NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CU 1571
2011 CW 0587 & 2011 CW 1852
YVONNE LANDRY

VERSUS

JEFFREY THOMAS

Judgment Rendered: December 21, 2011

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APPEALED FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH ST. TAMMANY
STATE OF LOUISIANA
DOCKET NUMBER 2008-10514, DIVISION "L"

THE HONORABLE HILLARY J. CRAIN, JUDGE PRO TEMPORE

THE HONORABLE DAWN AMACKER, JUDGE

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BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

McDONALD, J.

At issue in this appeal is a judgment awarding a father supervised visitation with his minor daughter. The child's mother appeals the judgment claiming the trial court erred by failing to award her sole custody based on sufficient evidence that the father sexually abused the child. The child's father also appeals the judgment claiming the trial court erred by restricting his visitation to occur only under supervision after concluding the mother failed to prove sexual abuse.

In conjunction with the parties' appeals, we also address the mother's two writ applications that were referred to the merits of the appeal. For reasons herein, we deny both writ applications and affirm the trial court's judgment.

FACTS AND PROCEDURAL HISTORY

Yvonne Landry and Jeffrey Thomas are the natural parents of S.T., a minor daughter, born on March 17, 2006. The parties were married in June of 2007, were separated shortly thereafter, and in April 2008, were awarded joint custody of S.T., with Ms. Landry designated as domiciliary parent, and Mr. Thomas awarded specific visitation rights. The parties were divorced by judgment dated April 13, 2009.

In December, 2009, Ms. Landry filed a motion to suspend Mr. Thomas' visitation rights, alleging he had sexually abused S.T. Judge Dawn Amacker suspended Mr. Thomas' visitation rights pending an investigation by the Office of Community Services in Orleans Parish. Mr. Thomas subsequently moved to have his regular visitation rights reinstated. In April, 2010, Judge Amacker granted the motion, pending a hearing, and allowed Mr. Thomas interim visitation subject to his mother's supervision. Ms. Landry filed a writ application with this court challenging Mr. Thomas' reinstated visitation rights. This Court granted the writ, vacated Judge Amacker's temporary visitation order, and remanded for a

contradictory hearing.[1] **Landry v. Thomas**, 2010 CW 0724 (La. App. 1 Cir. 4/28/10).

Trial of the motion to suspend visitation proceeded before Judge Hillary Crain over the months of July, August, and September, 2010. On December 20, 2010, Judge Crain issued written reasons for judgment stating the allegations of sexual abuse had not been proven "even by a preponderance of the evidence." On February 22, 2011, Judge Crain signed a judgment ordering visitation to Mr. Thomas under his mother's supervision according to a specified schedule.[2]

On January 5, 2011, Ms. Landry filed a motion for new trial and for professionally supervised visitation. This motion was based in part on a dispute between the parties over the location of Mr. Thomas' Christmas visitation with S.T., and the purported new opinion of therapist Dr. Amy Dickson that S.T. was exhibiting symptoms of sexual abuse and that visitation should be professionally supervised. On March 2, 2011, Ms. Landry filed a supplemental motion for new trial, for professionally supervised visitation, and for the court to review all transcripts and evidence; the supplemental motion reurged the grounds submitted in the earlier motion, with the additional allegation that the paternal grandmother was an "ineffective, hostile, and negligent" supervisor. No opposition to the motion for new trial was filed.

Judge Amacker held a hearing on the new trial motions on March 17, 2011,

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[1] Ms. Landry also moved to recuse Judge Amacker, which motion was denied as moot as Judge Hillary Crain was sitting *pro tempore* for Judge Amacker while she was on medical leave. Ms. Landry moved to continue the visitation hearing, which motion Judge Crain denied. Ms. Landry took a writ to this Court which was denied with language. **Landry v. Thomas**, 2010 CW 1365 (La. App. 1 Cir. 7/28/10).

[2] In his December 20, 2011 reasons for judgment, Judge Crain stated visitation would be awarded to Mr. Thomas under the supervision of the maternal grandmother. On February 22, 2011, Judge Crain signed amended reasons for judgment, stating that his reference to the "maternal" grandmother was a typographical error, and that he intended to have the "paternal" grandmother supervise the visits.

and denied them in open court. Mr. Thomas and Ms. Landry subsequently each filed before the trial court a motion for appeal of Judge Crain's February 22, 2011 judgment. Ms. Landry's motion also challenged Judge Amacker's denial of her motion for new trial. Both motions for appeal were granted.

