IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Montgomery County Office of Children & Youth,	:	
Petitioner	:	
v.	:	No. 724 C.D. 2010
Department of Public Welfare,	:	Submitted: October 1, 2010
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: January 12, 2011**

Montgomery County Office of Children & Youth (OCY) petitions for review of the March 29, 2010, Order of the Acting Secretary of Public Welfare (Secretary) upholding the Order of the Department of Public Welfare (DPW), Bureau of Hearings and Appeals (BHA), that adopted the recommendation of an Administrative Law Judge (ALJ) to grant the appeal of H.G. and expunge H.G.'s Indicated Report of child abuse. OCY argues that the ALJ erred in granting H.G.'s appeal because the ALJ applied the wrong legal standard to hold that H.G.'s actions did not constitute child abuse under the Child Protective Services Law (CPSL), 23 Pa. C.S. §§ 6301 – 6386, and the ALJ erroneously concluded that OCY

did not prove by substantial evidence that the risk alleged to be disregarded was substantial and unjustifiable.[1] For the following reasons, we affirm.

The facts in this matter, as found by the ALJ and adopted by the BHA, are as follows. K.K., a four-year old child who was in H.G.'s care at her home day care facility, died on August 9, 2007, as a result of drowning in H.G.'s above-ground swimming pool. (Findings of Fact (FOF) ¶¶ 1-3.) H.G. and her husband installed an above-ground swimming pool at their home in 2002. (FOF ¶ 4.) Pursuant to local building and maintenance codes, the pool was required to be surrounded by a four-foot high fence, and the gate providing access to the pool was required to be equipped with a self-closing, self-latching mechanism. (FOF ¶ 5.) The mechanism at H.G.'s pool was not self-locking and the bolt system used did not line up, requiring an individual to physically lift the gate to make the bolt slide into the keeper.[2] (FOF ¶¶ 12-14.) On August 9, 2007, H.G. was babysitting K.K., T.M. (also four-years old), and M.P. (two-years old), who were playing in a baby pool with ankle-deep water located on H.G.'s outside deck. (FOF ¶¶ 6-7.) H.G. took M.P. inside the house in order to retrieve K.K.'s earplugs because K.K. was recovering from an ear infection, leaving K.K. and T.M. unattended outside for up

[1] The CPSL defines child abuse as, *inter alia*, "[a]ny recent act or failure to act by a perpetrator which causes *nonaccidental* serious injury to a child under 18 years of age." 23 Pa. C.S. § 6303(b) (emphasis added). The term nonaccidental is defined in the CPSL as "[a]n injury that is the result of an intentional act that is committed with disregard of a substantial and unjustifiable risk." 23 Pa. C.S. § 6303(a).

[2] However, both H.G. and her husband testified that their swimming pool area underwent numerous inspections by multiple government agencies, including the township in which they live, and they never received notice that there were any problems with the type of locking system they used. (Hr'g Tr. at 46-49, 65-66, R.R. at 13a, 17a-18a).

to one minute. (FOF ¶¶ 6-7, 11.) While inside, H.G. spoke to her fourteen-year old daughter for about five to ten seconds. (FOF ¶ 10.) Upon her return, H.G. noticed that K.K. was not in the baby pool. (FOF ¶ 8.) H.G. searched the surrounding area, including under the decks, and ultimately found K.K. face down in the above-ground swimming pool. (FOF ¶ 9.) H.G. immediately called 911 and gave CPR to K.K. (ALJ Op. at 11; Montgomery County Detective Bureau Interview Report at 4, Ex. C-3, R.R. at 33a.) During his subsequent investigation into K.K.'s death, Montgomery County Investigative Detective Mark Minzola, an average adult male in reasonable shape, found it physically difficult to latch the gate to the above-ground swimming pool. (FOF ¶ 15.) He indicated that it would be very difficult for a four-year old child to have unlatched a properly latched gate. (FOF ¶ 16.) Mr. Minzola did not find H.G.'s actions to be reckless or grossly negligent. (FOF ¶ 17.)

On October 4, 2007, OCY filed the Indicated Report of child abuse[3] against H.G. and placed H.G.'s name on the Childline Registry. (FOF ¶ 18.) The Indicated Report provided the following: "[t]he evidence shows that [H.G.] intentionally left [K.K.] (and another child) unsupervised in a situation involving a substantial and unjustifiable risk. [K.K.] was left unsupervised in child pool. Gate to the above[-]ground pool in which [K.K.] drowned was either unlatched or was capable of being unlatched by [K.K.]." (Indicated Report at 2, R.R. at 27a.) H.G.

