COURT OF APPEALS
DECISION
DATED AND FILED

April 7, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP2743

Cir. Ct. No. 2009CV160

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN EX REL. DEBORAH L. SMALLEY,

PETITIONER-APPELLANT,

V.

WILLIAM ORTH, DIRECTOR, SAUK COUNTY DEPARTMENT OF HUMAN SERVICES,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Sauk County: JAMES EVENSON, Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings.*

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

¶1 PER CURIAM. Deborah Smalley appeals an order that affirmed, on certiorari review, a child maltreatment substantiation determination made by

the Sauk County Department of Human Services under WIS. STAT. § 48.981 (2009-10).[1] Specifically, the Department determined that a child had sustained serious injury as the result of Smalley's neglect. Smalley claims that the Department's decision was not supported by substantial evidence and that the Department's refusal to produce unredacted copies of medical records, police reports, and social service notes violated her due process rights. We conclude that there was substantial evidence in the record to support the Department's decision, but that the Department should have produced the unredacted records. We are unable to adequately evaluate whether Smalley's due process rights were violated, however, because the certiorari return from the Department does not contain the unredacted records. We therefore reverse the certiorari order in part and remand for further proceedings consistent with this opinion.

Background

¶2 On Tuesday, September 16, 2008, one-year-old Landon Miller's grandmother, Marilee Loy, discovered a "soft spot" on the child's skull. Marilee and Landon's mother, Megan Loy, took Landon to the emergency room, where x-rays revealed that Landon had a skull fracture and cephalohematoma (a pooling of fluid between the scalp and skull). Megan told the ER nurse that Landon had been "screaming for no reason" for three to four days.

¶3 The preliminary assessment of the ER physician, Dr. Michael Foley, was that the fracture had occurred within the past twenty-four hours. The radiologist, Dr. Shadman, similarly noted in the medical records that, according to

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

its radiologic appearance, the injury appeared "acute," meaning that it had probably occurred within the past week, although Shadman later told the treating physician, Dr. Jodi McGraw, that it could have occurred between one and ten days before the child was brought to the ER.

¶4 Dr. McGraw testified that Landon's injury was the result of "significant and direct" force, such as a direct blow to the head with an object, or falling a significant distance onto his head onto an object. In Dr. McGraw's opinion, the fracture would not be consistent with falling down a couple of carpeted stairs. The injury would be "more likely" if the child had fallen down seven steps onto a hard surface.

¶5 Dr. McGraw also testified that she would expect "a lot of pain behaviors," such as crying and fussiness and clinginess, immediately after the injury. It would be consistent with the type of injury Landon received for a child to scream for three to four days after it occurred. However, Dr. Fost told the investigating social worker that it was also possible that the child had not exhibited typical symptoms, since there was no evidence of subdural hematoma or bleeding or swelling in the brain.

¶6 Logan's mother, Megan, told the treating doctor that Landon had fallen backwards down several carpeted stairs the day before the injury (Monday, September 15), but had gotten right back up and was not crying; that he had been seen by an orthopedic surgeon on Thursday, September 11, and did not seem to be behaving unusually at that time; that he had stayed overnight at his father's the preceding Wednesday (September 10) "prior to the episodes of fussiness"; and that he had fallen down a flight of stairs at Smalley's ten days prior to the

discovery of the injury (Saturday, September 6), but had seemed normal the following day.

¶7 Smalley herself testified that Landon was staying overnight at her house on September 6 when her son Joey came to tell her that Landon was sitting at the bottom of a flight of stairs crying. Smalley was watching television at the time, and she did not see how Landon came to be at the bottom of the stairs, and did not know how long he had been there. Smalley noted that Landon usually crawled down steps backward, and speculated that perhaps her dog had knocked him down. Smalley acknowledged that she had a dog gate for the stairs which was not in place that day. When Smalley picked Landon up, he stopped crying, so she did not think the event was significant.

¶8 The investigating social worker concluded that it was more likely than not that Landon's injury was the result of falling down the stairs at Smalley's house because there was no other plausible explanation for how the injury had occurred. The hearing officer determined that the evidence was sufficient to establish by a preponderance of the evidence that Smalley had neglected Landon by leaving him largely unsupervised for a period of time that led to him falling down a flight of stairs onto a tile landing and injuring his head. The hearing officer therefore substantiated the social worker's determination of child neglect. The circuit court affirmed the substantiation determination on certiorari review, and Smalley appeals.

Discussion

¶9 Our review of an administrative decision is limited to considering: (1) whether the Department kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its action was arbitrary, oppressive, or

unreasonable, representing its will rather than its judgment; and (4) whether the Department could reasonably make the determination in question based on the evidence before it. *See* ***State v. Waushara Cnty. Bd. of Adjustment***, 2004 WI 56, ¶12, 271 Wis. 2d 547, 679 N.W.2d 514. We presume the Department's decision to be correct and valid, and will not substitute our discretion for that of the board or set aside its factual findings if those findings are supported by any reasonable view of the evidence. ***Id.***, ¶13.

¶10 The first issue Smalley raises on appeal is the sufficiency of the evidence to support the child maltreatment substantiation determination. Smalley criticizes the investigating social worker for basically accepting at face value the family's denials that any injury occurred while Landon was in their care, and argues that it was unreasonable to conclude that Landon had been injured in Smalley's care because there was "no medical evidence to support the theory that a child could suffer a skull fracture and have the attending swelling escape notice for ten days."

