing 5 pounds, 6.4 ounces. Her discharge diagnosis was "failure to thrive." The Division placed the baby in a foster home, but she was re-hospitalized on November 20, 2013 because she was still medically fragile. Sally was later transferred to Division supervision at "St. Clare's, a medically staffed foster placement," where she remained until shortly before the fact-finding hearing.<sup>5</sup>

At the conclusion of the hearing, Judge Marysol Rosero rendered an oral decision, concluding that the Division had established by a preponderance of the evidence that defendant abused or neglected Sally by "creating and allowing to be created a substantial risk of harm to the health of the child."

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<sup>5</sup> By this time, the Division had also assumed care and custody of Martin. In May 2015, R.W. gave birth to another child, A.T.M., who was also placed in the Division's custody. The Division subsequently filed an action to terminate defendant and R.W.'s parental rights to all three children. That matter is not a subject of this appeal.

Specifically, the judge found that "[t]he child was with [defendant] for a month and a half. The child lost weight during the time that [s]he was with [hi]m," but her condition improved once she was removed from defendant's care. Thus, the judge determined there was "a direct and causal relationship between the acts of . . . neglect of [defendant] and their substantial effect upon his child[.]"

Judge Rosero also found that defendant was aware that Sally's condition required treatment at the high-risk clinic, but he did not obtain this necessary care for her. Thus, the judge held that defendant "failed to act in a manner which would avoid the harm caused to the child[,]" and that his "omission rose to the level . . . of conduct that created an unsafe condition for the child and caused physical injury . . . [to her]." This appeal followed.

On appeal, defendant contends that: (1) the Division failed to prove that his conduct constituted abuse or neglect under N.J.S.A. 9:8-21(c)(4), and (2) the trial judge "improperly place[d] the burden of proof on [him] and ignore[d] the actions [he] undertook to save his daughter's life." We disagree.

Our task as an appellate court is to determine whether the decision of the family court is supported by substantial credible evidence in the record and is consistent with applicable law. Cesare v. Cesare, 154 N.J. 394, 412 (1998). We owe particular

deference to "the family courts' special jurisdiction and expertise[.]" Id. at 413. Unless the judge's factual findings are "so wide of the mark that a mistake must have been made[.]" they should not be disturbed, even if we would not have made the same decision if we had heard the case in the first instance. N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 279 (2007) (quoting C.B. Snyder Realty, Inc. v. BMW of N. Am., Inc., 233 N.J. Super. 65, 69 (App. Div. 1989)). "It is not our place to second-guess or substitute our judgment for that of the family court, provided that the record contains substantial and credible evidence to support" the judge's decision. N.J. Div. of Youth & Family Servs. v. F.M., 211 N.J. 420, 448-49 (2012).

Through the admission of "competent, material and relevant evidence," the Division must prove by a preponderance of the evidence that the child was abused or neglected. N.J.S.A. 9:6-8.46(b). In pertinent part, N.J.S.A. 9:6-8.21(c)(4) defines an "abused or neglected child" as:

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 or guardian, as herein defined, to exercise a minimum degree of care (a) in supplying the child with adequate food, clothing, shelter, education, medical or surgical care though financially able to do so or though offered financial or other reasonable means 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. . . .

Thus, to find abuse and neglect under N.J.S.A. 9:6-8.21(c)(4), the parent must fail to "exercise a minimum degree of care." A parent "fails to exercise a minimum degree of care when he or she is aware of the dangers inherent in a situation and fails adequately to supervise the child or recklessly creates a risk of serious injury to that child." G.S. v Dep't of Human Servs., 157 N.J. 161, 181 (1999). "Where an ordinary reasonable person would understand that a situation poses dangerous risks and acts without regard for the potentially serious consequences, the law holds him responsible for the injuries he causes." Id. at 179. In addition, "[w]hen 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." Id. at 182.

The Supreme Court has interpreted the statutory language to mean "conduct that is grossly or wantonly negligent, but not necessarily intentional." N.J. Div. of Youth & Family Servs. v. E.D.-O., 223 N.J. 166, 179 (2015) (quoting G.S., 157 N.J. at 178). "Conduct is considered willful or wanton if done with the knowledge



that injury is likely to, or probably will, result." G.S., 157 N.J. at 178. "[T]he concept of willful and wanton misconduct implies that a person has acted with reckless disregard for the safety of others." Id. at 179.

Applying these standards, we are satisfied there was sufficient competent, credible evidence in the record to support Judge Rosero's finding that defendant abused or neglected Sally by failing to seek needed medical attention for this fragile infant. Sally lived with defendant for over a month before he finally took her to the hospital. He did not take the baby to at least two scheduled medical appointments, even though he was fully aware of the high-risk nature of Sally's condition.

During the period following the child's release from the hospital to defendant and R.W.'s care, Sally lost 20% of her already-low birth rate. The photographs submitted in evidence graphically depict the baby's dire condition. Sally's ribs were poking through her extremely loose and wrinkled skin. This is certainly not a case where defendant could have been unaware that his child was in desperate need of medical attention. Yet, he never sought assistance until Sally went into respiratory arrest.

Under these circumstances, defendant's argument that the Division was required to introduce expert medical evidence concerning Sally's condition is clearly without merit. As our

Supreme Court noted in New Jersey Department of Children and Families v. A.L., "[i]n many [abuse or neglect] cases, an adequate presentation of actual harm or imminent danger can be made without the use of experts." 213 N.J. 1, 29 (2013). Based upon the clear photographic evidence of Sally's harrowing physical condition and defendant's stipulation as to her equally distressing diagnoses, there is ample support in the record for Judge Rosero's conclusion that defendant failed to provide a minimum degree of care to his helpless daughter within the intendment of N.J.S.A. 9:6-8.21(c)(4).

Finally, we reject defendant's contention that the judge improperly shifted the burden of proof to him. Judge Rosero specifically stated at the beginning of her oral opinion that the Division bore the burden of proving defendant abused or neglected Sally by a preponderance of the evidence. As discussed above, the Division plainly met that burden here.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION