

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 CA 1525

JMM
A.P., INDIVIDUALLY AND ON BEHALF OF HER
MINOR CHILDREN, H.H. and J.J.H.

VERSUS

LISA TADLOCK, LCSW
AND THE FAMILY COUNSELING CENTER

Judgment Rendered: MAY 29 2014

APPEALED FROM THE NINETEENTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
DOCKET NUMBER C584899

HONORABLE TIMOTHY E. KELLEY, JUDGE

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BEFORE: PETTIGREW, McDONALD, AND McCLENDON, JJ.

JJP Pettigrew, J. concurs

JMC McCleendon, J. concurs and assigns readers.

McDONALD, J.

This is an appeal of the denial of a motion for new trial following the granting of a motion for summary judgment that dismissed the remaining claims in this case: those of A.P. on behalf of her minor children, H.H. and J.J.H.,¹ against the State of Louisiana, Department of Social Services, Office of Community Services (OCS), Kaaren Hebert, in her official capacity as the Interim Secretary of OCS, and Fran Nevers, individually and in her official capacity as District Manager of the Washington Parish OCS, Leslie Lyons, individually and in her official capacity as a Child Welfare Specialist Supervisor in the Washington Parish OCS, and Justine Goebel, individually and in her official capacity as a Child Welfare Specialist 3 in the Washington Parish OCS.² After a *de novo* review, we affirm the district court judgments that granted summary judgment dismissing the case with prejudice and denied the motion for new trial.³

FACTS

This case arose out of Child In Need of Care (CINC) proceedings that involved allegations of sexual abuse. A.P. is the mother of H.H. and J.J.H., twin minor children born of her marriage to J.H. A.P. and J.H. were divorced on February 16, 2007. A.P. was granted domiciliary custody and J.H. was given supervised visitation, due to seizures caused by his end-stage brain cancer.

On May 7, 2007, H.H. and J.J.H., three years old, indicated knowledge of oral sexual acts to A.P. On May 9, 2007, A.P. consulted Lisa Tadlock, LCSW, in

¹ In the interests of privacy, we have used the initials of the parties involved in this matter.

² The claims against Lesleigh Noel Branch Hanson (formerly Lesleigh [Leslie] Branch), a Child Welfare Specialist at the Washington Parish OCS, were severed from this case, and the motion to dismiss all claims against her was remanded to the trial court for determination. **C.K., A.P., et al. v. The State of Louisiana, Through the Office of the Attorney General for the State of Louisiana, et al.**, 2010 CA 1656 (La. App. 1 Cir. 4/8/11). However, judgment was also granted in favor of Lesleigh Noel Branch dismissing the claims against her. The claims against Walter Reed, in his official capacity as District Attorney for Washington Parish, were dismissed on motion of the plaintiffs on April 7, 2009. The claims against James D. "Buddy" Caldwell, Attorney General of the State of Louisiana, were dismissed on motion of the plaintiffs on May 28, 2009.

³ An appeal of a denial of a motion for new trial will be considered as an appeal of the judgment on the merits, when it is clear from the appellant's brief that the appeal was intended to be on the merits. **Nelson v. Teachers' Retirement System of Louisiana**, 2010-1190 (La. App. 1 Cir. 2/11/11), 57 So.3d 587, 589, n.2.

Washington Parish about this disclosure by the children. Ms. Tadlock then reported suspected sexual abuse of the children to OCS. A.P. thereafter married her boyfriend, C.K., on May 19, 2007.

C.K. was interviewed pursuant to the OCS investigation in June 2007. On June 15, 2007, OCS obtained an instanter order to remove the children from their parents' custody. OCS sought custody of H.H. and J.J.H. based on allegations of sexual abuse of the children in May and June 2007. At a 72-hour hearing on June 19, 2007, the Juvenile Court found the children were in need of care. The Juvenile Court stated:

Specific factual findings are clearly there is evidence before the Court which would lead the Court to the conclusion that these children are being the subject of an intense tug-of-war. Clearly based upon revelations made to Ms. Tadlock, who is the counselor, the children need continued therapy in order to determine what in fact is going on in the children's lives. There is no question that they are being abused. The question is are they being abused sexually or are they being abused mentally? One or the other is happening; maybe both.

