COURT OF APPEALS
DECISION
DATED AND FILED

January 25, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-0406 **Cir. Ct. No. 01CV009867**

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

D.S., A MINOR, BY HER GUARDIAN AD LITEM KEVIN M. COSTELLO,

PLAINTIFF-RESPONDENT,

V.

JOCELYN GODBOLT, PATRICIA WENDT, JANINE S. NOLDE, MARILYN MCCLOUD, IRA KENNEDY AND MILWAUKEE COUNTY,

DEFENDANTS,

DENISE REVELS ROBINSON AND MARY KENNEDY,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Milwaukee County: MICHAEL D. GUOLEE, Judge. *Reversed and cause remanded with directions*.

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 WEDEMEYER, P.J. Denise Revels Robinson and Mary Kennedy appeal from an order denying their motion seeking summary judgment.[1] Robinson and Kennedy claim the trial court erred in denying their motion because each is entitled to qualified immunity and therefore cannot be held liable for the injuries D.S. suffered when her foster parent, Jocelyn Godbolt, physically abused her. Because Robinson and Kennedy are entitled to qualified immunity, we reverse the order and remand to the trial court with directions to dismiss Robinson and Kennedy from this action.

BACKGROUND

¶2 On February 14, 1997, Godbolt received a foster home license. Subsequently, foster children were placed in her home. In 1999, she had three foster children in her household. One of them was C.W., a five-year-old boy, who was described as hyperactive and sometimes difficult to control.

¶3 On September 2, 1999, Godbolt was in the waiting room of the Bureau of Milwaukee Child Welfare with C.W. for a scheduled visitation with C.W.'s biological parent. Godbolt struck C.W. hard on the left side of the head, causing his head to hit the wall. Child welfare worker Elizabeth Eastman witnessed the incident and a referral was made to the child welfare agency of possible physical abuse against C.W. Bethany Christian Services investigated the complaint and concluded that the alleged physical abuse was substantiated. Godbolt failed to cooperate with the investigation.

[1] We granted the petition seeking to appeal from a non-final order.

¶4 Based on the substantiated abuse finding, the Bureau sent Godbolt a notice dated February 8, 2000, that her foster home license was immediately revoked. All foster children were removed from the Godbolt home.

¶5 Godbolt sought to reverse the revocation of her foster home license and filed a petition on February 25, 2000, under WIS. STAT. § 227.42 for an administrative hearing. The hearing was conducted on May 31, 2000, after which the administrative law judge (ALJ) concluded that the revocation was appropriate based on the substantiated abuse finding.

¶6 On April 1, 2000, Lutheran Social Services (LSS) replaced Bethany as the contract agency to perform independent investigations of allegations of child abuse.[2] Godbolt appealed the Bethany finding to LSS. LSS supervisor Mike Andrews, who was a social worker with thirty years' experience, reviewed Bethany's findings of physical abuse pursuant to the review process mandated by 42 U.S.C. § 5106(b)(2)(A)(xi)(II) of the federal Child Abuse Prevention and Treatment Act ("CAPTA").[3] On July 26, 2000, he overturned the Bethany

[2] The administrative review occurred before the appeal to LSS. The record is unclear as to why this occurred. The appellants suggested that the administrative review was related solely to the license revocation and the LSS review was related to the finding of abuse. D.S. argues that the appeal procedure was erroneous and that Godbolt should have had the LSS review before the administrative hearing. We address this issue later in the body of the opinion, but offer this brief explanation here so as to avoid confusion regarding the sequence of dates.

[3] 42 U.S.C. § 5106(b)(2)(A)(xi)(II) provided:

> (2) Coordination
>
> A State plan submitted under paragraph (1) shall, to the maximum extent practicable, be coordinated with the State plan under part B … relating to child welfare services and family preservation and family support services, and shall contain an outline of the activities that the State intends to carry out using amounts received under the grant to achieve the purposes of this subchapter, including—

(continued)

decision based on the fact that there were no noted injuries to C.W., no evidence of medical attention, no complaints of pain or indications of pain, and C.W. went on with his scheduled visitation without reported incident.