[3] An "indicated report" may be filed "if an investigation by the [OCY] or the [DPW] determines that substantial evidence of the abuse exists based on any of the following: (1) [a]vailable medical evidence[;] (2) [t]he child protective service investigation[; or] (3) [a]n admission of the acts of abuse by the perpetrator." Section 6303 of the CPSL, 23 Pa. C.S. § 6303.

filed an appeal with the BHA requesting to have her record expunged, and a hearing was held before the ALJ. The ALJ recommended granting H.G.'s appeal, concluding, *inter alia*, that the totality of the evidence supported the conclusion that K.K.'s death was accidental and that OCY did not prove by substantial evidence that H.G. disregarded a substantial and unjustifiable risk by entering her home for about one minute to retrieve K.K.'s earplugs. (ALJ Op. at 11.) The ALJ held that H.G. believed that the gate to the above-ground pool was secured because it appeared, from her vantage point, that the bolt was secured and her fourteen year old daughter had used the pool earlier in the morning. (ALJ Op. at 9.) The BHA adopted the ALJ's recommendation in its entirety on June 2, 2009. OCY requested reconsideration from the Secretary, which was granted; however, the Secretary upheld the BHA's Order on reconsideration. OCY now petitions this Court for review.[4]

On appeal, OCY argues that the ALJ erred in interpreting the CPSL's definition of nonaccidental in this matter by improperly relying on the standard for criminal recklessness, rather than the plain language of the CPSL and this Court's decision in F.R. v. Department of Public Welfare, 4 A.3d 779 (Pa. Cmwlth. 2010). According to OCY, by applying the criminal recklessness standard, the ALJ

[4] "This Court's review is limited to determining whether legal error has been committed, whether constitutional rights have been violated, or whether the necessary findings of fact are supported by substantial evidence." F.R. v. Department of Public Welfare, 4 A.3d 779, 782 n.7 (Pa. Cmwlth. 2010). A record of child abuse may be expunged by the Secretary if good cause is shown and proper notice provided to the appropriate subjects of the report, or if the alleged perpetrator appeals an indicated report within 45 days of being notified of the report on the grounds that the report is inaccurate or is being maintained in a manner inconsistent with the CPSL. Section 6341(a) of the CPSL, 23 Pa. C.S. § 6341(a).

erroneously added the concepts of "conscious disregard" and "gross deviation" to the CPSL's definition of nonaccidental. (OCY's Br. at 14.)

The CPSL defines child abuse as, *inter alia*, "[a]ny recent act or failure to act by a perpetrator which causes *nonaccidental* serious injury to a child under 18 years of age." 23 Pa. C.S. § 6303(b) (emphasis added). The term nonaccidental is defined in the CPSL as "[a]n injury that is the result of an intentional act that is committed with disregard of a substantial and unjustifiable risk." 23 Pa. C.S. § 6303(a). This term previously was undefined, resulting in our Supreme Court applying the standard for criminal negligence found at Section 302(b)(4) of the Crimes Code, 18 Pa. C.S. § 302(b)(4).[5] P.R. v. Department of Public Welfare, 569 Pa. 123, 132, 801 A.2d 478, 483 (2002). The Supreme Court, in P.R., also stated that "the legal standard for differentiating abuse from accident must acknowledge some level of culpability by the perpetrator that his actions could reasonably create a serious injury to the child." Id. at 137, 801 A.2d at 486-87. Thereafter, the General Assembly amended the CPSL to include the current definition. Subsequently, in F.R., this Court rejected the argument that this amendment

[5] Section 302(b)(4) defines "criminal negligence" as:

> (4) A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and intent of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

18 Pa. C.S. § 302(b)(4).

rendered P.R.'s use of the criminal negligence standard inapplicable, reasoning that, in defining nonaccidental by using the language used in P.R. verbatim, the General Assembly was codifying the Supreme Court's decision in P.R., not circumventing it.[6] F.R., 4 A.3d at 787. The ALJ, in the case before us, issued his recommendation before this Court issued its decision in F.R.