.....

The Court finds that the most appropriate and least restrictive action available to OCS was to remove the children from the home. The actions were appropriate. The Court will approve those actions.

At a hearing in the Juvenile Court on September 19, 2007, A.P. and J.H. both stipulated that the children were in need of care. At that time, the Juvenile Court continued the children in state custody, finding that it was the most appropriate placement. The Juvenile Court further found that OCS had taken reasonable efforts to avoid the necessity of moving the children from their home.

At a December 7, 2007 hearing, the Juvenile Court found:

All of this is wrapped in a blanket, if you will, of animosity between the parents, that is obviously longstanding and very deep-seated. So my concern probably of paramount nature has been the fact that neither parent acted appropriately to protect the children in the event something did occur. And neither parent acted promptly to undertaking protection.

The Juvenile Court repeatedly found throughout the proceedings that the parents failed to act to protect the children and that the parents failed to demonstrate to the Juvenile Court that they were acting in the best interest of the children. The Juvenile Court found that the actions of OCS were reasonable, and the court-appointed CASA workers found that the children were happy and well-adjusted in the Juvenile Court-approved foster care setting.

J.H. and A.P. did not submit a safety plan to the Juvenile Court until February 2, 2008. On February 21, 2008, the Juvenile Court ordered the return of the children to the custody of their father, with supervised visitation with A.P. Shortly after the conclusion of the CINC proceedings, J.H. died.

On August 21, 2008 C.K. and A.P. (individually and as tutrix of H.H. and J.J.H.) filed a suit for damages, based upon the OCS investigation of sexual abuse of the children and the removal of H.H. and J.J.H. from A.P. against Ms. Tadlock and the Family Counseling Center in the Twenty-Second Judicial District Court. By supplemental and amending petition, the plaintiffs added as defendants OCS, Kaaren Hebert, in her official capacity as the Interim Secretary of OCS, Fran Nevers, individually and in her official capacity as District Manager of the Washington Parish OCS, Leslie Lyons, individually and in her official capacity as a Child Welfare Specialist Supervisor in the Washington Parish OCS, and Justine Goebel, individually and in her official capacity as a Child Welfare Specialist 3 in the Washington Parish OCS, (collectively the OCS defendants). The Twenty Second Judicial District Court sustained an objection of improper venue, severed the claims against the OCS defendants, and ordered those claims transferred to the Nineteenth Judicial District Court.

In the Nineteenth Judicial District Court, the OCS defendants filed a peremptory exception raising the objection of prescription, among other objections, as to the claims brought by A.P. individually and the claims brought by C.K. The

district court sustained the peremptory exception raising the objection of prescription as to the claims of A.P. individually and the claims of C.K and dismissed those claims with prejudice on May 10, 2010. This court affirmed that judgment. **A.P. v. Tadlock**, 2010-1656 (La. App. 1 Cir. 11/9/11), 90 So.3d 551 (table), writ denied, 2012-0366 (La. 4/9/12), 85 So.3d 699 (unpublished).

The OCS defendants thereafter filed a motion for summary judgment asking that the only remaining claims, those of H.H. and J.J.H. seeking damages for their removal from A.P., be dismissed. After a hearing, the district court granted the motion for summary judgment and dismissed the suit with prejudice on February 5, 2012.

A.P., on behalf of H.H. and J.J.H., is appealing the judgment. In her assignments of error, A.P. asserts that: 1) the district court erred in finding that the OCS defendants had immunity from civil liability; 2) her own affidavit, along with the affidavits of Monica Knight and Alicia Pellegrin, established genuine issues of material fact that preclude summary judgment; 3) the district court erred in finding that the differences between this case and **M.D. v. State, Dept. of Social Services**, 2005-1044 (La. App. 1 Cir. 9/1/06), 943 So.2d 471, writ denied, 2006-2386 (La. 12/21/06), 944 So.2d 1289 were sufficient to determine that there were no genuine issues of material fact; and, 4) the district court erred in finding that the issues in the instant case had been decided in the Juvenile Court.