Ms. Landry also filed a writ application with this court seeking expedited consideration since S.T. is now having visitation with her father, which according to Ms. Landry, is inadequately supervised by S.T.'s paternal grandmother. On April 11, 2011, this Court issued an interim order referring Ms. Landry's writ to the same appellate panel assigned the yet to be lodged appeal. **Landry v. Thomas**, 2011 CW 0587 (La. App. 1 Cir. 4/11/11).

In the interim, Mr. Thomas and Ms. Landry were back in court before Judge Amacker. At some point, Ms. Landry filed a "Plaintiff's Supplemental Motion to Authorize Dr. Amy Dickson to Provide Appropriate Therapy for the Parties' Child & Motion for Professionally Supervised Visitation," which she alleges she filed due to S.T.'s sexually acting out with another girl at school. Judge Amacker held a hearing on the motion on June 27, 2011.

On July 1, 2011, Ms. Landry filed a motion to recuse Judge Amacker because of the judge's comments and questions during both the March 17 and June 27 hearings. Mr. Thomas filed an opposition to the motion. Judge Reginald Badeaux was assigned the recusal motion, and a hearing was held on July 6, 2011. On August 4, 2011, Judge Badeaux denied the recusal motion, providing extensive reasons for judgment. Ms. Landry then filed a second writ application with this court, under 2011 CW 1852, asserting that Judge Badeaux abused his discretion in refusing to recuse Judge Amacker. She asked that her second writ be referred to the appeal panel handling the appeals from Judge Crain's February 22, 2011 judgment, and her first writ, filed under 2011 CW 0587, challenging Judge

Amacker's denial of her motion for new trial. She also sought an order from this court directing the clerk of the trial court to forward an audio recording of the June 27, 2011 hearing to this Court for review. On October 20, 2011, this Court granted that part of Ms. Landry's application seeking referral of her second writ to the same panel assigned to the appeals and her first writ application. This Court denied that portion of her writ application requesting the June 27, 2011 hearing audio recording. **Landry v. Thomas**, 2011 CW 1852 (La. App. 1 Cir. 10/20/11).

REVIEW OF FEBRUARY 22, 2011 JUDGMENT AWARDING MR. THOMAS SUPERVISED VISITATION

We first address the parties' appeals of the judgment awarding Mr. Thomas visitation with S.T. under his mother's supervision. Ms. Landry contends Judge Crain erred by failing to award her sole custody based on evidence that Mr. Thomas sexually abused S.T. Mr. Thomas contends Judge Crain erred by restricting his visitation to occur only under supervision after concluding Ms. Landry failed to prove sexual abuse.

Under La. R.S. 9:341(A), whenever a court finds by a preponderance of the evidence that a parent has subjected his child to sexual abuse, the court shall prohibit visitation between the abusive parent and the abused child until such parent proves that visitation would not cause physical, emotional, or psychological damage to the child. Should visitation be allowed, the court shall order such restrictions, conditions, and safeguards necessary to minimize any risk of harm to the child. **Id.** Even when abuse is not proven, a trial court may impose conditions upon visitation to minimize any the risk of harm to a child. **Harper v. Harper**, 33,452 (La. App. 2 Cir. 6/21/00), 764 So.2d 1186, 1191; **Hollingsworth v. Semerad**, 35,264 (La. App. 2 Cir. 10/31/01), 799 So.2d 658, 664. The paramount consideration in setting visitation privileges for a non-custodial parent is the best

interest of the child. **Harper v. Harper**, 764 So.2d at 1191. Appellate review of a trial court's findings with respect to child visitation is governed by the manifest error standard of review. **State ex rel. J.S.W. v. Reuther**, 36,421 (La. App. 2 Cir. 9/18/02), 827 So.2d 1199, 1204.