In his recommendation, the ALJ recognized the development of the definition of nonaccidental and believed, erroneously pursuant to F.R., that when it amended the CPSL, the General Assembly intended to change the definition of nonaccidental from the criminal negligence standard enunciated in P.R. The ALJ noted that the language the General Assembly used, "disregards a substantial and unjustifiable risk," was analogous to the standard used for criminally reckless

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[6] Both P.R. and F.R. involved the use of corporal punishment. In P.R., the mother swung a belt in an attempt to administer corporal punishment on her child, who attempted to evade the blows by running away and, while the child was running away, the belt struck the child in the eye. P.R., 569 Pa. at 126, 801 A.2d at 480. The Supreme Court concluded that P.R.'s actions did not constitute child abuse, stating that the use of a belt bearing a buckle to administer corporal punishment, by itself,

> cannot be viewed . . . as a gross deviation from the standard of care a reasonable parent would observe in the same situation[, i.e., the criminal negligence standard]. Without substantial proof that this unusual injury was more than the regrettable result of corporal punishment, we cannot allow the oddity of the result itself to presuppose the element of unjustifiable risk that would lead to the finding of criminal negligence.

Id., 569 Pa. at 138, 801 A.2d at 487. In F.R., the father spanked the child on the buttocks multiple times with an open hand, resulting in bruising, pain, and functional impairment. F.R., 4 A.3d at 780. This Court held that the father's appeal was properly denied because the factual findings that the father's intentional act of spanking caused the child severe pain, bruising, and functional impairment were supported by substantial evidence and were caused by a substantial and unjustifiable risk. Id., 4 A.3d at 784, 788.

conduct under the Crimes Code and quoted that term as defined by Section 302(b)(3) of the Crimes Code, 18 Pa. C.S. § 302(b)(3).[7] It is this reference to which OCY objects. However, the ALJ's acknowledgment of the analogous wording between nonaccidental and criminal recklessness was the extent of the ALJ's reliance on the criminal recklessness standard. In fact, the ALJ specifically indicated that he "must make findings in accordance with the provisions of the CPSL, as amended" and went about doing so, stating that OCY did not prove by substantial evidence that H.G. disregarded a substantial and unjustifiable risk by entering her house for about one minute. (ALJ Op. at 11.) There is no mention of "conscious disregard" or "gross deviation" anywhere in the ALJ's analysis. Accordingly, we conclude that the ALJ did not rely, erroneously or otherwise, on the definition of criminal recklessness and that the ALJ applied the proper definition of nonaccidental as set forth in Section 6303(a) of the CPSL.

OCY also asserts that the ALJ erred in finding K.K.'s death was accidental based on his conclusion that OCY did not establish, by substantial evidence, that H.G. disregarded a substantial and unjustifiable risk by leaving K.K. unsupervised

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[7] The ALJ defined criminal recklessness as:

> (3) A person acts recklessly with respect to a material element of an offense when he consciously [intentionally?] disregards a substantial and justifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and intent of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation.

(ALJ Op. at 10-11 (quoting 18 Pa. C.S. § 302(b)(3) (emphasis and addition provided by the ALJ)).

for about one minute in the vicinity of the above-ground pool. Specifically, OCY asserts that the ALJ erred in holding that the "unsecured swimming pool" did not constitute a substantial and unjustifiable risk that H.G. disregarded when she intentionally entered her home for a minute, which resulted in K.K.'s death. (OCY Br. at 10.) Essentially, OCY's argument is that K.K.'s drowning, the installation of a bolt system that failed to meet building code standards to secure the above-ground swimming pool, and general statistics regarding accidental drownings constitute sufficient evidence to support OCY's conclusion that the unsecured pool constituted a substantial and unjustifiable risk, which H.G. disregarded.

The burden of proof in an expungement hearing is on the county agency to show, by substantial evidence, that the indicated report is accurate and, if it fails to meet that burden, the request for expungement will be granted. Bucks County Children and Youth Social Services Agency v. Department of Public Welfare, 808 A.2d 990, 993 (Pa. Cmwlth. 2002). Section 6303(a) of the CPSL defines substantial evidence as "[e]vidence which outweighs inconsistent evidence and which a reasonable person would accept as adequate to support a conclusion." 23 Pa. C.S. § 6303(a). The agency's evidence must outweigh any contrary evidence. C.F. v. Department of Public Welfare, 804 A.2d 755, 757 (Pa. Cmwlth. 2002). "[I]n determining whether a finding of fact is supported by substantial evidence, the Court must give the party in whose favor the decision was rendered the benefit of all reasonable and logical inferences that may be drawn from the evidence. . . ." S.T. v. Department of Public Welfare, 681 A.2d 853, 856 (Pa. Cmwlth. 1996). The BHA is the ultimate fact finder in expungement proceedings with the authority to

make credibility and evidentiary weight determinations. F.R., 4 A.3d at 781 n.3, 783.