STANDARD OF REVIEW

In determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. An appellate court thus asks the same questions as does the trial court in determining whether summary judgment is appropriate: whether there is any genuine issue of material fact, and whether the mover-appellant is entitled to judgment as a matter of law.

Janney v. Pearce, 2009-2103 (La. App. 1 Cir. 5/7/10), 40 So.3d 285, 289, writ denied, 2010-1356 (La. 9/24/10), 45 So.3d 1078.

The motion for summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, admitted for purposes of the motion for summary judgment, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law. La. C.C.P. art. 966B(2). The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. La. C.C.P. art. 966C(2).

STATUTORY IMMUNITY

The Louisiana Supreme Court has held that the duty of a child protection caseworker and OCS is delineated by La. Ch. C. arts. 611 and 612, and by La. R.S. 9:2798.1. **Todd v. State Through Dept. of Social Services, Office of Community Services**, 96-3090 (La. 9/9/97), 699 So.2d 35, 39.

Louisiana Children's Code article 611 provides, in part:

A. (1) No cause of action shall exist against any:

(a) Person who in good faith makes a report, cooperates in any investigation arising as a result of such report, or participates in judicial proceedings authorized under the provisions of this Chapter.

(b) Caseworker who in good faith conducts an investigation, makes an investigative judgment or disposition, or releases or uses information contained in the central registry for the purpose of

protecting a child.

(2) Such individuals shall have immunity from civil or criminal liability that otherwise might be incurred or imposed.

B. This immunity shall not be extended to:

(1) Any alleged principal, conspirator, or accessory to an offense involving the abuse or neglect of the child.

(2) Any person who makes a report known to be false or with reckless disregard for the truth of the report.

Louisiana Children's Code article 612 provides, in part:

G. The Department of Children and Family Services shall set priorities for case response and allocate staff resources to cases identified by reporters as presenting immediate substantial risk of harm to children. Absent evidence of willful or intentional misconduct or gross negligence in carrying out the investigative functions of the state child protection program, caseworkers, supervisors, program managers, and agency heads shall be immune from civil and criminal liability in any legal action arising from the department's decisions made relative to the setting of priorities for cases and targeting of staff resources.

Louisiana Revised Statutes 9:2798.1 provides, in part:

B. Liability shall not be imposed on public entities or their officers or employees based upon the exercise or performance or the failure to exercise or perform their policymaking or discretionary acts when such acts are within the course and scope of their lawful powers and duties.

C. The provisions of Subsection B of this Section are not applicable:

(1) To acts or omissions which are not reasonably related to the legitimate governmental objective for which the policymaking or discretionary power exists; or

(2) To acts or omissions which constitute criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct.

Thus, although OCS and its employees may be entitled to qualified immunity set forth in Arts. 611 and 612 and La. R.S. 9:2798.1, there is no such immunity if gross negligence is alleged and proven. **M.D.**, 943 So.2d at 481.

ASSIGNMENT OF ERROR NO. 2

In this assignment of error, A.P. asserts that her own affidavit, along with those of Monica Knight, a former OSC caseworker, and Alicia Pellegrin, a clinical psychologist, establish that there are genuine issues of material fact that preclude summary judgment.

The affidavit of Alicia Pellegrin addressed the actions of Ms. Tadlock, who was first consulted by A.P. and then court-appointed as a social worker on the case, and the actions of J.H., in his videotaping the children's disclosure of sexual exposure. However, Ms. Pellegrin's testimony does not address the actions of OCS. The affidavit of Monica Knight contains exhibits from the record that document H.H. and J.J.H.'s exposure to sexual knowledge and the ongoing animosity between A.P. and J.H. We find that the affidavits of Ms. Pellegrin, Ms. Knight, and A.P. do not raise genuine issues of material fact regarding the children being taken into OCS custody and their stay in OCS custody for their protection from abuse. This assignment of error has no merit.

