FILED

JAN 19 2018

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

No. 354156

COURT OF APPEALS DIVISION III
OF THE STATE OF WASHINGTON

Jonathan D. Durant
Appellant

v.

State of Washington Department of Social and Health Services,
Respondent.

Appeal from the Superior Court of Spokane County

APPELLANT'S OPENING BRIEF

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I. MOVING PARTY

Mr. Durant appeals from a Spokane County Superior Court decision upholding the DSHS Board of Appeals Review Decision and Final Order and the Office of Administrative Hearings Initial Order. The appellant contends that the decisions do not comport with WAC 388-15-009 and RCW 9A.16.100.

II. STATEMENT OF RELIEF SOUGHT

Mr. Jonathan Durant moves the court to overturn the Superior Court decision upholding the Board of Appeals decision and the OAH Initial Order and direct the lower courts to enter that the finding of child abuse was unfounded. The decisions incorrectly applied WAC 388-15-009 and RCW 9A.16.100.

III. FACTS

A. Procedural History

On May 7, 2015, Child Protective Services (CPS) received a report alleging that the Appellant, Jonathan Durant, abused or neglected a child in his care. CPS investigated this allegation and concluded that the alleged abuse or neglect occurred. Mr. Durant was notified by certified mail on July 29, 2015, that there was a finding of abuse by CPS. On September 4, 2015, Mr. Durant responded to the founded finding and asked for reconsideration and

Review Request Form. On September 29, 2015, DSHS responded to the request for reconsideration and upheld the founded finding.

Mr. Durant requested a hearing on the matter. The matter was set for hearing on August 31, 2016. On October 5, 2016 an initial order was issued by the Office of Administrative Hearings finding that the Department correctly made a founded finding of physical abuse. On October 25, 2016, Mr. Durant Petitioned for Administrative Review of the Initial Order of the Office of Administrative Hearings. On December 2, 2016, DSHS Board of Appeals upheld the decision of the hearing examiner. A Petition for Reconsideration was filed December 8, 2016. The Order for Reconsideration was filed December 22, 2016 denying reconsideration. Mr. Durant timely filed a Petition for Judicial Review with Spokane Superior Court on January 20, 2017.

In a decision entered on August 25, 2017, the Superior Court upheld the Board of Appeals decision entered December 2, 2016. The Appellant filed this Notice of Appeal on June 22, 2017.

B. Facts Relevant to Motion

On May 6, 2015, Andrew Foskett took his child, A.F., to the emergency room with a complaint of child abuse because A.F. stated he was hit on the buttocks by his mother's boyfriend the previous night. VRP at 39. Andrew Foskett is the biological father of A.F. and Nicole Alexander is the biological

mother of A.F. *Id* at 35. The Appellant, Mr. Durant, was engaged to Ms. Alexander at the time of accusation and was a guardian for A.F. when at Ms. Alexander's home. *Id* at 146-147. A.F. was eight years old at the time of the incident, weighed 80 pounds, and was four foot six inches in height. *Id* at 147.

The attending physician in the emergency room noted "multiple contusions" but no other abnormalities with A.F. *Id* at 137-138. Deputy Kenoyer was dispatched to respond to Holy Family Hospital to investigate the claims of child abuse. VRP p. 25-26. Deputy Kenoyer spoke with Mr. Foskett and A.F. *Id.* A.F. indicated to Deputy Kenoyer that Mr. Durant spanked him ten times with a cutting board for lying. VRP at 30. Deputy Kenoyer noted in his police report that he observed bruising on A.F's buttocks. VRP at p. 26-27. A.F. told Deputy Kenoyer that his buttocks was very sore last night; sore enough that when he rolled over it woke him up. *Id* at 27. However, Deputy Kenoyer testified that A.F was sitting in a chair when he arrived at the emergency room and didn't appear to be in discomfort. *Id.* He testified that his understanding was A.F. was disciplined for lying and he did not refer the report for any charges against Mr. Durant. *Id.* at 30.