In reasons for judgment, Judge Crain stated that sexual abuse of S.T. by Mr. Thomas had not been proven by a preponderance of the evidence. Despite this statement, he continued:

> However, the court finds there are allegations made, which if proven would be extremely disturbing and these allegations are sufficient in nature and are sufficiently factually based to create concerns in the professionals who are trained in determining sexual abuse, and the Court [finds] that something may have occurred. However, due to the age of the child, the lack of physical evidence and the circumstances surrounding the post separation relationship of the parties a determination cannot be reached at this time. The Court has already placed the child in therapy with a therapist not subject to the litigation. After therapy and after the child matures it may be possible to determine definitively whether sexual abuse did or did not occur. The therapist has been ordered to report to the Court anything that would indicate that sexual abuse has occurred without raising the issue with the child. So far there has been no indication to the Court. Until a more definitive conclusion can be reached the Court believes that it is in the best interest of the child that visitation be controlled to preclude even the possibility of future abuse.

The evidence regarding the issue of sexual abuse presented to Judge Crain consisted of testimony from both parents, S.T.'s maternal and paternal grandmothers, a babysitter, Ms. Landry's boyfriend, a child protection investigator, a psychologist, and two pediatricians.

Ms. Landry and one of her babysitters, Jennifer Beach, testified that S.T. often came home from visitation with Mr. Landry with genital redness and irritation. On one occasion in August of 2008, Ms. Landry was particularly concerned because S.T., two years old at the time, returned home from her father's house with such irritation that her genitals were "almost purple," and that S.T. told her, "my daddy hurt my privates and my butt really bad." Ms. Landry had S.T.

examined by three physicians after this incident, but none opined that S.T. had been sexually abused. According to Ms. Landry, in the fall of 2009, S.T. began to have toileting issues, genital rashes, and behaviorial changes. S.T. told her mother that she bathed and slept with her father. According to Loretta Landry, S.T.'s maternal grandmother who had regular contact with her, S.T. began to put her hands down her pants, tried to insert toys in her vagina in the bathtub, began to pose in seductive ways, and was obsessed with "butts."[3] She also testified that S.T. returned from visits at her father's house with a red vaginal area and stated that S.T. had told her she slept and bathed with her father, that her father did not wear pajamas, and that her daddy "really did hurt [her] privates."

In late November 2009, S.T., then three years old, returned from a visit to her father's house, and, according to Ms. Landry, stated that her daddy had touched her privates with his hand and finger, that it hurt, and she did not want him to do that again. Ms. Landry took S.T. to her pediatrician, Dr. Amanda Jackson, who noted that S.T. had mild genital redness and a vaginal discharge. S.T. reported to Dr. Jackson that her daddy had hurt her privates and demonstrated by vigorously rubbing her hand back and forth over her genital area. Concerned that S.T. "clearly demonstrated being touched in a way that no child should be touched," Dr. Jackson referred S.T. to Childrens' Hospital in New Orleans for possible sexual abuse follow up and contacted the Office of Community Services.

Marion Johnson, a child protection investigator with the Department of Family and Child Services in Orleans Parish, interviewed S.T. when she arrived at Children's Hospital. S.T. told Ms. Johnson that "daddy said he wasn't going to to hurt me anymore" and again demonstrated his actions by "aggressively" rubbing

[3] John Lavis, Ms. Landry's boyfriend, also testified that, at some time in the fall of 2009, when S.T. would have been three years old, she turned to her mother and Mr. Lavis, and "out of nowhere, all of a sudden kind of turned to us and stuck her butt out and said, 'tickle my bottom.'"

between her legs. Dr. Yamika Head, the pediatrician at Children's Hospital who examined S.T., also confirmed the child's report and gesturing of an "up and down motion with her finger to her genital area" as what her daddy had done. Although Dr. Head had "concerns" about possible sexual abuse, there was nothing "definitive" to confirm such; she recommended that S.T.'s future visitation with Mr. Thomas be supervised.

