

05AP1034

SUPREME COURT OF WISCONSIN

District A
Appeal No. 05-AP-1034
Circuit Court Case No. 05-CV-192

KRISTI L.M., J.K.M. and J.M.,
Petitioners-Respondents,

v.

DENNIS E.M.,
Respondent-Appellant-Petitioner.

SUPREME COURT BRIEF

Respectfully submitted,

Elbert & Pfitzinger, Ltd.
Brian A. Pfitzinger, SBN: 1000509

Attorney for Respondent-Appellant-
Petitioner, Dennis E.M.

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STATEMENT OF ISSUES

- I. DID THE COURT OF APPEALS AND TRIAL COURT INFRINGE UPON DENNIS' CONSTITUTIONAL RIGHT TO HAVE A RELATIONSHIP WITH HIS CHILD WHEN THEY EXPANDED THE DEFINITION OF "SEVERE" BRUISING TO INCLUDE ANY BRUISE?

Answer: Yes

The issue was presented to the Court of Appeals as:

Whether the Trial Court erred in finding reasonable grounds to believe that Dennis engaged in child abuse.

Answer: No. Judge Dykman dissented.

STATEMENT OF CASE

On December 13, 2005, Dennis and Kristi separated (R. 19, p. 103). On February 28, 2005, Dennis filed for Divorce in Dodge County Case No. 05-FA-80 (R. 19, p. 114). An Order to Show Cause Hearing was held on March 15, 2005. At that Hearing the Family Court Commissioner temporarily ordered that Dennis was to have visitation with the minor children Monday through Friday from 7:30 a.m. until 1:00 p.m. unless he was off from work, then he was to have visitation from 7:30 a.m. until 5:00 p.m. Dennis was also ordered to have the children one overnight per week and one four hour block of time on Saturday or Sunday each week (R. 19, p. 94, 121, & 123). Five weeks later, on April 4, 2005, a Petition for Temporary Child Abuse Injunction was filed with the Dodge County Clerk of Courts (R. 1). On April 8, 2005 a Child Abuse Injunction Hearing was held in front of Reserve Judge Richard Callaway. Judge Callaway issued the Child Abuse Injunction (R. 14). A continued hearing was held in Family Court on April 13, 2005. At that hearing, the Family Court Commissioner issued an Amended Temporary Order integrating the Injunction and, as a result, Dennis' placement was significantly limited to two hours of supervised placement per week. Notice of Intent to Appeal the Child Abuse Injunction was filed on April 15, 2005 (R. 16). The Court

of Appeals rendered a decision on September 14, 2006,
affirming the Injunction as to J.K.M. and reversing the
Injunction as to J.M. Judge Dykman dissented (A-Ap. 238-
348).

STATEMENT OF THE FACTS

On March 25, 2005, Dennis called his wife, Kristi, at work to inform her that their son, J.K.M., had fallen and hit his head on the entertainment center (R. 19, p. 5). Dennis informed Kristi that J.K.M. was fine; he was conscious and did not have any ill reactions (R. 19, p. 58). Kristi testified that when the children were returned to her that evening, J.K.M. was acting fine (R. 19, p. 32). Three days later, on Monday, March 28, 2005, Kristi took J.K.M. to the police department and photographs were taken of J.K.M.'s head (R. 19, p. 33 & 68). After leaving the police department, Kristi took J.K.M. to Children's Hospital (R. 19, p. 34).

Dr. Hennes, an attending physician at Children's Hospital, testified that he examined J.K.M. on March 28, 2005 (R. 19, p. 23-24). Dr. Hennes discovered J.K.M. had two circular yellowish-brown bruises on his head about an inch apart (R. 19, p. 25). Dr. Hennes testified the bruises were more than a week old and he could not say with any certainty what caused the bruises (R. 19, p.25). Dr. Hennes' examination revealed no bony tenderness and no swelling (R. 19, p. 26). There were no bruises detected anywhere else and J.K.M.'s extremities looked normal (R. 19, p.26). He testified that the CT scan was normal and a

skeletal survey showed no acute or chronic fractures (R. 19, p. 26). When asked if these injuries were serious, Dr. Hennes said "not that I can detect" (R. 19, p. 26). Finally, Dr. Hennes testified that the likelihood that the bruises were the result of child abuse was very minimal, and definitely less than fifty-percent (R. 19, p. 28).

Subsequently, a Temporary Placement Order was filed and social services investigated (R. 19, p. 62 & 64). The Temporary Placement Order expired on Monday, April 4, 2005 (R. 19, p. 62), and Corporation Counsel elected not to file a CHIPS petition (R. 19, p. 62). Criminal charges were not referred to the District Attorney (R. 19, p. 64).

Then on April 6, 2005, Kristi took the photographs taken by the police department to Dr. Greenbaum even though Kristi was not seeking medical treatment for J.K.M., and the bruises were not causing any problems (R. 19, p. 21, 36, 63, & 64). Dr. Greenbaum testified that the bruises found on J.K.M.'s head were suspicions for abuse (R. 19, p. 9). However, Dr. Greenbaum was unable to diagnose child abuse to a reasonable degree of medical certainty (R. 19, p. 15). She also admitted she did not examine the child herself but was only relying on records and photographs (R. 19, p. 12). In addition, Dr. Greenbaum testified that she could not tell by looking at the photographs who caused the injuries (R.

19, p. 16).

Finally, Kristi admitted she has never seen Dennis harm his children (R. 19, p.78). Kristi's mother also testified that she had never seen Dennis physically hurt her daughter or his children (R. 19, p. 89). Dennis testified that he did not do anything to injure J.K.M., has never harmed his children or wife, and would never hurt his children (R. 19, p. 98, 99, & 101). Dennis testified that he did not grab J.K.M.'s head and did not believe he would be able to physically cause the bruises found on J.K.M.'s head given the size of his hands (R. 19, p. 97).

ARGUMENT

- I. DID THE COURT OF APPEALS AND TRIAL COURT INFRINGE UPON DENNIS' CONSTITUTIONAL RIGHT TO HAVE A RELATIONSHIP WITH HIS CHILD WHEN THEY EXPANDED THE DEFINITION OF "SEVERE" BRUISING TO INCLUDE ANY BRUISE?

Section 813.122(5)(a)(3), Wis. Stat. (2003-04)¹, grants a trial court the discretionary authority to issue a child abuse restraining order or injunction upon the finding that reasonable grounds exist to believe that the respondent has engaged in, or may engage in, abuse of the child victim. For the purpose of determining whether grounds for the injunction exist, the term "abuse" is given the same meaning as used in Wis. Stat. § 48.02(1) of the Children's Code. Wis. Stat. § 813.122(1)(a). Section 48.02(1), Wis. Stat., defines abuse as physical injury inflicted on a child by other than accidental means. Further, according to Wis. Stat. § 48.02(14g), physical injury includes but is not limited to lacerations, fractured bones, burns, internal injuries, severe or frequent bruising or great bodily harm. (Emphasis added). Although the above definition is not exhaustive, the doctrine of *eiusdem generis* limits the definition to injuries of the same kind, class, character, or nature of those enumerated. State v. Ambrose, 196 Wis.2d

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

768, 777, 540 N.W.2d 208, 212 (Ct. App. 1995).

"The very fact that the word bruising is qualified by the terms 'severe or frequent' suggests that non-severe or infrequent bruising may lie outside those injuries that the legislature intended to address." Yahn v. Doocy, 2005 WI App 254, 288 Wis.2d 460, 706 N.W.2d 702. Dennis agrees with Judge Dykman's dissent. In his dissent, Judge Dykman stated "The rule of *ejusdem generis* and common sense tells us that serious injuries like those mentioned, and *serious* bruising are the injuries that the legislature was interested in preventing. Injuries of a minor nature were specifically not included in the statute" (A-Ap 245-46).

Dennis asserted to the Trial Court that he did not abuse J.K.M., that Dr. Hennes' testimony supported his assertion, and that the bruises found on J.K.M. were not severe, as required by Wis. Stat. § 48.02(14g). The only evidence presented at the Injunction Hearing of physical injury concerned two circular yellowish brown bruises on J.K.M.'s head about an inch apart. Dr. Hennes testified the bruises were more than a week old and he could not say what caused the bruises. When asked if these were serious injuries, he said "not that I can detect." He observed no bruises or bony tenderness anywhere else, J.K.M.'s extremities looked normal, and a head CT scan was normal. A

skeletal survey revealed no acute or chronic fractures. Dr. Hennes testified that the likelihood that the bruises were the result of child abuse was very minimal, and definitely less than fifty percent. Another doctor, Dr. Greenbaum, who had not seen J.K.M. but saw photographs of the bruising, testified the bruises were suspicious. However, she was unable to diagnose child abuse to a reasonable degree of medical certainty.

Despite the evidence and testimony from the Injunction Hearing, the Court of Appeals concluded that there was sufficient evidence for the Trial Court to conclude that there were reasonable grounds to believe the bruises to J.K.M. were not accidental (A-Ap. 240). The Court of Appeals also concluded that the definition of physical abuse includes the type of bruises in this case (A-Ap. 240). Finally, the Court of Appeals concluded that the legislature intended to include the conduct that caused bruises of this type to the head of an eleven-month-old child (A-Ap. 240-41).

However, the Court of Appeals offered no explanation for why the bruises found on J.K.M. were included in the definition of physical injury. The Court of Appeals did not make a finding, and clearly could not make a finding based on the record, that the bruises to J.K.M. were severe. The

Court of Appeals did not go through the same analysis it did in Yahn, 288 Wis.2d at 460; it did not analyze how Wis. Stat. § 48.02(14g), the doctrine of *ejusdem generis*, or the legislative intent of the Statute, applied to the facts in the instant case.

Dennis asserts the Yahn case is important to the instant case because in Yahn the Court of Appeals did look at Wis. Stat. § 48.02(14g), did cite the doctrine of *ejusdem generis* and did glean the legislative intent of the Statute. Particularly, the Court of Appeals noted in its decision that "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." Id. at 460. Further, the Yahn decision is important to the instant case because the Yahn case was decided on October 20, 2005 *after* the instant case had already been submitted to the Court of Appeals. By the Court of Appeals not applying the same rationale from Yahn to the instant case, the decisions appear to be in conflict with each other. Finally, Yahn is important because that decision starts to define the parameters of Wis. Stat. § 48.02(14g) by finding the Statute does not include pain alone. Id.

By not providing any explanation for its ruling, the

Court of Appeals is giving three inconsistent and incorrect messages in its Decision. The Court of Appeals' conclusions imply: (1) bruises do not need to be severe for a finding of abuse; (2) the bruises found on J.K.M.'s head were severe; and (3) that "conduct" alone can be the basis for issuing an injunction. None of these conclusions comport with the Statute, implied legislative intent, or previous Court of Appeals decisions.

The first incorrect message the Court of Appeals sent by its Decision is that bruises do not need to be severe. Judge Dykman in his dissent stated, "[T]he majority changed the definition to mean 'bruising which does not have to be severe'" (A-Ap. 244). If the Court of Appeals is concluding that bruises do not need to be severe, then their Decision is in direct opposition with Wis. Stat. § 48.02(14g) as well as with what the Court of Appeals states is the legislative intent of the Statute. The Statute states "severe or frequent" bruising. Wis. Stat. § 48.02(14g). As the Court of Appeals stated in Yahn, "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." 288 Wis.2d at 460. Had the legislature intended the result the Court of Appeals achieves, it would have

omitted the words "severe or frequent" as modifying the word bruising.

The word bruising in Wis. Stat. § 48.02(14g) is modified by the words "severe" and "frequent" for the purpose of requiring petitioners to present a heightened level of proof prior to the granting of a child abuse injunction because the ramifications of a child abuse injunction are substantial in family court cases. A child abuse injunction supercedes family court orders. Once an injunction is granted, Wis. Stat. § 813.122 envisions a change of placement and custody under a divorce order or judgment and a rebuttable presumption is created in Wis. Stat. § 767.24(2)(b)2.c. that the degree of cooperation required for joint custody will be impossible. See Scott M.H. v. Kathleen M.H., 218 Wis.2d 605, 611, 581 N.W.2d 564 (Ct. App. 1998); M.Q. v. Z.Q., 152 Wis.2d 701, 707-08, 449 N.W.2d 75 (Ct. App. 1989). In turn, that change in custody can have serious ramifications on a relationship between a parent and child. This Court has stated:

"'Custody' may imply a temporary arrangement that theoretically could be changed as future circumstances might warrant. But a change in custody may result in a complete severance of child-parent ties as does termination. The day to day contact between the child and one having custody can create a relationship that may leave the birth parent almost an intruder. All of the day to day interactions between a parent and a child are bound to be diminished if not eliminated where the parent comes on scene as a court permitted

visitor."

Barstad v. Frazier, 118 Wis.2d 549, 555, 348 N.W.2d 479 (1984).

Therefore, trial courts hearing child abuse injunctions are not just protecting the children subject to child abuse injunctions, but they are also protecting the parents from false accusations of abuse. This protection against false accusations translates into protecting parents' fundamental right to have a relationship with their children. "Both this court and the United States Supreme Court have recognized that the relationship between a parent and a child is a constitutionally protected right." Barstad, 118 Wis.2d 549, at 556-557.

Children are injured all the time; bruises and scrapes are inevitable. There is even possible minor bruises or injury accidentally suffered at the hand of a parent exercising reasonable corporal punishment. Therefore, by the Court of Appeals not requiring bruises to be severe, an injunction will be obtained too easily by a parent falsely alleging child abuse to gain a custody advantage in family court, thereby eliminating the protection due the other parent against false allegations, and ultimately, infringing upon a parent's constitutional right to have a relationship with their children.

The second incorrect message the Court of Appeals sends

by its Decision is that the bruises to J.K.M. were severe. The question then becomes what makes bruises severe? Why were these bruises severe? Were the bruises severe because J.K.M. was eleven months old? If so, then at what age would these bruises no longer be considered severe? This Court is surely not going to establish a bright line rule that a child with any bruise under the age of one, two, or three years old falls within the Statute, while a child with any bruise, over five years old, does not.

Again, Dennis asserts a higher level of proof is required for a child abuse injunction because of the serious ramifications of an injunction. The Court of Appeals decision in M.Q. supports this assertion. The Court of Appeals' findings in M.Q. implies that expert testimony is necessary to establish emotional damage. 152 Wis.2d at 709. By citing to this case Dennis is not suggesting that expert testimony should be required before an injunction is issued, although, it is disturbing that the Court of Appeals, in this case, disregarded a medical expert's testimony regarding the seriousness of the bruises to J.K.M., and substituted its own judgment for that of the doctor. However, Dennis does suggest that this Court caution trial courts in making child abuse injunction determinations and require trial courts to go through a serious method of

inquiry making specific findings as to why bruises are found to be severe, based on evidence presented.

The third incorrect message the Court of Appeals sends by its Decision is that "conduct" alone can be the basis for issuing an injunction. The Court of Appeals concluded that "the legislature intended to include the conduct that causes the bruises of this type to the head of an eleven-month-old child" (A-Ap. 240) (Emphasis added). Conduct alone does not warrant issuing a child abuse injunction. Section 48.02(1), Wis. Stat., defines abuse as "physical injury inflicted on a child by other than accidental means." This Statute already addresses conduct by qualifying the injury as having resulted by "other than accidental means." If the legislature intended conduct alone as the basis for an injunction, it would have included a list of the prohibited conduct in the Statute. For instance, the Statute could read "abuse results when any person punches, slaps, or kicks a child." The Statute does not include such a list.

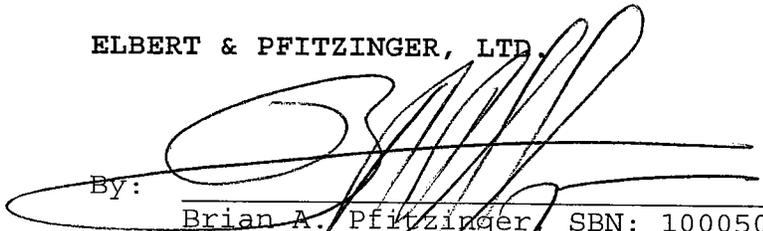
CONCLUSION

First, this Court must clarify for trial courts and courts of appeal statewide that Wis. Stat. § 48.02(14g) only includes "severe or frequent" bruising in the definition of physical injury. Then, the Supreme Court must clarify that it is apparent the legislature did not intend all bruises to be included in the definition of physical abuse. This Court must also clarify that the definition of physical injury is limited by the doctrine of *ejusdem generis*. This Court's clarification will harmonize the Statute, the implicit legislative intent, and the Court of Appeals' Decisions in Yahn and M.O. Finally, this Court has the opportunity to develop how "severe" bruising should or should not be defined. This development will prohibit the definition of "physical abuse" in Wis. Stat. 48.02(1) from being completely eroded until any injury is included in the definition. Most importantly, this development will protect parents from false allegations and uphold their constitutional right to have a relationship with their children.

Dated this 8th day of February, 2007.

Signed,

ELBERT & PFITZINGER, LTD.

By: 

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Attorneys for Respondent-Appellant-
Petitioner
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CERTIFICATION

I certify that this brief conforms to form and length requirements of Wis. Stat. § 809.19(8)(b) & (c) in that it is Desktop Publishing or Other Means (monospaced font, 10 characters per inch, double spaced, a 1.5 inch left margin, and all other margins 1 inch). The length of the brief is 19 pages.

Three copies of the Petitioner's brief were served by hand delivery on counsel for the Petitioners-Respondents, as well as the Guardian ad Litem.

Dated this 8th day of February, 2007.

Signed,

ELBERT & PFITZINGER, LTD.

By: 

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APPENDIX TABLE OF CONTENTS

Petition in Civil Court for Temporary
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STATE OF WISCONSIN, CIRCUIT COURT, DODGE COUNTY

DODGE COUNTY

For Official Use

IN THE CIRCUIT COURT

J.K.M.

Please print or type KRISTI L. MAYS 7/14/22 (MOTHER)
 AND J.M.

Petitioner's Address: 208 MacArthur Drive
 (Optional) Beaver Dam WI 53916

Petition in Civil Court for
 Temporary Restraining
 Order and/or Injunction
 (Child Abuse - 30710)

APR 4 2005

DODGE COUNTY, WIS
 LYNN M. HRON
 CLERK OF COURTS

Respondent: DENNIS E. MAYS
 Address: 109 HELLER ST
BEAVER DAM WI 53916

Case No. 05 CV 193

Respondent's	Date of Birth	Sex	Race	Height	Weight	Hair color	Eye color
	10-11-68	Male	White	6'1"	340	brown	blue

Under oath, I petition the court for a temporary restraining order and/or injunction against the respondent under §813.122, Wis. Stats, based upon the following:

- The petitioner is Petitioners are children a child. parent. stepparent. legal guardian.
- The child is J.K.M. and J.M. whose date of birth is 4-14-04 and 2-8-02
- The respondent is an adult and is is not a parent of the child.
- The respondent has engaged in, or based on prior conduct of the child and the respondent may engage in: (Mark any of the following boxes that apply.)
 - a. Physical injury inflicted on the child by other than accidental means.
 - b. Sexual intercourse or sexual contact contrary to §§940.225, 948.02, 948.025, 948.095, Wis. Stats.
 - c. Sexual exploitation of the child contrary to §948.05, Wis. Stats.
 - d. Permitting, allowing or encouraging the child to violate the prostitution laws contrary to §944.30, Wis. Stats.
 - e. Forcing the child to view sexual activity contrary to §948.055, Wis. Stats.
 - f. Exposing genitals or pubic area to the child contrary to §948.10, Wis. Stats.
 - g. Causing the child to expose genitals or pubic area contrary to §948.10, Wis. Stats.
 - g. Emotional damage to the child as defined in §48.02(1)(gm), Wis. Stats.
- Stated below or attached as part of this petition is a statement of facts indicating that the respondent has engaged in, or based on prior conduct of the child and the respondent may engage in, abuse of the child. (State when, where, what happened, and who did what to whom:) See Attached.

I REQUEST THAT THE COURT: (Mark any of the following boxes that apply.)

1. Immediately issue a temporary restraining order and set a time for a hearing on an injunction requiring the respondent to:
 - a. avoid the residence of the child and any premises temporarily occupied by him or her.
 - b. avoid contacting the child and causing any other person to have contact with him or her in any way unless the court agrees such contact is in the best interest of the child.
 - c. other: _____
2. Appoint a guardian ad litem for the child.
3. Set reasonable or necessary child support.
4. Grant an award in a reasonable amount for the costs of maintaining this action and attorney fees, if deemed appropriate, and such other relief as may be just and equitable.
5. Direct the sheriff to assist in executing or serving this temporary restraining order and injunction.

Subscribed and sworn to before me

on 4-4-2005

Kristi L Mays
 Signature of Petitioner

- Distribution:
- Original - Court
 - Petitioner
 - Respondent
 - Law Enforcement
 - Other

Patricia Kelly
 Notary Public, State of Wisconsin

Kristi L. Mays
 Name Printed or Typed

My commission expires 10-10-2009

April 4, 2005
 Date

05CV192

The respondent and myself are in the process of a divorce action. During the respondent's last visit with the minor children, our 11 month old son came back to my residence with bruises on his head consistent with fingerprints. Dodge County Human Services took both J.K.M. [redacted] and [redacted] into physical custody and an Order for Temporary Physical Custody was issued on March 30, 2005. Because the attorney for the Department of Health and Human Services does not believe that he has sufficient evidence to meet the burden of proof in Children's Court, Attorney Kianovsky stated to my attorney that he will not be filing a Petition for Children in Need of Protection or Services. Thus, the Order for Temporary Physical Custody expires today.

My husband has a long history of mental illness and an inability to cope with stressful situations. He has not been able to manage the children on his own for any great length of time. Added to this problem, along with the bruising left on our 11 month old son, is my husband's long history of psychological instability and problems. In June of 2000, the Lake Delton Police Department did an Emergency Detention and took Dennis to Boscobel Memorial Hospital, Psychiatric Unit. At this point in time, Dennis was threatening to take an overdose of pills. Dennis was in the care of Dr. Don Ferguson of Madison, Wisconsin from approximately 2003 to 2005.

In December of 2004, ~~he~~ Dennis called me at work and told me he had made his final goodbyes to his children and told me he wasn't coming home after work and I wouldn't see him again. This was another suicide threat.

On January 17, 2005, ~~he~~ Dennis called a Crisis Line which in turn notified the Beaver Dam Police Department that the caller was suicidal. Beaver Dam Police responded to our residence and two officers, Officer Heather Johnson and Officer Mattheal Biel, both talked to Dennis about why he called the Crisis Line. They filed a report indicating he was in a depressed state.

On February 8, 2005, Dennis called me at work to tell me he was going to the cemetery to spend the day.

Within the last several weeks, the defendant asked if I was familiar with the man from Montello who, upon being served with divorce papers from his wife, killed himself and his young son. Then Dennis told me that he could relate to this man and started crying.

I have discovered recently that Dennis has made calls to sex hotlines while the children were in his care.

Our three year old son, just yesterday, told me that "daddy said we're going to die." When I asked ~~the~~ ^{J.M.} ~~son~~ ^{J.M.} what he was talking about and he explained that daddy had told him that all four of us, mom, ~~[redacted]~~ ^{J.K.M.} ~~[redacted]~~ ^{J.M.} and daddy were all going to die.

My husband has been in an extreme agitated state since the filing of this divorce action. He has made numerous threats and inferences that he is either going to kill himself or kill himself and the children. Now he is openly talking to our three year old son about dying.

J.K.M.

I believe it is in my children's best interest that they be protected from their father given his current emotional state and given the fact that [REDACTED] our 11 month old son returned home on March 28, 2005 with bruises on his head consistent with fingerprints.

Now that the Order for Temporary Physical Custody has expired, my husband is demanding overnight placement with the children. I do not believe the children will be safe in his care. I am asking this Court to issue a Temporary Restraining Order on their behalf.

Kristi L. Mays

Kristi L. Mays

Subscribed and sworn to before me this 4th day of April, 2005.

Patricia C. Veling

Patricia C. Veling
Notary Public, Dodge County, WI
My Commission expires 6/10/2007

FILED
IN THE CIRCUIT COURT

APR 4 2005

DODGE COUNTY, WIS
LYNN M. HRON
CLERK OF COURTS



Children's Hospital of Wisconsin

PHONE 414-266-2626

LAST, FIRST J. K. M. MRN 203-685-4
DATE OF BIRTH 04/14/04 SEX M LOCATION VN 43037729
ADMIT DATE 03/28/05
PMD
KRSZIZANIEK, RANDY J

EMERGENCY DEPARTMENT TRAUMA CENTER HOME CARE INSTRUCTIONS FOR

PLEASE NOTE:

The examination and treatment today was given on an emergency basis only. Follow-up care with your own doctor will complete the treatment you were given here.

Please make special note of the boxes () below. Please follow these instructions. If you do not have a personal doctor for your child or if we are sending you to another doctor for care, the name of the doctor you should call is listed below.

- YOUR CHILD'S DIAGNOSIS IS SUSPECTED NON-ACCIDENTAL TRAUMA
MAKE AN APPOINTMENT TO SEE DR. CHILD PROTECTIVE SERVICES WHEN TO MORROW PHONE

Call as soon as possible to get an appointment time. Call that doctor sooner if you have any other problems or questions or if your child gets worse. If you can not reach your doctor, then call us at (414) 266-2626 or return to the Emergency Department.

- If you belong to an HMO - call your primary physician for authorization for follow-up visits at Children's Hospital Clinics.
Any x-rays taken will be read by a Radiologist. If that review shows new information we will call you or your doctor.
If cultures were done, the results will come back in 2 - 3 days. If they are positive, we will call you or your doctor.
Fill prescriptions and follow the directions on the medicine label. Be sure to give your child all the medicine unless your doctor tells you not to. Remember to tell your doctor which medicines your child is taking.

OTHER INSTRUCTIONS: RETURN HERE IF YOUR CHILD HAS ANY VOMITING OR OTHER WORSER

SIGNATURE

MO/RN

INSTRUCTIONS GIVEN

- HS PURPURA
ASTHMA
FEBRILE NEONATE
CAST CARE / DRESSING CHANGE
CHICKEN-POX
CONSTIPATION
CROUP
OTHER
RSV
VOMITING & DIARRHEA
EAR INFECTION
FEVER
FEBRILE SEIZURE
HEAD INJURY
INGESTION
LACERATIONS
SORE THROAT / STREP THROAT
SPRAIN / STRAIN
TAKING TEMPERATURE
MDI
BULB SYRINGE
CRUTCH WALKING
BURN CARE
RETURN DEMO

I understand that the treatment was given on an emergency basis only, and therefore, discharge may have occurred before all medical problems were apparent, diagnosed, and/or treated. I have read and understand the above. I received a copy of this form and applicable instruction sheets and will arrange for follow-up care as indicated above. I understand the teaching that was provided.

INSTRUCTED BY

DATE / TIME

SIGNATURE OF PERSON RESPONSIBLE / RELATIONSHIP

Original - MEDICAL RECORDS; Copies to: PARENT/GUARDIAN, EDTC

A-Ap. 105



VN 20/08 088 10N 87:91 50 70/70

02561E (09/03)

D.O.B. Petitioner: Kristi L. Mayo (Mother) J.M. J.M. Injunction (Child Abuse)
 Address: For [redacted] J.M.
 (Optional) 4-14-04 2-8-02
 -VS- Respondent: Dennis C. Mayo
 Address: 109 Hellos Street Beaver Dam WI 53916 Case No. 05 CV 192

Respondent's	Date of Birth	Sex	Race	Height	Weight	Hair color	Eye color
	<u>10-11-68</u>	<u>M</u>	<u>White</u>	<u>6'1"</u>	<u>340</u>	<u>Brown</u>	<u>Blue</u>

THE COURT FINDS:

1. The petitioner has filed a petition alleging child abuse.
2. The petitioner has served upon the respondent a copy of the petition and notice of the time for a hearing on the issuance of the injunction; or the respondent has served upon the petitioner notice of the time for a hearing on the issuance of the injunction. The respondent had an opportunity to be heard. This court has personal and subject matter jurisdiction. J.K.M. + J.M.
3. The child is [redacted], whose birth date is 4-14-04 + 2-8-02
4. Based on the hearing held on the petition, there are reasonable grounds to believe that the respondent has engaged in, or threatened to engage in abuse to the child.

IT IS ORDERED:

1. The respondent avoid the child's residence and/or any premises temporarily occupied by the child now and in the future.
2. The respondent avoid contacting or causing any person other than a party's attorney to contact the child unless petitioner consents in writing and the court agrees the contact is in the best interest of the child. *Contact means knowingly touching, meeting, communicating or being in visual or audio contact with the child.*
3. If requested, the sheriff shall serve and assist in executing this injunction; other: _____
4. Other: _____

IT IS FURTHER ORDERED the respondent is prohibited from possessing a firearm until the expiration of this injunction. Possession of a firearm is a Class E Felony punishable by a maximum of 2 years in prison or \$10,000 in fines, or both. A respondent may retain a firearm only if the respondent is a peace officer and only to the extent required by the peace officer's employer. The respondent shall immediately surrender any firearm(s) that he or she owns or has in his or her possession to:

- the sheriff of this county. the sheriff of the county in which the respondent resides: _____
 another person: _____

Name and Address _____

THIS INJUNCTION SHALL BE EFFECTIVE UNTIL 4/8/2009

Violation of this order shall result in immediate arrest and is punishable by imprisonment not to exceed 9 months or a fine not to exceed \$1,000, or both, and payment of filing and service fees.