¶7 Based on this decision, Milwaukee County reissued Godbolt's foster care license on August 3, 2000. On September 21, 2000, D.S. was placed in Godbolt's home. On December 4, 2000, D.S. was physically abused by Godbolt. On October 19, 2001, D.S., by her guardian *ad litem* Kevin M. Costello, filed a complaint alleging a civil rights violation under 42 U.S.C. § 1983. D.S. named a variety of defendants, including Robinson and Kennedy. Robinson and Kennedy filed a motion seeking summary judgment based on qualified immunity on December 1, 2003, which the trial court denied. Robinson and Kennedy then filed a petition for leave to appeal from the non-final order. We granted the petition on March 1, 2004, and stayed proceedings in the trial court pending disposition on the petition by this court.

> (A) an assurance in the form of a certification by the chief executive officer of the State that the State has in effect and is enforcing a State law, or has in effect and is operating a Statewide program, relating to child abuse and neglect that includes—
>
> ….
>
> (xi) provisions, procedures, and mechanisms to be effective not later than 2 years after October 3, 1996—
>
> ….
>
> (II) by which individuals who disagree with an official finding of abuse or neglect can appeal such finding[.]

DISCUSSION

¶8 The issue in this case is whether Robinson and Kennedy are entitled to qualified immunity from suit despite their decision to place D.S. in the Godbolt home, where she was physically abused. Robinson was the Director of the Bureau of Milwaukee Child Welfare, Wisconsin Department of Health and Family Services, and Kennedy was the Program Coordinator of CAPTA for the Bureau.

¶9 Whether a public official is entitled to qualified immunity is a question of law. *See* ***Penterman v. Wisconsin Elec. Power Co.***, 211 Wis. 2d 458, 468, 565 N.W.2d 521 (1997). "The doctrine of qualified immunity protects public officials from civil liability if their conduct does not violate a person's clearly established constitutional or statutory right." ***Kara B. v. Dane County***, 205 Wis. 2d 140, 146, 555 N.W.2d 630 (1996). The question presents two parts: whether a constitutional right has been violated, and whether qualified immunity attaches.

¶10 In ***Kara B.***, our supreme court held that a foster child has "a clearly established constitutional right under the Due Process Clause to safe and secure placement in a foster home." ***Id.*** at 158. The question here, then, is whether Robinson and Kennedy violated that right when D.S. was placed in Godbolt's home.

¶11 D.S. claims that her right was violated because Robinson and Kennedy knew about the C.W. incident, the Bethany finding of substantiated abuse, and the revocation of the foster home license. As a result, D.S. contends that Robinson and Kennedy placed D.S. in the home of a known child abuser.

¶12 Robinson and Kennedy respond that at the time of the placement, LSS had determined that the alleged C.W. abuse was not substantiated and that

Godbolt had been licensed to operate as a foster home. They also assert that reasonable state officials in the positions of Robinson and Kennedy could have believed that knowledge of the C.W. incident did not constitute knowledge or suspicion that Godbolt was a child abuser.

¶13 "When confronted with a claim of qualified immunity, a court must ask first the following question: 'Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?'" ***Brosseau v. Haugen***, 543 U.S. ___, 125 S.Ct. 596, 598 (2004) (quoting ***Saucier v. Katz***, 533 U.S. 194, 201 (2001)). The focus is whether the public officials had fair notice that their conduct was unlawful. ***Id.***, 125 S.Ct. at 599. Our analysis is based "against the backdrop of the law at the time of the conduct." ***Id.*** "If the law at that time did not clearly establish that the [official's] conduct would violate the Constitution, the [official] should not be subject to liability or, indeed, even the burdens of litigation." ***Id.***

¶14 In conducting our review, we conclude that there was no existing case law to provide Robinson and Kennedy notice that placing D.S. with Godbolt under the specific factual circumstances in this case would violate D.S.'s due process rights and subject them to liability. The specific facts in this case provide that at the time D.S. was placed, LSS had overturned the substantiated abuse finding. LSS concluded that Bethany was wrong and that the C.W. event did not constitute abuse. This decision was based on reasonable factors: that no medical attention was sought, no bruising occurred, there were no complaints or indications of pain, and C.W. continued with his visitation without incident. In addition, the county had reinstated Godbolt's license to operate as a foster home. Further, it was undisputed that Godbolt had no prior history of allegations or

incidents of child abuse. In fact, D.S. had previously been placed in Godbolt's home without incident.