On May 7, 2015, Child Protective Services (CPS) received a report alleging that the Appellant, Jonathan Durant, abused or neglected a child in his care. *Id.* at 80. Jennifer Erickson was the CPS investigator assigned to this case. *Id* at 79. Ms. Erickson spoke with Mr. Foskett and A.F. *Id* at 81-83. Mr. Foskett

stated that Mr. Durant spanked A.F. *Id* at 84. When Ms. Erickson met with A.F. on May 8, 2015 and again on May 12, 2015, A.F. did not appear in any pain, nor did he complain of pain. Id. at 108, 124. A.F. told Ms. Erickson on the May 12, 2015 meeting that he was spanked thirty-two times. *Id* at 108, 118. This allegation is inconsistent with what he told Deputy Kenoyer on May 6, 2015. Ms. Erickson testified that A.F. knew that he had done wrong in stealing and lying and that the spankings were discipline for those behaviors. *Id.* at 118, 128-129.

A physician's assistant, Ms. Taylor, examined A.F. on May 9, 2015. *Id.* at 90. She testified that A.F. was seated on the exam table during her examination. *Id.* at 91. She further testified that had A.F. been in any discomfort from sitting, she would have noted that in her reports, and that no such notation was present in her report. *Id* at 91-92. She also did not document any complaints about pain in the buttocks. *Id.* at 92.

The Court found that Ms. Erickson credibly testified that she had concerns regarding statements made by A.F. CP, Order Denying Appeal and Affirming Division of Child and Family Services' Founded Finding of Physical Abuse, p. 3. Specifically, that A.F. was making outlandish statements that seemed to be directly influenced by the pending child custody case. *Id.* Due to this, the Court found the earlier accusation of ten spankings to be more credible. *Id.*

On May 11, 2015, Ms. Erickson also met with Ms. Alexander and Mr. Durant. VRP at 86. Both parties stated that A.F. was punished for lying and

stealing gum from his teacher. *Id* at 98, 102. A.F. received five spankings for lying, five spankings for stealing, and when he continued to lie he received 2-3 more spankings. *Id.* The spankings were done with a "generational paddle" which was about half the size of a standard phone book. *Id* at 99. Ms. Erickson testified at trial that she found both Ms. Alexander and Mr. Durant to be credible in their statements to her and their efforts with the Department, and that other that the bruising of A.F., in her mind the discipline would have been appropriate. *Id* at 135.

Ms. Alexander testified at the hearing but Mr. Durant did not. *Id* at 144. Ms. Alexander testified that she met with A.F.'s teacher where she was notified that A.F. was caught taking things out of the teacher's desk and then lied to the teacher about it. *Id* at 149-151. Ms. Alexander stated that A.F. continued to lie about the stealing and she was extremely concerned that this behavior would escalate further and would impact A.F.'s reputation with other teachers and eventually lead to law enforcement issues. *Id* at 151-152. Ms. Alexander stated that she wanted to prevent A.F. from stealing in the future and felt this situation needed a stronger punishment than a normal transgression. *Id* at 152-153. Ms. Alexander went on to note that A.F.'s behavior had become increasingly defiant over recent months and that this was a significant escalation of his behavioral issues. *Id* at 153.

Ms. Alexander testified that she waited for Mr. Durant to get home that night because she felt it was important for A.F. to view them as a parenting team. *Id.* Together Ms. Alexander, Mr. Durant, and A.F. discussed the punishment and determined five spankings for lying and five spankings for stealing was appropriate. *Id* at 154-155. After the initial punishment, the parties continued to discuss the issues with A.F. and he continued to lie so they gave him additional spankings. *Id* 155-156, 158. During the final set of spankings, Ms. Alexander realized it was not working and a different form of discipline would be necessary. *Id* at 164. Ms. Alexander had Mr. Durant administer the spankings because A.F. openly mocked her the last time she tried to spank him and she believed A.F. respected Mr. Durant's authority more that hers. *Id* at 167-168. Ms. Alexander stated that A.F. was clothed and she did not believe the spanking would leave a mark but that he does bruise easily. *Id* at 157, 163. She also testified that A.F. was not crying or flinching during the spanking. *Id.* at 154-155. Ms. Alexander testified that the bruise was gone by the 10th of May. *Id.* at 162-163. The Court found the testimony of Ms. Alexander to be credible. *Id.*

Ultimately, the Court found that by a preponderance of the evidence that the contusions found to exist on A.F.'s body were caused by the 13-14 strikes against his body administered by Mr. Durant with a hard wooden

implement. It determined that even though the bruise was gone in five days, the discipline was unreasonable.

IV. GROUNDS FOR RELIEF

Mr. Jonathan Durant is entitled to review under RAP 2.2 (1) because the decision of the Superior Court is a final judgment in a proceeding.