¶11 Smalley's argument downplays the undisputed fact that Landon was found crying at the bottom of the stairs while in Smalley's care during a period of time when Smalley admitted that she had been watching television rather than the child, and further ignores the treating physician's statement to the social worker that the child might not have exhibited typical symptoms of pain in the days after the injury since there was no evidence of subdural hematoma or bleeding or swelling in the brain. Smalley essentially wants this court to draw different inferences from the evidence than those drawn by the investigating social worker and Department, which we will not do under our deferential standard of review of administrative decisions. In sum, we conclude that there was substantial evidence in the record to support the Department's determination that, given the available

evidence, the most likely cause of the child's injury was falling down the stairs at Smalley's house.

¶12 Smalley next contends that the Department's refusal to turn over unredacted medical records, police reports, and social services investigation notes during discovery violated her due process rights by unfairly limiting her ability to prepare for the hearing and in cross-examining witnesses. Smalley specifically points to a treatment note by Dr. McGraw stating that McGraw's suspicions were initially aroused due to changes in the mother's statements about the timing of the fussiness and lack of correlation with the reported history and severity of the injury. Smalley contends that deleted sentences from the treatment notes of Dr. McGraw, Dr. Foley, and a nurse, and the statements witnesses gave to investigators, hampered Smalley's ability to explore how the stories of Landon's mother and grandmother varied from their initial reports. Smalley also contends that this hampered her ability to undermine the witnesses' credibility regarding whether there had been any other events that might have caused the injury while in their care.

¶13 The hearing officer determined that the materials in question were properly redacted under WIS. STAT. § 48.981(7)(a)1., which provides that reports and records relating to a suspected abuse investigation may be disclosed to the subject of the report, "except that the person or agency maintaining the record or report may not disclose any information that would identify the reporter." Providing information contained in a suspected abuse report does not constitute "disclosure," however, unless the recipient was previously unaware of the information at the time of the communication. ***State v. Polashek***, 2002 WI 74, ¶23, 253 Wis. 2d 527, 646 N.W.2d 330.

¶14 Here, the hearing officer concluded that each of the redactions fell within the statutory prohibition on disclosure "by indicating that a report had been made and either stating or clearly implying the identity of the reporter." However, the hearing officer's factual finding that "none of the redacted sections identifies individuals who are not mentioned elsewhere in the record" undermines his legal conclusion that providing Smalley with the unredacted materials would have "disclosed" to her the identity of any reporter of whom she was not already aware. In other words, if the unredacted materials do not identify any suspected abuse reporter still unknown to Smalley, then WIS. STAT. § 48.981(7)(a) does not provide grounds for refusing to turn the materials over to Smalley. We therefore agree with Smalley that she should have been provided with unredacted copies of the records.

¶15 The next question is whether the omission rises to the level of a due process violation. Neither party has provided this court with Wisconsin case law directly addressing the due process standard to be applied in the context of child maltreatment substantiation proceedings. However, in the analogous context of a criminal proceeding—which would, if anything, require a higher standard of due process than an administrative proceeding of this nature—the prosecution is required to turn over "evidence favorable to an accused upon request … where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." ***Brady v. Maryland***, 373 U.S. 83, 87 (1963). This may include impeachment evidence, where "the reliability of a given witness may well be determinative of guilt or innocence." *See* ***United States v. Bagley***, 473 U.S. 667, 676 (1985) (quoting ***Giglio v. United States***, 405 U.S. 150, 154 (1972) (internal quotation marks omitted)). Thus, to establish a ***Brady*** violation, a defendant must show that: (1) the State suppressed evidence within its possession

at the time of trial; (2) the evidence was favorable to the defendant; and (3) the evidence was material to a determination of the defendant's guilt or punishment. ***Brady***, 373 U.S. at 87. Evidence is material when there is a reasonable probability that its disclosure would have led to a different result in the proceeding. ***State v. Garrity***, 161 Wis. 2d 842, 850, 469 N.W.2d 219 (Ct. App. 1991).

¶16 The Department contends that the information redacted in this case pertained to only "the name of the reporter or information which by its context would reveal the reporter's identity." Unfortunately, because the appellate record contains only the redacted materials, we cannot independently determine whether any of the blacked-out information whose "context would reveal the reporter's identity" would include initial statements made by the mother or grandmother that might vary from subsequent statements they made about the timing of Landon's fussiness or history in the ten days preceding the discovery of his injury. Because we have no basis on which to evaluate the strength the redacted material might have had as impeachment evidence favorable to Smalley, we cannot determine the probability that it would have altered the outcome of the proceeding. We therefore conclude that we must remand this matter for further proceedings.

¶17 On remand, the circuit court should arrange to have the certiorari return supplemented with the unredacted materials that should have been turned over to Smalley. The parties should then be given an opportunity to address the impact that the redacted information might have had upon the proceeding, as well as to provide the court with any additional authority they might discover regarding the due process standard in an administrative proceeding of this nature.

By the Court.—Order affirmed in part; reversed in part and cause remanded for further proceedings.

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