As part of her investigation, Ms. Johnson spoke to both parents, and told Mr. Thomas about S.T.'s disclosures. Mr. Thomas denied the allegations of sexual abuse but did not fully discuss the situtation with Ms. Johnson based on advise from his attorney. He showed Ms. Johnson the sink where he bathed S.T. and admitted that S.T. would occasionally sleep in his bed with him on her visits. Mr. Thomas told Ms. Johnson he thought Ms. Landry was "coaching" S.T. to make accusations against him; however, Ms. Johnson testified that she saw no evidence that S.T. was being "brainwashed" by her mother. After her investigation, Ms. Johnson commenced proceedings to have Mr. Thomas' visitation suspended based on her belief that sexual abuse had occurred.[4]

During his testimony, Mr. Thomas denied sexually abusing S.T. and stated that he and his daughter had a "wonderful relationship." Mr. Thomas testified that S.T. occasionally did have diaper rashes when she was with him, that she often came to him with a diaper rash, that he would treat the rashes with rash cream or baby powder, and that there had been "times when it burned and [S.T.] sat with me and my mother and had to try to get it off." Mr. Thomas denied bathing with S.T., and testified that, with the exception of once or twice, he always bathed S.T. in the kitchen sink. Rebecca Rutledge, Mr. Thomas' mother, who spent much time with

[4] The proceedings, instituted in Orleans Parish, were subsequently dismissed.

Mr. Thomas and S.T. during S.T.'s visits, also testified that Mr. Thomas always bathed S.T. in his kitchen sink. Ms. Rutledge stated that she did not believe Mr. Thomas would have abused S.T., and S.T. told her that she told the doctor her daddy had hurt her "because her mommy told her to."

After reviewing the evidence Judge Crain had before him, we conclude he did not manifestly err in concluding there was insufficient evidence of sexual abuse to warrant termination of Mr. Thomas' visitation rights. Judge Crain heard the witnesses firsthand and was in the best position to ascertain their credibility. **Romanowski v. Romanowski**, 03-0124 (La. App. 1 Cir. 2/23/04), 873 So.2d 656, 660. Further, although Judge Crain noted there were allegations "sufficiently factually based to create concerns in the professionals who are trained in determining sexual abuse," he was not bound by the concerns of these professionals in light of the evidence as a whole. See **Day v. Day**, 97-1994 (La. App. 1 Cir. 4/8/98), 711 So.2d 793, 797; **Kuhl v. Kuhl**, 97-1725 (La. App. 3 Cir. 7/8/98), 715 So.2d 740, 743; **W.M.E. v. E.J.E.**, 619 So.2d 707, 710-711 (La. App. 3 Cir. 1993). Expert witnesses are intended to "assist the trier of fact" in understanding the evidence or in the determination of a fact at issue. La. C.E. art 702. Clearly, expert assistance may be valuable in a court's determination, particularly dealing with the psychological and emotional welfare of children; however, the ultimate "best interest of the child" decision squarely remains in the exclusive province of the court. **W.M.E.**, 619 So.2d at 710-711. This decision necessarily focuses on all of the evidence and testimony presented. **Id.**

The record clearly indicates that, as a toddler, S.T. had recurrent problems with genital irritation. Based on S.T.'s reports that her daddy hurt her by rubbing her genitals, Judge Crain could have believed those witnesses, including experts, who surmised S.T.'s genital problems resulted from Mr. Thomas' inappropriate

sexual contact with her. On the other hand, Judge Crain also could have reasonably interpreted S.T.'s reports and demonstrations as an expected reaction by a toddler to the discomfort caused by her father's nonsexualized attempts to treat her recurrent diaper rash. Regarding other evidence presented, including allegations that Mr. Thomas bathed and slept with S.T., and that S.T. began to exhibit disturbing behaviors, Judge Crain heard the witnesses, read the depositions, and apparently did not find the evidence sufficient to prove sexual abuse. Given Judge Crain's opportunity to observe the demeanor of the witnesses, he was in the best position to make determinations as to their credibility. Our review on appeal reveals that he carefully evaluated the testimony and made factual findings that are reasonably supported by the record. Ms. Landry's arguments to the contrary are without merit.

We further conclude that Judge Crain did not err in ordering that Mr. Thomas' future visitation with S.T. be supervised. If Judge Crain had found that Mr. Thomas sexually abused S.T., he would have been required under La. R.S. 9:341(A) to "order such restrictions, conditions, and safeguards necessary to minimize any risk of harm" to S.T. But, even without a finding of abuse, as is the case here, a trial court has the discretion to impose supervised visitation by a neutral party to minimize the risk of harm to the child. **Harper**, 33,452 (La. App. 2 Cir. 6/21/00), 764 So.2d at 1190-1191; see also **Coie v. Coie**, 42,077 (La. App. 2 Cir. 2/21/07), 948 So.2d 1276, 1279-1280.