This injunction is entitled to full faith and credit in every civil or criminal court of the United States or any other state, or Indian tribal courts (to the extent such tribal courts have personal jurisdiction over non tribal members).

- DISTRIBUTION:
1. Original - Court
 2. Petitioner
 3. Respondent
 4. Law Enforcement
 5. Department of Justice or Designee

The respondent was present in court and personally served with a copy of this order.

BY THE COURT:

Richard J. Callahan
 Signature of Circuit Judge
Richard J. Callahan
 Name Printed or Typed

A-AP. 106 4/8/05
 Date

Personally Handed To the Respondent
 CV-114, 07/00 Injunction (Child Abuse)

Domestic abuse/child abuse attachment

Case # 05CV192

Divorce/child visitation. The respondent may exercise such child visitation rights as are permitted herein or by the Family Court Commissioner or Family Court Judge, and on such conditions as they shall determine. If the child(ren) is old enough, this may include reasonable telephone access to the child(ren). Visitation shall be exercised away from the petitioner's residence. The respondent may call the petitioner solely for the purpose of arranging or canceling child visitation or for discussing any emergencies involving the child(ren). The parties may also have contact for the purpose of attending marriage counseling if both are interested. Finally, this injunction does not prohibit the respondent from coming to court for Family Court hearings or from participating in meetings to discuss the divorce at an attorney's office even if the petitioner is also present. Any visitation set up under this injunction may be subject to modification by order of the Family Court and exercise of such visitation will not be deemed a violation of this injunction.

Visitation schedule. Respondent may exercise visitation at the following times and under the following terms: SUPERVISED VISITATION AT TIMES

AGREED TO BY G.A.L.

Personal property pickup. The respondent may make arrangements to pick up his clothing, shaving kit and other personal effects, but not furniture, but only in the presence of a uniformed police officer. This pickup of property must be at a mutually agreeable time and the respondent must make the arrangements for the police to be there unless the petitioner assumes that responsibility. This order was made with petitioner's approval.

No relief under §767.23/§767.24. The Court has only exercised its inherent authority to do substantial justice between the parties in the context of §813.12/§813.122, including to clarify whether child visitation is a violation of the injunction. The Court is not granting any relief under any section of chapter 767 of the Wis. Stats., including §767.24 and §767.24.

No child custody/primary placement award is made herein.

STATE
OF
WISCONSIN

CIRCUIT COURT
CIVIL DIVISION

COUNTY
OF
DODGE

KRISTI MAYS (Mother) for

██████████ AND ██████████
J.K.M. J.M.

NOTICE OF APPEAL

Petitioners,

vs.

DENNIS MAYS,

Case No. 05-CV-192

Respondent.

TO: Dodge County Clerk of Court
Dodge County Justice Facility
210 W. Center Street
Juneau, WI 53039

Attorney Dawn P. Gergen
Gergen, Gergen & Pretto SC
105 Front Street, P.O. Box 453
Beaver Dam, WI 53916

Clerk of Court of Appeals
P.O. Box 1688
Madison, WI 53701-1688

Attorney Alana Busch-Ell, GAL
Buchholz Law Office LLC
999B W. Main Street, P.O. Box 310
Waupun, WI 53963

NOTICE IS HEREBY GIVEN THAT the respondent, Dennis Mays, appeals to the Court of Appeals, District IV, from the Child Abuse Injunction, in Case Number 05-CV-192, entered April 8, 2005, in the Circuit Court for Dodge County, Honorable Richard J. Callaway presiding, in which the Court, after hearing testimony, granted the petitioners' request to grant the injunction.

This is not an appeal within Sec. 752.31(2) Stats.

FILED
IN THE CIRCUIT COURT

This is not an appeal entitled to preference by statute.

APR 15 2005

Dated this 15th day of April, 2005.

DODGE COUNTY, WIS
LYNN M. HRON
CLERK OF COURTS

ELBERT & PFITZINGER, LTD.


Jacquelyn L. Wolter, State Bar No. 1052322 FOR:

Brian A. Pfitzinger, State Bar No. 1000509
210 E. Center Street, P.O. Box 203
Juneau, WI 53039

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1 THE BAILIFF: Please rise.

2 THE COURT: Please be seated. This is in the matter
3 of J.K.M. and J.M. Case No. 05 CV 192. The
4 appearances.

5 ATTORNEY GERGEN: Thank you, Your Honor. May it
6 please the Court, the appearances are as follows. The
7 petitioner, um, the petitioner-mother, Kristi Mays, appears in
8 person and by Attorney Dawn P. Gergen. The respondent, Dennis
9 Mays, I know is in the building. Hopefully he's coming. I'll
10 state his appearance, I guess, when he gets here. Also in the
11 courtroom is Attorney Zev Kianovsky, the Assistant Corporation
12 Counsel for Dodge County, as well as Brenda Ingram, a social
13 worker from Dodge County Human Services. We're here today on
14 a child abuse restraining order petition.

15 I have a Dr. Greenbaum from Children's Hospital of
16 Milwaukee that I need to page at this time.

17 THE COURT: All right. He's appearing by phone?

18 ATTORNEY GERGEN: Yes. And also appearing in the
19 courtroom, Your Honor, is Attorney Alana Busch-Ell who's the
20 Court-appointed guardian ad litem in this matter. And now
21 Mr. Mays is also present.

22 THE COURT: All right.

23 ATTORNEY BUSCH-ELL: Your Honor, the bailiff is
24 going to look for Mr. Mays' attorney. We're missing an
25 attorney, Your Honor. We're missing Mr. Mays' attorney.

1 THE COURT: So is he on his way?

2 MR. MAYS: He's in Courtroom 3, Your Honor.

3 THE COURT: We better wait.

4 ATTORNEY GERGEN: Dr. Greenbaum should be calling in
5 about four minutes, Your Honor. Attorney Bruce Elbert is
6 present now from Attorney Pfitzinger's office.

7 THE COURT: Okay. Do you want to try to call him?

8 ATTORNEY GERGEN: She's going to call back. She's
9 going to be paged. However, to expedite matters and not waste
10 the Court's time, I'd like to call my client and then, when
11 Dr. Greenbaum calls in, we can take her.

12 THE COURT: That's fine.

13 ATTORNEY GERGEN: I would call Kristi Mays to the
14 stand.

15 THE COURT: Do you want to raise your right hand?

16 ATTORNEY GERGEN: Up there, behind her.

17 THE COURT: Just a minute. Now raise your right
18 hand to be sworn.

19 THE CLERK: Do you solemnly swear to tell the truth,
20 the whole truth and nothing but the truth, so help you God?

21 MS. MAYS: I do.

22 DIRECT EXAMINATION

23 BY ATTORNEY GERGEN:

24 Q Please state your full name.

25 A Kristi Mays. Kristi Leigh Mays.

1 Q And are you the mother of ^{J.K.M.} [REDACTED] and ^{J.M.} [REDACTED]

2 A Yes, I am.

3 Q And can you tell me what occurred on Good Friday of this year

4 that resulted in your taking the children to the hospital?

5 A I received a call from Dennis saying that ^{J.K.M.} [REDACTED] had fallen and

6 hit his head on the entertainment center getting blocks out.

7 Q How old is ^{J.K.M.} [REDACTED]?

8 A He's only 11 months old.

9 Q And you have another child, ^{J.M.} [REDACTED] and how old is he?

10 A He's three.

11 Q And the children were at their father's house for a visit?

12 A Correct.

13 Q Are you and Mr. Mays separated?

14 A Yes, we are.

15 Q Is there a divorce currently pending?

16 A Yes, there is.

17 Q So what happened after he called you?

18 A Um, he called and said that ^{J.K.M.} [REDACTED] had hit his head and he said

19 he was doing fine.

20 (Telephone is ringing in courtroom.)

21 THE CLERK: Hello. I have the doctor's office

22 returning the page; okay? Here you go.

23 ATTORNEY GERGEN: Thank you. Hello?

24 DR. GREENBAUM: Hello.

25 ATTORNEY GERGEN: Can you state your name, please.

1 DR. GREENBAUM: Yes. My name is Virginia Jordan,
2 j-o-r-d-a-n, Greenbaum.

3 ATTORNEY GERGEN: Spell Greenbaum for the court
4 reporter, please.

5 DR. GREENBAUM: G-r-e-e-n-b-a-u-m, like Mary.

6 ATTORNEY GERGEN: Thank you.

7 THE COURT: We have to swear her.

8 ATTORNEY GERGEN: Okay, that's right. Can you raise
9 your right hand and be sworn in, please.

10 DR. GREENBAUM: Yes.

11 THE CLERK: Do you solemnly swear to tell the truth,
12 the whole truth and nothing but the truth, so help you God?

13 DR. GREENBAUM: I do.

14 DIRECT EXAMINATION

15 BY ATTORNEY GERGEN:

16 Q Okay. Dr. Greenbaum, will you state your name again?

17 A Virginia Jordan Greenbaum.

18 Q And what is your occupation, Dr. Greenbaum?

19 A I'm a forensic pathologist and the medical director at the
20 Child Protection Center at Children's Hospital of Wisconsin.

21 Q Dr. Greenbaum, you understand you're appearing this morning in
22 Dodge County Circuit Court in a child abuse restraining order
23 petition hearing before Judge Callaway in the Mays' case
24 regarding the Mays' children. Correct?

25 A Yes.

1 Q Now, did you have an opportunity to review the records of
2 J.K.M. [REDACTED] when he entered Children's Hospital for an exam in
3 the emergency room on March 28th, 2005?

4 A I did.

5 Q Did you prepare a report after doing an investigation?

6 A Yes, I did.

7 Q Now, Dr. Greenbaum, you can't see this but I have a copy of
8 your report marked as Exhibit No. 1. Your report at the top
9 is entitled, Consultation, Child Advocacy Center, date of
10 admission, 3-28-2005.

11 ATTORNEY ELBERT: Your Honor, I object to the use of
12 this report. I received a copy of this report about a half an
13 hour ago and I -- I scanned it when I was in another court in
14 another hearing. But I just got it this morning. I haven't
15 had a chance to review it. I haven't had a chance to have my
16 expert review it. So I object to it.

17 THE COURT: She's going to testify, I assume, as to
18 what's in the report without even using the report so the
19 objection is overruled.

20 ATTORNEY GERGEN: Thank you.

21 BY ATTORNEY GERGEN:

22 Q Dr. Greenbaum, can you tell me what investigation you did into
23 the alleged abuse of J.K.M. [REDACTED]?

24 A I was initially contacted by telephone on March 28th when he
25 came to the emergency department and consulted with the

1 physicians and suggested various tests that should be done.
2 I later reviewed the written reports of the emergency
3 department visit, reviewed the results of the tests, spoke to
4 the mother to get additional history as far as the event and
5 also background medical history and then reviewed some 18 or
6 so color photographs that had been obtained by the police on
7 or around the date that he was seen in our emergency
8 department.

9 Q And what findings did you make regarding the investigation you
10 did with regard to the injuries to ^{J.K.M.} [REDACTED]

11 A Um, there were -- there was a cluster of three small round
12 brown to red-brown bruises, kind of oriented in a horizontal
13 line, very evenly spaced, on the left portion of the scalp.
14 And, according to the emergency department notes, this was not
15 tender, no longer swollen and nothing to suggest a skull
16 fracture. There was also a report of a bruise on the right
17 side of the forehead, or temple area. I could hardly see this
18 in the photograph. The photographs, um, the lighting was a
19 little difficult so I think I saw it but it was difficult to
20 be sure but it was definitely documented in the emergency
21 department notes and that was on the right side of the
22 forehead. Um, the photographs showed, um, some red areas on
23 both knees, um, some red areas on the tops of the feet, dorsum
24 of the feet, and a single photograph of the chin showed -- it
25 was a little bit out of focus. It looked like a suggestion of

1 -- of a possible abrasion on the chin. I could not be sure
2 from the photographs.

3 Q So you found through your investigation that this child had
4 four distinct bruises on his head?

5 A Yes.

6 Q And, based upon your investigation and your experience, what
7 conclusions did you come to regarding whether or not there --
8 there is a likelihood of physical abuse that occurred to this
9 child?

10 A I think it is, um, suspicious for abuse for several reasons.
11 I asked the mother in detail about what the baby was able to
12 do at that time and she indicated that he was crawling and was
13 able to pull to stand but was not walking with assistance so I
14 would -- I would term that a pre-cruiser so he's not really
15 very mobile. A child who is not too mobile, who is a
16 pre-cruiser, typically has no bruises at all but they just --
17 they -- they can't get themselves into trouble, can't generate
18 that much force and can't move fast. Once in a while you see
19 one bruise or perhaps two but to see four, um, is somewhat
20 unusual and it's very unusual to see them clustered in one
21 area over the scalp with absolutely no explanation from the
22 caretaker. At this age, children require constant supervision
23 so usually if a child has that, a bump on the forehead or
24 something, the mom or the dad knows where it happens,
25 whatever, so there's that history. So having a cluster of

1 contusions -- bruises, same thing as contusions -- on the
2 forehead without any explanation in a child that's very young
3 and not mobile is a suspicious thing for an inflicted trauma
4 or physical abuse.

5 Q And -- and did you conclude that the appearance of these marks
6 might suggest finger or knuckle marks?

7 A Um, yes. By their round -- their small, round appearance and
8 their very even spacing, kind of in a horizontal line, that is
9 what immediately came to mind. It's not diagnostic of that
10 but it's suggestive of that.

11 Q Now, you're aware that Mr. Mays indicates that he believes or
12 he -- it's his position that the child sustained these -- this
13 injury by falling into an entertainment center. How do you --
14 how do you respond to that?

15 A Well, I asked the mother about the entertainment center and it
16 sounded like a pretty standard piece of furniture. I would
17 expect that the child is -- would have to either be crawling
18 into it or standing and then fall and bump against it, either,
19 which it's a very minor trauma, very low velocity. At most, I
20 would expect to see a single bruise, probably on the forehead,
21 depending on where he hit his head.

22 But at most a single bruise. Certainly you wouldn't expect to
23 see a cluster of three individual bruises; even, you know, if
24 he hits his head on the knob of a door or the corner, it's
25 still going to leave you one bruise.

1 Q So the bruises that you found on ^{J.K.M.} [REDACTED] are inconsistent
2 with that story of what happened?

3 A Yes. At least the three on the left are. I think it could
4 account for the one on the right but I don't think it would
5 account for the three on the left.

6 Q And you are the director of -- the medical director of the
7 Child Protection Center at the Children's Hospital of
8 Milwaukee?

9 A Children's Hospital of Wisconsin and Milwaukee, yes.

10 Q How long have you been so employed?

11 A Um, I was employed in February 2005 and became medical
12 director about a year or so later, in September 2000 -- I
13 mean, 2000. I'm sorry, I was employed in February 2000,
14 became medical director in September of 2001.

15 Q And you had training in detecting or looking for signs of
16 physical abuse in children?

17 A Yes.

18 Q Now, Dr. Hennes is a physician in the -- at your hospital as
19 well; correct?

20 A Correct.

21 Q And he also or he, um, he examined ^{J.K.M.} [REDACTED] correct?

22 A Yes.

23 Q His report that we have, which is rather short, only finds or
24 suggests two bruises on the head. Were you relying on
25 something other than his report to suggest there were more

1 than two bruises?

2 A Yes. The other doctor examining the child had found a total
3 of four and had made a small diagram of where these bruises
4 were and they corresponded to the bruises seen on photographs.

5 Q All right. That's all the questions I have of the doctor.

6 ATTORNEY GERGEN: Oh, I just want to ask her one
7 more question.

8 THE COURT: Okay.

9 BY ATTORNEY GERGEN:

10 Q The opinions that you stated to the Court, do you hold those
11 opinions to a reasonable degree of medical certainty?

12 A Yes, I do.

13 ATTORNEY GERGEN: Thank you. Now you're going to be
14 questioned by Attorney Bruce Elbert, okay?

15 DR. GREENBAUM: Okay.

16 CROSS EXAMINATION

17 BY ATTORNEY ELBERT:

18 Q Dr. Greenbaum, you did not examine the child yourself; did
19 you?

20 A No.

21 Q So you're just relying on records and photographs; is that
22 correct?

23 A Correct.

24 Q Now, Dr. Hennes examined the child personally on March 28th;
25 is that correct?

1 A Yes.

2 Q And he made -- he works in your department; correct?

3 A No. He's an emergency department physician.

4 Q And if a child is brought to him with an allegation of child
5 abuse, he, of course, would carefully examine the child with
6 that in mind; correct?

7 A You would need to ask him.

8 Q Okay. Is he a qualified doctor, do you know?

9 A Yes.

10 Q And he made a finding that the probability of abuse of this
11 child was low. Is that correct?

12 A That's what he wrote in his report.

13 Q And he performed a couple of CT scans on the child?

14 A A CT scan on the head and a skeletal survey on the body.

15 Q And those -- the results of those examinations were negative;
16 correct?

17 A They were within normal limits for that child, yes.

18 Q Now, if Dr. Hennes who personally examined the child was
19 unable to identify four areas of bruising, that would suggest
20 that the bruises were very, very minor. Correct?

21 A Not necessarily.

22 Q Well, you yourself indicated that the bruise on the -- some of
23 the bruises were very difficult to identify. Correct?

24 A The one on the right because they -- the child's skin is very
25 pale and in the photographs would kind of reflect the light so

1 it was difficult to see.

2 Q Don't you think a doctor personally examining the child would
3 be in a better position to identify an injury than you simply
4 examining photographs?

5 A I think it really depends on, um, the exam in person, the
6 lighting in the room, the circumstances under which the exam
7 was performed. If the child is very, um, moving around a lot
8 and very upset, it's very hard to get a good exam. I've had
9 times when I've, um, looked at a child and not seen a bruise
10 and then later come back and seen it more clearly. Um, it
11 really depends on the lighting.

12 Q Well, this child was examined in an emergency room; correct?

13 A Yes.

14 Q And emergency rooms have very good lighting; do they not?

15 A They have, um, it's adequate lighting, not as good as having a
16 flash camera or having surgery lighting; that's where we have
17 portable lights that can be used to get a good view of certain
18 things.

19 Q Do you know if Dr. Hennes used portable lighting?

20 A I would doubt he did.

21 Q Do you know?

22 A I don't.

23 Q So why would you doubt it?

24 A Because usually we don't in examining a child.

25 Q You don't know what he did, though; do you?

1 A No. I wasn't there.

2 Q Now, you can not make a finding of abuse to a reasonable
3 degree of medical certainty; can you?

4 A I said it was suspicious for abuse to a reasonable degree of
5 medical certainty.

6 Q But you can not make a finding of abuse to a reasonable degree
7 of medical certainty?

8 A You mean as a diag -- exactly what do you mean?

9 Q Exactly what I said.

10 A Well, maybe you could define what you mean.

11 Q What I mean is, you can not to a reasonable degree of medical
12 certainty say that this child was physically abused.

13 A I can not say that these injuries are diagnostic that this is
14 100 percent certain that this is abuse and could be nothing
15 else, no.

16 Q Now, the redness on the knees and the feet would be suggestive
17 of crawling on a carpet; correct?

18 A It could be. It depends on -- on the carpeting and the
19 child's sensitivity of the skin and, you know, how he crawls.
20 I just didn't have enough information to be able to say
21 anything on that.

22 Q Now, you're aware that the father of this child reported that
23 the child injured its head while in his placement; correct?

24 A Yes.

25 Q And the mother did not report any suspicions of abuse until

1 three days after the child was returned to her placement;
2 correct?
3 A That's my understanding.
4 Q And you don't know her or-- Strike that. It could, in fact,
5 be possible that the mother caused these bruises herself and
6 reported them later claiming that the husband caused them to
7 prevent him from having any placement with the child; isn't
8 that correct?
9 A I cannot tell by looking at the photos who caused the
10 injuries.
11 ATTORNEY ELBERT: That's all the questions I have.
12 THE COURT: Okay. Guardian ad litem.
13 ATTORNEY GERGEN: Doctor--
14 THE COURT: Just a minute, just a minute.
15 ATTORNEY GERGEN: Oh, yes. Sorry.
16 THE COURT: The guardian ad litem.
17 ATTORNEY GERGEN: I forgot about her. I'm sorry.
18 THE COURT: By the way, your expert's on the phone
19 now so--
20 ATTORNEY ELBERT: Right.
21 THE CLERK: There's another doctor on the phone. I
22 just got another message.
23 THE COURT: What's that?
24 THE CLERK: Doctor Hens or Henne.
25 THE COURT: Well, they'll have to wait.

1 CROSS EXAMINATION ;

2 BY ATTORNEY BUSCH-ELL:

3 Q Could you tell from the pictures--

4 THE COURT: Identify yourself.

5 BY ATTORNEY BUSCH-ELL:

6 Q I'm sorry. This is Alana Busch-Ell. I'm the guardian ad
7 litem for the child.

8 A Hi.

9 Q Hi. Could you tell from the pictures based on your experience
10 how old that bruising was?

11 A No. It's very hard to, um, tell the age of bruises by looking
12 at them. There's a number of clinical studies looking at how
13 well people can determine the age of bruises and -- and it's
14 been found that we are just not good at it. The color of the
15 bruises can be very, um, very unreliable between people and
16 even on the same child the bruises can look different, um, and
17 still be the same age so I would not be able to give you an
18 estimate with any degree of certainty.

19 Q Could you tell if, in fact, the four bruises all occurred at
20 the same time?

21 A I couldn't even say that. I mean, let's say those had
22 occurred 15 minutes apart. That wouldn't be -- I wouldn't be
23 able to determine that.

24 Q Could you tell if even the three bruises that were in the
25 cluster all occurred at the same time?

1 A No.

2 Q Have you reviewed Dr. Hennes's report?

3 A Yes.

4 Q Okay. And, in fact, there was a preliminary report and then a
5 longer, more thorough report?

6 A Um, there was a written cover sheet and then a dictated note
7 and I'm not sure exactly when that was dictated, whether that
8 was that night or the next morning.

9 Q Do either of those reports mention the bruises on the feet and
10 the knees and the chin?

11 A No.

12 Q They-- In fact, at one point, don't they indicate that the
13 rest of the skin is clear?

14 A Yes.

15 Q And you indicated from the photographs that there were clearly
16 red marks on the feet and the knees?

17 A There's some areas of redness. The photographs are -- are --
18 um, it's difficult to determine detail, um, what exactly they
19 are. They would be consistent with very superficial or minor
20 abrasions. It's -- it's really hard to see. I can say that
21 the ones on the feet are pretty clearly reddened areas. The
22 knees and ankle, it's harder to tell by the photos. It's
23 basically two red areas. I can't say for sure what they are.

24 Q And I think that you said that this is a fairly pale child?

25 A Yes.

1 Q Were there -- from the photographs, were there any other
2 discolorations that you noticed?

3 A Not that I could see for sure. Some of the photographs were
4 just a little bit out of focus. It was hard to see. There
5 was actually one little mark on the left side of the forehead,
6 kind of a scratch, which I thought could easily be a
7 fingernail scratch. Kids do that a lot. But I think that was
8 the only one we had previously discussed.

9 Q And, in fact, the knees and the feet, did they look like
10 scrapes or did they just look like redness?

11 A It looked like rug -- well, I really can't say much about the
12 knees. The feet it looked like little roughened areas of
13 irritation.

14 Q Okay.

15 A So it would be consistent with friction against the carpet.
16 But, you know, without being able to touch it and really get a
17 very good look at it, it's hard to say more than that.

18 Q Thank you, Doctor.

19 A Sure.

20 THE COURT: Redirect?

21 ATTORNEY GERGEN: Thank you.

22 REDIRECT EXAMINATION

23 BY ATTORNEY GERGEN:

24 Q Dr. Greenbaum, in your report it says you actually reviewed
25 the report of Dr. Hennes who saw only the two bruises but also

1 the report of Dr. Nilay Shay, correct, and that's the report
2 with the diagram of the head and indicating where the bruises
3 are?

4 A Yes.

5 Q And we don't have a copy here of that report but, to your
6 knowledge, when was that examination done?

7 A That was done before Dr. Hennes's exam, in all likelihood.
8 That doctor goes in first, examines the child, gets a history,
9 um, kind of a thorough work-up and then will write up a note
10 and then at that point Dr. Hennes, his attending physician,
11 will go in and do his exam.

12 Q So, in fact, you do have a doctor's report that you relied on
13 from the night ^{J.K.M.} [REDACTED] was examined in the emergency room at
14 Children's Hospital which indicates that there are four
15 bruises on his head; correct?

16 A Yes.

17 Q And do you have -- do you have any explanation for why
18 Dr. Greenbaum only found two when the--

19 THE COURT: You're talking to Dr. Greenbaum.

20 DR. GREENBAUM: You mean, Dr. Hennes?

21 ATTORNEY GERGEN: I apologize.

22 DR. GREENBAUM: That's all right.

23 BY ATTORNEY GERGEN:

24 Q Do you have any explanation for why Dr. Hennes only found two
25 bruises when the doctor who examined the child before him

1 found four?

2 A I would imagine that it was related to issues of lighting and
3 probably the child's activity, moving around and making it
4 difficult -- a difficult exam. That's what I would suggest.

5 Q Might it also be that Dr. Hennes spent less time examining
6 this child than Dr. Shay?

7 A Yes.

8 Q The pictures that you relied on were provided to you by the
9 child's mother; correct?

10 A Yes.

11 Q And they were the 16 to 18 pictures that were taken by the
12 Beaver Dam Police Department; correct?

13 A That's my understanding.

14 Q Okay. You still have those pictures in your file?

15 A I do.

16 ATTORNEY GERGEN: Those are all the questions I
17 have.

18 THE COURT: Recross?

19 ATTORNEY ELBERT: Nothing, Your Honor.

20 ATTORNEY BUSCH-ELL: No, Your Honor.

21 THE COURT: All right.

22 ATTORNEY ELBERT: I would ask to take Dr. Hennes out
23 of order.

24 THE COURT: Let's finish with her. She's on the
25 phone. Any recross for her?

1 ATTORNEY ELBERT: No.

2 THE COURT: Okay, fine. Thank you, Doctor.

3 DR. GREENBAUM: Very good, bye-bye.

4 ATTORNEY GERGEN: Your Honor, I would move the

5 report into evidence. She just testified as to what's in it.

6 ATTORNEY ELBERT: I renew my objection.

7 THE COURT: How do we shut this off to get rid of

8 the doctor?

9 ATTORNEY GERGEN: Oh.

10 THE COURT: Thank you.

11 ATTORNEY GERGEN: I would move her report into

12 evidence, Your Honor.

13 ATTORNEY ELBERT: I renew my objection.

14 THE COURT: Let's wait.

15 ATTORNEY ELBERT: Do we have Dr. Hennes on the line?

16 THE COURT: I don't know.

17 (Telephone call into the courtroom.)

18 ATTORNEY ELBERT: Is this Dr. Hennes?

19 THE CLERK: Here's Dr. Hennes, Judge.

20 DR. HENNES: Hello?

21 ATTORNEY ELBERT: Hello, Dr. Hennes?

22 DR. HENNES: Yes.

23 ATTORNEY ELBERT: This is Attorney Bruce Elbert

24 talking to you. You're on the speaker phone in court. And I

25 ask you to raise your right hand to be sworn in.

1 DR. HENNES: Okay.

2 THE CLERK: Do you solemnly swear to tell the truth,
3 the whole truth and nothing but the truth, so help you God?

4 DR. HENNES: I do.

5 DIRECT EXAMINATION

6 BY ATTORNEY ELBERT:

7 Q Could you state your name for the record, please.

8 A Halim, h-a-l-i-m. The last name is Hennes, H-e-n-n-e-s.

9 Q And how are you employed, sir?

10 A I'm sorry, what?

11 Q How are you employed?

12 A I am a professor of pediatrics in emergency medicine at the
13 Medical College of Wisconsin and attending physician at the
14 emergency department in the trauma center.

15 Q How long have you been so employed?

16 A Twenty-five years.

17 ATTORNEY ELBERT: Do you stipulate to his
18 credentials, Counsel?

19 ATTORNEY GERGEN: How long has he -- did he --
20 actually has he -- he said professor--

21 THE COURT: If you want to, you can cross examine
22 afterwards.

23 ATTORNEY GERGEN: Okay.

24 THE COURT: I assumed he's licensed in Wisconsin.
25 Ask him that.

1 BY ATTORNEY ELBERT:

2 Q Are you licensed in Wisconsin?

3 A Yes.

4 Q Are you board certified?

5 A Yes.

6 Q Now, did you examine a child by the name of ^{J.K.M.} [REDACTED] on
7 March 28th, 2005?

8 A Yes.

9 Q And where did that examination take place?

10 A At Children's Hospital emergency department.

11 Q And who brought the child to the hospital?

12 A I believe it was his mom.

13 Q Did you talk to the mother at all?

14 A I have not. It's kind of a routine in the emergency
15 department that when a child with suspected maltreatment is
16 seen in the emergency department we do not want to put the
17 parents through the burden of having to repeat the story
18 several times so the social worker will interview the mother
19 of that patient, or the care provider, and obtain the whole
20 history and then she comes out and talks to us and give us the
21 history.

22 Q All right. And so when you examined this child, you were
23 specifically looking for evidence of child maltreatment; is
24 that correct?

