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SUMMARY
November 16, 2017

2017COA144

**No. 17CA0049, *People in Interest of M.M. and P.M. III* —
Juvenile Court — Dependency and Neglect — Adjudication —
No-Fault**

This dependency and neglect case extends the reasoning of *People in Interest of J.G.*, 2016 CO 39, to other “no-fault” grounds for adjudication. A division of the court of appeals concludes that, under *J.G.*, an adjudication based on a child’s lack of proper parental care through no fault of the parent, section 19-3-102(1)(e), C.R.S. 2017, does not require a finding of parental fault. *J.G.*’s reasoning, however, does not extend to “fault-based” grounds for adjudicating a child dependent and neglected — i.e., mistreatment or abuse by a parent or lack of proper parental care through a parent’s acts or omissions — which do require a finding of fault as to *each* parent.

Here, at the summary judgment stage, father admitted that mother abused and neglected the children. Given these admissions, the division concludes that the trial court properly entered summary judgment on the two “no-fault” grounds for adjudication under section 19-3-102(1)(c) and (e)— there was no dispute that the children were in an injurious environment and lacked proper care through no fault of a parent. However, because father disputed facts underlying the “fault-based” grounds for adjudication under section 19-3-102(1)(a) and (b), the trial court erred in granting summary judgment and adjudicating the children dependent and neglected on those grounds.

Court of Appeals No. 17CA0049
Fremont County District Court No. 16JV173
Honorable Ramsey L. Lama, Judge

The People of the State of Colorado,

Petitioner-Appellee,

In the Interest of M.M. and P.M. III, Children,

and Concerning P.M., Jr.,

Respondent-Appellant.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division VI
Opinion by JUDGE HARRIS
Berger and Nieto*, JJ., concur

Announced November 16, 2017

Daniel B. Slater, Cañon City, Colorado, for Petitioner-Appellee

Jenna L. Mazzucca, Guardian Ad Litem

The Gasper Law Group, PLLC, Kenneth H. Gray, Colorado Springs, Colorado,
for Respondent-Appellant

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2017.

¶ 1 P.M., Jr. (father) appeals the trial court’s summary judgment order adjudicating his children dependent and neglected. Because we conclude that father did not dispute that the children were in an injurious environment and were without proper parental care through no fault of a parent, we affirm the summary judgment in part. However, we reverse the portion of the summary judgment order that adjudicates the children dependent and neglected on other statutory grounds.

I. The Trial Court Proceeding

¶ 2 The Fremont County Department of Human Services (the Department) filed a dependency and neglect petition after completing a preliminary investigation as part of a domestic relations proceeding between father and K.B. (mother). The Department alleged that five-month-old M.M. and four-year-old P.M. III (the children) lacked proper parental care through a parent’s acts or omissions, the children were without proper care through no fault of a parent, and the children’s environment was injurious to their welfare.

¶ 3 The magistrate granted custody of the children to the Department. But he left the children in both parents’ care with the

provision that P.M. III would spend equal time with each parent and M.M. would stay with mother while having daily visits with father.

¶ 4 Mother admitted that the children were dependent and neglected. Father, however, denied the allegations in the petition and requested an adjudicatory trial before a jury.

¶ 5 The Department then moved to adjudicate the children dependent and neglected by summary judgment. It identified undisputed facts, including the following:

- father used marijuana around the children;
- a pipe that tested positive for opiates was found in one of the children's clothing after a visit at father's home;
- father recently pleaded guilty to violating a permanent protection order (which was issued based on allegations of domestic violence by father) by threatening mother;
- according to father, both children were in danger when in mother's care;
- according to father, mother abused the children emotionally and psychologically;
- according to father, mother used M.M.'s illnesses as a means of control and alienation;

- according to father, the children needed protection from mother; and
- according to father, mother was unfit.

¶ 6 Father's response to the motion included an affidavit in which he disputed the allegations concerning his drug use, domestic violence, and the violation of the protection order. He did not dispute his earlier statements about mother.

¶ 7 Father asserted that there were genuine issues of material fact and the Department was not entitled to summary judgment based on mother's admission or the undisputed facts concerning her fitness as a parent.

¶ 8 The trial court granted summary judgment and adjudicated the children dependent and neglected under four statutory grounds. Later, the court upheld the magistrate's dispositional order.

II. Adjudication

¶ 9 Father asserts that the trial court erred in granting summary judgment in favor of the Department. He contends that the facts concerning him were disputed, the remaining undisputed facts concerned only mother, and the children could not be adjudicated

dependent and neglected simply because the Department established that mother was a danger to the children.

¶ 10 Of the four statutory grounds for adjudication, two require a showing of fault as to each parent, but two do not. We conclude that the undisputed facts established that, with respect to the “no-fault” grounds, the children were dependent and neglected and the trial court properly granted summary judgment on those statutory grounds. But with respect to the other statutory grounds, we agree that the material facts concerning father’s conduct were disputed and thus the trial court erred in granting summary judgment on those grounds.

