COURT OF APPEALS
DECISION
DATED AND FILED

October 20, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP3018 **Cir. Ct. No. 2004CV125**

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

LUKE YAHN,

PETITIONER-RESPONDENT,

PAYTON YAHN AND ISAAC YAHN,

PETITIONERS,

V.

BRIAN P. DOOCY,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Vernon County: MICHAEL J. ROSBOROUGH, Judge. *Vacated*.

Before Lundsten, P.J., Dykman and Higginbotham, JJ.

¶1 PER CURIAM. Brian Doocy appeals a child abuse injunction which bars him from physically disciplining his girlfriend's children. The children's father petitioned for the injunction after he learned from a third party that Doocy had hit one of the children in the head with his knuckle in a Dairy Queen parking lot. The trial court granted the injunction on the theory that the hit caused the child pain and that pain constitutes "physical injury" within the meaning of the child abuse statutes. We disagree. We conclude that the evidence presented was insufficient to establish that the child suffered a physical injury. Accordingly, we vacate the injunction.

¶2 A trial court has discretion whether to grant a child abuse injunction under WIS. STAT. § 813.122 (2003-04)[1] if there are reasonable grounds to believe that the respondent has engaged or may engage in abuse of the child. ***M.Q. v. Z.Q.***, 152 Wis. 2d 701, 708, 449 N.W.2d 75 (Ct. App. 1989). Whether reasonable grounds exist is a mixed question of fact and law. We will uphold the trial court's determinations as to what happened unless clearly erroneous, but will independently review the legal conclusions based upon those established facts. ***Id.***

¶3 As the trial court noted, the basic facts of the incident were undisputed—namely, that Doocy, as a disciplinary measure, hit the child on the forehead with the knuckle of one of Doocy's hands while holding the child under his other arm. Doocy referred to this as giving the child a "noogie." A third-party witness who was in the Dairy Queen testified that the blow did not amount to a

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

punch,[2] but that the child was crying after being hit. Both Doocy and the child's mother testified that the child was already crying or having a tantrum prior to being hit, and that the child suffered no bruising or visible mark as a result of the incident. The question before this court is whether as a matter of law the conduct described above provided grounds for an injunction.

¶4 In considering whether there are reasonable grounds to believe that a person has engaged or may engage in abuse of a child sufficient to warrant an injunction, the term "abuse" has the meaning set forth in the Children's Code. Pertinent here, it means "[p]hysical injury inflicted on a child by other than accidental means." WIS. STAT. §§ 813.122(1)(a) and 48.02(1)(a). Section 48.02(14g) defines physical injury as follows: "'Physical injury' includes but is not limited to lacerations, fractured bones, burns, internal injuries, severe or frequent bruising or great bodily harm."

¶5 Here, the trial court did not make a factual determination that the child suffered any lacerations, fractured bones, burns, internal injuries, severe or frequent bruising, or great bodily harm or comparable harm. Rather, the trial court emphasized that the statute's list of physical injuries was not exhaustive, and concluded that the definition should encompass striking a child in the head hard enough to cause pain.

¶6 Under the doctrine of *ejusdem generis*, the meaning of a general catchall phrase in relation to the enumeration of specific things in a statute is

[2] The child's father mentioned during his argument to the court that his other child had reported that Doocy struck both children with a fist on other occasions. That information was not properly before the trial court, however, because it was not provided by testimony prior to the close of evidence. We therefore cannot consider it for purposes of this appeal.

limited to other things "of the same kind, class, character, or nature." ***State v. Ambrose***, 196 Wis. 2d 768, 777, 540 N.W.2d 208 (Ct. App. 1995) (citations omitted). While we agree with the trial court that the phrase "physical injury" is not restricted to those injuries specified in the statute, we disagree that a rap on the head that does not result in any mark, bruising, or other identifiable injury falls within the same category as the enumerated injuries. To the contrary, the very fact that the word bruising is qualified by the terms "severe or frequent" suggests that even non-severe or infrequent bruising may lie outside those injuries that the legislature intended to address. Similarly, the legislature's use of the term "great bodily harm" (defined under WIS. STAT. § 939.22(14) as "bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury"), rather than the term "bodily harm" (defined under § 939.22(4) as "physical pain or injury, illness, or any impairment of physical condition"), suggests that the statute does not encompass pain alone.

¶7 Thus, although this court by no means endorses the striking of a three-year-old in the head as an appropriate disciplinary measure, we cannot conclude that Doocy's conduct rose to the level of child abuse as a matter of law. Accordingly, we conclude that there were insufficient grounds to support the injunction, and the injunction must be vacated.

By the Court.—Order vacated.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.