COURT OF APPEALS
DECISION
DATED AND FILED

October 16, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

Nos. 97-0021 and 97-0022

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STELLA M.,

PLAINTIFF-RESPONDENT,

v.

DANIEL T.-W.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Sauk County: VIRGINIA A. WOLFE, Judge. *Reversed.*

Before Vergeront, Roggensack and Deininger, JJ.

ROGGENSACK, J. Daniel T.-W. appeals two child abuse injunctions ordering him to refrain from contact with his young son, Alexander W., and Michael M., the teenage son of his former live-in girlfriend, Stella M., who is also Alexander's mother, for a period of two years. Daniel contends that evidence that he spanked Alexander until the child's buttocks were red after the

child refused to get dressed to go to daycare, and that he yelled profanities at Michael for refusing to clean his room until the teenager closed the door of his room and ultimately left the house, was insufficient to constitute abuse of either child within the meaning of the child abuse injunction statute. We conclude that (1) Daniel's spanking of his son was not "physical injury" under the facts of this case, and (2) Stella failed to prove that Daniel's yelling at Michael caused "emotional damage" because there was no evidence that Michael suffered emotional damage described by the statute. Accordingly, we reverse the orders of the circuit court.

BACKGROUND

Daniel and Stella resided together in Daniel's two-bedroom apartment with their two-year-old son, Alexander, and Stella's sixteen-year-old son, Michael, from a previous marriage. Daniel's son, Billy, from a previous marriage also stayed at the apartment for certain periods of visitation. Michael had his own room, and Alexander slept in the living room. Due to tight financial circumstances, Daniel did not have long-distance telephone services, and he was behind on utility bills.

Sometime in November of 1996, when Stella was away from the apartment, Alexander was kicking and refusing to cooperate as Daniel attempted to get him ready for daycare in the morning before work. Daniel turned Alexander over his knee and administered a bare-handed spanking on Alexander's bare buttocks. The slaps from the spanking awoke Michael, who arose from bed to see what was happening. Michael observed Alexander crying as Daniel spanked him several times. Michael then returned to his room, and Alexander settled down and got dressed. That evening when Stella returned home, she noticed that

Alexander's buttocks were red as she changed his diaper. The redness had disappeared by the following evening.

On December 1 or 2, 1996, Stella was again out of the apartment, when Daniel and Michael had a verbal altercation. At trial, Daniel said he was upset with Michael for three reasons: (1) because Michael had turned the thermostat up when he knew that the heat bill hadn't been paid; (2) because Michael refused to keep his room clean; and (3) because Michael had incurred substantial extended service charges on Daniel's telephone bill. According to Michael, shortly after Daniel came home with Alexander and Billy, around 8:30 p.m., he came into Michael's room and yelled at him for setting the thermostat at 70 degrees. Michael didn't respond. About fifteen minutes later, Daniel came into the room again, pounded on the door and told Michael to clean his room or leave. Michael then closed the door to his room, but Daniel kicked it and told him to leave the door open and clean his room, or to get out. Michael said that Daniel was "out of control," hollering profanities at him within the hearing of the two younger boys, and that he was afraid, having seen Daniel hit both his mother and his brother on prior occasions. Eventually, Michael called a friend, whose grandfather came to get him. Michael then called his mother from the friend's house.

Meanwhile, Stella had called home and heard Daniel's version of the incident. Stella called Billy's mother to come and pick up Billy, and Billy's mother in turn called the police. By the time Stella arrived home at 10:30 or 11:00 p.m., Daniel was sitting on the front porch blocking the door with his feet, "waiting for the next batch of cops." When Stella got Alexander out of bed, she noticed that he was uncharacteristically jumpy and afraid. Stella picked up clothes for the boys, and did not return to the apartment after that night.

On December 3, 1996, Stella filed a petition for a temporary restraining order and child abuse injunctions against Daniel, alleging physical and emotional abuse to the boys. The circuit court heard evidence on the petition on December 9, 1996, and issued the injunctions on the grounds that Daniel had physically abused Alexander and emotionally abused Michael. Daniel challenges both injunctions on appeal. Alternatively, if the injunctions are upheld, he argues that the matter should be remanded for a determination of his visitation rights to Alexander under § 813.122(5), STATS.

DISCUSSION

Standard of Review.