V. ARGUMENT

A. The Department of Social and Health Services Made an Incorrect Founded Finding of Physical Abuse of a Child Against Appellant.

The Department of Social and Health Services (DSHS) incorrectly made a founded finding of physical abuse of a child. Mr. Durant used reasonable punishment to deter the behavior of stealing and lying. "Abuse or neglect" means the injury, sexual abuse, sexual exploitation, negligent treatment, or maltreatment of a child. WAC 388-15-005. An abused child is a child who has been subjected to child abuse or neglect. WAC 388-15-009. Physical abuse means the non-accidental infliction of physical injury or physical mistreatment on a child. WAC 388-15-009. Physical abuse includes doing any act that is likely to cause and which does cause bodily harm greater than transient pain or minor temporary marks or which is injurious to the child's health, welfare or safety. WAC 388-15-009 (1)(f). Physical discipline of a child, including the reasonable use of corporal

punishment, is not considered abuse when it is reasonable and moderate and is inflicted by a parent or guardian for the purposes of restraining or correcting the child. WAC 388-15-009 (2). The age, size, and condition of the child and the location of any inflicted injury shall be considered in determining whether the bodily harm is reasonable or moderate. *Id.* Other factors may include the developmental level of the child and the nature of the child's misconduct. *Id.*

Here, Mr. Durant was a guardian of A.F. and Ms. Alexander (now Durant) was A.F.'s parent. The spankings were given specifically to correct A.F.'s escalating behaviors of stealing, lying, and defiance toward his mother. The discipline itself was reasonable and moderate, as was testified to by Ms. Erickson. What is left to determine is whether the inflicted injury meets the requirements of WAC 388-15-009(2).

The factors to be used under WAC 388-15-009(2) are the age, size, and condition of the child, the location of any inflicted injury, the developmental level of the child, and the nature of the child's misconduct. Here, A.F. was a developmentally normal eight year old child at the time of the spanking. The spanking was done to his buttocks, an area of fatty tissue on the body. His misconduct was significant, ongoing, and increasing in severity. The punishment was appropriate.

Was it physical abuse under WAC 388-15-009(1), notwithstanding the parameters of WAC 388-15-009(2)? No. As noted above, WAC 388-15-009(1)(a-

f) outlines these behaviors as physical abuse of a child: throwing, kicking, burning or cutting a child; striking a child with a closed fist; shaking a child under age three; interfering with a child's breathing; threatening a child with a deadly weapon; and doing any other act that is likely to cause and that does cause bodily harm greater than transient pain or minor temporary marks or that is injurious to the child's health, welfare, or safety. There are no allegations here that there was throwing, kicking, burning or cutting. Nor was there any striking with a fist, shaking of any kind, interference with breathing, or threats with a deadly weapon. This leaves WAC 388-15-009(1)(f). Here, there has been no showing of anything greater than transient pain. It was repeatedly testified to that A.F. did not cry or flinch at the time of the spanking, nor did he display any discomfort while sitting at any time. There is nothing about this disciplinary spanking that was injurious to A.F.'s health, welfare, or safety.

Finally, these bruises that were the sole concern of Ms. Erickson and of the lower courts were in fact simply minor temporary marks. Counsel can locate no case law that defines "minor temporary marks." All credible testimony here indicated that A.F.'s bruises healed within five days. Typically, moderate to severe bruising takes four to six weeks to heal whereas minor contusions take considerably less time. See Attachment A, p. 2. Here, such a minor bruise as to only take five days to heal must be precisely that: a minor temporary mark.

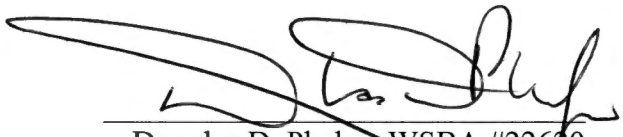
Furthermore, testimony was provided that A. F. bruises easily, and no determination was made that the bruising was caused by the spanking. Close to 24 hours had passed from the time the spankings occurred and when A.F. was taken to the hospital. VRP at 36. During that time he was at school and had interactions with his maternal grandmother and paternal father. VRP at 36, 48-50. It cannot be concluded that the bruising was from the spankings.