We begin our analysis by recognizing that what occurred here was a tragedy. There is no question that swimming pools pose some risk; indeed, both parties acknowledged this risk before the ALJ. (Hr'g Tr. at 80-81, R.R. at 21a.) Presumably, the purpose of building a fence and gate around a swimming pool is to mitigate the risks posed by the swimming pool. Here, the ALJ found that H.G. believed that the gate was properly secured when she left K.K. unattended. (ALJ Op. at 9.) Indeed, H.G. stated that she did not really consider the risk posed by the adult swimming pool when she decided to go inside because she believed that the gate was properly secured. (Hr'g Tr. at 83, R.R. at 22a.) Thus, we believe, contrary to OCY's assertion, that the proper question is whether the ALJ properly concluded that H.G., by entering her home and leaving K.K. unattended for one minute, did not disregard a substantial and unjustifiable risk posed by a *properly secured* above-ground swimming pool. In other words, the risk H.G. faced and allegedly disregarded was that of K.K., a four-year old, unlatching a *properly secured* gate and drowning in the above-ground swimming pool in less than one minute.[8] Reviewing the evidence in the light most favorable to H.G., the prevailing party below, we agree with the ALJ that H.G. did not disregard a substantial and unjustifiable risk and, therefore, K.K.'s drowning was accidental and did not constitute child abuse under the CPSL.

[8] Obviously, we would be faced with a different question if H.G. had been aware that the gate was not properly latched and left K.K. despite that knowledge.

OCY's argument that the risk here was substantial and unjustified is premised on its evidence regarding the statistics of the general danger of accidental drowning posed by swimming pools, the fact that H.G. stipulated that the local building code required a self-latching, self-closing mechanism, and the very tragic fact that K.K. drowned. However, the ALJ also had before him H.G.'s evidence that she did not disregard a substantial and unjustifiable risk, namely that she believed that the gate was properly latched as it appeared to be so, she was inside for only one minute, and she immediately searched for K.K. upon returning and noticing his absence. Additionally, Mr. Minzola testified that he did not consider H.G.'s actions on that day to be reckless or grossly negligent, that it would be difficult for a four year old child to unlatch a properly latched gate, (FOF ¶¶ 16-17; Hr'g Tr. at 32-33, R.R. 9a), and both H.G. and her husband testified that their swimming pool area underwent numerous inspections by multiple government agencies, including the township in which they live, and they never received notice that there were any problems with the type of locking system they used. (Hr'g Tr. at 46-49, 65-66, R.R. at 13a, 17a-18a).

In holding that OCY's evidence did not constitute substantial evidence to support the finding that H.G. disregarded a substantial and unjustifiable risk, the ALJ essentially concluded that OCY's evidence did not outweigh H.G.'s contrary evidence. Determinations regarding the weight of the evidence are solely within the province of the fact finder. F.R., 4 A.3d at 781 n.3, 783. Moreover, our Supreme Court in P.R. stated that: "[w]ithout substantial proof that this unusual injury was more than the regrettable result of corporal punishment[, i.e., the intentional act], we cannot allow the oddity of the result itself to presuppose the

element of unjustifiable risk that would lead to the finding of criminal negligence." P.R., 569 Pa. at 138, 801 A.2d at 487. Thus, OCY's reliance on K.K.'s drowning itself as evidence of the element of substantial and unjustifiable risk in this matter is improper because there was not substantial proof that his drowning was more than the tragic result of H.G.'s intentional act of leaving him unattended outside for one minute while she went inside to get his earplugs. As further stated by the Supreme Court in P.R., "the legal standard for differentiating abuse from accident must acknowledge some level of culpability by the perpetrator that his actions could reasonably create a serious injury to the child." Id. at 137, 801 A.2d at 486-87. Based on the factual findings here, H.G.'s actions do not rise to the level of culpability necessary to support the conclusion that she committed child abuse on that tragic afternoon.

Accordingly, we affirm.

RENÉE COHN JUBELIRER, Judge

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O R D E R

NOW, January 12, 2011, the Order of the Department of Public Welfare in the above-captioned matter is hereby **AFFIRMED**.

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RENÉE COHN JUBELIRER, Judge