The determination of whether proper grounds exist for the issuance of a child abuse injunction is a mixed question of fact and law. ***M.Q. v. Z.Q.***, 152 Wis.2d 701, 708, 449 N.W.2d 75, 78 (Ct. App. 1989) (***Interest of H.Q.***). We will not set aside the findings of the circuit court unless they are clearly erroneous. Section 805.17(2), STATS. However, we will draw an independent conclusion as to whether the established facts fulfill the legal standards for physical or emotional abuse. ***Interest of H.Q.***, 152 Wis.2d at 708, 449 N.W.2d at 78.

Child Abuse Injunctions.

Section 813.122(5), STATS., grants a circuit court the discretionary authority to issue a child abuse restraining order or injunction upon the receipt of a properly filed petition and after a hearing where it is found that "reasonable grounds to believe that the respondent has engaged in, … or may engage in, abuse of the child victim." ***Interest of H.Q.***, 152 Wis.2d at 708, 449 N.W.2d at 78. For the purpose of determining whether grounds for the injunction exist, the term

"abuse" is given the same meaning as that used in § 48.02(1), STATS., of the Children's Code, including:

> (a) Physical injury inflicted on a child by other than accidental means.

and

> (gm) Emotional damage for which the child's parent, guardian or legal custodian has neglected, refused or been unable for reasons other than poverty to obtain the necessary treatment or to take steps to ameliorate the symptoms.

as well as any threat to inflict such physical injury or emotional damage. Section 813.122(1)(a). In the Children's Code, the term "physical injury"

> includes but is not limited to lacerations, fractured bones, burns, internal injuries, severe or frequent bruising or great bodily harm, as defined in s. 939.22(14).

while the term "emotional damage" is further defined as:

> harm to a child's psychological or intellectual functioning. Emotional damage shall be evidenced by one or more of the following characteristics exhibited to a severe degree: anxiety; depression; withdrawal; outward aggressive behavior; or a substantial and observable change in behavior, emotional response or cognition that is not within the normal range for the child's age and stage of development.

Section 48.02(14g) and (5j).

Alexander.

The injunction which the court issued to enjoin Daniel from having contact with his son rested upon the ground that the spanking incident had resulted in physical injury to Alexander within the meaning of § 48.02(1) and (14g), STATS., and therefore, it constituted abuse within the meaning of § 813.122(5), STATS. Daniel claims that the evidence before the circuit court was insufficient to constitute abuse as a matter of law.

The issue we must decide is whether red marks which are still visible on a child's buttocks hours after a spanking are sufficient to constitute physical injury as defined by the statute, if no other physical consequences of the spanking exist. When we are asked to apply a statute whose meaning is in dispute, our efforts are directed at determining legislative intent. ***Truttschel v. Martin***, 208 Wis.2d 361, 365, 560 N.W.2d 315, 317 (Ct. App. 1997). In so doing, we begin with the plain meaning of the language used in the statute. ***Id***. If the language of the statute clearly and unambiguously sets forth the legislative intent, our inquiry ends, and we must apply that language to the facts of the case. However, if the language used in the statute is capable of more than one meaning, we will determine legislative intent from the words of the statute in relation to its context, subject matter, scope, history, and the object which the legislature intended to accomplish. ***Id***. We will also look to the common sense meaning of a statute to avoid unreasonable and absurd results. ***Kania v. Airborne Freight Corp.***, 99 Wis.2d 746, 766, 300 N.W.2d 63, 71 (1981) (citation omitted).

The plain language of the statute at issue here does not address whether red marks from a parental spanking administered with an open hand on a child's buttocks are included within the definition of a physical injury sufficient to

constitute abuse. Therefore, we will look to the subject of spankings in general and the specific scope and object of the child abuse injunction statute and the Children's Code to which it refers in order to determine the legislative intent regarding when a child abuse injunction may be issued against a parent who has administered such a spanking, which has not resulted in any lacerations, fractured bones, burns, internal injuries, severe or frequent bruising or great bodily harm.

We begin by recognizing that the State has an interest in protecting the safety and the well-being of minors. *See, e.g.,* ***State v. Killroy***, 73 Wis.2d 400, 407, 243 N.W.2d 475, 480 (1976) (holding Wisconsin's criminal child abuse statute is constitutional). We now turn to an examination of the scope of the child abuse injunction statute. We first note that, like out-of-home placements under ch. 48, the provisions of § 813.122, STATS., are designed to protect children from dangerous circumstances. *Cf.* ***Lossman v. Pekarske***, 707 F.2d 288 (7th Cir. 1983) and ***Beermann v. Beermann***, 559 N.W.2d 868 (S.D. 1997) ("When a court issues a protection order, it puts the would-be abuser on notice that his or her actions will be scrutinized."); *also cf.* ***Schramek v. Bohren***, 145 Wis.2d 695, 702, 429 N.W.2d 501, 503 (Ct. App. 1988) (noting legislative acknowledgment of domestic abuse as serious statewide social concern). We then observe that the examples of physical injury specifically listed in § 48.02(14g), STATS.—lacerations, fractured bones, internal injuries, and severe or frequent bruising—all indicate a dangerous level of force which would exceed that which a reasonable person would consider necessary for disciplinary purposes.