25 A That's correct.

1 Q And, specifically, were you looking for head trauma?

2 A Yes.

3 Q And how long did you examine the child?

4 A I cannot really recall in detail. I know the resident went in
5 first, examined the child, and then he came out, told me what
6 he found. I went back with the resident, examined the child,
7 looked for bruises, looked for any -- any bony tenderness on
8 the exam since this was a head trauma.

9 Q Was the lighting in the emergency room adequate?

10 A Um, I would say average.

11 Q And did you discover any bruising on the child?

12 A I discovered two, um, yellowish -- I believe they were
13 yellowish-brown bruises on the side of his head. Both of them
14 were kind of circular and about maybe a little over an inch
15 apart.

16 Q Was the child cooperative during the examination or was the
17 child squirming around?

18 A The child was very appropriate for age.

19 Q Could you determine the age of the bruising?

20 A I -- they would have been more than a week old.

21 Q More than a week old?

22 A By the color of it.

23 Q Do you have any opinions as to what may have caused the
24 bruises?

25 A Um, I cannot say with any certainty. That history that I

1 heard is that the child on Friday which was about two or three
2 days prior to him coming to our emergency department fell and
3 hit his head on a table.

4 Q And, in your opinion, would the bruising have been caused
5 prior to the -- the -- prior to Friday, the 28th?

6 A It's possible, yeah, just based on the color of the bruise.

7 Q Were these serious injuries?

8 A Um, not that I can detect. There was no bony tenderness,
9 there was no swelling and the child advocate ordered a
10 complete neurological exam. I did not see any bruises or any
11 bony tenderness anywhere else, particularly over the chest,
12 the extremities looked normal and we, because of the history,
13 we proceeded with obtaining a head CT scan that was read by
14 the radiologist and it reported as normal and we also went and
15 did what we call a skeletal survey where we look at all the
16 bones to see if there are any evidence of acute or, um,
17 chronic fractures and we did not find any.

18 Q Now, did you prepare a or dictate a report regarding this,
19 your evaluation?

20 A Yes.

21 Q And is that a two-page report entitled, "Emergency Department
22 Note"?

23 A It should be, yes.

24 ATTORNEY ELBERT: Your Honor, I've had that marked
25 Exhibit 3 and I would move that into evidence.

1 ATTORNEY GERGEN: Well, Your Honor, Attorney Elbert
2 has never provided me with Dr. Hennes's report. I, at least,
3 provided him with Dr. Greenbaum's report.

4 ATTORNEY ELBERT: It was in the Chips proceeding.

5 THE COURT: Well, the Court -- there's three
6 exhibits. What's No. 2?

7 ATTORNEY GERGEN: Photographs, Your Honor.

8 THE COURT: All right. And where are they? They're
9 not here.

10 ATTORNEY GERGEN: They're going to be introduced.
11 They're here. They're going to be intro--

12 THE COURT: I thought the question of the doctor was
13 she still had the photographs. Do we have them here?

14 ATTORNEY GERGEN: We have the originals here. We
15 have the copy -- I made copies for Dr.--

16 THE COURT: All right.

17 ATTORNEY GERGEN: --Greenbaum.

18 THE COURT: I'll receive exhibits 1, 2 and 3 and
19 we'll decide--

20 ATTORNEY GERGEN: Thank you.

21 BY ATTORNEY ELBERT:

22 Q Doctor, do you have an opinion to a reasonable degree of
23 medical certainty as to whether or not--

24 THE COURT: Isn't the real question reasonable
25 medical probability? I think.

1 BY ATTORNEY ELBERT:

2 Q Doctor, do you have an opinion to a reasonable degree of
3 medical probability as to whether or not the bruises you saw
4 on this child constituted child abuse?

5 A Um, very minimal. Um, I would say it's less than -- it's
6 definitely less than 50 percent just based on seeing those two
7 bruises.

8 Q And did you make a finding in your report that you ruled out
9 abuse?

10 A I did not rule it out. I said the likelihood is small.

11 ATTORNEY ELBERT: I have nothing further.

12 THE COURT: Guardian ad litem.

13 ATTORNEY BUSCH-ELL: None right now, Your Honor.

14 THE COURT: All right.

15 CROSS EXAMINATION

16 BY ATTORNEY GERGEN:

17 Q Good morning, Dr. Hennes. This is Attorney Dawn Gergen.

18 A Good morning.

19 Q I'm just -- going to just ask you a couple questions.

20 A Sure. Please do.

21 Q Okay. You said on answering questions from Attorney Elbert
22 that the bruises were likely caused prior to March 28th. In
23 fact, March 28th was the date that you examined J.K.M.

24 Correct?

25 A Correct.

1 Q And so the bruises you believe occurred prior to that date but
2 you're unable to tell us exactly when those bruises occurred;
3 correct?

4 A Correct. Well, can I backtrack for a second? The bruises go
5 through different stages of healing and the color would
6 change.

7 Q Okay. Were you able to view the photographs taken by the
8 police department of ^{J.K.M.} [REDACTED] that Dr. Greenbaum looked at?
9 Were you able to look at those?

10 A No. I have not seen any photographs.

11 Q Have you had an opportunity to review the report of
12 Dr. Greenbaum?

13 A No. That was done after I saw the child.

14 Q I believe she did send you or fax you a copy of that report
15 but you have not reviewed that. Is that correct?

16 A I have not received any, no. When did she fax that?

17 Q I believe it was yesterday.

18 A Well, I'm sorry. I was -- I was out with--

19 Q That's okay. I understand.

20 A I was out of the office all day yesterday.

21 Q I understand. Now, you testified that you're a professor of
22 pediatric medicine at the Medical College of Wisconsin?

23 A That's correct.

24 Q And you're also an attending physician. Which is your
25 full-time job or your primary job?

1 A My primary job is clinical work in the emergency department.

2 Q Okay. Have you had specific training with regard to

3 identifying physical abuse in children?

4 A Um, I am also board certified in pediatric emergency medicine

5 as part of our training. The child abuse is an essential part

6 of our work and our training.

7 Q Doctor, the doctor who did the work-up before you examined

8 J.K.M. I believe that was Dr. Shay?

9 A Uh-huh.

10 Q Is that correct?

11 A It may be. I did not see any other records from anyone else.

12 Q Okay. But there -- there was a physician in the--

13 A Oh, Dr. Shay. That's the resident. I'm sorry. Yes, I did.

14 Q Okay. And do you know how much time Dr. Shay spent examining

15 J.K.M.

16 A Um, I believe he was in the room for maybe thirty minutes.

17 Q Thirty minutes. Was that a longer period of time than you

18 spent examining J.K.M.

19 A Yes. Usually the residents spend more time.

20 Q And that resident noticed four bruises on the child's head.

21 Correct?

22 A That's what I saw on his drawing on the emergency department

23 record and we briefly discussed it and, when I went in, I

24 could not really identify anything other than two bruises I

25 noted on the side of the head.

1 ATTORNEY GERGEN: Very good. All right. Thank you
2 for your testimony, Doctor.

3 THE COURT: Thank you. Guardian ad litem.

4 ATTORNEY BUSCH-ELL: No, Your Honor.

5 THE COURT: All right.

6 DR. HENNES: Am I done?

7 THE COURT: Not yet.

8 ATTORNEY ELBERT: Yes.

9 THE COURT: Yes. Thank you, Doctor, you're done.

10 DR. HENNES: Thank you very much.

11 ATTORNEY GERGEN: I'm to resume the testimony of my
12 client at this point?

13 THE COURT: Sure. We're back on the record with
14 Miss Mays.

15 DIRECT EXAMINATION

16 BY ATTORNEY GERGEN:

17 Q Where were J.K.M. and J.M. your children, on March 25th?

18 A They were with their father.

19 Q And this was the day that he called you to say that your 10-
20 month, 11-month-old son, had fallen and injured his head?

21 A That's correct.

22 Q And when the children were returned to you, did you notice any
23 bruising on J.K.M.'s head?

24 A Yes, I did. There was -- there was, um, cuts on his forehead
25 and then, on the side of his head, there was one long -- it

1 was kind of a weird color, like an orangish, reddish color,
2 long mark that was swollen, plus he had a red mark on his
3 chin, on his knees and then on the tops of his feet.
4 Q Did you notice the three circular marks on his head?
5 A At that time I didn't because it was so swollen.
6 Q And did you eventually take ^{J.K.M.} [REDACTED] to the emergency room?
7 A Yes. Well, I took him on Monday night, yes.
8 Q Why did you -- they-- Strike that. The children came back
9 from dad on Friday, Good Friday, March 25th?
10 A Correct.
11 Q Why did you wait till March 28th to take the children to the
12 emergency room?
13 A At the time ^{J.K.M.} [REDACTED] was acting fine, his pupils weren't dilated,
14 he wasn't, um, nauseous at the time of the injury. I had
15 asked his father that when he called. He seemed to be acting
16 okay. When I got home from work on Monday night, um, I
17 noticed the swelling had gone down and that is when you could
18 see the three distinct marks on the left side of his head.
19 Q So then what did you do?
20 A Um, I took him that night then to the police department just
21 to make sure that that's truly what I was seeing. Um, and
22 then they recommended a -- they did a report and then
23 recommended that I go to Children's Hospital in Milwaukee.
24 Q From the time that ^{J.K.M.} [REDACTED] came back from his father's house to
25 the time you took him to the police department, did he have

1 any other falls or incidents involving his head?

2 A No, he did not.

3 Q Was he in your care throughout that time?

4 A Um, from 5:30 Saturday night till Monday morning at 7:30.

5 Q And so what did the police department do when you got there?

6 Did they take photographs?

7 A They took photographs, yes.

8 ATTORNEY GERGEN: Your Honor, I -- there's a yellow
9 manila envelope there with a-- I had it marked.

10 THE CLERK: I handed it to you.

11 THE COURT: All I got so far, all I have is
12 Exhibit 2 here.

13 ATTORNEY GERGEN: Maybe I did. Sorry, I have it.
14 Sorry. Yeah, it's been marked.

15 BY ATTORNEY GERGEN:

16 Q I'm going to show you an exhibit marked No. 2. The envelope
17 is marked. However, in the envelope are photographs; correct?

18 A Correct.

19 Q Are these the photographs of your son, ^{J.K.M.} [REDACTED] that were
20 taken by the Beaver Dam Police Department?

21 A Yes, they are.

22 Q Are these the photographs then that were copied and taken to
23 Dr. Greenbaum?

24 A Yes, they are.

25 Q And we obtained these from the file of Dodge County Human

1 Services and the Corporation Counsel; correct?

2 A Correct.

3 Q Do those photographs show the various, um, small, round,
4 circular bruises on ^{J.K.M.'s} [REDACTED] head?

5 A Yes, they do.

6 Q After you had the photographs taken, what did you do next?

7 A Um, the social services was called in and took the boys, both
8 ^{J.M.} [REDACTED] and ^{J.K.M.} [REDACTED] into protective custody and gave me temporary
9 placement.

10 Q And then did you go to Children's Hospital?

11 A Yes, that -- that same night.

12 Q And who examined the child at Children's Hospital?

13 A The Dr. Nilay Shay was the first doctor that came in and did
14 the exam.

15 Q And how long did Dr. Shay spend with ^{J.K.M.} [REDACTED]?

16 A Um, it was a considerable amount of time. At least 20
17 minutes.

18 Q At least 20 minutes?

19 A Yeah.

20 Q So when Dr. Hennes says probably 30 minutes, that probably is
21 correct?

22 A Correct.

23 Q And did you believe that Dr. Shay or Shay did a thorough exam
24 of ^{J.K.M.} [REDACTED]?

25 A Yes, I did. He actually took down the -- or they have an OR

1 light and turned that on and he brought that down and looked
2 at ^{J.K.M.'s} [REDACTED] head which Dr. Hennes did not.

3 Q And Dr. Shay found four bruises?

4 A Yes, he did.

5 Q And then after Dr. Shay was finished examining ^{J.K.M.} [REDACTED] what
6 happened next?

7 A Um, he went to do a head CT and also a full body scan to see
8 if there were any fractures.

9 Q Then what happened?

10 A We came back to the room and waited for the, I guess, the
11 final report.

12 Q When did Dr. Hennes exam the child?

13 A I believe he did come in before we went to the CAT scan.

14 Q Okay. And how long in your recollection did Dr. Hennes spend
15 examining ^{J.K.M.} [REDACTED]?

16 A Um, it was minimal. It was maybe one to five minutes, at the
17 most.

18 Q So considerably less time than Dr. Shay did?

19 A Correct.

20 Q Did Dr. Hennes pull down that light that Dr. Shay did to
21 examine the child's head?

22 A No, he did not.

23 Q After you received the report of Dr. Hennes, did you take the
24 child -- how did the child come to see Dr. Greenbaum?

25 A Um, Dr. Greenbaum actually didn't exam him. She got the

1 reports from Dr. Shay and then I brought the pictures to her.

2 Q And when was this?

3 A Um, it would have been Wednesday evening I dropped the
4 pictures off at the hospital.

5 Q Now, in your petition that you filed, you believe that ^{J.K.M.} [REDACTED]
6 -- how do you believe these injuries occurred to ^{J.K.M.} [REDACTED]?

7 A Well, the -- the--

8 ATTORNEY ELBERT: Objection, calls for speculation.

9 ATTORNEY GERGEN: Well--

10 THE COURT: She's the mother. I guess she can.

11 It's her opinion only so that's all right.

12 BY ATTORNEY GERGEN:

13 Q Okay. In your opinion-- Let me rephrase the question. In
14 your opinion, based upon your conversations with all these
15 physicians, do you believe that these bruises that resulted on
16 your son's head were the result of him falling into an
17 entertainment center?

18 A No, I don't.

19 Q Do you have an opinion as to how these bruises were caused?

20 A I believe they were caused by his father.

21 Q Now--

22 ATTORNEY ELBERT: Objection, Your Honor,
23 speculation; move to strike.

24 THE COURT: Overruled.

25 BY ATTORNEY GERGEN:

1 Q Tell me about your husband, Mr. Mays. Has he had a very
2 lengthy track record of suicide threats and emotional
3 instability?

4 A Yes, he does.

5 Q Okay. We've listed it in the petition that was filed but
6 let's go through that starting with June of 2000. What
7 happened in June of 2000?

8 A Um, Dennis was very depressed and threatened to take an
9 overdose of pills, whatever. I don't recall what exactly.

10 ATTORNEY ELBERT: Your Honor, I'm going to object at
11 this point. I don't believe my client's suicide attempts are
12 relevant to whether or not this child was the subject of
13 abuse.

14 ATTORNEY GERGEN: Well, Your Honor, it's not just
15 the -- the burden in the statute says whether or not it's
16 reasonable to believe the child was the victim of physical
17 abuse or could be the victim of physical abuse.

18 THE COURT: The problem you have with that is if he
19 in the past threatened suicide. Um, except for maybe some
20 mental strain with an 11-month-old child, I -- I don't know
21 where it's relevant here.

22 ATTORNEY GERGEN: Well, the testimony will show
23 that, if I could continue, that he's had a long history of
24 mental illness, suicide threats and now the three-year-old
25 child just the other day told his mother that daddy said we

1 were all going to die and, in addition to the suicide threats,
2 he's also made reference to killing himself and his children
3 and that's what I would like this witness to testify to. And
4 these are recent, Your Honor. I started with--

5 THE COURT: You mean that he disclosed to his wife
6 that -- that he was going to kill himself and the children?

7 ATTORNEY GERGEN: Yes.

8 THE COURT: She can testify to that. Go ahead.

9 ATTORNEY GERGEN: Thank you.

10 BY ATTORNEY GERGEN:

11 Q Did your husband make reference to you recently that he could
12 relate to the man from Montello? Can you tell the Court about
13 that incident?

14 A He called me on the way home from work at ten o'clock at night
15 and asked me--

16 Q Approximately when?

17 A This would have been January 3rd.

18 Q Of this year?

19 A Of this year.

20 Q And what did he say?

21 A He asked me if I read the article in the newspaper about what
22 happened in Montello and I said I was not aware of it, what
23 happened? And he said that there was a man who was served
24 divorce papers by his wife, took himself and his 17-month-old
25 son and killed him and himself. He became very quiet--

1 Q Was he -- who's "he" now?

2 A Dennis. He became very quiet, started crying and said I can
3 relate to that.

4 Q Relating to the man who killed himself and his son?

5 A That's correct.

6 Q Has your older -- older son, the three-year-old -- what's his
7 name? J.M. [REDACTED]

8 A J.M. [REDACTED]

9 Q Does -- has J.M. [REDACTED] made any comments to you recently about his
10 father saying you're all going to die?

11 A Yes, he has.

12 Q What -- what occurred and when.

13 A It was this past Sunday. J.M. [REDACTED] said, mommy, can we talk and I
14 said yeah. Sometimes he will say something; sometimes he
15 doesn't. So I sat down next to him on the step and he said
16 we're going to die and I said, J.M. [REDACTED] who said that to you and
17 who told you that and he didn't say anything. And I asked him
18 again, J.M. [REDACTED] who told you that and he said daddy. And I said,
19 well, what else did daddy say and he said words and I told him
20 that, um, it was okay to say what daddy said and then he said
21 mommy's a bitch and I asked him if it was just mommy that was
22 going to die. He said, no, mommy, J.M. [REDACTED], J.K.M. [REDACTED] and daddy.

23 Q Had he ever talked about dying before?

24 A No, he did not.

25 Q Does he know what dying is?

1 A No, he does not.

2 Q Does your husband recently have a history of explosive
3 behavior?

4 A Yes, he does.

5 Q Can you tell the Court about that recently, what's happened
6 recently?

7 A Recently. Um, January 17th, um, I was picking the boys up
8 after work and he became angry that we were leaving. We had
9 been discussing ^{J.M.'s} birthday party and so he went and stood
10 behind our van and would not let the boys and I leave.

11 Q Was he agitated at that time?

12 A Very agitated.

13 Q Was he yelling?

14 A Yes, he was.

15 Q Does your husband -- has he during the course of your
16 marriage, during the course of the children's lives, has he
17 been able or has he watched the children for a length of time
18 on his own without having a problem or calling you?

19 A No, he hasn't.

20 Q In fact, when you work nights and he had to take care of the
21 children, what would happen?

22 ATTORNEY ELBERT: Objection, Your Honor. How's this
23 relevant to the issue of child abuse?

24 THE COURT: Overruled. I'll find out.

25 ATTORNEY GERGEN: Thank you.

1 BY ATTORNEY GERGEN:

2 Q What would happen?

3 A He would call my work and often demand that I would come home
4 because one of the boys weren't sleeping and he needed to get
5 up for work. When we were living in the Dells, he was working
6 day shift and so he would demand that I would come home
7 because he needed to get some sleep because he had to get to
8 work in the morning.

9 Q Do you have reason to believe that your husband has exposed
10 the children to sexual material?

11 A Yes, I do.

12 Q And why?

13 A I found out that on December 3rd, while the boys were in
14 Dennis's care, he made a sex phone call, um, based on the
15 credit card statement.

16 Q Well, okay. And so what does that have to do with exposing
17 the boys to sexual behavior materials?

18 A Um, he was taking care of the boys at the time and ^{J.M.} has
19 shown when he's with his dad he's more aware at night of his
20 privates. Um, the weekend of Easter Saturday after I picked
21 him up, he did a striptease in the living room.

22 Q Who's "he"? Who's "he"?

23 A I'm sorry. ^{J.M.} did a striptease in the living room while
24 watching himself in the mirror of the curio cabinet at my
25 parent's house.

1 Q Was this unusual behavior?

2 A Yes, it is.

3 Q Had it ever happened before?

4 A No, it hasn't. There was another time, like a week prior,
5 that he spilled something on his pants at supper time and took
6 off his pants. Well, then he proceeded to, um, take off his
7 diaper, pushed his bottom way out and said, look at me, mommy.

8 Q Has Dennis told you that he thought of killing himself while
9 he was caring for the children?

10 A Yes, he has.

11 Q When was this?

12 A Um, there was an incident in November of 2004 where he said he
13 was downstairs doing laundry and thought about hanging himself
14 and he was caring for the boys at the time.

15 Q But he told you this?

16 A Yes, he did, after the fact.

17 Q Has he told you that he has tried to get himself ED'd or
18 emergency -- emergency detained recently?

19 A Um, since we -- since I left, several times, yes.

20 Q Well, several times within the last--

21 A Since December.

22 Q Do you believe that there's reasonable grounds -- do you
23 believe that your children are safe in his care at this time?

24 A No, I don't.

25 ATTORNEY GERGEN: Those are all the questions I

1 have.

2 THE COURT: Cross-examine.

3 ATTORNEY ELBERT: Your Honor, could we take a brief
4 recess? This matter was calendared for a half an hour and I
5 have other matters that I have to inform the Courts that I'm
6 not going to be able to make.

7 THE COURT: That's fine. I was going to suggest
8 that. There are three pretrial conferences, family matters,
9 that we can maybe dispose of those while you're taking your
10 recess.

11 ATTORNEY ELBERT: I have a feeling this is going to
12 go the balance of the morning.

13 THE COURT: I'm afraid it might. I don't know.
14 Let's adjourn this matter.

15 (After a recess, the following proceedings occurred:)

16 THE COURT: Okay, we're back on the record in this
17 matter. I understand there was some talk of settlement but
18 apparently it's not.

19 ATTORNEY ELBERT: Well, I didn't have -- I didn't
20 have enough time to go through all the specifics of the
21 settlement with my client so that's what I was doing. So
22 we're only partway through. He doesn't understand everything.
23 It's a -- kind of a three-party proposal, involving a
24 temporary physical placement order through the Department of
25 Social Services and I was in the process of explaining to my

1 client what that means and the ramifications of a restraining
2 order if one would be issued. But I haven't had enough time
3 to discuss all of it with my client. So if I could have
4 another 15 minutes, I could probably do that. It might
5 resolve the matter. It might not

6 ATTORNEY GERGEN: Well, my client would like to
7 proceed, Your Honor.

8 ATTORNEY ELBERT: All right.

9 THE COURT: I think -- let's proceed. At least we
10 can get more testimony in.

11 ATTORNEY ELBERT: Could we, at this time point, then
12 call Dr. Haight?

13 ATTORNEY BUSCH-ELL: We're calling him out of order?
14 ATTORNEY ELBERT: Yes.

15 THE COURT: Because mom is still on the -- your
16 client plans on testifying; right?

17 ATTORNEY ELBERT: We're at the point where I would
18 cross-examine her but I'd like to take Dr. Haight out of order
19 because he's been waiting for a call as I understand it.

20 THE COURT: Any objection?

21 ATTORNEY GERGEN: No, Your Honor.

22 THE COURT: All right.

23 (Getting Dr. Haight on the telephone.)

24 DR. HAIGHT: Dr. Haight speaking.

25 ATTORNEY ELBERT: This is Attorney Bruce Elbert

1 calling.

2 DR. HAIGHT: Hello there.

3 ATTORNEY ELBERT: Sorry for the delay but this
4 hearing is taking longer than anybody anticipated.

5 DR. HAIGHT: That's okay.

6 ATTORNEY ELBERT: Could you raise your right hand
7 and be sworn in, please?

8 DR. HAIGHT: I sure can.

9 THE CLERK: You solemnly swear to tell the truth,
10 the whole truth and nothing but the truth, so help you God?

11 DR. HAIGHT: I do.

12 DIRECT EXAMINATION

13 BY ATTORNEY ELBERT:

14 Q Could you state your name for the record, please.

15 A Michael Lawrence Haight.

16 Q And where are you employed?

17 A At Psychiatric Associates.

18 Q And what is your position?

19 THE COURT: Where?

20 ATTORNEY ELBERT: At Psychiatric Associates in
21 Beaver Dam.

22 DR. HAIGHT: Yes, sir.

23 BY ATTORNEY ELBERT:

24 Q And what is your position there?

25 A I'm a psychologist.

1 Q Okay. And what -- could you briefly review your credentials?

2 A Sure. I got my doctorate degree in November of 2003 and have

3 been working at Psychiatric Associates doing primarily

4 individual adult therapy for the past year. Prior to that, I

5 was working at two different V.A. hospitals, one in Milwaukee

6 and one at the V.A. center at Knoxville, Iowa.

7 Q And are you licensed to practice in the State of Wisconsin?

8 A Yes, I am.

9 Q Are you board certified?

10 A Yes.

11 Q Now, is Dennis Mays, Junior, a patient of yours?

12 A Yes, he is.

13 Q And how long has he been a patient of yours?

14 A Um, Dennis was transferred to my care and our first session

15 was on January 3rd of 2005.

16 Q On how many occasions have you had sessions with Dennis?

17 A I've had 13 sessions with Dennis.

18 Q Now, you said he was transferred to your care from a different

19 psychologist?

20 A Yes. He -- he was being seen prior to that by Dr. Singer

21 (phonetic), a psychiatrist and Dr. Furgeson (phonetic) who I

22 believe is a psychologist.

23 Q And they're out of Madison; is that correct?

24 A I believe so, yes.

25 Q And did you review their records?

1 A Yes, I have. I have reviewed the records that they have sent
2 to me.

3 Q And are you aware of whether or not Dennis has been a suicidal
4 risk in the past?

5 A Yes. I understand that he was hospitalized in the past.

6 Q Do you know when that hospitalization occurred?

7 A I believe that that was 2000 or 2001.

8 Q Now, have you done any psychological testing with Dennis?

9 A No psychological testing. Just individual therapy sessions.

10 Q Okay. What -- what did the individual therapy consist of?

11 A In the individual therapy sessions, we have been focusing on
12 medication compliance, we've been focusing on decreasing his
13 depression and anxiety that has primarily been focused around
14 some relationship issues with his wife and also working on
15 different -- different ways to -- different ways and
16 strategies to manage stress. I also should note that his wife
17 was present during two of the therapy sessions.

18 Q Is Dennis on medication at this time?

19 A At this time I believe he's still currently taking Welbutrin
20 and Buspirone, yes.

21 Q Is he compliant with the medications?

22 A To the best of my knowledge, yes. He has always reported
23 compliance in our therapy sessions with his medication.

24 Q And what is your assessment at this point of Dennis? Is he a
25 suicidal threat?

1 A He--

2 ATTORNEY GERGEN: I'm going to--

3 DR. HAIGHT: --suicidal threat at this time in my

4 opinion.

5 THE COURT: Sure.

6 DR. HAIGHT: --and--

7 ATTORNEY ELBERT: Just a minute, Doctor.

8 DR. HAIGHT: Sure.

9 ATTORNEY BUSCH-ELL: She's objecting, Your Honor.

10 Attorney Gergen is objecting.

11 ATTORNEY GERGEN: Your Honor, this doctor has

12 testified that he has not done an evaluation of this man and

13 now he's being asked as to whether or not in his opinion that

14 he poses a suicidal risk or a suicidal threat and I'm not sure

15 that he can make that, um, draw any conclusions if he has not

16 evaluated or anyone has evaluated Mr. Mays recently.

17 THE COURT: Let's do this. We'll have to sift and

18 winnow through it. He can testify and I'll have to decide

19 whether or not he is but he has met with him and had 13

20 sessions so that should give him some idea. Proceed.

21 Objection overruled.

22 BY ATTORNEY ELBERT:

23 Q Do you-- In your opinion, is Dennis a suicide threat at this

24 time?

25 A Um, in fact, I just met with him yesterday and, in my opinion,

1 it is not -- it's not my belief that he is a suicidal risk,
2 otherwise I would have had to take the necessary steps or
3 actions to discuss hospitalization or some alternate route.
4 But during the 13 therapy sessions that we have had, um,
5 Dennis has never been suicidal at any -- at any of those
6 sessions.

7 Q Is his depression under control with the medications?

8 A He -- he currently still -- still is somewhat depressed due to
9 some of the stressors that he's currently going through with
10 the separation and pending divorce with his wife but I -- it
11 is my opinion that he has definitely improved on his coping
12 skills and lessened his depression since January of 2005 when
13 I began seeing him.

14 Q Do you consider him to be a risk to other people?

15 ATTORNEY GERGEN: Same objection, Your Honor.

16 DR. HAIGHT: Based -- well, based on what my client
17 has reported in his therapy sessions, he has never given any
18 indication that he would be a threat to any other individuals.

19 BY ATTORNEY ELBERT:

20 Q Now, based upon your--

21 THE COURT: Wait. Before we proceed any further,
22 let me ask you this. This is a -- a child abuse TRO.
23 Shouldn't the courtroom be closed? If these people are
24 witnesses, who are they?

25 ATTORNEY GERGEN: They're -- well, I already

1 identified Brenda Ingram from the Department of Human
2 Services.

3 THE COURT: Okay, all right.

4 ATTORNEY GERGEN: This is my client's mother.

5 THE COURT: All right.

6 ATTORNEY GERGEN: And this is her brother.

7 THE COURT: That's fine, okay.

8 ATTORNEY GERGEN: I don't -- and the others are --
9 are law enforcement personnel.

10 THE COURT: Okay, proceed. Proceed, Doctor.

11 BY ATTORNEY ELBERT:

12 Q Doctor, based upon your 13 sessions with Dennis, do you feel
13 he poses a threat to his children?

14 A Um, again, based upon what he has reported in sessions, he's
15 never given any indication that he would be a danger or a
16 threat to his kids and has always talked -- and in my
17 presence, the one session that his, um, he briefly had his
18 kids at the beginning of the session, has always acted with
19 them appropriately in my estimation.

