

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Sherry L. Orth,	:	
Appellant-Appellant,	:	
v.	:	No. 12AP-195
Franklin County Children Services,	:	(C.P.C. No. 11CVF-07-8682)
Appellee-Appellee.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on August 30, 2012

Farlow & Associates, LLC, and Beverly J. Farlow, for appellant.

Ron O'Brien, Prosecuting Attorney, and Jeffrey C. Rogers, for appellee.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} Sherry L. Orth is appealing from an adjudication that she was involved in an out-of-home child abuse. She assigns seven errors for our consideration:

FIRST ASSIGNMENT OF ERROR: THE TRIAL COURT ABUSED ITS DISCRETION IN AFFIRMING THE FINDING THAT THE USE OF RESTRAINT PROCEDURES ON STUDENT 1 CAUSED HIS INJURY.

SECOND ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED AS A MATTER OF LAW BY FAILING TO CONSIDER R.C. § 2151.011(B)(30) AS A WHOLE.

THIRD ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT INTENT AND TRAINING ARE NOT RELEVANT TO R.C. 2151.011(B)(30).

FOURTH ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED AS A MATTER OF LAW BY CONCLUDING THAT APPELLEE'S DECISION IS NOT UNCONSTITUTIONAL, ILLEGAL, ARBITRARY, CAPRICIOUS, OR UNREASONABLE, DESPITE THE UNREASONABLE STANDARD IT IMPOSED UPON APPELLANT, AND IMPOSES ON TEACHERS IN GENERAL.

FIFTH ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED AS A MATTER OF LAW BY CONCLUDING THAT APPELLEE'S DECISION WAS SUPPORTED BY A PREPONDERANCE OF RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE.

SIXTH ASSIGNMENT OF ERROR: THE TRIAL COURT DEPRIVED APPELLANT OF A MEANINGFUL APPEAL UNDER R.C. § 2506.04 BY GIVING UNDUE DEFERENCE TO APPELLEE.

SEVENTH ASSIGNMENT OF ERROR: THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO ADDRESS APPELLEE'S FAILURE TO FILE APPELLANT'S ADMINISTRATIVE HEARING TRANSCRIPT UNTIL FEBRUARY 10, 2012.

{¶ 2} When the pertinent events occurred, Orth had been a teacher with the Columbus Public Schools for 25 years, 10 of them working with pre-kindergarten students with emotional and/or physical challenges.

{¶ 3} On October 22, 2009, one of her students arrived at school late and promptly threw a fit. His fit includes throwing things around the classroom. This led to the student being removed from the classroom and staying in a break room until he calmed down. Later, he returned to his classroom.

{¶ 4} The sessions for students in the pre-kindergarten program are half-day sessions. When midday arrived, it was time for the student to get on a bus. He refused and threw another fit.

{¶ 5} Orth arranged for an aide to take the rest of the class to the waiting school bus. Orth then tried to get the child under control and on the bus. The child physically resisted and tried to get away from Orth. Orth attempted to restrain him. According to her own version of the facts, she dragged the child back toward her several times. During her restraint and attempted restraint of the child, he received scratches on his lower back and buttocks area. The scratches were deep enough that they bled a little.

{¶ 6} In common parlance, this encounter would not necessarily be considered child abuse. However, the Ohio legislature has defined "child abuse" with a statute. The statute pertinent here is R.C. 2151.011(B)(30), which reads:

"Out-of-home care child abuse" means any of the following when committed by a person responsible for the care of a child in out-of-home care:

- (a) Engaging in sexual activity with a child in the person's care;
- (b) Denial to a child, as a means of punishment, of proper or necessary subsistence, education, medical care, or other care necessary for a child's health;
- (c) Use of restraint procedures on a child that cause injury or pain;
- (d) Administration of prescription drugs or psychotropic medication to the child without the written approval and ongoing supervision of a licensed physician;
- (e) Commission of any act, other than by accidental means, that results in any injury to or death of the child in out-of-home care or commission of any act by accidental means that results in an injury to or death of a child in out-of-home care and that is at variance with the history given of the injury or death.

{¶ 7} Of particular pertinence is R.C. 2151.011(B)(30)(c). Under Orth's own version of the facts, she used a restraint procedure which caused injury to the child. Her method of restraint did not involve her immobilizing the child or exerting sufficient control over the child that she prevented him from freeing himself such that she had to repeatedly drag him back to her, causing him injury.

{¶ 8} Orth had the option of letting him vent and watching over him until his fit ran its course. No other students were in the classroom when Orth dragged the child back to herself repeatedly. No other staff was in danger.

{¶ 9} Under Orth's own version of what occurred, Orth used a "restraint procedure[] * * * that cause[d] injury." *See* R.C. 2151.011(B)(30)(c).

{¶ 10} Turning to the individual assignments of error, by Orth's own admission, the restraint procedure caused injury to the student.

{¶ 11} The first assignment of error is overruled.

{¶ 12} The trial court judge who reviewed this situation on an R.C. Chapter 2506 appeal did not need to go to other parts of R.C. 2151.011(B)(30) to decide if the decision that an out-of-home child abuse occurred. Orth's actions clearly qualified, given the clear words of R.C. 2151.011(B)(30)(c).

{¶ 13} The second assignment of error is overruled.

{¶ 14} The statute does not talk about intent or training. Indeed, Orth was found by the hearing officer who reviewed the situation to have injured the child during the course of well-intentional restraint. No malicious intent was present or required to be present for purposes of R.C. 2151.011(B)(30).

{¶ 15} The third assignment of error is overruled.

{¶ 16} The fourth assignment of error uses many words to allege the simple standard for our review in determining if a trial court judge has abused his or her discretion.

{¶ 17} "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 18} An abuse of discretion connotes more than an error of judgment; it implies a decision that is arbitrary or capricious, one that is without a reasonable basis or clearly wrong. *Pembaur v. Leis*, 1 Ohio St.3d 89 (1982); *Wise v. Ohio Motor Vehicle Dealers Bd.*, 106 Ohio App.3d 562, 565 (9th Dist.1995); and *In re Ghali*, 83 Ohio App.3d 460, 466 (10th Dist.1992).

{¶ 19} We cannot find an abuse of discretion by the trial court judge who addressed the R.C. Chapter 2506 appeal here. We note that the trial court judge merely

followed the statutory standard for "Out-of-home care child abuse" as enacted by the Ohio legislature. If the standard is unreasonable, the legislature should be encouraged to rewrite the definitions pertaining to child abuse or to add an exception to the definition for classroom teachers.

{¶ 20} The fourth assignment of error is overruled.

{¶ 21} The trial court's decision was consistent with the evidence, including Orth's own version of the facts.

{¶ 22} The fifth assignment of error is overruled.

{¶ 23} The trial court did not give undue deference to any party in the R.C. 2506.04 appeal. The trial court simply found that even under Orth's version of the facts an instance of out-of-home care child abuse as defined by R.C. 2151.011(B)(30) occurred.

{¶ 24} The sixth assignment of error is overruled.

{¶ 25} As to the seventh assignment of error, although the hearing transcript was delayed, it was available to all in time for a meaningful appeal to be heard by the trial court. No reversible error occurred because of the delay.

{¶ 26} The seventh assignment of error is overruled.

{¶ 27} All seven assignments of error having been overruled, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT and CONNOR, JJ., concur.