The guardian ad litem points out that the statute's list is not exhaustive, and argues that applying the doctrine of *ejusdem generis* should lead to the conclusion that red marks which are still visible hours after a spanking are of the "same kind, class, character or nature" as burns and severe or frequent

bruising. ***State v. Ambrose***, 196 Wis.2d 768, 777, 540 N.W.2d 208, 212 (Ct. App. 1995); 73 AM. JUR. *Statutes* § 214 (2d ed. 1974). While we agree that the phrase "physical injury" is not restricted to those injuries specified in the statute, *see* ***Cheatham v. State***, 85 Wis.2d 112, 124, 270 N.W.2d 194, 200 (1978), we disagree that red marks on a child's buttocks are in the same category as burns and severe or frequent bruising. To the contrary, the very fact that the word bruising is qualified by the terms "severe" or "frequent" suggests that non-severe or infrequent bruising lies outside of those injuries which the legislature intended to address. Therefore, we must conclude that red marks from a spanking administered with an open hand on the child's buttocks and which do not result in any bruising whatsoever do not constitute "physical injury" within the meaning of § 48.02(1)(a) and (14g), STATS., and the injunction, in regard to Alexander, must be vacated.

Michael.

The injunction which the court issued to enjoin Daniel from having contact with Stella's son, Michael, rested on the ground that the yelling incident had resulted in emotional damage to Michael, within the meaning of § 48.02(1)(gm) and (5j), STATS.; and therefore, it constituted abuse within the meaning of § 813.122(5), STATS. Again, we agree with Daniel that the evidence before the circuit court was insufficient, as a matter of law, to fulfill the statutory definitions of abuse.

As with the definition of physical injury, the plain language of the statute defining emotional damage does not cover the specific instances of conduct at issue here. However, we note that it is questionable whether Daniel is capable of violating the terms of the statute because he is not "the child's parent, guardian

or legal custodian," and there was absolutely no evidence relating to whether he had "neglected, refused or [was] unable for reasons other than poverty" to deal with any emotional problems Michael might have had. One reasonable reading of the statute would be that while anyone might cause harm to a child's psychological functioning, only those listed persons with a legal responsibility to care for the child could commit abuse *by failing to obtain treatment* for a child's anxiety, depression, withdrawal or behavioral changes. Under this reading of the statute, it would be legally irrelevant who or what actually caused the child's emotional problems.

We need not resolve this question today, however, because we conclude that Stella failed to prove Michael had suffered emotional damage. As we noted in ***Interest of H.Q.***, the fact that children are "upset" or "concerned" over the behavior of an adult, does not, in the absence of expert testimony, establish that they suffered severe anxiety, depression, or were emotionally damaged by the adult. In this case, not only was there a complete lack of the expert testimony needed to establish what the normal range of teenage behavior would be, but even the lay witnesses failed to give testimony which would suggest emotional damage. While a teenager's retreating to his room and shutting his door may constitute a physical withdrawal from an argument, we conclude it is not the type of emotional withdrawal referenced in the statute. Therefore, the injunction which prohibits contact with Michael must also be vacated.

In light of our conclusions on the injunctions, it is unnecessary to remand for a determination of Daniel's visitation rights.

CONCLUSION

Red marks from a disciplinary spanking administered with an open hand on a child's buttocks, which resulted in no bruising, do not constitute physical injuries sufficient to restrain a parent from having contact with his or her child because they do not fall within the category of harms listed within the statutory definitions of abuse. Therefore, the injunction should not have been issued in regard to Alexander.

Moreover, lay testimony to the effect that a teenager was unresponsive to his mother's live-in boyfriend, and withdrew into his room, is insufficient to show that he was exhibiting "severe withdrawal," and does not provide sufficient proof upon which to issue a child abuse injunction. Therefore, the injunction as to contact with Michael also should not have been issued.

By the Court.—Orders reversed.

Not recommended for publication in the official reports.