In reasons for judgment, Judge Crain noted that S.T. was in therapy and that, thus far, there was no indication from that therapist that sexual abuse had

occurred.[5] He indicated that after therapy and after S.T. had matured, determinations as to whether sexual abuse occurred might be possible. But, he went on to state that "[u]ntil a more definitive conclusion [could] be reached[,] the Court believes that it is in the best interest of the child that visitation be controlled to preclude even the possibility of future abuse." Considering S.T.'s young age and the contentious relationship between her parents, it was not manifestly erroneous for Judge Crain to find that supervised visitation was in S.T.'s best interest. See **Harper**, 764 So.2d at 1190-1191. From our review of the record, there is ample evidence to support Judge Crain's decision. Mr. Thomas' arguments to the contrary are without merit.

DENIAL OF MOTION FOR NEW TRIAL

We next address Judge Amacker's denial of Ms. Landry's motion for new trial, that the judge review the entire record, and for professionally supervised visitation. Judge Amacker heard the new trial motion on March 17, 2011. In response to Ms. Landry's motion that she read the entire record before making a determination on the motions for new trial and professionally supervised visitation, Judge Amacker said:

> I'll certainly take that into consideration after hearing everything we have today. It all depends what's at issue, gentlemen, as you know, in a case, on whether or not I have to read the entire record, every transcript, everything that's gone on in this case, to reach a decision on the isolated issues that you present in connection with a [m]otion for [n]ew [t]rial.

Judge Amacker went on to state that she did not want to unduly delay matters, and as a number of the transcripts from hearings were not transcribed, she would

[5] At a May 26, 2010 hearing, the parties stipulated that Dr. Amy Dickson, a clinical psychologist, would provide counseling services to S.T. The stipulation provided that Dr. Dickson would be called to testify only if S.T.'s therapy revealed evidence of abuse. Dr. Dickson's role in this litigation is discussed in relation to Ms. Landry's motion for new trial and motion to recuse Judge Amacker.

see, after the hearing, if she felt comfortable ruling without reviewing all of the as-yet-unprepared record. She noted that Ms. Landry's position in moving the court to review the entire record was undermined by her failure to see that the record was available for review.

The trial court recessed for a period during which she reviewed portions of the record, specifically, a new deposition of Dr. Dickson, S.T.'s therapist, taken the previous day, March 16, 2011. Upon her return, Judge Amacker stated that she had read "everything that's present in the record as of today ... ." The court stated her finding that Ms. Landry had failed to establish any newly discovered evidence sufficient to justify the granting of a new trial under La. C.C.P. art. 1972(2). She further denied the motion on discretionary grounds. She noted that Dr. Dickson's new deposition revealed no "newly made allegations by the child of sexual abuse by any party." Judge Amacker further opined that, had Dr. Dickson's new deposition been available to the court at trial, it would not have changed the outcome because sexual abuse had not been proven. Judge Amacker thus denied the motion for new trial.

Under La. C.C.P. 1972(2), a new trial shall be granted when the moving party has discovered, since the trial, evidence important to the cause, which he could not, with due diligence, have obtained before or during the trial. To meet this burden of proof on a motion for new trial based on newly discovered evidence, the mover must show that such evidence: (1) is not merely cumulative; (2) would tend to change the result of the case; (3) was discovered after trial; and (4) could not, with due diligence, have been obtained before or during the trial. **Thomas v. Comfort Center of Monroe, LA, Inc.**, 10-0494 (La. App. 1 Cir. 10/29/10), 48 So.3d 1228, 1240. The standard of review of a judgment on a motion for new trial, whether on peremptory or discretionary grounds, is that of

abuse of discretion. **Guillory v. Lee**, 09-0075 (La. 6/26/09), 16 So.3d 1104, 1131.