A. Legal Standard

¶ 11 We review the trial court’s grant of summary judgment de novo. *Robinson v. Legro*, 2014 CO 40, ¶ 10.

¶ 12 Summary judgment is a drastic remedy and is only appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *People in Interest of S.N. v. S.N.*, 2014 CO 64, ¶¶ 14-15; see also C.R.C.P. 56(c).

¶ 13 The moving party bears the burden of establishing that there is no disputed material fact. *Gibbons v. Ludlow*, 2013 CO 49, ¶ 11. A material fact is one that will affect the outcome of the case. *Peterson v. Halsted*, 829 P.2d 373, 375 (Colo. 1992). To meet this burden, the moving party may use pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. C.R.C.P. 56(c). If the moving party fails to meet this burden, summary judgment must be denied. See *Wolther v. Schaarschmidt*, 738 P.2d 25, 28 (Colo. App. 1986).

¶ 14 But, if the moving party meets its burden, the burden shifts to the opposing party to demonstrate that there is a triable issue of fact. *City of Aurora v. ACJ P'ship*, 209 P.3d 1076, 1082 (Colo. 2009). To do so, the nonmoving party must “adequately demonstrate by relevant and specific facts that a real controversy exists.” *Id.*

¶ 15 Even when the material facts are undisputed, summary judgment is only appropriate when “reasonable minds could draw but one inference from them.” *S.N.*, ¶ 18 (quoting *Gibbons*, ¶ 35). In making this determination, the nonmoving party is entitled to the benefit of all favorable inferences reasonably drawn from the

undisputed facts, and all doubts must be resolved against the moving party. *Brodeur v. Am. Home Assurance Co.*, 169 P.3d 139, 146 (Colo. 2007). Thus, the facts must be viewed in the light most favorable to the nonmoving party. *S.N.*, ¶ 16.

B. Grounds for Adjudication

- ¶ 16 A child is dependent and neglected if, as pertinent here,
- a parent has subjected the child to mistreatment or abuse or allowed another to mistreat or abuse the child without taking lawful means to stop the mistreatment or abuse and prevent it from recurring, § 19-3-102(1)(a), C.R.S. 2017;
 - the child lacks proper parental care through the parent's actions or omissions, § 19-3-102(1)(b);
 - the child's environment is injurious to his or her welfare, § 19-3-102(1)(c); or
 - the child is without proper care through no fault of the parent, § 19-3-102(1)(e).

¶ 17 Whether a child is dependent and neglected presents a mixed question of fact and law because it requires application of evidentiary facts to the statutory grounds. *S.N.*, ¶ 21. Accordingly, two criteria must be met to grant summary judgment adjudicating a

child dependent and neglected. First, the evidentiary facts — the raw historical data underlying the controversy — must be undisputed. *Id.* Second, a reasonable trier of fact must not be able to draw divergent inferences when applying the undisputed evidentiary facts to the statutory definitions of dependency and neglect. *Id.* at ¶ 23.

C. Analysis

1. The Adjudication Order

¶ 18 The trial court adjudicated the children dependent and neglected on the grounds that

- their environment was injurious to their welfare;
- they lacked proper parental care through no fault of a parent;
- they had been subjected to mistreatment and abuse by mother; and
- they lacked proper parental care through mother's actions and omissions.

¶ 19 As the basis for its order, it concluded that undisputed facts showed that (1) the parents were divorced and exercised joint parenting time; (2) the children were in danger and subjected to

emotional and psychological abuse while in mother's care; (3) mother used M.M.'s illnesses as a means of control and alienation; (4) mother neglected the children and they were unsafe in her care; and (5) the children needed protection from mother.

2. Adjudication Based on Injurious Environment and Lack of Proper Care Through No Fault of Parent

¶ 20 We first determine whether the undisputed facts support the children's adjudication as dependent and neglected under section 19-3-102(1)(c) and (e).

¶ 21 In *People in Interest of J.G.*, 2016 CO 39, ¶ 32, the supreme court concluded that the Department did not have to prove parental fault in order to adjudicate a child dependent and neglected under section 19-3-102(1)(c) — the injurious environment provision. It observed that the injurious environment provision differed from other statutory bases for adjudication because it does not contain any reference to a parent or to parental fault. *Id.* at ¶¶ 34-35.

Thus, the supreme court reasoned, the focus of the injurious environment provision is on "the *existence* of an injurious environment rather than who caused it," *id.* at ¶ 34, and a parent's conduct or condition is not necessarily relevant when determining

whether a child is dependent and neglected under this provision, *id.* at ¶ 38. Likewise, an adjudication under the no-fault lack-of-proper-care provision does not turn on parental fault, but instead looks only to whether the child is without proper care.