20 ATTORNEY ELBERT: Thank you, Doctor. Nothing
21 further.

22 THE COURT: Cross-examine.

23 CROSS EXAMINATION

24 BY ATTORNEY GERGEN:

25 Q Good morning, Dr. Haight.

1 A Good morning.

2 Q My name is Dawn Gergen. I'm the attorney for Kristi Mays
3 here. I'm going to ask you some questions; okay?

4 A Okay.

5 Q Okay. Your opinion that he is not at threat to anyone or
6 suicidal at this time is based upon Dennis's representations
7 to you in your 13 or more sessions; correct?

8 A That -- that is correct, yes.

9 Q Now, have you had a chance to review the report of Dr.
10 Virginia Greenbaum from the Children's Hospital in Milwaukee
11 regarding injuries sustained to ^{J.K.M.} [REDACTED]?

12 A I believe I was. I believe that is something that Dennis
13 briefly showed me in the last session.

14 Q Well, we just got it yesterday so I guess I doubt that. I
15 don't think his attorney had it until late last night.

16 A Okay. He showed me a medical report yesterday that assessed
17 and looked at the bruises on one of his children.

18 Q Were you aware -- have you reviewed the contents of the
19 petition for the child abuse restraining order filed by Kristi
20 Mays?

21 A Um, again, I believe that this is what -- another form that
22 Dennis showed me yesterday during our session, yes.

23 Q Okay. Well, in this -- I'm just going to ask you questions
24 off of that. Did Dennis tell you that within the last couple
25 of months he told his wife that he could relate to the man

1 from Montello who killed himself and his young son after he
2 was served with divorce papers?

3 A How -- how Dennis explained that to me was that he was
4 discussing the article with his wife and that he said he could
5 relate to the individual's pain, going through -- going
6 through a divorce and that he was hopeful at that time that
7 that would not be the case with he and his wife, Kristi.

8 Q Well, did he discuss with you the killing of the gentleman and
9 the gentleman's son and how he could relate to that?

10 A No, not at all. Not at all. How he can relate to the killing
11 of any individuals, no.

12 Q Did -- were you aware that he has told his wife that he felt
13 like hanging himself while he was folding laundry in the
14 basement within the last couple of months?

15 A Um, no, I was not aware of that.

16 Q Were you aware of his call to the Crisis Center on
17 January 17th, 2005, and later police intervention?

18 A Yes. In fact, I was able to read the Dodge -- Dodge County
19 Sheriff's report on that, again just yesterday, during our
20 session and I believe the sheriff's report states at no time
21 during our lengthy conversation did he report any suicidal or
22 homicidal ideations to the best of my recollection.

23 Q There was no sheriff's report ever filed. But purposes you're
24 referring to the Beaver Dam Police report; is that right?

25 A Okay. That -- that may be correct.

1 Q Are you -- have you ever interviewed these children?

2 A No. I'm just -- I have just met both of them just very briefly

3 at the beginning of one of my sessions and then, shortly

4 thereafter, Kristi came and picked up the kids.

5 Q Are you aware, has anyone made you aware that three-year-old

6 J.M. has made statements that daddy says we're all going to

7 die? Are you familiar with that?

8 A Dennis -- Dennis told me about that statement yesterday, that

9 J.M. had made that, yes.

10 Q But you haven't interviewed the children about that or about

11 the injuries sustained to Jacob; have you?

12 A No. No, I have not.

13 Q Now, you have been counseling -- providing counseling to

14 Mr. Mays since January 3rd; correct?

15 A Yes. Yes, that's correct.

16 Q Have you had an opportunity to meet with Mrs. Mays for any

17 length of time to discuss the various suicide threats or

18 statements he has made to her?

19 A Um, I believe when she was -- when she was -- when she was at

20 a couple of the sessions, um, she -- she referenced a couple

21 of times that her husband had made -- had made some statements

22 in which -- in which it made her think that he was potentially

23 suicidal at different times but I don't -- I don't recall her

24 stating in either one of those sessions her saying that Dennis

25 had told her specifically or outright that he was suicidal,

1 like, for example, with the hanging of the laundry or anything
2 like that.

3 Q Okay. And you said Mr. Mays is currently being prescribed
4 Welbutrin and another drug. What was the other drug?

5 A Buspirone.

6 Q Can you spell that please?

7 A B-u-s-p-i-r-o-n-e.

8 Q What is Buspirone? What is that prescribed to accomplish?

9 A Again, it's -- it's, um, to help with an individual's mood,
10 can be helpful with either anxiety or depression.

11 Q Why is he taking both Welbutrin and Buspirone?

12 A That is a question that would be best asked -- answered by his
13 psychiatrist, Dr. Graupner.

14 Q And the -- that he's continued to take these drugs as
15 prescribed, again, comes from his reporting to you so you
16 don't actually know if he's taking them or not; do you?

17 A No, I do not.

18 Q What -- do you have a diagnosis? Is there one? I mean, is
19 there a diagnosis of Mr. Mays either done by you or in your
20 file as to depression, anxiety? I mean, what's the diagnosis
21 that you're operating under here?

22 A The diagnosis that I'm operating under is major depressive
23 disorder.

24 Q Tell me, what is a major depressive disorder?

25 A Um, some of the symptoms that Dennis was experiencing upon my

1 initial evaluation of him was his, um, he had been having
2 sometimes fluctuations in his eating and sleeping habits,
3 sometimes feeling fatigued throughout the day, Dennis was
4 feeling, um, pretty sad and down in January, um, feeling
5 frustrated and somewhat irritable at times, um, given the
6 situation he thought that he and his wife may be headed
7 towards a potential separation or a divorce. Dennis was also
8 having periods of tearfulness related to this as well.

9 Q At the time that he was diagnosed as having a major depressive
10 disorder, was he on medication at that time?

11 A Yes. I -- I believe that he was on both of those medications
12 at that time but I'm not 100 percent certain.

13 Q So he still had a major depressive disorder even though he was
14 taking the medication; is that right?

15 A Yes.

16 Q And, again, you have not seen ^{J.K.M.} [REDACTED] or ^{J.M.} [REDACTED]
17 specifically, the injuries to ^{J.K.M.} [REDACTED] um, that were
18 reported by Children's Hospital?

19 A No. No, I did not specifically see any -- any of those
20 injuries.

21 ATTORNEY GERGEN: That's all the questions I have.

22 THE COURT: All right. Guardian ad litem?

23 ATTORNEY BUSCH-ELL: I don't have any other
24 questions.

25 THE COURT: No questions. Any redirect?

1 ATTORNEY ELBERT: Briefly.

2 THE COURT: All right.

3 REDIRECT EXAMINATION

4 BY ATTORNEY ELBERT:

5 Q Doctor, you testified that you reviewed Mrs. Mays' petition
6 for the restraining order yesterday. Is that correct?

7 A Uh-huh.

8 Q And there is one statement in here that, quote, her
9 three-year-old son just yesterday told me that daddy said
10 we're going to die, unquote. Did Dennis indicate to you that
11 he -- he told that to his three-year-old son?

12 A What Dennis told me during the session was that he did not
13 tell that to his three-year-old son and he did not know when
14 or where his son had heard that statement.

15 ATTORNEY ELBERT: That's all I have. Thank you.

16 DR. HAIGHT: Okay, thank you.

17 THE COURT: Doctor, this is Judge Callaway. Can I
18 ask you a couple questions?

19 DR. HAIGHT: Absolutely.

20 THE COURT: All right. Do you believe that if
21 Dennis were not on his medication, that he were not on the
22 medication, that he'd be a danger to himself or to others?

23 DR. HAIGHT: Um, there would be greater potential
24 for that if he were not on his medication, yes.

25 THE COURT: Okay. Thank you.

1 DR. HAIGHT: You're welcome.

2 THE COURT: Anything else? Thank you, Doctor.

3 DR. HAIGHT: Thank you.

4 THE COURT: Your next witness.

5 ATTORNEY ELBERT: I believe it's -- it's my turn to
6 cross-examine Kristi Mays.

7 THE COURT: All right. Miss Mays, do you want to
8 come back up on the stand and we'll continue with your
9 testimony.

10 THE COURT: Okay, Mr. Elbert.

11 CROSS EXAMINATION

12 BY ATTORNEY ELBERT:

13 Q Are you currently taking the medication Welbutrin?

14 A No, I'm not.

15 Q Were you recently?

16 A Um, for about four weeks, half a dose.

17 Q And who prescribed that for you?

18 A Dr. Personic (phonetic).

19 Q Why did he prescribe it?

20 A Because of weight gain and I was feeling stress with the
21 separation.

22 Q Now, on March 25th of this year, you received a call from
23 Dennis regarding ^{d.K.M.} [REDACTED] hurting his head on the entertainment
24 cabinet; correct?

25 A Correct.

1 Q And Dennis told you that the child was opening the door and
2 trying to get blocks out of the entertainment center; correct?
3 A Correct.
4 Q And, in that process, he hit his head on the door I believe.
5 A Yes. He said he had a big goose egg on the side of his head.
6 Q And he called and told you about that?
7 A Correct.
8 Q And did he discuss with you whether or not he should take the
9 child to the hospital?
10 A No. He said that he was doing fine. He didn't lose
11 consciousness, didn't throw up, that he seemed like he was
12 doing fine.
13 Q He was concerned about it, though?
14 A He wanted to tell me just to let me know that it happened.
15 Q And that was Good Friday; correct?
16 A Correct.
17 Q And that evening before he returned the child to you, he took
18 the child to the Easter Bunny; right?
19 A Yes.
20 Q And he had photographs of the child on the Easter Bunny's lap
21 taken; correct?
22 A Right.
23 Q And he gave you a copy of one of the photographs?
24 A Yes, he did.
25 Q And then you eventually got custody back of the child that

1 night; right?

2 A For couple hours, yes.

3 Q Okay. And did you notice any swelling?

4 A Yes, I did.

5 Q And was the swelling on the left side of the head?

6 A Yes, it was.

7 Q How long was the swelling?

8 A Um, it was a, I would say, fairly long mark. I don't know

9 exactly the measurement.

10 Q Three or four inches?

11 A Again, I don't exactly know the measurement.

12 Q Well, was it above the left ear?

13 A It was -- it was right here.

14 Q Right where the bruising shows up in the photographs?

15 A Correct. Plus he had a laceration on his forehead along with

16 a red mark on his chin, on his knees and on the top of his

17 feet.

18 Q The red marks on the knees resemble rug burns; is that right?

19 A Correct.

20 Q Which could easily be done by crawling?

21 A I -- I never experienced him having rug burns while I was

22 caring for him.

23 Q Now, was the swelling noticeable?

24 A Yes, it was.

25 Q Okay. Was it discolored?

1 A Yes, it was.

2 Q And was the child acting as if it had a head injury?

3 A He was a little fussy but not -- he's also teething so--

4 Q Did you take the child to the hospital?

5 A At that time I did not, no.

6 Q Did you take the child to a doctor?

7 A No, because he was doing fine.

8 Q He wasn't displaying any symptoms of a head injury?

9 A No.

10 Q He was eating normally?

11 A His eating, um, was fair. I mean, he goes through growth

12 spurts and then he eats more but he was also teething so he

13 wasn't, you know, 100 percent but close.

14 Q So his eating was not abnormal; is that fair to say?

15 A Right, right.

16 Q Then on Monday you decided to take the child to the UW

17 Hospitals; is that right?

18 A On Monday the swelling had gone down and you could see that

19 there were three distinct marks on the side of his head that

20 were round like a fingerprint so, yes, I did.

21 Q And did you discuss that, taking the child to UW Hospitals,

22 with anybody prior to doing it?

23 A To them-- No, after I went to the police department.

24 Q You went to the police department and said look at these; is

25 that right?

1 A I went there to say: Is this what it looks like? It looks
2 like fingerprints to me. Does it look like that to you? And
3 what should I do.

4 Q Did you take the child to be examined by your brother who's a
5 member of the police department?

6 A Um, he briefly stopped over before.

7 Q Okay. And your brother's name is Corey and he's in the
8 courtroom?

9 A Correct.

10 Q So Corey came over to your house and you showed the bruising
11 on the child to him?

12 A I had shown them to my parents first of all and they said,
13 yeah, so Corey came after they looked at him too.

14 Q Did you ask Corey to come over?

15 A Yes, I did.

16 Q And he came over and did he tell you to take the child down to
17 UW Hospital?

18 A No, he did not.

19 Q Did he refer you to the police department?

20 A Um, I asked what I should do and he said you could go to the
21 police department.

22 Q And did somebody at the police department tell you to take the
23 child to UW Hospital?

24 A Yes.

25 Q And you -- you did that; correct?

1 A Correct.

2 Q And then did you contact Social Services or did they--

3 A The police officer contacted Social Services.

4 Q And which police officer was that?

5 A Officer Jones.

6 Q And then Social Services contacted you?

7 A They -- they came to the police department.

8 Q All right. And did they file a temporary placement order?

9 A Yes, they did.

10 Q And that expired?

11 A Correct.

12 Q And the Corporation Counsel elected not to proceed with a

13 Chips proceeding; correct?

14 A Right. Correct.

15 Q And then at that point you contacted UW Hospital again; is

16 that right?

17 A I don't recall.

18 Q Well, Dr. Greenbaum got involved in this case just this week;

19 correct?

20 A Correct.

21 Q And the temporary physical placement order expired on Monday;

22 correct?

23 A Correct.

24 Q And then you got UW Hospital involved subsequent to that;

25 correct?

1 A They were involved the night of -- that we took ^{J.K.M.} [REDACTED] in on
2 the 28th.

3 ATTORNEY GERGEN: I'm sorry. Did you say UW
4 Hospital?

5 ATTORNEY ELBERT: I'm sorry--

6 MRS. MAYS: --Children's--

7 ATTORNEY GERGEN: Listen to the questions carefully;
8 okay?

9 MRS. MAYS: I'm sorry.

10 BY ATTORNEY ELBERT:

11 Q When did you contact Children's Hospital following the
12 decision not to file a Chips proceeding?

13 A I don't recall.

14 Q Did you call them on Wednesday?

15 A Um, I did speak to Dr. Greenbaum on Wednesday, yes.

16 Q And did you place that call to her?

17 A Yes, I did.

18 Q And who told you to call Dr. Greenbaum?

19 A I decided to call her because she was actually paged the night
20 that ^{J.K.M.} [REDACTED] was -- that we brought him in the hospital. She's
21 the one that ordered the CAT scan and other x-rays.

22 Q So then you called her?

23 A But -- I'm sorry, sir. Actually, I spoke to Dr. Nilay Shay
24 too and he also told me to talk to Dr. Greenbaum. He was the
25 resident that saw ^{J.K.M.} [REDACTED].

1 Q Now, at that time you knew that Social Services had
2 investigated the case; right?

3 A As far as I knew. However, the police department hadn't been
4 involved yet. The Mayville officer was off until Monday.

5 Q And the Mayville officer hasn't requested any charges yet; has
6 he?

7 A Not as far as I know.

8 Q And so they weren't doing anything, Social Services wasn't
9 doing anything, so then you decided to call UW Hospital,
10 Dr. Greenbaum; is that correct?

11 A I called Children's Hospital in Milwaukee and spoke to
12 Dr. Shay first.

13 Q And then he referred you to Dr. Greenbaum?

14 A Correct.

15 Q And did -- did you -- did you request Dr. Greenbaum to review
16 the case?

17 A I asked her, um, if she was able to look at the pictures and
18 make a decision on what she thought happened.

19 Q When you did that, you did that because you don't want Dennis
20 to have any placement with the children, any significant
21 placement with the children; isn't that right?

22 A No. I did that because my son has bruises on his head.
23 Q Which were causing him no problems; right?

24 A Um, thank God, no, they weren't.

25 Q Okay. And so you weren't seeking treatment for the child;

1 were you?

2' A Not at the time, no.

3 Q There was no reason for the child to be treated because the
4 child wasn't hurt; isn't that true?

5 A The child was hurt. There was bruises and rug burns.

6 Q But he was -- he was behaving normally?

7 A Um, as far as I could tell, yes.

8 Q And the child had had CAT scans done on May 28th?

9 A Correct.

10 Q All normal?

11 A There were no broken bones.

12 Q You heard the doctor testify today everything was within
13 normal limits; correct?

14 A Correct.

15 Q So the purpose of you contacting Children's Hospital on
16 Wednesday -- this last Wednesday, and Dr. Greenbaum, was to
17 get restrictions on Dennis's placement; isn't that right?

18 A That's not correct, no. It was to follow-up. Dr. Shay had
19 written on his discharge note suspicious for non-accidental
20 injury. That's what I was following up on.

21 Q Again, you did that after several different agencies had
22 investigated the case; right?

23 A Correct. But I was just following up on Dr. Shay's note.
24 And, as you heard, Dr. Hennes said the bruises were yellow and
25 you could clearly see on these pictures that they're not.

1 Q Isn't it true that you want to restrict your children's
2 placement with Dennis as much as you can?
3 A If they were safe with him, I would be fine with him seeing
4 them but they're not.
5 Q Now, you complained or you state in your petition for
6 restraining order that Dennis made a sex call while he had
7 placement with the children; is that correct?
8 A Correct.
9 Q Did the children say anything to you about the sex calls?
10 A No. But ^{J.M.} displays more awareness of his privates.
11 Q Well, when you and Dennis were living together, you engaged in
12 sexual relations when the children were home; weren't you?
13 A They were sleeping. This was during the day, however. I was
14 working during the day.
15 Q Isn't it true that young children often explore their bodies
16 as a matter of curiosity?
17 THE COURT: Well, that's not -- let's stick to the
18 issue at hand here.
19 ATTORNEY ELBERT: Well--
20 THE COURT: That's irrelevant.
21 ATTORNEY ELBERT: They brought it up, Your Honor.
22 THE COURT: Well, they only brought it up, you know,
23 with films or videos or calls, nothing to do with--
24 ATTORNEY ELBERT: That's all I have, Your Honor.
25 THE COURT: Cross-examine?

1 ATTORNEY BUSCH-ELL: Your Honor, could I come up and
2 look at those pictures--

3 THE COURT: Sure.

4 ATTORNEY BUSCH-ELL: --ask some questions about
5 them?

6 THE COURT: Sure.

7 CROSS EXAMINATION

8 BY ATTORNEY BUSCH-ELL:

9 Q Looking at -- looking at this picture, Mrs. Mays, I don't know
10 if these are numbered at all--

11 THE COURT: If you're going to use the photograph,
12 why don't you mark it on the back and give it a number so at
13 least the record will be clear.

14 BY ATTORNEY BUSCH-ELL:

15 Q I'm going to mark the back No. 1 on this picture. Mrs. Mays,
16 this is an a side view of ^{J.K.M.'s} head; is that correct?

17 A Correct.

18 Q And the person is holding a ruler?

19 A Correct.

20 Q And we can see two fingerprint type marks on his head; is that
21 right?

22 A Correct.

23 Q All right. And there's a -- a small scratch on the forehead?

24 A Correct.

25 Q Okay. Looking at that picture, can you tell me where-- This

1 was on -- taken on what day?

2 A That would have been the 28th.

3 Q The Monday?

4 A The Monday, yes.

5 Q And was this picture taken at the police department?

6 A Yes, it was.

7 Q Okay. When you saw ^{J.K.M.} [REDACTED] on Friday, where was the swelling?

8 A Um, it would've been right over this area here--

9 Q So--

10 A --and it was discolored. It was like an orangish, reddish --

11 it was a weird color.

12 Q And it covered both of the small marks that we see in the

13 picture?

14 A Correct.

15 Q Okay. Looking at picture No. 2, that's a picture of ^{J.K.M.'s} [REDACTED]

16 -- his head and face but the -- the other side; correct?

17 A Correct.

18 Q And, again, a person is holding a little ruler up to his head?

19 A Correct.

20 Q And there appears to be a small mark right above the ruler?

21 A Correct.

22 Q Okay. And was there any-- And, again, this picture was taken

23 on Monday--

24 A Correct.

25 Q --the 28th?

1 A Right.

2 Q Were there any marks on that -- on that side of ^{J.K.M.'s} [REDACTED] head
3 on Friday when you saw him?

4 A I don't recall.

5 Q Okay. The big bruise was all on the other side?

6 A Right, right. And that's what had my attention was the long
7 bruise and then I saw -- I'm sorry -- then I saw the scratch
8 on his forehead.

9 Q When they talk about three bruises on -- the cluster of
10 bruises, they're not talking about the scratch mark, though;
11 correct?

12 A No, they're not.

13 Q Do any of the pictures reflect that third bruise?

14 A There was one. I think. You can kind of see it in this
15 picture here.

16 Q Let's mark that picture. We'll mark that No. 3. So if we
17 compare picture No. 1 with picture No. 3, you can see there's
18 actually three bruise marks there?

19 A Correct.

20 Q It doesn't show as well in -- in picture No. 1.

21 A Correct.

22 Q And, again, that swelling covered all three of those marks?

23 A Yes, it did.

24 Q How far past those marks did the bruising go or the swelling
25 go?

1 A I -- I'm not sure. I'm not certain. ;

2 Q What about the orangish reddish color?

3 A That was the whole length of the mark.

4 Q You testified on direct, I think, something to the affect that

5 your husband had attempted to get himself emergency detained?

6 A Several times since December 13th, yes.

7 Q Can you please elaborate on that. I am not sure what you're

8 talking about.

9 A He called me and said that he was, um, talking to his doctors

10 in Madison at the first phone call to see if they would admit

11 him.

12 Q When was that?

13 A That would have been the week of December 13th, I think that

14 Thursday or Friday.

15 Q And he -- he was asking to be admitted?

16 A Correct.

17 Q And what happened with that?

18 A He was not admitted.

19 Q And this was -- this happened again?

20 A Yeah. I think there was another incident at the end of

21 December. Um, January 18th he had told me that he was going

22 to talk to Dr. Haight about getting himself committed. I

23 think there was another one. I -- I think there's at least

24 four -- four times and, on a couple different occasions, he

25 called my mother and asked her to give him a ride and, on

1 another, he called my brother and said that he was going to be
2 doing this, um, if he could help me get the van because it was
3 at, I believe, Dr. Haight's.

4 Q And he wanted a ride for what?

5 A He wanted -- he asked my mom for a ride to Madison cause he
6 was sure that he was going to get committed.

7 Q Did he tell you why he thought he should be admitted?

8 A He was very depressed. Emotionally, he was all over the
9 place, um, very angry.

10 Q Was this discussed in therapy with Dr. Haight when you were
11 present?

12 A As far as the admissions or the -- no, I don't think I was.

13 Q And he acknowledged that he was-- What did he say to you as
14 to why he should be admitted?

15 A What did Dennis say?

16 Q Yes.

17 A Basically, that he was very depressed, he -- he can't handle
18 things. He was very tearful, um, just really very upset. He
19 would call me several times and leave messages and I think he
20 did call his sister several times also regarding the same
21 information.

22 Q And -- and those contacts with you are separate from the
23 several specific phone calls you mentioned in your restraining
24 order papers?

25 A I believe so, yes.

1 Q You indicate that in December of '04 he called you at work and
2 he said he made his final good-byes to the children?
3 A Correct.
4 Q Did he use the word "final" good-bye?
5 A Yes, he did.
6 Q And did he also tell you he wasn't coming home after work and
7 that you wouldn't see him again?
8 A He said he wasn't coming home after work..
9 Q Did he say you won't see him again?
10 A I don't recall.
11 Q Did you take that as a suicide threat?
12 A With him, I did. I actually called Dr. Furgeson's office and
13 spoke to the nurse -- I can't recall her name at the time --
14 to let her know that I was very concerned, that he had several
15 suicide talks and, um, that I was concerned for him. She did
16 attempt to call him but he hung up on her.
17 Q And on February 8th did he call you to indicate he was going
18 to go spend the day in the cemetery?
19 A Yes, he did. He said he likes the quietness of the cemetery,
20 that he's getting closer to his mom who died, um, I believe it
21 was December of '95, that' he's getting closer to her and
22 she's buried in Massachusetts.
23 Q Do you have any knowledge through out your marriage to Dennis
24 of him failing to take his medication?
25 A He was notorious for that. This is the first time that he's

1 ever taken it. I don't know if he still is.

2 THE COURT: Could you repeat that question, please?

3 I didn't quite hear it.

4 ATTORNEY BUSCH-ELL: I asked through their marriage
5 did she know of any times where he failed to take his
6 medication.

7 THE COURT: What's the answer?

8 MS. MAYS: That he was notorious for that, that he
9 never took his medication. And he'd actually lie to me about
10 it, that he was taking it.

11 BY ATTORNEY BUSCH-ELL:

12 Q Were you able to tell?

13 A You could -- you could tell by his mood; yeah, that he wasn't
14 taking his medicine.

15 Q Could you then also tell that he must be taking his medicine?

16 A To be honest, I really haven't seen, with the contact that
17 I've had with him, an improvement with his medication, no.

18 Q Did you ever have any meetings with Dr. Furgeson when he was
19 Dennis's psychologist?

20 A I met with him on his last appointment with him which was on
21 January 4th.

22 Q Why?

23 A Dennis wanted me to come with him to sit in on his
24 appointment.

25 Q What was discussed at that meeting?

1 A It was basically an end-of-relationship type of thing, where,
2 you know, kind of closing out so he could start with his new
3 therapist. I did speak to Dr. Furgeson at that point about
4 the call that I got from Dennis the previous night about the
5 man that shot himself and his son in Montello and he talked to
6 Dennis about how that can give -- be looked at as a threat or
7 just manipulation.

8 Q Did Dr. Furgeson indicate any concern with Dennis's switching
9 counselors at this stage?

10 A To me he did not, no.

11 Q You indicated that you've never seen ^{J.K.M.} [REDACTED] with rug burns.

12 Does that -- did you mean that for his feet and his knees and
13 his chin or--

14 A He's -- I've never seen him when I've been taking care of him
15 with rug burns. That was something I actually talked to
16 Dennis about a couple weeks prior because ^{J.K.M.} [REDACTED] would come
17 home with rug burns on his forearms and I talked to him about
18 it, that it's important to have a long-sleeved shirt on him
19 so he doesn't get those rug burns because I'm sure it hurts
20 and Dennis's reply was don't tell me how to parent.

21 ATTORNEY BUSCH-ELL: I don't have any other
22 questions, Your Honor.

23 ATTORNEY GERGEN: Attorney Busch-Ell is done
24 questioning so may I redirect?

25 THE COURT: Go ahead.

REDIRECT EXAMINATION

1
2 BY ATTORNEY GERGEN:

3 Q Thank you. Now, when you took the child to-- Strike that.
4 When you went to see Dr. Greenbaum with the photographs, at
5 that point in time the temporary custody order issued by Judge
6 Klossner on the Dodge County Department of Human Services
7 petition had expired; correct?

8 A Correct.

9 Q And at that time was it your understanding, based upon the
10 information that the Department had at that time, that they
11 were not, um, at that time considering filing a Chips
12 petition?

13 A Correct.

14 Q However, that was based upon their having what report?

15 A They only had Dr. Hennes's report.

16 Q Correct. They did not have Dr. Shay's report, nor did they
17 have Dr. Greenbaum's report; correct?

18 A Correct.

19 Q Did they close their -- had they closed their file at that
20 point?

21 A Not that I'm aware of.

22 Q And, in fact, they're present today; correct?

23 A Correct.

24 Q And, in fact, there's still an investigation ongoing by the
25 social worker; correct?

1 A Correct.

2 ATTORNEY ELBERT: Your Honor, at this point I'm
3 going to object to the leading questions.

4 ATTORNEY GERGEN: I'll refrain from that, Your
5 Honor.

6 THE COURT: All right.

7 BY ATTORNEY GERGEN:

8 Q When the child came home on March 25th, Good Friday, you did
9 not see three individual fingerprint marks on his head; did
10 you?

11 A No, I didn't.

12 Q They were covered by that big swelling?

13 A Yes, they were.

14 Q When did they first become identifiable to you as three
15 distinct small bruises?

16 A Monday night after I got home from work.

17 Q And that's when you took the child to--

18 A --the police department, yes.

19 Q And who at the police department, again, told you to take the
20 child or who told you to take the child to Children's Hospital
21 in Milwaukee?

22 A Officer Jones.

23 Q Now, you said that Dennis is notorious for not taking his
24 medication?

25 A Yes, he is.

1 Q And you're aware of how he behaves when he doesn't take it;
2 correct?

3 A Correct.

4 Q How does he behave when he doesn't take it?

5 A He has extreme mood swings, his reactions to things are
6 inappropriate and the intensity of them are greater than what
7 a -- a level -- normal level you'd react to.

8 Q Do you believe or do you have reason to believe that he has
9 failed to take his medication at different times during the
10 last several months?

11 A Yes, I do.

12 Q Do you believe the children are in danger when he doesn't take
13 his medication if there's no one else there?

14 A There's no doubt in my mind.

15 Q Why is that?

16 A Because Dennis has an explosive personality and if the
17 medication helps a little bit to keep him somewhat stable,
18 because when you have two little kids only 11 months and a
19 three-year-old, they're very busy and that's very trying.