ASSIGNMENT OF ERROR NO. 3

In assignment of error number three, A.P. asserts that the district court erred in finding that the differences between this case and **M.D.** were sufficient to determine that there were no genuine issues of material facts.

There are many factual differences between this case and **M.D.** In that case, a verbally impaired, mildly autistic 4-year-old girl was subjected to multiple intrusive examinations during which time both parents denied any abuse, there was conflicting evidence of penetration, and there was a history of dermatological problems in the child's genital area. This court found that the actions of OCS in that case were far beyond diligent, and in fact stepped over into harassment. This court also found that as there was no certainty that the child was abused, OCS should have proceeded with care, but instead, OCS removed the child from her

home in an arbitrary and capricious manner for nine months and acted in bad faith in refusing to entertain the reasonable evidence against its position.

The facts of this case are vastly different, in that J.H. made a written statement to the sheriff's department that he had videotaped his children playacting inappropriate sexual activity; that J.H. was terminally ill during the ongoing investigation; that A.P. reported to Ms. Tadlock that H.H. and J.J.H. had shown knowledge of inappropriate sexual activity; that the allegations did not include penetration and thus physical exams were not undertaken; and in that A.P.'s boyfriend, whom she married during the proceedings, was identified as the perpetrator of the abuse during the investigation. This assignment of error has no merit.

ASSIGNMENT OF ERROR NO. 4

In this assignment of error, A.P. asserts that the district court committed reversible error in finding that the issues in the instant case had been decided in the Juvenile Court, because the Juvenile Court did not possess the requisite jurisdiction to grant the relief requested in the instant lawsuit.

It is well-settled that an appellate court cannot set aside a juvenile court's findings of fact in the absence of manifest error or unless those findings are clearly wrong. *In re A.J.F.*, 2000-0948 (La. 6/30/00), 764 So.2d 47, 61. Throughout the proceedings, the Juvenile Court repeatedly found that the actions of OCS were reasonable and necessary under the circumstances, and further, found that the parents had not acted properly to protect the children from sexual abuse and the threat of continued harm. After a thorough review of the record, we cannot say that the Juvenile Court committed manifest error in those findings or that those findings are clearly wrong. This assignment of error has no merit.

ASSIGNMENT OF ERROR NO. 1

In this assignment of error, A.P. asserts that the district court committed

reversible error based upon the determination that the OCS defendants had immunity from civil liability. The children were taken into OCS custody after allegations of sexual abuse were made by A.P. to Ms. Tadlock, who reported the allegations to OCS. After an investigation was begun, it was not clear at first who was the perpetrator of the abuse. As the investigation continued, the perpetrator was believed to be C.K., first the boyfriend and then the husband of A.P. Three months after the children were taken into OCS custody, both parents stipulated that the children were in need of care.

Our *de novo* review of this case reveals that A.P. has failed to produce factual support sufficient to establish that she will be able to satisfy her evidentiary burden of proof at trial to show that the OCS defendants committed gross negligence in the investigation of sexual abuse and the removal of the children from her custody. This assignment of error has no merit.

DECREE

For the foregoing reasons, we affirm the district court judgment that granted the OCS defendants' motion for summary judgment and dismissed the suit with prejudice, and we affirm the judgment that denied the motion for new trial. Costs are assessed against A.P.

AFFIRMED.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 CA 1525

**A.P., INDIVIDUALLY AND ON BEHALF OF HER
MINOR CHILDREN, H.H. AND J.J.H.**

VERSUS

**LISA TADLOCK, LCSW
AND THE FAMILY COUNSELING CENTER**

McCLENDON, J., concurring.

The OCS defendants are entitled to qualified immunity as set forth in LSA-Ch.C. arts. 611 and 612 and LSA-R.S. 9:2798.1, unless the plaintiffs can establish gross negligence or "acts or omissions which constitute criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct." See LSA-R.S. 9:2798.1C(2). Although the affidavit of Monica Knight raises serious concerns regarding the manner in which OCS handled this case, it does not establish that plaintiffs will be able to satisfy their evidentiary burden of proof at trial. Accordingly, I concur with the result reached by the majority.