¶ 22 Father says that mother's admissions cannot support summary judgment against him, and we agree (as does the Department). *See People in Interest of S.T.*, 2015 COA 147, ¶ 34. But it is *father's* admissions, not mother's, that support the court's adjudication of the children as dependent and neglected.

¶ 23 In his affidavit submitted with his response, father admitted the truth of certain of the Department's factual assertions and, by doing so, conceded that certain material facts were indeed undisputed. *See Gibbons*, ¶ 11 (nonmoving party must produce enough evidence to establish a disputed issue for trial or the moving party is entitled to summary judgment).

¶ 24 True, father's affidavit created a factual dispute concerning his drug use, the owner of the pipe, and, potentially, whether he had violated the permanent protection order. But he did not dispute that mother was not properly caring for the children. Specifically, father admitted that he had told the Department that the children

were in danger when in mother's care, mother had emotionally and psychologically abused the children, M.M. had suffered under mother's care and the children needed protection from mother, and mother had used M.M.'s illnesses as a means of control and alienation. While father is entitled to any favorable inference reasonably drawn from the facts, *Jenkins v. Panama Canal Ry. Co.*, 208 P.3d 238, 241 (Colo. 2009), we are persuaded that reasonable minds could only draw one inference from father's statements.

¶ 25 These statements are effectively an admission that the children were in an injurious environment. Although father asserts that these statements only related to mother, he misunderstands the holding of *J.G.* A child's adjudication as dependent and neglected under the injurious environment and no-fault provision does not require a determination of parental fault or that both parents lack the availability, ability, and willingness to provide reasonable parental care. See *J.G.*, ¶ 44. The caseworker alleged that the "issues that exist between the . . . [p]arents create an environment that is injurious to both children's welfare," and father did not dispute that allegation. Thus, if the case proceeded to a

trial on adjudication, father's admissions would necessarily prove the Department's case.

¶ 26 The purpose of summary judgment is to avoid a trial where, as here, there is no dispute as to the material facts and one party is entitled to judgment as a matter of law. *Dubois v. Myers*, 684 P.2d 940, 943 (Colo. App. 1984). Thus, as to the two no-fault bases for adjudication, under section 19-3-102(1)(c) and (e), we conclude that the court properly granted summary judgment to the Department. *See People in Interest of A.M.*, 786 P.2d 476, 479 (Colo. App. 1989).

¶ 27 To the extent father argues that the court could have removed the children from the injurious environment by changing the parenting plan, we reject that argument. The juvenile court's task is to determine whether the children, under the circumstances then existing, are subject to an injurious environment or lack proper parental care, and are therefore dependent and neglected. *See* § 19-3-505(1), C.R.S. 2017. The juvenile court is not required to dismiss a petition on the chance that the court with jurisdiction over the domestic relations case will change the parenting plan to remedy the Department's concerns.

3. Adjudication Based on Abuse and Lack of Proper Parental Care

¶ 28 Our reasoning, however, does not extend to the two additional bases pursuant to which the court adjudicated the children dependent and neglected. While *J.G.* made clear that parental fault is not at issue under the injurious environment or no-fault lacks-proper-care ground for adjudication, *J.G.*'s holding does not apply equally to adjudications based on mistreatment or abuse under section 19-3-102(1)(a) and lack of proper parental care under section 19-3-102(1)(b). Just the opposite, the Colorado Supreme Court recognized that parental conduct is relevant to adjudication when the statutory grounds make reference to parental conduct or fault. *J.G.*, ¶ 38. And, section 19-3-102(1)(a) and (b) explicitly implicate parental conduct. *J.G.*, ¶¶ 35-36.

¶ 29 Here, the trial court made no findings that father's conduct had resulted in the children being mistreated or abused or even that he had failed to take measures to stop mother from abusing or mistreating the children. Nor did it find that father's acts or omissions had resulted in the children lacking proper parental care in either parent's home.

¶ 30 True, the Department had asserted that father used marijuana in the children's presence, was responsible for fragments of a pipe with opiate residue that were found in P.M. III's clothes, abused mother in the children's presence, and only took an active role as a parent when his parenting was being monitored. However, as the trial court recognized, father had shown that there were disputed issues of material fact as to these issues. And a Department report, submitted to the court before the summary judgment motion, indicates that the pipe found in P.M. III's clothes was negative for all substances when retested by law enforcement.

¶ 31 Accordingly, the trial court erred in adjudicating the children dependent and neglected under section 19-3-102(1)(a) and (b). On remand, the court should amend the order of adjudication to reflect that the children were adjudicated dependent and neglected only under section 19-3-102(1)(c) and (e).

III. Conclusion

¶ 32 The judgment is affirmed in part, reversed in part, and remanded with directions to the court to amend the order of adjudication.

JUDGE BERGER and JUDGE NIETO concur.