20 ATTORNEY GERGEN: That's all the questions I have,
21 Your Honor.

22 THE COURT: Any recross?

23 ATTORNEY ELBERT: Thank you, Your Honor.

24 RECROSS EXAMINATION

25 BY ATTORNEY ELBERT:

1 Q You testified that Dennis was making all these suicidal
2 statements to you in December of 2004. Is that right?
3 A He made the one that he wasn't coming home.
4 Q And did you discuss that statement with Dr. Ferguson in
5 January of this year?
6 A Did I discuss--
7 Q Dennis making that statement with Dr. Ferguson.
8 A I called his nurse that day.
9 Q And when you saw Dr. Haight, did you discuss the incidents you
10 have testified about which occurred in December of '04?
11 A I don't recall.
12 Q Now, you indicated that when Dennis was not on his medication
13 you feel that his children are in jeopardy. Is that correct?
14 A Correct.
15 Q Or your children are in jeopardy. Have you ever seen him harm
16 your children in your presence?
17 A He's -- he's very -- an angry person and yells and--
18 Q My question was: Have you ever seen him physically harm the
19 children in your presence?
20 A In my presence? No, because I was the parent in that
21 situation.
22 Q Well, he's the parent too; isn't he?
23 A Dennis has never had to parent as much as he's had to with the
24 separation. He's not able to handle a lot of stressful
25 situations and a lot of multitasking. He can only focus on

1 one thing.

2 Q Is that why you don't want him to see the children?

3 A I would love him to see the children if they were safe in his

4 care but they're not.

5 Q That's because he can't focus? He can only focus on one

6 thing?

7 A That's because he's angry and my son came home with bruises on

8 his head.

9 Q Did you say that he is angry because your son came home with

10 bruises on his head?

11 A No. Dennis is an angry person. He has explosive moods. You

12 can't reason with him, even over small, little things. Like,

13 for instance, it's not appropriate to do the dishes while

14 people are trying to come into the kitchen and eat buffet

15 style.

16 Q That creates a danger to the children?

17 A His behavior does, yes.

18 ATTORNEY ELBERT: Nothing further.

19 THE COURT: Any questions?

20 ATTORNEY BUSCH-ELL: No, Your Honor.

21 THE COURT: All right. Thank you, ma'am. Just

22 leave the photographs there.

23 MRS. MAYS: Okay.

24 THE COURT: Next witness.

25 ATTORNEY ELBERT: Your Honor, I have a police

1 officer who's been sitting here all morning. Can I take him
2 out of order?

3 THE COURT: Sure.

4 ATTORNEY GERGEN: No problem.

5 THE CLERK: Do you solemnly swear to tell the truth,
6 the whole truth and nothing but the truth, so help you God?

7 OFFICER PRIEVE: Yes, I do.

8 DIRECT EXAMINATION

9 BY ATTORNEY ELBERT:

10 Q Would you state your name for the record, please.

11 A Brian Richard Prieve.

12 Q And where are you employed?

13 A The Dodge County Sheriff's Department.

14 Q And how long have you been employed there?

15 A Approximately three years, just shy of three years.

16 Q Okay. Were you called to a residence at 109 Heller Street in
17 Beaver Dam on January 18th, 2005?

18 A Yes, I was.

19 Q And what was the purpose of your dispatch to that location?

20 A I was contacted by my dispatch-- At the beginning of my tour
21 of duty on that date at midnight, they contacted me and wished
22 that I would call the Beaver Dam Police Department where I was
23 told by the Department that -- Beaver Dam Police Department if
24 I could respond and assist their officers at that residence.

25 Q What was the nature of the dispatch?

1 A They told me it was a check welfare. ?
2 Q And did you proceed to go to that location?
3 A Yes, I did.
4 Q And upon your arrival there, did you have contact with Dennis
5 Mays?
6 A Yes, I did.
7 Q And were you there checking on his mental health?
8 A Yes.
9 Q And you were dispatched there in response to a -- Mr. Mays
10 called a help line; is that correct?
11 A That's correct.
12 Q When you arrived there, did you have a conversation with
13 Mr. Mays?
14 A Yes, I did.
15 Q Was he lucid?
16 A Lucid--
17 Q Was he tracking with you?
18 A Yes.
19 Q And what did he tell you?
20 A I asked him if he had made any suicidal comments to the
21 operator and he had stated that, no, he did not.
22 Q Did you -- how long did you talk to him?
23 A Approximately 45 minutes to an hour I would say.
24 Q Okay. And what you're looking for is to see if he's mentally
25 acute, if -- if potentially--

1 ATTORNEY GERGEN: Well, Your Honor, I'm going to
2 object to this type of leading question. You could ask him
3 what he is looking for--

4 THE COURT: Realize we'll go a little faster if we
5 do it this way.

6 ATTORNEY GERGEN: All right.

7 BY ATTORNEY ELBERT:

8 Q What was the purpose for your staying with him and talking to
9 him for about 45 minutes?

10 A The Beaver Dam officers had asked him if he had anybody in the
11 area that he knew personally and he advised them that he had
12 known me prior to this and, due to his relocating, that this
13 was -- I was the only closest one so they wanted somebody
14 outside of an officer contact relationship to speak with him
15 and that's why they asked for me to respond to the residence.

16 Q So you knew him?

17 A Correct.

18 Q And, being an officer, if you would have suspected any
19 suicidal tendencies or homicidal tendencies, you would have
20 immediately done a Chapter 51; is that correct?

21 A That is correct.

22 Q Did you have any concerns about Dennis after speaking to him
23 for 45 minutes that night?

24 A No, I did not.

25 Q And when you were talking to him for 45 minutes, what did he

1 indicate his concerns were?

2 A He stated that he was very upset over his wife and his
3 children not living with him and moving out.

4 Q Was he very concerned about the fact that he had not been able
5 to see his children?

6 A Yes.

7 Q And that was the focus of his upset; is that correct?

8 A I believe it was, yes.

9 Q And you also spent a lot of time talking to him about him
10 hurting himself; is that right?

11 A Yes.

12 Q And he indicated to you that he had no -- no inclination to
13 cause harm to himself; is that right?

14 A That's correct.

15 Q And did he also tell you how-- Strike that. Let me read from
16 your report. "Throughout the time speaking with Dennis, he
17 repeatedly told me he was not going to hurt himself nor
18 anybody else and he would not do anything that would
19 jeopardize him from being able to see his children." Did he
20 tell you that?

21 A Yes, that's correct.

22 Q And, again, that was on January 18th, 2005?

23 A Yes.

24 THE COURT: What was the date?

25 ATTORNEY ELBERT: January 18th--

1 THE COURT: Okay.

2 ATTORNEY ELBERT: --2005.

3 BY ATTORNEY ELBERT:

4 Q Let me show you what's been marked as Exhibit 4. Do you
5 recognize that as your incident report in regard to this
6 incident?

7 A Yes.

8 ATTORNEY ELBERT: I move Exhibit 4 into evidence.

9 ATTORNEY GERGEN: No objection.

10 THE COURT: Okay.

11 ATTORNEY ELBERT: I have no further questions.

12 THE COURT: Anything else?

13 ATTORNEY GERGEN: Yes.

14 THE COURT: Do you have any questions?

15 ATTORNEY BUSCH-ELL: I'll wait, Your Honor.

16 THE COURT: Okay. Of this witness?

17 ATTORNEY BUSCH-ELL: If you don't mind, I'll wait
18 until after Attorney Gergen goes.

19 THE COURT: Do you have questions?

20 ATTORNEY GERGEN: Yes.

21 THE COURT: Okay.

22 CROSS EXAMINATION

23 BY ATTORNEY GERGEN:

24 Q Thank you. Sir, you testified that Mr. Mays was very upset
25 that that evening; correct?

1 A Correct.

2 Q Upset enough that he called a crisis line; correct?

3 A Correct.

4 Q And he said to you that he was upset about his wife and
5 children moving out; right?

6 A That's correct.

7 Q And also that he hadn't seen his children; correct?

8 A That's correct.

9 Q Were you aware -- did he tell you that he actually had seen
10 his children that very day, January 17th? Did he tell you
11 that? Did you know that?

12 A I'm trying to remember. I believe that he did tell me he did
13 see his children that day, yes.

14 Q And you have been a friend of his for sometime?

15 A Approximately eight years, I believe.

16 Q But you -- you weren't in a position to see him on a daily
17 basis?

18 A No.

19 ATTORNEY GERGEN: Those are all the questions I
20 have.

21 ATTORNEY BUSCH-ELL: None, Your Honor.

22 THE COURT: All right. Thank you.

23 ATTORNEY ELBERT: Your Honor, may this witness be
24 excused?

25 THE COURT: Yes.

1 OFFICER PRIEVE: Thank you..

2 THE COURT: Next witness.

3 ATTORNEY GERGEN: One minute, Your Honor. Your
4 Honor, I would call Carol Johnson to the stand.

5 MS. JOHNSON: Do I stand here?

6 THE COURT: Do you want to raise your right hand?

7 THE CLERK: Do you solemnly swear to tell the truth,
8 the whole truth and nothing but the truth, so help you God?

9 MS. JOHNSON: Yes, I do.

10 DIRECT EXAMINATION

11 BY ATTORNEY GERGEN:

12 Q Please state your name.

13 A I'm Carol Johnson.

14 Q And are you the mother of Kristi Mays?

15 A Yes.

16 Q And you know Dennis Mays?

17 A Yes, I do.

18 Q He's your son-in-law?

19 A Yes.

20 Q And have you had regular contact with him since your
21 daughter's marriage to him?

22 A Yes. Oh, yes.

23 Q And can you describe your son-in-law's personality, at least
24 within the last few years?

25 A He -- his personality jumps all over. He has different moods.

1 He's very controlling. If he wants to do something, he wants
2 to do it now.

3 Q Have you had an opportunity or ever seen him have an
4 explosion, an emotional explosion, be very explosive?

5 A The last time I talked to Dennis, and I went over to the house
6 that night because I was worried for Kris, um--

7 Q When was this, if you recall?

8 A Oh, it must have been, um, um, I think it was right before she
9 left.

10 Q That'd be December of '04?

11 A Uh-huh.

12 Q Okay. What happened?

13 A He called looking for her and I said she wasn't there. He
14 said okay, all right and he hung up so I called him back and I
15 said, Dennis, you sound upset. What's the matter, I says.
16 Um, he says, well, I came home to a mess. He says, the whole
17 house is a mess, he says. And I says well, I don't know where
18 Kris is and he hung up on me again. And I knew he was very
19 upset with her and he says there was toys all over, that's
20 what he told me when he talked to me and so then I left and I
21 thought, well, I went to WalMart because I thought she'd
22 probably be at WalMart, so I came there and there she was
23 coming out with the two kids and was shopping because she --
24 she had told me that she had, um, lists of things she had to
25 have done before he came home, which is very bizarre when you

1 have two small kids to complete all this stuff but she had--
2 Q Who made the list?
3 A Dennis did. Dennis had things that he wanted completed before
4 he got home from work.
5 ATTORNEY ELBERT: Your Honor, I'm going to object to
6 this. I fail to see how this is relevant to the issue before
7 this Court.
8 THE COURT: I agree. I don't know what the--
9 ATTORNEY GERGEN: I understand.
10 THE COURT: -- it's -- several people are involved
11 in separations, divorce cases, family, back and forth but I'm
12 not sure it's relevant to this.
13 BY ATTORNEY GERGEN:
14 Q Do you have any knowledge of Dennis being either physically or
15 emotionally abusive to your daughter or your grandchildren?
16 A I think to Kris I've seen it, with Kris especially. He -- he
17 is very controlling to Kris. He would tell -- he couldn't --
18 he -- as much as even changing the children, it was Kris,
19 Kris, Kris. He'd come over to our house: Kris, can you get
20 me a diaper. He'd sit on the floor with the children to
21 change them but then he wouldn't have a diaper in hand: Kris,
22 Kris, I need wipes.
23 Q Let me ask you this. From your knowledge of their marriage,
24 who -- who cared for the children?
25 A Kris.

1 Q And did Dennis, to your knowledge, ever care for the children
2 for any great length of time on his own?

3 A There is times that Kris had to take the children with her to
4 doctors--

5 ATTORNEY ELBERT: Objection, Your Honor. This is
6 not a custody case.

7 THE COURT: We'd be getting into custody.

8 ATTORNEY GERGEN: Well, the point of this is, Your
9 Honor, is that there are things that he's not been able to do
10 and because he's been left alone with the kids now for some
11 time, that this is an explanation for perhaps his mood swings,
12 why these injuries occurred. If the Court doesn't think it's
13 relevant, we can move on.

14 THE COURT: All right.

15 ATTORNEY GERGEN: That's all the questions I have.

16 ATTORNEY ELBERT: Very briefly.

17 CROSS EXAMINATION

18 BY ATTORNEY ELBERT:

19 Q Now, you've testified that Dennis has these mood swings?

20 A Right.

21 Q Correct?

22 A Right.

23 Q Have you ever seen him physically hurt your daughter?

24 A No.

25 Q Have you ever seen him physically hurt his children when he's

1 having mood swings?

2 A No.

3 ATTORNEY ELBERT: That's all.

4 ATTORNEY BUSCH-ELL: No questions.

5 REDIRECT EXAMINATION

6 BY ATTORNEY GERGEN:

7 Q When he was having these mood swings and the children were
8 present, was someone else also present?

9 A That's right.

10 ATTORNEY GERGEN: That's all the questions I have.

11 ATTORNEY ELBERT: I'm done.

12 THE COURT: Let me -- do you have any witnesses you
13 want to call?

14 ATTORNEY BUSCH-ELL: No, Judge.

15 THE COURT: All right. Can I make a suggestion
16 here?

17 ATTORNEY GERGEN: Sure.

18 THE COURT: With the guardian ad litem's approval,
19 because she's the children's attorney, but couldn't this be
20 done in such a way that if you're going to have some
21 visitations supervised by somebody?

22 ATTORNEY GERGEN: We suggested that, Your Honor,
23 yes.

24 ATTORNEY ELBERT: That's what I was discussing with
25 my client when we came back from the recess and I hadn't

1 completed my discussions with him.

2 THE COURT: I mean, does it make sense? It would
3 get adjourned, the actual decision on this, and you can have
4 some visitation with supervision and see how that went for
5 three or four months. That's what I would think. It might
6 solve all your problems.

7 ATTORNEY GERGEN: That was discussed during the
8 break, Your Honor, and Mr. Mays would have to agree to only
9 have supervised visits with the children and we would also --
10 we asked him to agree to have a psychological evaluation done
11 as well. My client's willing to go along with that. I believe
12 that has been a request also of the Department of Human
13 Services.

14 ATTORNEY ELBERT: I think my client will agree to
15 have a psychological evaluation. However, he needs this
16 restraining order to be lifted for a couple of reasons. It
17 could very well affect his employment as a prison guard in
18 Waupun because if he is under a restraining order, under his
19 work directives, he's not allowed to work. That's a
20 Department of Corrections' rule.

21 THE COURT: Let me ask you this, however. If there
22 was an agreement that you'd have supervised visitation, the
23 restraining would be lifted then.

24 ATTORNEY ELBERT: That's what we were requesting,
25 yes.

1 THE COURT: The temporary restraining order would
2 not be there unless, for example, during visitation they'd
3 have some problem. Then--

4 ATTORNEY GERGEN: Well, Your Honor--

5 THE COURT: --go immediately back in effect if there
6 was something.

7 ATTORNEY GERGEN: And in what case would these
8 supervision visits be ordered if this is gone, if this case is
9 gone?

10 ATTORNEY BUSCH-ELL: Judge, I would say that the
11 supervised visitation, there could be a stipulation to that
12 possibly in their divorce. I mean, that would be the case
13 that we would be operating under.

14 THE COURT: Sure. It could in that regard but you
15 wouldn't have to -- you could lift the temporary restraining
16 order in this case but not make it an adjudication in this
17 case at this point. That's all I'm saying.

18 ATTORNEY GERGEN: The case wouldn't have to be
19 dismissed, though; it could still be just held open.

20 ATTORNEY BUSCH-ELL: But, Judge, then would you, if
21 we needed to come back on the restraining order case-- You're
22 here as a reserve judge. Would you just render a decision
23 based on everything you've heard, render a written decision,
24 or would we have to go through all this again with judge --
25 well, whichever judge?

1 THE COURT: You may have to file -- if there's some
2 violation, you mean, during the visitation?
3 ATTORNEY BUSCH-ELL: Or something happened, right.
4 I mean--
5 THE COURT: You'd have to file another petition, I
6 presume. I'm just trying to solve the problem so there's some
7 visitation but yet supervised. I can't see why it can't be.
8 I assume the big problem would be finding somebody that'd be
9 willing to supervise it. Would her mother do it or--
10 ATTORNEY GERGEN: She's offered to do it before and
11 he's refused, Your Honor.
12 MS. JOHNSON: Yes, I did. The last time, he
13 refused.
14 THE COURT: Yeah.
15 MS. JOHNSON: --three days I was going to--
16 ATTORNEY ELBERT: Because he doesn't trust her.
17 ATTORNEY GERGEN: Well, there we go, Your Honor.
18 That's why we're here.
19 THE COURT: Why don't you offer somebody that he
20 would trust? I'm just trying to resolve it. We'll go ahead.
21 If you want to continue with the hearing, I'll do that. But
22 I'm trying to solve the issue that might -- offer something
23 that might--
24 ATTORNEY ELBERT: Your Honor, could I have a few
25 minutes with my client?

1 THE COURT: Sure.

2 (After a brief recess, the following proceedings
3 occurred:)

4 THE COURT: Back with Mays case. Okay, we're back
5 on the record.

6 ATTORNEY ELBERT: Your Honor, the problem my client
7 is having with this is that he adamantly denies hurting this
8 child in any way and he doesn't understand why he should be
9 under such onerous restrictions having done nothing. Those
10 are his feelings. His feeling is that this is Mrs. Mays' way
11 of gaining full custody of the children, to deprive him of
12 placement with the children, a means of getting child support
13 from him because right now they have a shared placement and so
14 he does want to proceed.

15 ATTORNEY ELBERT: I call -- are you done?

16 ATTORNEY GERGEN: Yeah.

17 ATTORNEY ELBERT: I call Dennis Mays.

18 THE CLERK: Do you solemnly swear to tell the truth,
19 the whole truth and nothing but the truth, so help you God?

20 MR. MAYS: I do.

21 DIRECT EXAMINATION

22 BY ATTORNEY ELBERT:

23 Q State your name for the record, please.

24 A Dennis E. Mays, Junior.

25 Q Where do you reside?

1 A I reside at 109 Heller Street in Beaver Dam, Wisconsin.

2 Q Now, you had placement of your children on March 25th, 2005;

3 is that correct?

4 A That is correct, sir.

5 Q And what were your placement times?

6 A I picked the children up at McDonald's on Spring Street

7 between 7:30 and 7:45 that morning. Then I returned them to

8 Kristi between 5:15 and 5:30 on that night and then I picked

9 them up again between eight and 8:15 that evening.

10 Q Did your son, ^{J.K.M.} [REDACTED] get injured that day?

11 A Yes, he did, sir.

12 Q How did that happen?

13 A He fell, hit his head on the entertainment center door.

14 Q Explain to the Judge how it happened.

15 A He was reaching for--

16 Q Go ahead.

17 A He was over by the entertainment center. There's two doors on

18 each side of the entertainment center door. He was over by

19 the left side of the entertainment center. The door was open.

20 He was pulling himself up with the door and the entertainment

21 center and was reaching for the blocks that are in the plastic

22 bag underneath the entertainment center, the big plastic

23 blocks; and at that time he fell and struck his head on the

24 entertainment door.

25 Q And after that happened, what did you do?

1 A I picked him up, I looked at him. He was crying at the time.
2 I consoled him. I looked at the injuries. He appeared to be
3 fine. It was bruising already and it was already forming a
4 lump on the side of -- his left side of his head.
5 Q Was he acting like he had a significant head injury?
6 A I don't believe so.
7 Q What did you do then?
8 A I -- I looked at him. I consoled him. He quieted down. At
9 that time I did contact Kristi at work.
10 Q And you explained what happened to him?
11 A Yes, I did.
12 Q What time of day did this happen?
13 A It happened between 12:15 to one o'clock and I contacted her
14 between 12:30 and one o'clock.
15 Q Were you angry at the time that that happened?
16 A No, I wasn't, Your Honor -- or sir. Sorry.
17 Q Later that day, did the swelling get worse?
18 A It didn't get any worse than it was right after it happened.
19 It appeared it was going down already.
20 Q Did you discuss with your wife taking him to the hospital?
21 A When I called Kristi, I told her I didn't feel he need to be
22 taken to Urgent Care but I did ask what she felt and she said
23 just to monitor him.
24 Q And you returned the children that evening?
25 A Yes, I did.

1 Q Prior to returning the children, did you take them to see the
2 Easter Bunny?
3 A Yes, I did.
4 Q Where was that?
5 A At the Beaver Dam Mall.
6 Q And did they sit on the Easter Bunny's lap?
7 A Yes, he did.
8 Q And were there photographs taken?
9 A There was two photographs taken, one for Kristi, one for
10 myself.
11 Q And what kind of moods were the children in when you had them
12 after this incident?
13 A Fine. In a good mood.
14 Q Behaving normally?
15 A Yes.
16 Q Now, the allegations or the suspicions are that you grabbed
17 the child by the head in some manner?
18 A I guess that was what the allegations are.
19 Q Did you?
20 A No, I did not.
21 Q And-- Lift your hand up. You have short fingers; don't you?
22 A Yes, I do.
23 Q Do you think your hand could reach around the head of your
24 child?
25 A I do not believe so.

1 Q Your only explanation for these injuries are that the child
2 injured his head when he fell against the entertainment
3 center?
4 A Yes.
5 Q Did you do anything to your child that could have injured him
6 in that area?
7 A No, I did not.
8 Q And this -- in January, January 18th, you called the crisis
9 hot line; is that correct?
10 A Yes, I did.
11 Q Why did you do that?
12 A Because I was despondent over the argument that Kristi and I
13 had.
14 Q And what was that argument about?
15 A We had discussed ^{J.M.'s} [REDACTED] third birthday, that she wanted to
16 have a joint birthday with her brother and our son at the
17 house and I said I didn't feel comfortable about that, with us
18 the way things were between us.
19 Q And you called the crisis hot line because you had no one else
20 to talk to?
21 A That is correct.
22 Q Did you make any threats?
23 A No, I did not.
24 Q And did you tell the officer that responded that you would not
25 do anything to jeopardize your abilities to see your children?

1 A Yes, I did.

2 Q The children mean a lot to you?

3 A Yes, they do.

4 Q Do you love them?

5 A Yes, I do.

6 Q Would you ever hurt them?

7 A No, I would not.

8 Q Did you hurt them on March 25th of this year?

9 A No, I did not.

10 Q Do you want to continue seeing your children on a regular
11 basis?

12 A Yes, I do.

13 Q Now, you went through a temporary or-- Strike that. You
14 agreed to an, I believe it was a three-day temporary placement
15 order; is that correct?

16 A Yes, I did. Because that's what I was asked.

17 Q You didn't want to do that, though; did you?

18 A No, I did not.

19 Q But your purpose -- you were intentionally willing to let
20 Social Services fully investigate this matter to get it behind
21 you; is that right?

22 A Yes, I was.

23 Q And they did fully investigate it?

24 A Yes. As far as I know, they did.

25 Q And nothing was filed as far as a Chips petition?

1 A No, there wasn't.

2 Q And when that decision was made, your wife then on her own
3 contacted Children's Hospital of Milwaukee to try and get
4 somebody to do something more. Is that right?

5 A As far as I know, yeah. I wasn't involved.

6 Q What do you feel is going on here?

7 A I feel that she's trying to get the kids where I can't see
8 them.

9 Q Do you acknowledge that you've had emotional problems in the
10 past?

11 A Yes, I do.

12 Q Do you acknowledge that you've been diagnosed as depressive?

13 A Yes, I do.

14 Q And are you treating for that?

15 A Yes, I am.

16 Q There was testimony that you commented about a man in Montello
17 who killed his child and himself. Did you make a comment
18 about that?

19 A Yes, I did.

20 Q What did you say?

21 A I stated to Kristi I was -- I asked if she read the article
22 about the man from Montello who -- he killed his 16-month-old
23 and himself after being filed with divorce papers because we
24 had moved from the Wisconsin Dells-Portage area last August
25 and I figured that she would have read it. It was on the

1 front page of the newspaper that day.

2 ATTORNEY GERGEN: Could you speak more directly? I
3 can't really hear him, Your Honor.

4 ATTORNEY ELBERT: The chair doesn't move but the
5 microphone does.

6 MR. MAYS: I had let her know that -- um, we had
7 lived in that area. I informed her if she had heard about it.
8 It was in that day's paper, front page of that paper on
9 January 3rd.

10 BY ATTORNEY ELBERT:

11 Q And by bringing up that incident, were you trying to indicate
12 to her that that's something you might do?

13 A No, I was not.

14 Q What was your purpose?

15 A Just to see if she had heard about it. I mean, it was a very
16 visible article on the front page. I figured that she would
17 have heard about it.

18 Q Did you tell her that or-- Strike that. Did you tell your
19 three-year-old son that everybody was going to die?

20 A No, I did not. No, I did not.

21 Q Did you tell your wife that you were going to spend a day in
22 the cemetery?

23 A No, I did not. And she states on that that she was at work
24 that day. She did not go to work on February 8th. It was our
25 son's third birthday.

1 Q Have you ever harmed your children in any way?
2 A No, I have not.
3 Q Have you ever harmed your wife in any way physically?
4 A No, I have not.
5 Q You argue with her, of course?
6 A Yes, we do.
7 Q Ever hit her?
8 A No, I have not.
9 Q Kick her?
10 A No, I have not.
11 Q Ever hit your children?
12 A No, I have not.
13 Q Kicked them?
14 A No, I have not.
15 Q Pushed them?
16 A No, I have not.
17 Q Grabbed them?
18 A In what way do you mean that?
19 Q Let me be more specific. Grab them by the head?
20 A No, I have not.
21 ATTORNEY ELBERT: That's all I have.
22 THE COURT: All right. Cross-examine.
23 CROSS EXAMINATION
24 BY ATTORNEY GERGEN:
25 Q Mr. Mays, your wife testified that you have fairly severe mood

1 swings and you get pretty upset. Is that a fair statement?

2 A I mean, it depends on the situation.

3 Q Well, okay. So it is possible given a situation that you

4 would have a violent mood swing and get very upset?

5 A I have never been violent towards anyone.

6 Q Have you -- your wife testified that you talked to her several

7 times within the last few months about getting emergency

8 detained by the authorities, by Dr. Haight. Did you do -- did

9 you talk to her about that?

10 A Not with Dr. Haight.

11 Q Well, did you talk to her about getting emergency detained by

12 somebody?

13 A Middle of December I was feeling pretty low because she had

14 left, yes.

15 Q And you felt you needed to be emergency detained in the middle

16 of December?

17 A I thought maybe I did. But my therapist at that time didn't

18 feel it was necessary.

19 Q And why did you feel that you needed to be emergency detained

20 in the middle of December?

21 A I was feeling pretty depressed because I hadn't seen the kids

22 for a week. My wife had left on the 13th of December while I

23 was at work.

24 Q And do you remember telling her that you were folding laundry

25 in the laundry room and felt like hanging yourself?

1 A No, I don't.

2 Q You don't remember telling her that?

3 A No, I don't.

4 Q You don't recall telling her you wanted to spend some time in
5 the cemetery?

6 A No, I don't.

7 Q Okay. Do you remember telling her -- do you recall telling
8 her that you had made your final good-byes to the children and
9 you weren't coming home?

10 A I didn't say it like that.

11 Q How did you say it?

12 A I told her I said good-bye to the boys. I was not coming home
13 that night because we had received a \$270.00 fuel bill in the
14 mail and I was angry about that.

15 Q You received a fuel bill in the mail that was high and you
16 were very angry and so you did what?

17 A I let her know I wasn't coming home that night.

18 Q So you said your good-byes to the children?

19 A I said good-bye to both boys because I was not coming home
20 that night.

21 Q You were pretty upset about that fuel bill?

22 A But I took the boys to the sitters that day and I went to
23 work.

24 Q Okay. And you testified when your attorney asked you why you
25 called the crisis line on January 17th that it had something

1 to do with a birthday party?

2 A Yes, it did.

3 Q Okay. Can you explain that again why you called the crisis
4 line because of that? Explain that again, please.

5 A Because we had argued about that and she had told me when I
6 told her about the birthday party I didn't feel comfortable
7 about that, she stated to me that doesn't sound like a man who
8 wants to be back with his family and I got angry about that
9 and we argued about it.

10 Q So why did you call the crisis line?

11 A Because I have no one else in the City of Beaver Dam or any
12 friends and I could not get ahold of my sister that night.

13 Q Were you feeling very upset?

14 A I was very upset that night.

15 Q And very depressed?

16 A I wouldn't say depressed. I was angry because she wouldn't
17 talk to me about it.

18 Q About a birthday party?

19 A She tells me that I didn't seem like a man that wants to get
20 back with his family, yes.

21 Q Is it fair to say that you get pretty upset about somewhat
22 relatively minor issues?

23 A Not all the time, no.

24 Q A birthday party, a fuel bill, would you consider those big
25 issues?

1 A Fuel bill, me telling her I'm not coming home that night
2 doesn't mean anything. Did I do anything to her? No.
3 Q And you wanted to be emergency detained last December; right?
4 A Because of the way I was feeling. She wasn't coming home; I
5 was depressed about that.
6 Q Okay. Have you been taking your medication regularly?
7 A Yes.
8 Q Every day?
9 A Yes, I have, since the middle of December.
10 Q And, before that, were you taking it every day?
11 A I did take it sporadically. If I'd feel good, I'd take myself
12 off the medicine.
13 Q You would take yourself off the medication?
14 A Yes, I would.
15 Q The doctor didn't tell to you stop taking the medicine?
16 A No.
17 Q You made that decision yourself?
18 A Yes, I did.
19 Q Were you on your medication on March 28th?
20 A Yes, I was.
21 Q But if you feel, you know, good in the future, you may take
22 yourself off your medication again; is that right?
23 A I can't answer that.
24 Q You can't answer that?
25 A (No answer by witness.)