¶15 D.S. contends that ***Kara B.*** clearly established that a foster child like D.S. has a constitutional right to not be placed in the home of a known or suspected child abuser and that this case establishes that social workers like Robinson and Kennedy are not to place foster children like D.S. into homes like Godbolt's. We are not persuaded that ***Kara B.*** controls the outcome of the instant case. As noted above, the factual scenario regarding D.S.'s situation is much different than the factual scenario presented in ***Kara B.***, where the supreme court found the public officials were not entitled to qualified immunity. ***Kara B.*** focused on "whether the constitutional right of foster children to safe and secure placement in a foster home was clearly established …." ***Kara B.***, 205 Wis. 2d at 147. The court concluded that it was. ***Id.*** at 158.

¶16 In the instant case, the parties do not dispute the existence of the constitutional right, but do disagree as to whether the right was violated. "The relevant inquiry, then, is whether a reasonable state official could have believed his or her act was constitutional 'in light of clearly established law and the information [he or she] possessed' at the time of the official's action." ***Penterman***, 211 Wis. 2d at 470 (citation omitted). Under the facts specific to this case set forth above, we are compelled to only one conclusion: that Robinson and Kennedy could believe that their act in placing D.S. in the Godbolt home was constitutional. Godbolt's home was a licensed foster home. The substantiated abuse finding in the C.W. case had been reversed. Godbolt had no prior history or incidents of alleged abuse. There is no case law analogous to the facts presented here, which would have notified Robinson and Kennedy that their actions were

unconstitutional. *See* ***Burkes v. Klauser***, 185 Wis. 2d 308, 338-39, 517 N.W.2d 503 (1994).

¶17 In the absence of law to put these officials on notice that their conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate. *See* ***Saucier***, 533 U.S. at 202. In addition, case law indicates that in a situation where officials of reasonable competence could have differing opinions on the issue, immunity should be recognized. *See* ***Baxter v. DNR***, 165 Wis. 2d 298, 302, 477 N.W.2d 648 (Ct. App. 1991). Clearly, the case involved a situation where reasonable officials disagreed as to whether the C.W. incident constituted child abuse. Bethany and the ALJ believed the incident was child abuse and LSS believed the incident was not child abuse. Under these circumstances, the balance tips in favor of applying immunity.

¶18 D.S. also argues that reliance on the LSS non-substantiated abuse finding was erroneous because of a muddling of the appeals procedure. She argues that the correct procedure should have been an appeal to LSS first and the ALJ last—that the ALJ's opinion should have been the final opinion. There is also some assertion that Godbolt was entitled to only one appeal—either to the ALJ or to LSS, but not both. We understand D.S.'s frustration with the procedural irregularities in this case. We admonish the bureau to maintain the integrity of the judicial process by following proper procedures for appeals. When the physical health and well-being of children are at stake, it is incumbent upon officials in charge of the process to ensure the process is not abused or irregular.

¶19 Nevertheless, we are presented with the record as it developed in this case and must base our decision on the facts specific to this case. We do not know whether the ALJ would have reached an opposite conclusion if Godbolt had

appealed to LSS first and then to the ALJ. We do know that the final appeal resulted in a determination that the C.W. incident did not constitute abuse, and that Godbolt was a licensed foster parent at the time of placement. Based on the foregoing, we conclude that Robinson and Kennedy are entitled to qualified immunity. The law was not clear in relation to the specific facts confronting them at the time of the placement—it was not clearly established at the time of the placement that Godbolt was a child abuser.[4] Accordingly, we reverse the decision of the trial court and remand the matter with directions that Robinson and Kennedy be dismissed from this case on the grounds that they are entitled to qualified immunity.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

[4] Hindsight is 20/20 and, given the abuse of D.S. following placement, it is easy to look back and say no child should have been placed in the Godbolt home. Unfortunately, hindsight is not available until after the damage has been done. Our decision cannot be based on hindsight, but must be based on the specific facts and law as they existed at the time of placement. Applying that standard, Robinson and Kennedy are entitled to qualified immunity in this case.