Ms. Landry's motion for new trial is based on Dr. Dickson's March 16, 2011 deposition. We agree with Judge Amacker that Dr. Dickson's deposition contains no new evidence that would tend to change the result of this case. In her deposition, Dr. Dickson discussed behaviors exhibited by S.T., some of which she opined were consistent with sexual abuse, including physical aggression toward peers, sudden bowel movements and urination in her clothing, sexualized acts toward her mother, and separation issues. Dr. Dickson's testimony indicates that most of these behaviors were occurring before the conclusion of the trial before Judge Crain, but Dr. Dickson did not reach the conclusion that they were consistent with sexual abuse until October 2010, after the trial. However, Dr. Dickson also admitted that S.T.'s behavior could have been attributable to stressors other than sexual abuse; that the sexualized acts toward her mother were based solely on reports from Ms. Landry or Ms. Landry's mother; that S.T. never specifically admitted to the sexual acts; and that S.T. made unconfirmed accusations of abuse against individuals other than her father. Given a trial court's discretion in assessing the weight to be given any evidence, we find no abuse of discretion in Judge Amacker's conclusion that Dr. Dickson's deposition did not constitute new evidence tending to change the result of this case.[6]

Judge Amacker denied Ms. Landry's motion for professionally supervised visitation, finding no reason to alter the judgment entered by Judge Crain and

[6] As noted, Dr. Dickson's arrived at her newly formed opinion that S.T.'s behaviors were indicative of sexual abuse in October 2010, after the close of the trial before Judge Crain, but before his rendition of reasons for judgment, or judgment. At the hearing on the motion for new trial, Judge Amacker questioned Ms. Landry's counsel as to why no attempt was made to notify Judge Crain of Dr. Dickson's newly formed opinion before Judge Crain decided the case. Under similar procedural circumstances, it has been held that a new trial is not warranted. See **Smith v. Hyman**, 6 So.2d 368, 371-372 (La. App. Orleans 1942).

noting that, since the paternal grandmother had not yet had the opportunity to supervise a visit under the new order (because of a stay in place pending the March 17 hearing), there was nothing new offered about her suitability. Agreeing that there is a lack of new evidence to prove Ms. Landry's allegations that Ms. Rutledge is an "ineffective, hostile, and negligent" supervisor, or to otherwise discount the paternal grandmother's qualifications as the supervisor of Mr. Thomas' visitation, we find no abuse of discretion in this determination.

Thus, based on a thorough review of the record and Judge Amacker's ruling with regard to Ms. Landry's motion, we conclude Judge Amacker did not abuse her discretion in denying the motion for new trial and for professionally supervised visitation. Ms. Landry's writ application filed under 2011 CW 0587 is hereby denied.[7]

MOTION TO RECUSE JUDGE AMACKER

We next address Judge Badeaux's denial of Ms. Landry's motion to recuse Judge Amacker, which Ms. Landry brings before this Court under writ application 2011 CW 1852.

As earlier stated, Judge Badeaux held a hearing on the recusal motion. Following the hearing, Judge Badeaux took the matter under advisement, read the transcript of the June 27, 2011 hearing, and listened to one and one half hours of Dr. Dickson's testimony via audiotape. In his reasons for judgment denying the recusal motion, Judge Badeaux reviewed Ms. Landry's specific allegations of bias and concluded they were conclusory and not based on evidence of a substantial nature. This Court has likewise reviewed Ms. Landry's allegations and agrees

[7] Ms. Landry argues Judge Amacker abused her discretion in refusing to review all evidence adduced before Judge Crain before ruling on the new trial and professionally supervised motions. Although it is unclear exactly what part of that evidence was pertinent to the motion for new trial, our review of the record demonstrates Judge Amacker had sufficient evidence before her to properly decide the motions.

with Judge Badeaux's findings. We adopt his August 4, 2011 reasons for judgment as our own.

Accordingly, we find Judge Badeaux did not err in denying the recusal motion. Ms. Landry's writ under 2011 CW 1852 is hereby denied.

DECREE

For reasons herein, the February 22, 2011 judgment is affirmed. The writs filed under 2011 CW 0587 and 2011 CW 1852 are denied. Costs of this appeal are assessed equally to Ms. Landry and Mr. Thomas.

JUDGMENT AFFIRMED. WRITS DENIED.