1 Q And that was the fuel bill incident?

2 A Yes, it was.

3 Q And did you hang up on her?

4 A My phone -- cell phone was dying. There was no power on my
5 cell phone and I -- I told her I had to go, I was on my way to
6 work.

7 Q How many times did you tell your wife that you were thinking
8 you needed to be emergency detained?

9 A Just that once in December.

10 Q Just one time in December?

11 A Yeah.

12 Q Because she testified there were four different instances.

13 A No, there wasn't.

14 Q You didn't talk to her on January 18th about getting yourself
15 admitted?

16 A No, I didn't.

17 Q Didn't you indicate to her on two different occasions that you
18 wanted her mother or her brother to drive you because you
19 thought you were going to be admitted?

20 A That was the end of or middle of December, that end of the
21 week of December 13th. That would have been like the --
22 December 17th, that Friday, and I do admit that.

23 Q Have you looked at the pictures?

24 A I've not -- I have not seen all the photos.

25 Q Okay. I want to point out -- would you look at the picture

1 that's marked No. 1 on the back? You see that picture was
2: taken March 28th. Is that your son's head?
3 A It appears to be.
4 Q Okay. And the person's holding a ruler?
5 A As far as I can see, yes.
6 Q Okay. Do you see the two marks on his head?
7 A Yes, I do.
8 Q Okay. Is that where the swelling had previously been?
9 A It appears to be.
10 Q And picture No. 3 is a similar picture. Is that a picture of
11 J.K.M.
12 A It appears to be.
13 Q Okay. And do you again see at least the two marks?
14 A Yes, I do.
15 Q Possibly a third in the middle?
16 A I can't see it there. I only see the two.
17 Q Okay. Were there any particular protrusions on the
18 entertainment center that you think could have caused those
19 bruises?
20 A He did hit the edge of the door when he fell.
21 Q And that might account for one bruise.
22 A It was a pretty long mark.
23 Q How long?
24 A I would say it was probably about this long.
25 Q And how -- how wide?

1 A It was probably about that wide.

2 Q An inch wide?

3 A I would -- maybe at the most.

4 Q Okay.

5 A I wouldn't even say that much. And it swelled up pretty good.

6 That is why I contacted Kristi at work. I do not recall a

7 mark being on his forehead, though, when I drop him off on

8 Monday, the 28h, at the day care.

9 Q The little scratch?

10 A Yes.

11 Q And the marks on the knees and the feet, do you know--

12 A I don't recall those being there when I dropped him off at on

13 March 28th.

14 ATTORNEY BUSCH-ELL: Okay. I don't have any other

15 questions.

16 MR. MAYS: All right.

17 ATTORNEY ELBERT: Nothing else.

18 THE COURT: Okay. Thank you. Next witness.

19 ATTORNEY ELBERT: I'm done.

20 THE COURT: All right. Do you have any witnesses?

21 ATTORNEY BUSCH-ELL: No.

22 THE COURT: Let me ask you this. You said there

23 were two photos taken at some mall?

24 ATTORNEY ELBERT: Yes.

25 THE COURT: And do you have those photos?

1 MR. MAYS: I have one at my house, Your Honor.
2 THE COURT: And when were they taken?
3 MR. MAYS: Between five and 5:15 on March 5th.
4 ATTORNEY ELBERT: About four hours after this injury
5 occurred.
6 THE COURT: But you don't have the photos here?
7 MR. MAYS: No. I did not bring mine, Your Honor.
8 THE COURT: Thank you. Anything else?
9 ATTORNEY GERGEN: No, Your Honor.
10 THE COURT: Anything else?
11 ATTORNEY BUSCH-ELL: No.
12 THE COURT: All right.
13 ATTORNEY BUSCH-ELL: I don't have any questions.
14 ATTORNEY GERGEN: Would you like some closing
15 remarks?
16 THE COURT: Very briefly.
17 ATTORNEY GERGEN: Well, Your Honor, Dr. Greenbaum's
18 testimony, I think, is the most compelling, besides the
19 testimony of Dr. Haight and Mr. Mays. Dr. Greenbaum looked at
20 the injuries and the reports of Dr. Shay, which unfortunately
21 we don't have, and Dr. Hennes and concluded, with her
22 expertise, that these are likely not accidental injuries that
23 would occur to a pre-cruiser child and that the likely
24 explanation is physical abuse.
25 The other extremely compelling testimony, Your

1 Honor, is Dr. Haight stating -- and this was in answer to your
2 question, um, what is the likelihood of Mr. Mays being a
3 danger to himself if he goes off of his medication.

4 THE COURT: I think the question was to himself and
5 to others.

6 ATTORNEY GERGEN: And to others. And Dr. Haight
7 said, yes, that will increase the likelihood of him being a
8 danger to himself and to others. And Mr. Mays gets on the
9 stand and tells you that because he was upset about a birthday
10 party, he was so upset about that that he called the crisis
11 center. And he was so upset about a fuel bill that he made
12 some good-byes to his children and wasn't coming home that
13 night. And he said that he has taken himself off his
14 medication in the past because he felt good and not because
15 the doctor told him that it was okay. But he took himself off
16 his medication in the past and, when asked if he would do so
17 in the future, he said I can't answer that. So he may very
18 well take himself off his medication in the future and
19 Dr. Haight thinks that that's an increase in a chance of him
20 being dangerous to himself and to others.

21 The Court has heard testimony of Dr. Greenbaum. The
22 Court can look at the pictures. The Court has heard the
23 testimony of Mrs. Mays about all of his suicide threats, about
24 his extreme emotional swings, and I think there's plenty of
25 evidence here, Your Honor, to suggest that there are

1 reasonable grounds to believe that Mr. Hayes has been
2 physically abusive to his children, or may be physically
3 abusive to his children in the future. And I believe that's
4 the finding the Court must reach in order to protect these
5 children. Thank you.

6 THE COURT: Okay. Mr. Elbert.

7 ATTORNEY ELBERT: Your Honor, I don't believe it
8 would be appropriate to issue a child abuse restraining order
9 on the facts of this case. Number one, both the child's
10 grandmother and the mother has testified that this man has
11 never physically abused either one of these children.

12 Now, on March 25th my client explained how this
13 child incurred an injury to his head. He immediately called
14 his wife, told her what happened, discussed that, whether or
15 not they should go to a hospital. It was determined it wasn't
16 necessary.

17 The very same evening, or afternoon, he takes the
18 child to the Easter Bunny to have a photograph taken. Now, if
19 he had just abused his child, would he have memorialized that
20 with a photograph of the children sitting on the lap of the
21 Easter Bunny? It doesn't make any sense. He gave a picture
22 of the child to his wife. Would he do that if he had just
23 physically abused his child? It doesn't make any sense. She
24 doesn't even -- she didn't bring her photograph here today to
25 say, look at that bruise.

1 Then she has the child for three days. On Monday,
2 the third day, she notices that there are individual bruises
3 and not one long bruise so she immediately suspects they're
4 finger marks. She goes to the police station where her
5 brother works. They-- And this custody case is going on.
6 The divorce is filed. The matters in the trenches, so to
7 speak. They tell her take the child down to the hospital and
8 have the child examined.

9 The child's examined by Dr. Hennes who has been an
10 emergency room practitioner for 25 years. He's a professor.
11 And he looks at the bruises. He sees two. He rules out
12 abuse, says the probability of this being an abuse-caused
13 injury is very minimal. He rules it out. That's a doctor who
14 saw this child on March 28th.

15 The case then goes to Social Services. They
16 investigate it. They do nothing. They don't file a Chips.

17 Now mom takes it on her own. Not having gotten any
18 satisfaction from anybody else, she calls Dr. Greenbaum at the
19 UW Hospital and gets a report where Dr. Greenbaum says, well,
20 this may be abuse, it's suspicious. But she doesn't know.

21 And so now, I think, it's highly inappropriate for a
22 court to issue a restraining order prohibiting him from seeing
23 his children for basically two years based upon, well, maybe,
24 it's suspicious. That's what Greenbaum says. Dr. Hennes
25 says, no, very low probability that this is an abusive

1 incident.

2 My client reported it, took the kids to the Easter
3 Bunny, and his wife doesn't do anything for three days. And,
4 by all the testimony, it's a minor injury. The child's
5 behavior wasn't changed at all. There was no head injury;
6 nothing showed up on the x-rays.

7 And the other thing that occurred to me, I wanted
8 you to look at my client's hands, that he may not -- probably
9 wouldn't be able to reach his hand around the child's head.
10 And, if he did, there's no injury to the neck. You know, the
11 child wasn't complaining about that. Nobody even mentioned
12 that, a neck injury which-- I don't think this child was
13 injured by somebody grabbing his head. I just don't. There's
14 no-- The only thing there is, is there's a couple marks that
15 may be suspicious but that's all they are.

16 And the remedy that these people are seeking with
17 this restraining order far outweighs any injury this child
18 incurred and the only evidence of occurrence is my client's
19 testimony as to how this happened, which was reported
20 immediately to the mother. There is no other evidence of
21 causation. And I think this Court's -- this Court has to make
22 a ruling that it is probable that my client caused this injury
23 by grabbing the child's head and there is nothing but
24 speculation in regard to that.

25 And the rest of the stuff is superfluous, regarding

1 my client's emotional crises in the past. We heard testimony
2 from his current psychologist who has seen him 13 times since
3 January, says he's not a threat to anybody.

4 THE COURT: That's not exactly true but go ahead.

5 ATTORNEY ELBERT: At this time he's on his
6 medication. And I also find it curious that in January -- on
7 January 18th he would tell the police officer who came to
8 evaluate him after a crisis call that he would do nothing to
9 jeopardize his ability to see his children. That does not
10 suggest that a month and a half later he's going to be abusing
11 his child. It leads to the opposite conclusion. That's all I
12 have, Your Honor. (Reporter changing paper.)

13 Your Honor, I think that the most appropriate way
14 that this matter should be resolved, or further investigated,
15 would be through a Chips evaluation. If there's been one
16 already, I don't know. You know, this matter isn't closed
17 yet. But I think a restraining order of this nature is highly
18 inappropriate under these circumstances.

19 THE COURT: Guardian ad litem.

20 ATTORNEY BUSCH-ELL: Well, Your Honor, I tend to
21 agree with Attorney Elbert that a Chips evaluation would be
22 more appropriate.

23 Given that, I'm concerned if these incidents, or
24 this incident, happened the way the mother believes, that
25 while an injunction would -- would grant the protection to the

1 children, there's no services being provided like the Chips
2 would do.

3 But, on the other hand, based on the testimony of
4 Dr. Greenbaum, and looking at the pictures and reviewing Miss
5 Mays' original petition and her concerns regarding Mr. Mays'
6 mental stability, what I think are her credible statements,
7 that he has made threats to hurt himself, I think there's
8 reason to believe that he either will hurt the children or he
9 has hurt the child in the past.

10 So I -- although it -- it's certainly not my choice
11 if I could choose what would happen, but I think Miss Mays has
12 met the burden and that the Court should grant the injunction.

13 THE COURT: All right. I think, as you all know,
14 the Chips petitions are much different. That's a child in
15 need of protective services. And here we have one parent that
16 can provide those services; there'd be no need for a Chips
17 proceeding against her. I'm not sure that there's been in a
18 divorce proceeding that we've ever had a Chips petition in
19 that regard. Just very seldom.

20 One of the problems you have here, I think, is that
21 we go through "he said/she said". But I'm very concerned
22 about the fact that a psychologist will say, when I asked him
23 the question that if he would not take his medication, that,
24 yes, it could be -- could result in a -- a problem for the
25 children.

1 Now, one of the-- In Chapter 51 proceedings for
2 mental commitments, you realize that the most prominent and
3 probably the most common problem we have is that the patients
4 don't take their medication and they don't do it because: I
5 don't need to take them, I get headaches, or I get fat. I've
6 heard a thousand arguments as to why people don't want to take
7 their medication. If they're on the medication, it seems to
8 keep them very, very calm and less likely to do this.

9 I'm concerned about the fact that children come home
10 with some bruises. I also realize that it occurred on the
11 25th. Bruising takes more time. Except for older people. I
12 can verify to that. You get a bruise; it occurs almost
13 instantly. But with younger children, the bruises may not
14 show up for three, four days.

15 You understand, that in this type of proceeding, if
16 the child's abused, it's statutory. That this Court is not
17 saying that -- that visitation can not take place. I think
18 that's a matter for the family court commissioner or the
19 family court judge to do. Any visitation that I set up on
20 this injunction is subject to modification.

21 But I am concerned about the fact that we have a
22 11-month-old child who ends up with some bruises; that they're
23 -- they're really not consistent with hitting your head
24 against something. They're -- it's an unusual marking. And
25 that's sort of scary. I've got grandchildren myself, quite a

1 few of them, and youngest one is only seven months old. And I
2 -- I think that, well, I'm also concerned about the fact that,
3 I mean, I agree with the guardian ad litem in this case: It's
4 a very close call.

5 But I think my responsibility is to protect the
6 children. I -- I guess I'm also concerned about his job.
7 It's a -- it's a concern. But have you given consideration to
8 that?

9 ATTORNEY GERGEN: Your Honor, we have. We've made
10 offers. They've been rejected. We are left with this. And
11 we want to protect the children too and this is the only way
12 to do it at this time.

13 THE COURT: All right. Well, have you given any
14 more thought--

15 ATTORNEY ELBERT: I haven't heard any offers other
16 than "it's our way or no way".

17 ATTORNEY GERGEN: That's not true at all. You
18 rejected it and said your client wanted to proceed. So we
19 proceeded and here we are. Your Honor, at this point in time,
20 we're asking the Court to issue the restraining order.

21 THE COURT: All right. Well, let me ask you this.
22 If I gave you five minutes, could you try to work out a final
23 stipulation? And -- and that's all. Five minutes, that's it.
24 I have another matter at 12:30. I'm going to adjourn this
25 matter for five minutes, maybe ten minutes, and give you a

1 chance. If you can't, I'm going to render a decision from the
2 bench.

3 (After a brief recess, the following proceedings
4 occurred:)

5 THE COURT: I'm going to issue the injunction. I
6 think that the Court has heard from the parties, the
7 witnesses, and the guardian ad litem's recommendation. The
8 child is ^{J.K.M.} [REDACTED], birth date is April 14th, 2004; he's just
9 11 months old.

10 Based upon the hearing, the Court finds there are
11 reasonable grounds to believe that the respondent has engaged
12 in, or threatened to engage in, abuse to the child. That
13 abuse can mean mentally as well as physically and I'm afraid,
14 under the circumstances, we might have both.

15 Again, my decision is not going to affect the family
16 court or whatever agreement may be made or ordered by the
17 court in the family court proceeding except I'm going to order
18 that any visitation in this matter be held under -- with some
19 supervision.

20 And I want Mr. Mays to give his attorney a list of
21 people who he would agree with. They can look at it
22 themselves. If they don't agree with it, they can argue it
23 out. I think it's important that we do this. These children
24 are very young and I don't think this Court could allow any
25 kind of indication that these things have occurred.

1 I'm concerned about the cumulative aspect of the
2 evidence. I see no reason why he would call his wife and ask
3 her if -- have you heard about the fellow in Montello that
4 killed his child and himself. There's no reason to bring that
5 up. It may be of interest in an -- in the newspaper but not
6 to call her and ask her about it. The doctor, his own
7 psychologist, indicated that he was suicidal at one time.
8 That he also testified that if he refused to take his
9 medication he could be -- could cause danger to himself or to
10 others. That's pretty important.

11 As I indicated before, I don't know what your
12 visitation has been at this time. What is it right now?

13 MR. MAYS: I haven't had anything in the past two
14 weeks, Your Honor.

15 THE COURT: No, no. What's the agreed upon
16 visitation?

17 ATTORNEY GERGEN: It wasn't agreed upon. It was
18 ordered temporarily by the Family Court Commissioner without
19 hearing any evidence or testimony whatsoever and it was daily
20 contact.

21 THE COURT: Well, daily contact by physical
22 presence?

23 ATTORNEY GERGEN: Yes.

24 THE COURT: Well--

25 ATTORNEY GERGEN: Your Honor, I just want to raise

1 one thing. We have asked for an injunction regarding both
2 children and we're hoping that the Court will issue it for
3 both children. Whatever is in danger to one is in danger to
4 the other.

5 THE COURT: I agree. I think we have to do it under
6 both children.

7 ATTORNEY GERGEN: Your Honor, I can suggest that the
8 guardian ad litem try to work out some supervised placement
9 with Mr. Mays and his children. I think the Court can provide
10 for that even in this injunction.

11 THE COURT: All right. Let's do it that way. Would
12 you mind doing that, work out some sort of a time period?

13 ATTORNEY BUSCH-ELL: Well, I can tell the Court that
14 after today, I'm no longer on these restraining orders and I'm
15 under contract--

16 THE COURT: Okay.

17 ATTORNEY BUSCH-ELL: --we've been told in terms of
18 our appointment. I'm not appointed by the family court at
19 this point. Perhaps I will be. I don't know.

20 THE COURT: There might be in the family court case.

21 ATTORNEY GERGEN: We could stipulate that she be
22 appointed forthwith in the family court case.

23 ATTORNEY BUSCH-ELL: That's fine.

24 THE COURT: Is that agreeable, Mr. Elbert?

25 ATTORNEY ELBERT: I don't care.

1 THE COURT: Okay. I think that would be a good way
2 to do it so we've got some continuity. Now, I'm not sure an
3 everyday -- has it been on an everyday basis?

4 ATTORNEY GERGEN: From 7:30 in the morning until one
5 o'clock in the afternoon most days during the week, yes.

6 THE COURT: Who takes care of the children if she's
7 working at 7:30?

8 MR. MAYS: I was.

9 ATTORNEY GERGEN: He was. And there is also a
10 sitter available, Your Honor.

11 THE COURT: And who will take care of them now?

12 ATTORNEY GERGEN: Kids Care. Their sitter is Beaver
13 Dam Community Hospital Kids Care. It's a day care.

14 THE COURT: All right. The next question I want to
15 ask is about firearms. Do you have any firearms?

16 MR. MAYS: I don't own any firearms, Your Honor.

17 THE COURT: Okay, that's fine. Do you agree--

18 ATTORNEY BUSCH-ELL: Yes.

19 THE COURT: --we don't need the firearm.

20 MR. MAYS: Well, I work at the Waupun Correctional
21 Institution.

22 THE COURT: And you can't have firearms; is that
23 right?

24 MR. MAYS: No.

25 ATTORNEY ELBERT: No. If he doesn't have the

1 ability to carry firearms, then he is unemployable there.

2 THE COURT: They don't -- they don't have firearms
3 in the prison.

4 MR. MAYS: Per Executive Directive 42 by my work
5 rules, I can't--

6 ATTORNEY GERGEN: We would have no objection--

7 THE COURT: They don't object. He doesn't have any
8 firearms. You don't--

9 MR. MAYS: Per Executive Directive 42 of my work
10 rules, if I have a restraining order against me, I can't work.

11 ATTORNEY ELBERT: Here. (Handing the Court papers.)

12 THE COURT: I never heard of that.

13 ATTORNEY GERGEN: I haven't either, Your Honor.

14 ATTORNEY ELBERT: This one right here. I think it
15 says firearm restrictions.

16 ATTORNEY GERGEN: Do you have the form?

17 THE COURT: We don't have -- there is no -- I'm not
18 issuing an injunction with firearms. He doesn't have any
19 firearms.

20 MR. MAYS: My work--

21 ATTORNEY ELBERT: He's not going to issue a
22 restriction regarding firearms. In other words, you can
23 possess firearms.

24 THE COURT: It's my understanding, at least from my
25 many visits with the prisons, most of the people in prison

1 don't have firearms.

2 ATTORNEY ELBERT: The only time they issue them is
3 if there's a riot.

4 THE COURT: Yeah. I don't think -- I'm -- I'm not
5 issuing any restraining order on the firearms. You don't have
6 any. We're talking about personal firearms.

7 ATTORNEY ELBERT: This says--

8 THE COURT: There is no restraining order on that.
9 Anything else?

10 ATTORNEY GERGEN: Your Honor, the clerk will -- the
11 clerk, this is her first time doing this so she's going to
12 continue to fill this out and she would just ask that you
13 check the boxes that you ruled.

14 THE COURT: I will. And we'll have -- the bailiff
15 will give a copy to the respondent. All right. Now, how long
16 do you want this restraining order for?

17 ATTORNEY GERGEN: Well, we'd like it for the maximum
18 amount of time.

19 THE COURT: Doesn't the statute require that I do
20 that?

21 ATTORNEY GERGEN: Yes, I believe it does.

22 ATTORNEY ELBERT: Statute requires that you issue it
23 for whatever they want.

24 ATTORNEY GERGEN: Unless it's by stipulation. We
25 can do it less than that time but I think--

1 ATTORNEY ELBERT: That's right.

2 THE COURT: --required.

3 ATTORNEY ELBERT: That's one area where you can't

4 even exercise your discretion.

5 THE COURT: Yeah, okay.

6 ATTORNEY GERGEN: I believe it's four years, Your

7 Honor, but whatever the maximum amount of time is under the

8 statute.

9 THE COURT: Four or two? I can't remember.

10 ATTORNEY ELBERT: I'm not sure. I know harassment

11 are two, domestic abuse are four. I'm not sure about child

12 abuse.

13 THE COURT: That's what this is. Okay. I think

14 domestic and child abuse are the same.

15 ATTORNEY GERGEN: Right. I believe so, Your Honor.

16 Can I look at that first?

17 THE COURT: Show it to Mr. Elbert, too.

18 ATTORNEY ELBERT: Your Honor, this restraining

19 order, I take it, is subject to any changes or any orders that

20 the family court might issue regarding placement; is that

21 right?

22 THE COURT: I think that the family court-- I can

23 issue an order but my guess is that the family court is going

24 to take precedence.

25 ATTORNEY GERGEN: I don't believe so, Your Honor. I

1 believe this takes precedence but I could be wrong.

2 THE COURT: Yeah. That's fine.

3 ATTORNEY ELBERT: Well, then because what you're
4 saying is that he's going to have supervised visitation for
5 four years? Is that what you're saying? Is that what you're
6 saying?

7 ATTORNEY GERGEN: I don't know if that's what I'm
8 saying. I'm saying we have this injunction. We'll have to
9 see where it takes us.

10 ATTORNEY ELBERT: What do you want me to do with it?

11 ATTORNEY GERGEN: I was told to have you look at it,
12 that's all.

13 ATTORNEY ELBERT: I don't even want to see it.

14 ATTORNEY GERGEN: All right, fine. Here you go,
15 Judge. You have to check the appropriate boxes and fill in
16 the date.

17 THE COURT: Again, my understanding is that any
18 visitation is going to be under supervision so we're not
19 blocking Mr. Mays from any visitation. What we're saying is
20 it's got to be supervised and that's at least until the people
21 supervising it are saying it doesn't have to be supervised any
22 more. I don't know if the guardian ad litem does that, but my
23 job is to protect the children. That's what I'm trying to do.
24 All right. What day is it today? The 8th?

25 ATTORNEY GERGEN: Yes. It's April 8th, Your Honor.

1 We'll have to Xerox this, I think. Let's Xerox this and have
2 a copy for the guardian ad litem and a copy for the
3 respondent--
4 ATTORNEY BUSCH-ELL: I'll pick mine up later.
5 THE COURT: Okay.
6 ATTORNEY BUSCH-ELL: Your Honor, is the hearing
7 ended then?
8 THE COURT: Is what?
9 ATTORNEY BUSCH-ELL: Is the hearing ended?
10 THE COURT: Yes.
11 ATTORNEY BUSCH-ELL: Thank you.
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DISTRICT IV

September 14, 2006

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You are hereby notified that the Court has entered the following opinion and order:

2005AP1034

Kristie L.M., J.K.M. and J.M. v. Dennis E.M.

Before Dykman, Vergeront and Deininger, JJ.

Dennis E.M. appeals from a child abuse injunction regarding two of his children. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate

for summary disposition. See WIS. STAT. RULE 809.21 (2003-04).¹ We affirm as to one child, but reverse as to the second.

The petition for the injunction was filed by Kristie L.M., as the mother of J.K.M. and J.M., who were approximately ages one and three at the time. The petition, using a preprinted checkbox form, alleged that Dennis had engaged in, or may engage in: (1) physical injury inflicted on the child by other than accidental means; and (2) emotional damage to the child as defined in WIS. STAT. § 48.02(1)(gm). A typed narrative with the petition alleged, among other things, that J.K.M. had returned home from Dennis's residence with bruises on his head that were consistent with fingerprints.

After an evidentiary hearing, the court granted the injunction as to both children. The court found that there were reasonable grounds to believe Dennis had engaged in, or threatened to engage in, abuse to the children. The injunction requires him to avoid the children's residence and to avoid contacting the children without Kristie's consent and court approval. Dennis appeals.

The injunction was issued under WIS. STAT. § 813.122(5)(a)3. That statute permits a court to issue an injunction if, after a hearing, the court finds reasonable grounds to believe that the respondent has engaged in, or based upon prior conduct of the child victim and the respondent, the respondent, may engage in abuse of the child victim. Section 813.122(5)(a)3. "Abuse" includes a threat to engage in any conduct that meets the definition of "abuse."

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

Section 813.122(1)(a). For all of these provisions, the term “abuse” has the meaning given in Wis. STAT. § 48.02(1)(a) and (1)(b) through (1)(gm). Section 813.122(1)(a).

Dennis first argues that the evidence is insufficient to support a finding that he engaged in child abuse in the form of physical injury. The definition of “abuse” includes “physical injury inflicted on a child by other than accidental means.” Wis. STAT. § 48.02(1)(a). The term “physical injury” “includes but is not limited to lacerations, fractures, burns, internal injuries, severe or frequent bruising or great bodily harm, as defined in s.939.22(14).” Section 48.02(14g). The only evidence at the hearing of physical injury concerned the bruises to J.K.M. as alleged in the petition.

Dennis argues that the court erred by finding that the bruises were not the result of an accident, as Dennis had claimed they were. Kristie argues that the court’s finding was supported by the testimony of a medical doctor who opined, based on the medical records, that the injuries, “without any explanation,” were “a suspicious thing for an inflicted trauma or physical abuse,” and that the pattern of bruising might suggest finger or knuckle marks. The doctor also testified that the pattern of bruising was not consistent with Dennis’s explanation that J.K.M. fell and hit his head on an entertainment center. We conclude there was sufficient evidence for the court to conclude that there were reasonable grounds to believe the bruises were not accidental.

Dennis next argues that the level of bruising in this case did not satisfy the definition of “physical injury” stated above. The only evidence of injury to J.K.M. was the bruises on his head, and Dennis argues that those bruises do not meet the statutory definition of “severe” bruising. We conclude that the definition includes the type of bruises here. The statutory definition states that it includes, but is not limited to, the specific injuries listed. We conclude

that the legislature intended to include conduct that causes bruises of this type to the head of an eleven-month-old child.

Dennis argues that even if the factual basis was established, the court erroneously exercised its discretion in granting the injunction. He argues that the court had a misconception about the effect that an abuse injunction would have in the parties' pending divorce case in family court. Specifically, the court said that its decision was not going to affect the family court orders, but in actuality, Dennis argues, the abuse injunction creates a rebuttable presumption that the parties will not be able to cooperate in the future decision making required for joint legal custody, *see* WIS. STAT. § 767.24(2)(b)2.c., and the family court deferred to the injunction in this case. However, Dennis does not cite to any information in the current record about what the family court did. Nor has he offered any authority for the proposition that a trial court error about the effect of the injunction is grounds for reversal.

Based on the above analysis, we affirm the injunction as to J.K.M., based on the court's finding of abuse in the form of physical injury. However, J.K.M.'s brother, J.M., is also covered by the injunction. Neither the circuit court nor the parties have cited any statute providing that a finding of abuse as to one child creates automatic grounds, by operation of law, for an injunction covering the child's siblings. The injunction statute is written in a way that appears to call for a specific finding as to "the child victim" for a child covered by an injunction. *See, e.g.*, WIS. STAT. § 813.122(1)(c), (5)(a)3., and (6). Accordingly, we analyze the injunction separately as to J.M.

As discussed above, the injunction statute authorizes an injunction when the court finds reasonable grounds to believe the respondent has committed abuse by causing physical injury. In this case there was no allegation or evidence that J.M. suffered a physical injury.

The definition of "abuse" also includes "emotional damage." Kristie's petition for the injunction alleged this ground. The circuit court may have found abuse on this ground when it stated that "abuse can mean mentally as well as physically and I'm afraid, under the circumstances, we might have both." The court appears to have been referring to comments that Dennis was asserted to have made about a recent news item about a man who killed his child and himself, and another comment to the effect that the family members were all going to die. On appeal, Dennis argues that the court erred by finding emotional damage. Kristie's brief asserts that this issue is "irrelevant," and she does not attempt to argue that there is support for such a finding.