Considering all the WAC 388-15-009(2) factors the punishment inflicted by A.F. was reasonable and moderate under the circumstances and did not constitute physical abuse. The court and CPS erred when they made a founded finding of child abuse against Mr. Durant.

VII. CONCLUSION

For the foregoing reasons, the decisions of the lower courts should be overruled, and the founded finding of negligent child abuse against Mr. Durant should be vacated.

Respectfully submitted this 18th day of January, 2018.



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Attachment A

Ann & Robert H. Lurie Children's Hospital of Chicago Publication "Muscle Contusion (Bruise)"

Ann & Robert H. Lurie
Children's Hospital of Chicago™

Muscle Contusion (Bruise)

A muscle contusion or muscle bruise is an injury to the soft tissue (muscle fibers, connective tissue and/or blood vessels and nerves) of the upper leg. The most commonly involved muscle is the quadriceps. The muscle contusion may be accompanied by bone contusion (bruise) or even a fracture (broken bone). These contusions are graded 1, 2, or 3 depending on the severity.

- Grade 1 (mild): A grade 1 muscle contusion produces mild bruising, little pain and no swelling at the site of impact. The knee moves normally or very close to normally. There may be some mild soreness when pressure is applied to the area of injury.
- Grade 2 (moderate): This injury is slightly deep than a grade 1 contusion and produces mild pain and a little swelling. People with a grade 2 quadriceps injury can only bend the knee part of the way and may walk with a slight limp. Pressure on the area of injury causes some pain.
- Grade 3 (severe): Severe muscle contusions are very painful and are accompanied by noticeable swelling. Individuals with this type of injury will usually develop obvious bruising at the sight of injury. A severe quadriceps contusion may result in a significant loss of motion in the knee and cause an obvious limp. People with a grade 3 contusion have pain with pressure at the site of injury and the surrounding area.

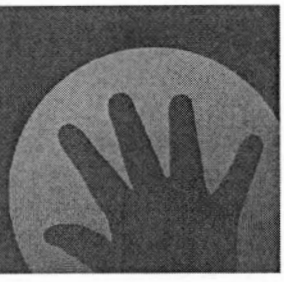
Causes
Muscle contusions occur when an individual receives one or more direct blows, to the body part, falls or jams of a body part against a hard surface. In essence, the muscles are compressed and crushed between the object or person delivering the blow and the underlying bone.

Signs & Symptoms
Signs and symptoms of muscle contusions include swelling and bruising at the injury site, muscle tightness, pain with or without movement, and inability to move a joint fully.

Diagnosis
A complete physical examination will determine the exact location and extent of the injury. Your child's doctor can tell you if they feel a gap within the muscle indicating a possible tear. X-rays of the bone are often taken to rule a fracture (broken bone) or other conditions. Additional tests such as ultrasound, CT scan or MRI may be required to determine the extent of the injury and to identify any additional injuries.

The results of the physical exam and other diagnostic tests allow your child's doctor to determine how severe this injury is; this is very important for guiding the treatment plan and making decisions about when it is safe for your child to return to athletics.

Treatment
Initial treatment includes rest and protecting the injury from further harm by stopping play or practice. Applying ice and elevating the injured area will help minimize injury to the muscle. For lower extremity injuries: if putting weight on the affected leg is painful, your child will need to use crutches to protect the injury site. Compressing the area with a soft



bandage and keeping the muscle in a slightly stretched position may be beneficial as well. Anti-inflammatory medications such as ibuprofen (ex.: Motrin or Advil) can be used for pain relief. Massage and heat should be avoided for at least the first week after injury.

If you notice numbness and weakness developing anywhere or rapidly increasing swelling in the injured area, you should seek immediate medical attention. Although this occurs very rarely, rapid bleeding into the muscle may cause a build-up of pressure in the thigh; this may require urgent surgery to drain blood from the thigh.

Once your child is able to comfortably bend their knee to 90 degrees or more, your child's physician will prescribe a physical therapy or rehabilitation program.

Returning to Activity & Sports

The time to return to activity and sports depends on the grade/severity of the injury and one's progress with stretching and strengthening exercises. Moderate-to-severe contusions take an average of 4-6 weeks to heal. Minor contusions take considerably less time. If your child puts too much stress on the injured area before it is healed, excessive scar tissue may develop.

Your physician will allow your child to return to contact sports when they get back their full strength, motion and endurance. Your child may need to wear a protective device or pad to prevent further injury to the area.