The statute creating this ground provides that "abuse" includes: "Emotional damage for which the child's parent, guardian or legal custodian has neglected, refused or been unable for reasons other than poverty to obtain the necessary treatment or to take steps to ameliorate the symptoms." WIS. STAT. § 48.02(1)(gm). The term "emotional damage" has the following definition:

"Emotional damage" means harm to a child's psychological or intellectual functioning. "Emotional damage" shall be evidenced by one or more of the following characteristics exhibited to a severe degree: anxiety; depression; withdrawal; outward aggressive behavior; or a substantial and observable change in behavior, emotional response or cognition that is not within the normal range for the child's age and stage of development.

Section 48.02(5j).

In the past, the statutory definition of “emotional damage” included the question of whether the parent “caused the damage.” See *M.Q. v. Z.Q.*, 152 Wis. 2d 701, 704, 449 N.W.2d 75 (Ct. App. 1989). However, in the current statute the question of who or what caused the emotional damage is absent. The conduct that is defined as abuse is the parent’s neglect, refusal, or inability to take the steps necessary for treatment or amelioration of emotional damage.

There is no evidence in this case that J.M. suffered emotional damage. There is no evidence that he exhibited any of the listed symptoms to a severe degree. Even if there was evidence of emotional damage, there is no evidence that Dennis neglected, refused, or was unable to take the steps necessary for treatment or amelioration of emotional damage. Therefore, there is no basis to find reasonable grounds to believe that Dennis has committed abuse of J.M. in this manner.

As noted above, the definition of “abuse” includes a threat to engage in any conduct that meets the statutory definition of abuse. WIS. STAT. § 813.122(1)(a). The circuit court’s oral findings and written order state that there are reasonable grounds to believe Dennis threatened to commit abuse. The court was apparently referring to the comments asserted to have been made by Dennis that we described above. We conclude that these comments by themselves, although disturbing, do not rise to a level that can reasonably be considered the making of a threat. They are simply too vague and unspecific.

Finally, the statute authorizes an injunction when there are reasonable grounds to believe, based upon prior conduct of the child victim and the respondent, that the respondent *may* engage in abuse of the child victim. WIS. STAT. § 813.122(5)(a)3. The circuit court made no oral finding that Dennis may engage in abuse. The preprinted form used by the court did not include

this ground. In the absence of such a finding, this ground cannot be a basis to support the injunction as to J.M.

In summary, we conclude that there were reasonable grounds to conclude that Dennis had abused J.K.M. by causing physical injury, and therefore we affirm the injunction as to that child. However, we conclude that there is no basis in the record that supports an injunction as to J.M., and therefore we reverse the injunction as to that child.

IT IS ORDERED that the order appealed from is summarily affirmed under WIS. STAT. RULE 809.21 as to J.K.M., and summarily reversed as to J.M.

DYKMAN, J. (*dissenting*). The majority reasons that the statutory phrase “severe or frequent bruising” found in WIS. STAT. § 48.02(14g) really means “bruising which does not have to be severe.” The majority offers no explanation for this unusual statutory interpretation other than to write: “The statutory definition states that it includes, but is not limited to, the specific injuries listed.” Majority at 3. The majority refers to § 48.02(14g): “‘Physical injury’ includes but is not limited to lacerations, fractured bones, burns, internal injuries, severe or frequent bruising or great bodily harm, as defined in s. 939.22(14).”

It is apparent from reading the statute that the legislature did not intend any kind of injury as the basis for a child-abuse injunction. Had the legislature intended the result the majority achieves, it would have omitted the word “severe” as modifying the word “bruising.” Thus, the

majority's excision of the word "severe" from the statute substitutes the majority's policy decision for that of the legislature.

This is more than a musing about statutory interpretation. Real people are involved, both parents and children. Children are injured all the time. Kids, playtime, bruises and scrapes are part of an inevitable mix. Most of the time a bandage and a kiss takes care of the injury. Turning ordinary bruises into child abuse is not protective for children and serves as an *in terrorum* accusation for parents.

There is a dark side to this. If a parent is found to have abused a child, the presumption of joint legal custody found in WIS. STAT. §767.24(2)(am) does not apply. Instead, a child abuse injunction creates a rebuttable presumption that joint legal custody is not in the best interest of the child. Section 767.24(2)(b)2.c. Family law practitioners are well aware of this statute. They and trial judges are not reticent about discussing their beliefs that some child abuse injunctions and domestic abuse injunctions are brought on questionable evidence as precursors to divorce actions, for the sole purpose of insuring a favorable legal custody judgment.

Unfortunately, the trial court was unaware of WIS. STAT. § 767.24(2)(am) and the danger of improvident child abuse injunctions because it mistakenly told the parties that its decision would not affect family court orders.

Kristie L.M. argues that public policy favors issuing child abuse injunctions. While that is one side of the equation, the language of the statute pertains to serious injuries, such as lacerations, fractured bones, burns, internal injuries or great bodily harm. The rule of *ejusdem generis* and common sense tells us that serious injuries like those mentioned, and *serious* bruising are the injuries that the legislature was interested in preventing. Injuries of a minor

nature were specifically not included in the statute. Thus, the statute, as the legislature intended it, protected parents from questionable assertions of child abuse while protecting children from serious harm.

We review a trial court's findings of fact deferentially, under the clearly erroneous standard. But we review whether reasonable grounds exist to issue a child abuse injunction de novo. *In re H.Q.*, 152 Wis. 2d 701, 708, 449 N.W.2d 75 (Ct. App. 1989). Unfortunately, the trial court did not find any facts. The trial court was concerned that the children came home with bruises. It was also concerned with the unusual markings on J.K.M.'s head and that the markings were not consistent with hitting your head on something. It found that "sort of scary." It concluded that its responsibility was to protect the children. The trial court did not consider that limits on child abuse injunctions gave protection to parents or that only serious injuries permitted it to issue a child abuse restraining order. It concluded, in effect, that any injury to a child could support a child abuse restraining order.

What were the facts the trial court heard? J.K.M.'s treating physician was a board certified specialist in pediatric emergency medicine and a professor of pediatric emergency medicine at the Medical College of Wisconsin. Child abuse was an essential part of his work and training. He testified that when he examined J.K.M., he was looking for evidence of child maltreatment, specifically head trauma. He discovered two circular yellowish-brown bruises on J.K.M.'s head about an inch apart. The bruises were more than a week old. He could not say what caused the bruises. When asked if these were serious injuries, he said "not that I can detect." He observed no bruises or bony tenderness anywhere else, J.K.M.'s extremities looked normal and a head CT scan was normal. A skeletal survey revealed no acute or chronic fractures. He was asked whether the bruises he saw constituted child abuse and he answered:

“[V]ery minimal.... I would say it’s less than—it’s definitely less than fifty percent just based on seeing those two bruises.” He was asked if he ruled out child abuse. He answered: “I did not rule it out. I said the likelihood is small.”

Other witnesses testified, including a doctor who did not examine J.K.M. The trial court made no credibility determinations and no factual findings, other than noting concerns. It employed an incorrect view of the law, concluding that a child abuse injunction was nothing more than an interim decision, reviewable by the family court. With no evidence at all of child abuse to J.K.M.’s sibling, it issued an injunction as to that sibling too.

I conclude, as we did in *In re H.Q.*, that the evidence does not support the issuance of a child abuse injunction. The only evidence of child abuse was bruises, and no one testified that they were, as the statute requires, “severe or frequent.” They were not. A doctor who had not seen J.K.M. but saw some photographs felt only that the bruises were “suspicious.” She was unable to diagnose child abuse to a reasonable degree of medical certainty. Instead she testified: “I said it was suspicious for abuse to a reasonable degree of medical certainty.” J.K.M.’s treating physician testified that the bruises were not serious, and the chance of their being caused by child abuse was small.

Despite a trial court relying on the wrong law, no evidence of serious bruising despite a statute requiring that, nothing more than suspicion on the part of the witness the majority relies on, and a treating physician who looked for evidence of child abuse and found the likelihood of that small, the majority affirms a decision that will cause damage to a father for at least the minority of his two children. It will make legal custody next to impossible and deter placement. His children will certainly be told that their father is a child abuser. Child abuse is a heinous act,

and courts should act when evidence of child abuse exists. It does not exist here. I cannot agree with the majority's conclusion that it does, and I therefore respectfully dissent.

Cornelia G. Clark
Clerk of Court of Appeals

SUPREME COURT OF WISCONSIN

DISTRICT A
APPEAL NO. 05-AP-1034
CIRCUIT COURT CASE NO. 05-CV-192

KRISTI L.M., J.K.M., and J.M.

Petitioners-Respondents

vs.

DENNIS E.M.

Respondent-Appellant-Petitioner

BRIEF AND APPENDIX OF PETITIONERS-RESPONDENTS

Respectfully submitted,

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No

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STATEMENT OF THE ISSUES

- I. DID THE TRIAL COURT ERR IN FINDING THE MEDICAL TESTIMONY CREDIBLE REGARDING J.K.M'S.INJURIES? Answer: No

- II. DID THE TRIAL COURT AND THE COURT OF APPEALS ERR IN HOLDING THAT THE INJURIES TO J.K.M SUPPORT THE FINDING THAT DENNIS E.M. HAS ENGAGED OR MAY ENGAGE IN CHILD ABUSE? Answer: No

STATEMENT OF THE CASE

On December 13, 2004, Dennis E.M. (hereinafter "Dennis E.M.") and Kristi L.M. (hereinafter "Kristi L.M.") separated after six years of marriage (R. 19). On February 28, 2005, Dennis E.M. filed a summons and petition for divorce and an Order to Show Cause for Temporary Order and supporting affidavit in Dodge County, Wisconsin, under Dodge County Case Number 05-FA-80 (R. 19). A temporary order hearing was held on March 23, 2005. At that hearing, the Family Court Commissioner, as an interim placement schedule, ordered that Dennis E.M. was to have placement of the parties' minor children (hereinafter "J.K.M. and J.M.") Monday through Friday from 7:30 a.m. to 1:00 p.m. unless it was Dennis E.M.'s day off from work. If it was Dennis E.M.'s day off from work, he would then have placement from 7:30 a.m. until 5:00 p.m. Dennis E.M. was also to have placement of the minor children one overnight per week and one four hour period of time on Saturday or Sunday each week.

During his period of placement with the parties' minor children, there was an incident of child abuse involving Dennis E.M. and the parties' minor child J.K.M., date of birth April 14, 2004, that occurred on or about March 25, 2005, while J.K.M. was placed with Dennis E.M. Kristi L.M. then filed a petition for a temporary child abuse restraining order on April 4, 2005 which was applicable to both of the parties' minor children, J.K.M. and J.M., date of birth, February 8, 2002. (R.1) On April 8, 2005, a child abuse restraining order hearing was held in the Dodge County Circuit Court, the Honorable Richard J. Callaway, Reserve Judge, presiding. After hearing testimony from

both parties and medical professionals, the trial court issued a child abuse injunction applicable to both of the parties' minor children, J.K.M and J.M. (R. 14). Attached to the child abuse injunction was a document entitled Domestic abuse / child abuse attachment. (R. 14). The attachment provided Dennis E.M. was to have supervised visitation at times agreed to by the Guardian ad Litem.

In response to the issuance of the child abuse injunction, a temporary order hearing in the divorce case was held on April 13, 2005 to amend the temporary order entered on March 23, 2005. At that hearing, the Family Court Commissioner, with the agreement of the Guardian ad Litem, issued an amended temporary order integrating the child abuse injunction into the divorce action. The Dennis E.M. filed a Notice of Appeal on April 15, 2005. (R. 16)

The District IV Court of Appeals issued a decision on September 14, 2006 affirming the injunction as to J.K.M. and reversed the injunction as to J.M.

STATEMENT OF THE FACTS

On March 25, 2005, Dennis E.M. contacted Kristi L.M. at work to inform her that their son, J.K.M. was reaching for blocks in the entertainment center and had hit his head. (R. 19, page 5, lines 5-6) The parties' minor child, J.K.M. was 11 months old at the time of the incident. (R. 19, page 5, line 8) Dennis E.M. indicated that J.K.M. was doing fine. (R. 19, page 5, lines 18-19) Dennis E.M. said that J.K.M. had a big goose egg on the side of his head. (R. 19, page 58, lines 4-5) Dennis E.M. did not discuss with Kristi L.M. whether or not he should take J.K.M. to the hospital. (R. 19, page 58, lines 8-9)

Dennis E.M. returned the children to Kristi L.M. later that same evening. (R. 19, page 58, lines 17-18) Kristi L.M. noticed swelling on the left side of J.K.M.'s head (R. 19, page 59, lines 3-5) The swelling was three to four inches above J.K.M.'s left ear (R. 19, page 59, lines 10-13) J.K.M. also had a laceration on his forehead along with red marks on his chin, on his knees and on the top of his feet. (R. 19, page 59, lines 15-17) The following Monday, the swelling had gone down on J.K.M.'s head and Kristi L.M. could see that there were three distinct marks on the side of his head that looked like fingerprints and appeared to be the impressions of fingers. (R. 19, page 60, lines 18-20) Kristi L.M. took J.K.M. to the Beaver Dam Police Department and someone at the police department told Kristi L.M. to take J.K.M. to hospital for examination. (R. 19, page 61, lines 22-23) The Beaver Dam police contacted Dodge County Social Services and Social Services filed a temporary placement order. (R. 19, page 62, lines 3-8)

At the evidentiary hearing on Kristi L.M.'s petition for the child abuse injunction, Dr. Greenbaum, the medical director at the Child Protection Center at Children's Hospital of Wisconsin in Milwaukee, Wisconsin provided testimony concerning J.K.M.'s injuries. Dr. Greenbaum had reviewed J.K.M.'s medical records from an examination that had occurred in the Hospital's emergency room on March 28, 2005. Dr. Greenbaum testified there was a cluster of three small, round, brown to red bruises, oriented in a horizontal line, evenly spaced, on the left portion of J.K.M.'s scalp. (R. 19, page 8, lines 9-13) There was also a bruise on the right side of J.K.M.'s forehead or temple area. (R. 19, page 8, lines 6-7) Based upon her investigation, she found that J.K.M. had four distinct bruises on his head. (R. 19, page 9, lines 3-4) She also determined that J.K.M. had some red areas on both knees, tops of his feet, and dorsum of the feet. (R. 19, page 8, lines 22-24) Dr. Greenbaum concluded that having bruises on the head as described, without any explanation in a child of J.K.M.'s age and lack of mobility is a suspicious for an inflicted trauma or physical abuse. (R. 19, page 10, lines 1-4) The marks suggested finger or knuckle marks, based upon their small, round appearance and their very even spacing, in a kind of horizontal line. (R. 19, page 10, lines 7-8) Dr. Greenbaum further testified that she would expect that the child, at 11 months of age, would have to be crawling into the entertainment center or standing and then fall into and bump against it. In either case, such an incident would be of very low velocity, and likely to cause only minor trauma on the forehead. (R. 19, page 10, lines 17-20) Had the fall taken place as suggested by

Dennis E.M., she would have expected to see a single bruise, probably on the forehead but she would not expect to see a cluster of three individual bruises. (R. 19, page 10, lines 22-23)

Dr. Shay, a medical resident at the Children's Hospital emergency room was the first to examine J.K.M. He found four bruises on the child's head. (R. 19, page 30, lines 20-21) Dr. Halim Hennes, a physician at the emergency department in the trauma center and the Children's Hospital, also examined J.K.M. on March 28, 2005 at the Children's Hospital emergency room. (R. 19, page 24, lines 6-10) Dr. Hennes testified that he examined J.K.M. and found two yellowish brown bruises on the side of his head. Both were circular and about a little over an inch apart. (R. 19, page 25, lines 12-15)

In addition to the medical testimony, related to the incident of abuse on J.K.M. the court also heard testimony regarding Dennis E.M.'s mental health. Dennis E.M. has a long history of suicide threats and emotional instability. (R. 19, page 37, lines 1-4) In June 2000, Dennis E.M. was very depressed and threatened to take an overdoes of pills. (R. 19, page 37, lines 8-9) In December 2004, Dennis E.M. has tried to get himself emergency detained on several occasions. (R. 19, page 42, lines 17-21) On or about January 3, 2005, Dennis E.M. called Kristi L.M. on her way home and asked her if she had read an article in the newspaper about a man in Montello would was served with divorce papers by his wife. After receiving the divorce papers, the man in the newspaper article murdered the couple's seventeen month old son and then killed himself. (R. 19,

page 38, lines 23-25) After placement with Dennis E.M., the parties' minor child J.M. has recently made comments about his father saying they're all going to die. (R. 19, page 39, lines 9-11) The previous Sunday, J.M. had told Kristi L.M. that "mommy, J.M., J.K.M. and daddy" were going to die. (R. 19, page 39, line 22) On or about January 17, 2005, Kristi picked up J.M. and J.K.M. after work and Dennis E.M. stood behind the van and would not let Kristi L.M. and the boys leave. (R. 19, page 40, lines 7-10) Dennis E.M. was very agitated and yelling. (R. 19, page 40, lines 12-14)

Dennis E.M. had been a patient of Dr. Haight's since January 3, 2005. (R. 19, page 46, lines 14-15) Dr. Haight was Dennis E.M.'s psychologist at Psychiatric Associates in Beaver Dam. (R. 19, page 45, lines 17-24) Dennis E.M. had previously been treated by Dr. Singer, a psychiatrist and Dr. Furgeson, a psychologist. (R. 19, page 46, lines 20-22) Dr. Haight has had 13 sessions with Dennis E.M. (R. 19, page 46, lines 16-17) Dr. Haight testified that Dennis E.M. is still somewhat depressed. (R. 19, page 49, lines 8-9) Dennis E.M. never discussed with Dr. Haight the killing and suicide in Montello or how he (Dennis E.M.) could relate to that incident. (R. 19, page 52, lines 8-11) Dennis E.M. never disclosed to Dr. Haight that he had felt like hanging himself while he was folding laundry in the basement in the last couple of months. (R. 19, page 52, lines 12-15) Dr. Haight stated that Dennis E.M. self-reported he has been taking his medication as prescribed. However Dr. Haight indicated he did not actually know whether or not Dennis E.M. was actually taking his medication. (R. 19, page 54, lines 15-17) Dr. Haight also testified that in the event Dennis E.M. was not on his medication, that he would be a

danger to himself or others. (R. 19, page 56, lines 20-24)

The Guardian ad Litem appointed to represent the best interests of the minor child in the child abuse injunction case, Attorney Alana Busch-Ell, was present in the court room and participated in the proceedings at the evidentiary hearing. Following the close of evidence and the arguments of counsel for the parties, Attorney Busch-Ell stated that she found the testimony of Dr. Greenbaum to be credible. Attorney Busch-Ell further stated that she found there was reason to believe Dennis E.M. either had hurt or would hurt the children. Attorney Busch-Ell recommended it was in the best interest of the minor children to issue the child abuse injunction.

After receiving the recommendation of the Guardian ad Litem, the trial court made its findings. The court found the bruises to J.K.M. were not consistent with the child hitting his head against an object. The court found the markings to be unusual and scary. The court also noted bruises in young children may not appear for three to four days.

Noting it had examined the totality, and the cumulative nature of the evidence and that it had heard the recommendation of the Guardian ad Litem, the trial court then issued the child abuse injunction to Kristi for both of the minor children. The court concluded there were reasonable grounds to believe Dennis E.M. had engaged in, and may engage in, child abuse.

STANDARD OF REVIEW

Whether to grant injunctive relief is left to the sound discretion of the trial court. State v. Seigel, 163 Wis.2d 871, 889, 472 N.W.2d 584, 591 (Ct.App.1991). Under Wis. Stat. § 813.122, the judge *may* grant a child abuse injunction if “the judge finds reasonable grounds to believe that the respondent has engaged in, or based upon prior conduct of the child victim and the respondent may engage in, abuse of the child victim.” Wis. Stat. § 813.122(5)(a) 3; M.Q. v. Z.Q., 152 Wis.2d 701, 708, 449 N.W.2d 75, 78 (Ct.App.1989). “Whether such reasonable grounds exist is a question of mixed fact and law. We will not set aside the factual portion of the judge’s answer to the question unless it is clearly erroneous. We independently review the judge’s conclusion, based on the established facts, whether such reasonable grounds exist.” M.Q., 152 Wis.2d at 708, 449 N.W.2d at 78 (citation omitted).

A discretionary determination by the trial court will not be reversed if the record shows that discretion was exercised and we can perceive a reasonable basis for the court’s decision. Prahl v. Brosamle, 142 Wis.2d 658, 667, 420 N.W.2d 372, 376 (Ct.App.1987). “[W]here the record shows that the court looked to and considered the facts of the case and reasoned its way to a conclusion that is (a) one a reasonable judge could reach and (b) consistent with applicable law, we will affirm the decision even if it is not one with which we ourselves would agree.” Burkes v. Hales, 165 Wis.2d 585, 590, 478 N.W.2d 37, 39 (Ct.App.1991) (footnote omitted). Indeed, “we generally look for reasons to sustain discretionary decisions.” Id. at 591, 478 N.W.2d at 39.

We construe statutes for one purpose: “to ascertain and give effect to the intent of the legislature.” DeMars v. LaPour, 123 Wis.2d 366, 370, 366 N.W.2d 891, 893 (1985). In determining legislative intent, we look first to the language chosen by the legislature. “If the statute is clear on its face, our inquiry ... ends and we must simply apply the statute to the facts of the case.” In re Peter B., 184 Wis.2d 57, 70-71, 516 N.W.2d 746, 752 (Ct.App.1994). We do not look behind the plain and unambiguous language of a statute. As Justice Frankfurter said: there is a three-step methodology for interpreting statutes: “1. Read the statute; 2. Read the statute; 3. Read the statute.” Henry J. Friendly, *Mr. Justice Frankfurter on the Reading of Statutes*, reprinted in HENRY J. FRIENDLY, BENCHMARKS 202 (1967). Katie T. v. Justin R. 204 Wis. 2d 401, 555 N.W. 2d 651 (Wis. App. 1996)

I. THE TRIAL COURT DID NOT ERR IN FINDING THE MEDICAL TESTIMONY CREDIBLE REGARDING J.K.M'S INJURIES

The findings of fact made by a trial court without a jury are viewed with deference and may not be upset on appeal unless they are clearly erroneous. Fryer v. Conant, 159 Wis.2d 739, 744, 465 N.W.2d 517, 519-20 (Ct.App.1990); Wis. Stat. § 805.17(2). The “clearly erroneous” standard is essentially the same as the “great weight and clear preponderance” standard. Noll v. Dimiceli's, Inc., 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct.App.1983). Conversely, the fact findings of the trial court need not be supported by the great weight or clear preponderance of the evidence. Cogswell v. Robertshaw Controls, Co., 87 Wis.2d 243, 249, 274 N.W.2d 647, 650 (1979). Reversal is required

only if the great weight and clear preponderance of the evidence requires a contrary finding. Id. at 249-50, 274 N.W.2d at 650 (citing In re Estate of Jones, 74 Wis.2d 607, 611, 247 N.W.2d 168, 169-70 (1976)). The fact finder is the arbitrator of the weight and credit to be accorded to the witness' testimony. Cogswell, 87 Wis.2d at 250, 274 N.W.2d at 650 (citing Gehr v. Sheboygan, 81 Wis.2d 117, 122, 260 N.W.2d 30, 33 (1977)).

“When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact.” Id. It is within the province of the factfinder to determine the credibility of the witnesses and the weight it wishes to attach to the evidence produced. Cogswell, 87 Wis.2d at 250, 274 N.W.2d at 650 (citing Gehr, 81 Wis.2d at 122, 260 N.W.2d at 33).

An appellate court gives deference to a trial court's findings because of the superior opportunity of the trial court to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony. Kleinstick v. Daleiden, 71 Wis.2d 432, 442, 238 N.W.2d 714 (1976). It is the fact finder's function to resolve any conflicts or inconsistencies in the evidence and to judge the credibility of the evidence State v. Pankow, 144 Wis.2d 23, 30-31, 422 N.W.2d 913 (Ct.App.1988), and the fact finder may believe some of the testimony of one witness and some of the testimony of another witness even though their testimony, read as a whole, may be inconsistent. State v. Toy, 125 Wis.2d 216, 222, 371 N.W.2d 386 (Ct.App.1985). Unless the testimony is inherently incredible, an appellate court may not substitute its judgment for that of the fact finder. State v. Saunders, 196 Wis.2d 45 at 54, 538 N.W. 2d 546 (Ct. App. 1995) The weight and

credibility to be given to the opinions of expert witnesses is 'uniquely within the province of the fact finder.' Schoerer v. Schoerer, 177 Wis.2d 387, 501 N.W.2d 916 (Ct. App. 1993)

The trial court heard the following testimony at the evidentiary hearing on Kristi L.M.'s petition for the child abuse injunction. Dr. Greenbaum, the medical director at the Child Protection Center at Children's Hospital of Wisconsin in Milwaukee, Wisconsin had reviewed J.K.M.'s medical records from an examination that had occurred in the Hospital's emergency room on March 28, 2005. Dr. Greenbaum testified there was a cluster of three small, round, brown to red bruises, oriented in a horizontal line, evenly spaced, on the left portion of J.K.M.'s scalp. (R. 19, page 8, lines 9-13) There was also a bruise on the right side of J.K.M.'s forehead or temple area. (R. 19, page 8, lines 6-7) Dr. Greenbaum found J.K.M. had four distinct bruises on his head. (R. 19, page 9, lines 3-4) She also determined that J.K.M. had some red areas on both knees, tops of his feet, and dorsum of the feet. (R. 19, page 8, lines 22-24) Dr. Greenbaum concluded that having bruises on the head as described, without any explanation in a child of J.K.M.'s age and lack of mobility is suspicious for an inflicted trauma or physical abuse. (R. 19, page 10, lines 1-4) The marks suggested finger or knuckle marks, based upon their small, round appearance and their very even spacing, in a kind of horizontal line. (R. 19, page 10, lines 7-8) Dr. Greenbaum further testified that she would expect that the child, at 11 months of age, would have to be crawling into the entertainment center or standing and then fall into and bump against it. In either case, such an incident would be of very low

velocity, and likely to cause only minor trauma on the forehead. (R. 19, page 10, lines 17-20) Had the fall taken place as suggested by Dennis E.M., she would have expected to see a single bruise, probably on the forehead but she would not expect to see a cluster of three individual bruises. (R. 19, page 10, lines 22-23)

Another medical professional, Dr. Shay, a medical resident at the Children's Hospital emergency room was the first to examine J.K.M. He found four bruises on the child's head. (R. 19, page 30, lines 20-21) Dr. Halim Hennes, a physician at the emergency department in the trauma center and the Children's Hospital, also examined J.K.M. on March 28, 2005 at the Children's Hospital emergency room. (R. 19, page 24, lines 6-10) Dr. Hennes testified that he examined J.K.M. and found two yellowish brown bruises on the side of his head. Both were circular and about a little over an inch apart. (R. 19, page 25, lines 12-15)

The trial court was able to listen to the testimony of the medical professionals, who were subject to cross examination by counsel for Dennis E.M. and the Guardian ad Litem for the minor child prior to the trial court. The trial court then determined the expert witnesses' credibility. "An appellate court may not substitute its judgment for that of the fact finder." State v. Saunders, 196 Wis.2d 45 at 54, 538 N.W. 2d 546 (Ct. App. 1995) "The weight and credibility to be given to the opinions of expert witnesses is 'uniquely within the province of the fact finder.'" Schoerer v. Schoerer, 177 Wis.2d 387, 501 N.W.2d 916 (Ct. App. 1993) This is exactly what the trial court did. After hearing testimony from all of the witnesses, assessing the credibility of their testimony, and the

evidence presented, the trial court properly decided to issue the injunction.

“I think that the Court has heard from the parties, the witnesses, and the guardian ad litem’s recommendation. The child is J.K.M. birth date is April 14, 2004, he is just 11 months old. Based upon the hearing, the Court finds there are reasonable grounds to believe that the respondent has engaged in, or threatened to engage in, abuse to the child. That abuse can mean mentally as well as physically and I’m afraid, under the circumstances, we might have both.”

(R. 19, page 120 lines 5-14)

Following the close of evidence and the arguments of counsel for the parties, the Guardian ad Litem for J.K.M, Attorney Alana Busch-Ell stated that she found the testimony of Dr. Greenbaum to be credible. Attorney Busch-Ell further stated that she found there was reason to believe Dennis E.M. either had hurt or would hurt the children. Attorney Busch-Ell recommended it was in the best interest of the minor child to issue the child abuse injunction.

After receiving the recommendation of the Guardian ad Litem, the trial court made its findings. The court found the bruises to J.K.M. were not consistent with the child hitting his head against an object. The court found the markings to be unusual and "scary." The court also noted bruises in young children may not appear for three to four days.

Noting it had examined the totality, and the cumulative nature of the evidence and that it had heard the recommendation of the Guardian ad Litem, the trial court then issued the child abuse injunction to Kristi L.M. for the minor child. The court concluded there were reasonable grounds to believe Dennis E.M. had engaged in, and may engage in,

child abuse.

The trial court did not err in finding that the testimony of the witnesses including the medical professionals credible and giving each the proper weight in deciding whether or not to issue the child abuse injunction. Based upon the injuries to J.K.M., the medical testimony, and the cumulative evidence the trial court properly found that Dennis E.M. had engaged in, and may engage in child abuse thus warranting the issuance of the child abuse injunction.

II. THE TRIAL COURT AND THE COURT OF APPEALS DID NOT ERR IN HOLDING THAT THE INJURIES TO J.K.M SUPPORT THE FINDING THAT DENNIS E.M. HAS ENGAGED OR MAY ENGAGE IN CHILD ABUSE

Dennis E. M. cites the unpublished case of Yahn v. Doocy, 288 Wis. 2d 460, 706 N.W. 2d 703 (Wis. App 2005) in support of his contention that the Court of Appeals erred in the instant case. The Court of Appeals in Yahn vacated a child abuse injunction that had been issued by the trial court. Evidence had been presented to the trial court in Yahn that the respondent had given a rap with his knuckle to the head of a three-year-old child as a disciplinary measure. The respondent described his action as a “noogie.” The child had been crying and throwing a tantrum prior to the respondent rapping him. The evidence showed the child was not bruised nor did the action leave any mark. The trial court noted the infliction of pain alone is not sufficient to support the issuance of a child abuse injunction.

Yahn, in dicta, states “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 limited to other things 'of the same kind, class, character, or nature' (*citing State v. Ambrose*, 196 Wis. 2d 768, 540 N.W. 2d 208 (Wis. App. 1995)) The court in Yahn went on to say, '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 (emphasis added)* falls within the same category as the enumerated injuries.'

Kristi L.M. agrees with the holding and the reasoning of Court of Appeals in Yahn. Kristi L.M. does not quarrel because the facts of Yahn are not the facts of the instant case. This case is not built on an "infliction of pain" theory. Rather, the facts in instant case support two distinct propositions: J.K.M. had discernable injuries which were substantiated by expert opinion; and the injuries suffered by J.K.M. were "severe" and were "of the same kind, class, character, or nature" under the *specific facts of this case*.

The three-year-old in Yahn had no bruises or injuries. J.K.M. had three bruises to his skull and one bruise on his forehead and temple. He had abrasions to his knees and feet. The circumstances of the bruises and abrasions to J.K.M. support the finding of a "physical injury." Judge Callaway said it: "he's just 11 months old." (R.19 page 120, Lines 8-9). What may not be severe to an older child may certainly be severe to an eleven-month-old. The injuries were to the child's skull. At J.K.M.'s age his skull is in a critical period of development. The skull protects the child's developing brain mass

along with critical sensory organs. The grip of grown man, Dennis E.M., caused the bruises to his eleven month old son's skull. Was it the intention of the Wisconsin Legislature to require that Dennis E.M. have exerted additional pressure to his grip of his eleven-month-old son's skull, for Dennis E.M. to have caused irreversible injury to J.K.M., in order for the child to be afforded the protection of the injunction? Clearly this is an absurd interpretation and one that is against the sound public policy of protecting children. In essence, the trial court considered the vulnerability of this child in the context of the injuries suffered. A bit more force by Dennis E.M. may have resulted in catastrophic consequences to the child. In this case, the harmonizing of the child's high vulnerability to catastrophic injury with the injuries actually suffered supports the statutory definition of "physical injury."

In his dissent to the Court of Appeals decision in this case, Judge Dykman states "Had the legislature intended the result the majority achieves, it would have omitted the words 'severe' as modifying the word 'bruising.'" Judge Dykman is correct. However, Judge Dykman is incorrect is attempting to substitute his interpretation of the injuries J.K.M. suffered in this case for that of the trial court. As Judge Callaway said in his holding "I am concerned with the cumulative aspect of the evidence." The age of child; the vulnerability of the child to injury; and the actual injuries suffered and the location of those injuries all lead to the inescapable conclusion this child's injuries fall well within the statutory definition.

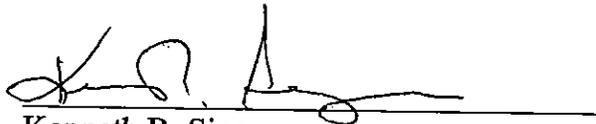
Finally, lost in the argument of this case is another important finding by Judge

Callaway: Based upon prior conduct, the Dennis E.M. may engage in the abuse of J.K.M. The real possibility of a life altering or life ending injury to J.K.M. at the hands of Dennis E.M. was a reasoned conclusion to the trial court based upon the incident at issue, Dennis E.M.'s suicidal threats, his refusal to take his medication and his calling Kristi L.M.'s attention to an incident where a local man had killed himself and his child while involved in a custody dispute. Judge Callaway found it "scary." Scary that Dennis E.M. may engage in like behavior with J.K.M.

III. CONCLUSION

The trial court did not err in finding reasonable grounds to believe Dennis E.M. engaged in child abuse. The testimony of Drs. Greenbaum and Hennes did not eliminate Dennis E.M. as the cause of the injuries sustained by J.K.M. The trial court properly applied the definition of physical abuse to the facts and surrounding circumstances of this case. Looking at the facts of this case, specifically the age of the child, the vulnerability of the child, and the injuries sustained by the child; the trial court did not err in issuing the child abuse injunction. Therefore, the decision of the Court of Appeals must be affirmed.

Respectfully submitted this 28 day of February, 2007.

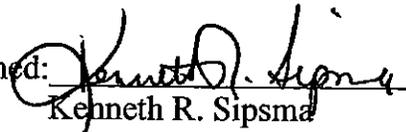

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I hereby certify that this brief conforms to the rules contained in §809.19 (8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is approximately 2854 words.

Dated at Madison, Wisconsin this 28th day of February, 2007.

Signed: 
Kenneth R. Sipsma

ATTORNEY FOR THE PETITIONER-RESPONDENT

BRIEF APPENDIX CERTIFICATION

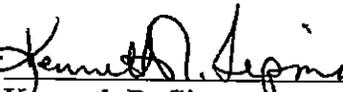
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I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis.Stat. §809.19(2)(a) and that contains:

1. a table of contents;
2. relevant trial court record entries;
3. the findings or opinion of the trial court; and portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles, and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve the confidentiality with the appropriate references to the record.

Dated at Madison, Wisconsin this 28th day of February, 2007.

Signed: 
Kenneth R. Sipsma

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1 Q And are you the mother of ^{J.K.M.} [REDACTED] and ^{J.M.} [REDACTED]

2 A Yes, I am.

3 Q And can you tell me what occurred on Good Friday of this year

4 that resulted in your taking the children to the hospital?

5 A I received a call from Dennis saying that ^{J.K.M.} [REDACTED] had fallen and

6 hit his head on the entertainment center getting blocks out.

7 Q How old is ^{J.K.M.} [REDACTED]?

8 A He's only 11 months old.

9 Q And you have another child, ^{J.M.} [REDACTED] and how old is he?

10 A He's three.

11 Q And the children were at their father's house for a visit?

12 A Correct.

13 Q Are you and Mr. Mays separated?

14 A Yes, we are.

15 Q Is there a divorce currently pending?

16 A Yes, there is.

17 Q So what happened after he called you?

18 A Um, he called and said that ^{J.K.M.} [REDACTED] had hit his head and he said

19 he was doing fine.

20 (Telephone is ringing in courtroom.)

21 THE CLERK: Hello. I have the doctor's office

22 returning the page; okay? Here you go.

23 ATTORNEY GERGEN: Thank you. Hello?

24 DR. GREENBAUM: Hello.

25 ATTORNEY GERGEN: Can you state your name, please.

1 physicians and suggested various tests that should be done.
2 I later reviewed the written reports of the emergency
3 department visit, reviewed the results of the tests, spoke to
4 the mother to get additional history as far as the event and
5 also background medical history and then reviewed some 18 or
6 so color photographs that had been obtained by the police on
7 or around the date that he was seen in our emergency
8 department.

9 Q And what findings did you make regarding the investigation you
10 did with regard to the injuries to ^{J.K.M.} [REDACTED]

11 A Um, there were -- there was a cluster of three small round
12 brown to red-brown bruises, kind of oriented in a horizontal
13 line, very evenly spaced, on the left portion of the scalp.
14 And, according to the emergency department notes, this was not
15 tender, no longer swollen and nothing to suggest a skull
16 fracture. There was also a report of a bruise on the right
17 side of the forehead, or temple area. I could hardly see this
18 in the photograph. The photographs, um, the lighting was a
19 little difficult so I think I saw it but it was difficult to
20 be sure but it was definitely documented in the emergency
21 department notes and that was on the right side of the
22 forehead. Um, the photographs showed, um, some red areas on
23 both knees, um, some red areas on the tops of the feet, dorsum
24 of the feet, and a single photograph of the chin showed -- it
25 was a little bit out of focus. It looked like a suggestion of

1 -- of a possible abrasion on the chin. I could not be sure
2 from the photographs.

3 Q So you found through your investigation that this child had
4 four distinct bruises on his head?

5 A Yes.

6 Q And, based upon your investigation and your experience, what
7 conclusions did you come to regarding whether or not there --
8 there is a likelihood of physical abuse that occurred to this
9 child?

10 A I think it is, um, suspicious for abuse for several reasons.
11 I asked the mother in detail about what the baby was able to
12 do at that time and she indicated that he was crawling and was
13 able to pull to stand but was not walking with assistance so I
14 would -- I would term that a pre-cruiser so he's not really
15 very mobile. A child who is not too mobile, who is a
16 pre-cruiser, typically has no bruises at all but they just --
17 they -- they can't get themselves into trouble, can't generate
18 that much force and can't move fast. Once in a while you see
19 one bruise or perhaps two but to see four, um, is somewhat
20 unusual and it's very unusual to see them clustered in one
21 area over the scalp with absolutely no explanation from the
22 caretaker. At this age, children require constant supervision
23 so usually if a child has that, a bump on the forehead or
24 something, the mom or the dad knows where it happens,
25 whatever, so there's that history. So having a cluster of

1 contusions -- bruises, same thing as contusions -- on the
2 forehead without any explanation in a child that's very young
3 and not mobile is a suspicious thing for an inflicted trauma
4 or physical abuse.

5 Q And --and did you conclude that the appearance of these marks
6 might suggest finger or knuckle marks?

7 A Um, yes. By their round -- their small, round appearance and
8 their very even spacing, kind of in a horizontal line, that is
9 what immediately came to mind. It's not diagnostic of that
10 but it's suggestive of that.

11 Q Now, you're aware that Mr. Mays indicates that he believes or
12 he -- it's his position that the child sustained these -- this
13 injury by falling into an entertainment center. How do you --
14 how do you respond to that?

15 A Well, I asked the mother about the entertainment center and it
16 sounded like a pretty standard piece of furniture. I would
17 expect that the child is -- would have to either be crawling
18 into it or standing and then fall and bump against it, either,
19 which it's a very minor trauma, very low velocity. At most, I
20 would expect to see a single bruise, probably on the forehead,
21 depending on where he hit his head.

22 But at most a single bruise. Certainly you wouldn't expect to
23 see a cluster of three individual bruises; even, you know, if
24 he hits his head on the knob of a door or the corner, it's
25 still going to leave you one bruise.

1 BY ATTORNEY ELBERT:

2 Q Are you licensed in Wisconsin?

3 A Yes.

4 Q Are you board certified?

5 A Yes.

6 Q Now, did you examine a child by the name of ^{J.K.M.} [REDACTED] on
7 March 28th, 2005?

8 A Yes.

9 Q And where did that examination take place?

10 A At Children's Hospital emergency department.

11 Q And who brought the child to the hospital?

12 A I believe it was his mom.

13 Q Did you talk to the mother at all?

14 A I have not. It's kind of a routine in the emergency
15 department that when a child with suspected maltreatment is
16 seen in the emergency department we do not want to put the
17 parents through the burden of having to repeat the story
18 several times so the social worker will interview the mother
19 of that patient, or the care provider, and obtain the whole
20 history and then she comes out and talks to us and give us the
21 history.

22 Q All right. And so when you examined this child, you were
23 specifically looking for evidence of child maltreatment; is
24 that correct?

25 A That's correct.

- 1 Q And, specifically, were you looking for head trauma?
- 2 A Yes.
- 3 Q And how long did you examine the child?
- 4 A I cannot really recall in detail. I know the resident went in
5 first, examined the child, and then he came out, told me what
6 he found. I went back with the resident, examined the child,
7 looked for bruises, looked for any -- any bony tenderness on
8 the exam since this was a head trauma.
- 9 Q Was the lighting in the emergency room adequate?
- 10 A Um, I would say average.
- 11 Q And did you discover any bruising on the child?
- 12 A I discovered two, um, yellowish -- I believe they were
13 yellowish-brown bruises on the side of his head. Both of them
14 were kind of circular and about maybe a little over an inch
15 apart.
- 16 Q Was the child cooperative during the examination or was the
17 child squirming around?
- 18 A The child was very appropriate for age.
- 19 Q Could you determine the age of the bruising?
- 20 A I -- they would have been more than a week old.
- 21 Q More than a week old?
- 22 A By the color of it.
- 23 Q Do you have any opinions as to what may have caused the
24 bruises?
- 25 A Um, I cannot say with any certainty. That history that I

1 A My primary job is clinical work in the emergency department.

2 Q Okay. Have you had specific training with regard to

3 identifying physical abuse in children?

4 A Um, I am also board certified in pediatric emergency medicine

5 as part of our training. The child abuse is an essential part

6 of our work and our training.

7 Q Doctor, the doctor who did the work-up before you examined

8 J.K.M. I believe that was Dr. Shay?

9 A Uh-huh.

10 Q Is that correct?

11 A It may be. I did not see any other records from anyone else.

12 Q Okay. But there -- there was a physician in the--

13 A Oh, Dr. Shay. That's the resident. I'm sorry. Yes, I did.

14 Q Okay. And do you know how much time Dr. Shay spent examining

15 J.K.M.

16 A Um, I believe he was in the room for maybe thirty minutes.

17 Q Thirty minutes. Was that a longer period of time than you

18 spent examining J.K.M.

19 A Yes. Usually the residents spend more time.

20 Q And that resident noticed four bruises on the child's head.

21 Correct?

22 A That's what I saw on his drawing on the emergency department

23 record and we briefly discussed it and, when I went in, I

24 could not really identify anything other than two bruises I

25 noted on the side of the head.

1 Q Tell me about your husband, Mr. Mays. Has he had a very
2 lengthy track record of suicide threats and emotional
3 instability?

4 A Yes, he does.

5 Q Okay. We've listed it in the petition that was filed but
6 let's go through that starting with June of 2000. What
7 happened in June of 2000?

8 A Um, Dennis was very depressed and threatened to take an
9 overdose of pills, whatever. I don't recall what exactly.

10 ATTORNEY ELBERT: Your Honor, I'm going to object at
11 this point. I don't believe my client's suicide attempts are
12 relevant to whether or not this child was the subject of
13 abuse.

14 ATTORNEY GERGEN: Well, Your Honor, it's not just
15 the -- the burden in the statute says whether or not it's
16 reasonable to believe the child was the victim of physical
17 abuse or could be the victim of physical abuse.

18 THE COURT: The problem you have with that is if he
19 in the past threatened suicide. Um, except for maybe some
20 mental strain with an 11-month-old child, I -- I don't know
21 where it's relevant here.

22 ATTORNEY GERGEN: Well, the testimony will show
23 that, if I could continue, that he's had a long history of
24 mental illness, suicide threats and now the three-year-old
25 child just the other day told his mother that daddy said we

1 were all going to die and, in addition to the suicide threats,
2 he's also made reference to killing himself and his children
3 and that's what I would like this witness to testify to. And
4 these are recent, Your Honor. I started with--

5 THE COURT: You mean that he disclosed to his wife
6 that -- that he was going to kill himself and the children?

7 ATTORNEY GERGEN: Yes.

8 THE COURT: She can testify to that. Go ahead.

9 ATTORNEY GERGEN: Thank you.

10 BY ATTORNEY GERGEN:

11 Q Did your husband make reference to you recently that he could
12 relate to the man from Montello? Can you tell the Court about
13 that incident?

14 A He called me on the way home from work at ten o'clock at night
15 and asked me--

16 Q Approximately when?

17 A This would have been January 3rd,

18 Q Of this year?

19 A Of this year.

20 Q And what did he say?

21 A He asked me if I read the article in the newspaper about what
22 happened in Montello and I said I was not aware of it, what
23 happened? And he said that there was a man who was served
24 divorce papers by his wife, took himself and his 17-month-old
25 son and killed him and himself. He became very quiet--

1 Q Was he -- who's "he" now?

2 A Dennis. He became very quiet, started crying and said I can
3 relate to that.

4 Q Relating to the man who killed himself and his son?

5 A That's correct.

6 Q Has your older --- older son, the three-year-old -- what's his
7 name? J.M. [REDACTED]

8 A J.M. [REDACTED]

9 Q Does -- has J.M. [REDACTED] made any comments to you recently about his
10 father saying you're all going to die?

11 A Yes, he has.

12 Q What -- what occurred and when.

13 A It was this past Sunday. J.M. [REDACTED] said, mommy, can we talk and I
14 said yeah. Sometimes he will say something; sometimes he
15 doesn't. So I sat down next to him on the step and he said
16 we're going to die and I said, J.M. [REDACTED] who said that to you and
17 who told you that and he didn't say anything. And I asked him
18 again, J.M. [REDACTED] who told you that and he said daddy. And I said,
19 well, what else did daddy say and he said words and I told him
20 that, um, it was okay to say what daddy said and then he said
21 mommy's a bitch and I asked him if it was just mommy that was
22 going to die. He said, no, mommy, J.M. [REDACTED], J.K.M. [REDACTED] and daddy.

23 Q Had he ever talked about dying before?

24 A No, he did not.

25 Q Does he know what dying is?

1 A No, he does not.

2 Q Does your husband recently have a history of explosive
3 behavior?

4 A Yes, he does.

5 Q Can you tell the Court about that recently, what's happened
6 recently?

7 A Recently. Um, January 17th, um, I was picking the boys up
8 after work and he became angry that we were leaving. We had
9 been discussing ^{J.M.'s} birthday party and so he went and stood
10 behind our van and would not let the boys and I leave.

11 Q Was he agitated at that time?

12 A Very agitated.

13 Q Was he yelling?

14 A Yes, he was.

15 Q Does your husband -- has he during the course of your
16 marriage, during the course of the children's lives, has he
17 been able or has he watched the children for a length of time
18 on his own without having a problem or calling you?

19 A No, he hasn't.

20 Q In fact, when you work nights and he had to take care of the
21 children, what would happen?

22 ATTORNEY ELBERT: Objection, Your Honor. How's this
23 relevant to the issue of child abuse?

24 THE COURT: Overruled. I'll find out.

25 ATTORNEY GERGEN: Thank you.

1 Q Was this unusual behavior?

2 A Yes, it is.

3 Q Had it ever happened before?

4 A No, it hasn't. There was another time, like a week prior,
5 that he spilled something on his pants at supper time and took
6 off his pants. Well, then he proceeded to, um, take off his
7 diaper, pushed his bottom way out and said, look at me, mommy.

8 Q Has Dennis told you that he thought of killing himself while
9 he was caring for the children?

10 A Yes, he has.

11 Q When was this?

12 A Um, there was an incident in November of 2004 where he said he
13 was downstairs doing laundry and thought about hanging himself
14 and he was caring for the boys at the time.

15 Q But he told you this?

16 A Yes, he did, after the fact.

17 Q Has he told you that he has tried to get himself ED'd or
18 emergency -- emergency detained recently?

19 A Um, since we -- since I left, several times, yes.

20 Q Well, several times within the last --

21 A Since December.

22 Q Do you believe that there's reasonable grounds -- do you
23 believe that your children are safe in his care at this time?

24 A No, I don't.

25 ATTORNEY GERGEN: Those are all the questions I

1 calling.

2 DR. HAIGHT: Hello there.

3 ATTORNEY ELBERT: Sorry for the delay but this
4 hearing is taking longer than anybody anticipated.

5 DR. HAIGHT: That's okay.

6 ATTORNEY ELBERT: Could you raise your right hand
7 and be sworn in, please?

8 DR. HAIGHT: I sure can.

9 THE CLERK: You solemnly swear to tell the truth,
10 the whole truth and nothing but the truth, so help you God?

11 DR. HAIGHT: I do.

12 DIRECT EXAMINATION

13 BY ATTORNEY ELBERT:

14 Q Could you state your name for the record, please.

15 A Michael Lawrence Haight.

16 Q And where are you employed?

17 A At Psychiatric Associates.

18 Q And what is your position?

19 THE COURT: Where?

20 ATTORNEY ELBERT: At Psychiatric Associates in
21 Beaver Dam.

22 DR. HAIGHT: Yes, sir.

23 BY ATTORNEY ELBERT:

24 Q And what is your position there?

25 A I'm a psychologist.

1 Q Okay. And what -- could you briefly review your credentials?
2 A Sure. I got my doctorate degree in November of 2003 and have
3 been working at Psychiatric Associates doing primarily
4 individual adult therapy for the past year. Prior to that, I
5 was working at two different V.A. hospitals, one in Milwaukee
6 and one at the V.A. center at Knoxville, Iowa.
7 Q And are you licensed to practice in the State of Wisconsin?
8 A Yes, I am.
9 Q Are you board certified?
10 A Yes.
11 Q Now, is Dennis Mays, Junior, a patient of yours?
12 A Yes, he is.
13 Q And how long has he been a patient of yours?
14 A Um, Dennis was transferred to my care and our first session
15 was on January 3rd of 2005.
16 Q On how many occasions have you had sessions with Dennis?
17 A I've had 13 sessions with Dennis.
18 Q Now, you said he was transferred to your care from a different
19 psychologist?
20 A Yes. He -- he was being seen prior to that by Dr. Singer
21 (phonetic), a psychiatrist and Dr. Furgeson (phonetic) who I
22 believe is a psychologist.
23 Q And they're out of Madison; is that correct?
24 A I believe so, yes.
25 Q And did you review their records?

1 it is not -- it's not my belief that he is a suicidal risk,
2 otherwise I would have had to take the necessary steps or
3 actions to discuss hospitalization or some alternate route.
4 But during the 13 therapy sessions that we have had, um,
5 Dennis has never been suicidal at any -- at any of those
6 sessions.

7 Q Is his depression under control with the medications?

8 A He -- he currently still -- still is somewhat depressed due to
9 some of the stressors that he's currently going through with
10 the separation and pending divorce with his wife but I -- it
11 is my opinion that he has definitely improved on his coping
12 skills and lessened his depression since January of 2005 when
13 I began seeing him.

14 Q Do you consider him to be a risk to other people?

15 ATTORNEY GERGEN: Same objection, Your Honor.

16 DR. HAIGHT: Based -- well, based on what my client
17 has reported in his therapy sessions, he has never given any
18 indication that he would be a threat to any other individuals.

19 BY ATTORNEY ELBERT:

20 Q Now, based upon your--

21 THE COURT: Wait. Before we proceed any further,
22 let me ask you this. This is a -- a child abuse TRO.
23 Shouldn't the courtroom be closed? If these people are
24 witnesses, who are they?

25 ATTORNEY GERGEN: They're -- well, I already

1 from Montello who killed himself and his young son after he
2 was served with divorce papers?

3 A How -- how Dennis explained that to me was that he was
4 discussing the article with his wife and that he said he could
5 relate to the individual's pain, going through -- going
6 through a divorce and that he was hopeful at that time that
7 that would not be the case with he and his wife, Kristi.

8 Q Well, did he discuss with you the killing of the gentleman and
9 the gentleman's son and how he could relate to that?

10 A No, not at all. Not at all. How he can relate to the killing
11 of any individuals, no.

12 Q Did -- were you aware that he has told his wife that he felt
13 like hanging himself while he was folding laundry in the
14 basement within the last couple of months?

15 A Um, no, I was not aware of that.

16 Q Were you aware of his call to the Crisis Center on
17 January 17th, 2005, and later police intervention?

18 A Yes. In fact, I was able to read the Dodge -- Dodge County
19 Sheriff's report on that, again just yesterday, during our
20 session and I believe the sheriff's report states at no time
21 during our lengthy conversation did he report any suicidal or
22 homicidal ideations to the best of my recollection.

23 Q There was no sheriff's report ever filed. But purposes you're
24 referring to the Beaver Dam Police report; is that right?

25 A Okay. That -- that may be correct.

1 like, for example, with the hanging of the laundry or anything
2 like that.

3 Q Okay. And you said Mr. Mays is currently being prescribed
4 Welbutrin and another drug. What was the other drug?

5 A Buspirone.

6 Q Can you spell that please?

7 A B-u-s-p-i-r-o-n-e.

8 Q What is Buspirone? What is that prescribed to accomplish?

9 A Again, it's -- it's, um, to help with an individual's mood,
10 can be helpful with either anxiety or depression.

11 Q Why is he taking both Welbutrin and Buspirone?

12 A That is a question that would be best asked -- answered by his
13 psychiatrist, Dr. Graupner.

14 Q And the -- that he's continued to take these drugs as
15 prescribed, again, comes from his reporting to you so you
16 don't actually know if he's taking them or not; do you?

17 A No, I do not.

18 Q What -- do you have a diagnosis? Is there one? I mean, is
19 there a diagnosis of Mr. Mays either done by you or in your
20 file as to depression, anxiety? I mean, what's the diagnosis
21 that you're operating under here?

22 A The diagnosis that I'm operating under is major depressive
23 disorder.

24 Q Tell me, what is a major depressive disorder?

25 A Um, some of the symptoms that Dennis was experiencing upon my

1 ATTORNEY ELBERT: Briefly.

2 THE COURT: All right.

3 REDIRECT EXAMINATION

4 BY ATTORNEY ELBERT:

5 Q Doctor, you testified that you reviewed Mrs. Mays' petition
6 for the restraining order yesterday. Is that correct?

7 A Uh-huh.

8 Q And there is one statement in here that, quote, her
9 three-year-old son just yesterday told me that daddy said
10 we're going to die, unquote. Did Dennis indicate to you that
11 he -- he told that to his three-year-old son?

12 A What Dennis told me during the session was that he did not
13 tell that to his three-year-old son and he did not know when
14 or where his son had heard that statement.

15 ATTORNEY ELBERT: That's all I have. Thank you.

16 DR. HAIGHT: Okay, thank you.

17 THE COURT: Doctor, this is Judge Callaway. Can I
18 ask you a couple questions?

19 DR. HAIGHT: Absolutely.

20 THE COURT: All right. Do you believe that if
21 Dennis were not on his medication, that he were not on the
22 medication, that he'd be a danger to himself or to others?

23 DR. HAIGHT: Um, there would be greater potential
24 for that if he were not on his medication, yes.

25 THE COURT: Okay. Thank you.

1 Q And Dennis told you that the child was opening the door and
2 trying to get blocks out of the entertainment center; correct?
3 A Correct.
4 Q And, in that process, he hit his head on the door I believe.
5 A Yes. He said he had a big goose egg on the side of his head.
6 Q And he called and told you about that?
7 A Correct.
8 Q And did he discuss with you whether or not he should take the
9 child to the hospital?
10 A No. He said that he was doing fine. He didn't lose
11 consciousness, didn't throw up, that he seemed like he was
12 doing fine.
13 Q He was concerned about it, though?
14 A He wanted to tell me just to let me know that it happened.
15 Q And that was Good Friday; correct?
16 A Correct.
17 Q And that evening before he returned the child to you, he took
18 the child to the Easter Bunny; right?
19 A Yes.
20 Q And he had photographs of the child on the Easter Bunny's lap
21 taken; correct?
22 A Right.
23 Q And he gave you a copy of one of the photographs?
24 A Yes, he did.
25 Q And then you eventually got custody back of the child that

1 night; right?

2 A For couple hours, yes.

3 Q Okay. And did you notice any swelling?

4 A Yes, I did.

5 Q And was the swelling on the left side of the head?

6 A Yes, it was.

7 Q How long was the swelling?

8 A Um, it was a, I would say, fairly long mark. I don't know
9 exactly the measurement.

10 Q Three or four inches?

11 A Again, I don't exactly know the measurement.

12 Q Well, was it above the left ear?

13 A It was -- it was right here.

14 Q Right where the bruising shows up in the photographs?

15 A Correct. Plus he had a laceration on his forehead along with
16 a red mark on his chin, on his knees and on the top of his
17 feet.

18 Q The red marks on the knees resemble rug burns; is that right?

19 A Correct.

20 Q Which could easily be done by crawling?

21 A I -- I never experienced him having rug burns while I was
22 caring for him.

23 Q Now, was the swelling noticeable?

24 A Yes, it was.

25 Q Okay. Was it discolored?

1 A Yes, it was.

2 Q And was the child acting as if it had a head injury?

3 A He was a little fussy but not -- he's also teething so--

4 Q Did you take the child to the hospital?

5 A At that time I did not, no.

6 Q Did you take the child to a doctor?

7 A No, because he was doing fine.

8 Q He wasn't displaying any symptoms of a head injury?

9 A No.

10 Q He was eating normally?

11 A His eating, um, was fair. I mean, he goes through growth

12 spurts and then he eats more but he was also teething so he

13 wasn't, you know, 100 percent but close.

14 Q So his eating was not abnormal; is that fair to say?

15 A Right, right.

16 Q Then on Monday you decided to take the child to the UW

17 Hospitals; is that right?

18 A On Monday the swelling had gone down and you could see that

19 there were three distinct marks on the side of his head that

20 were round like a fingerprint so, yes, I did.

21 Q And did you discuss that, taking the child to UW Hospitals,

22 with anybody prior to doing it?

23 A To the-- No, after I went to the police department.

24 Q You went to the police department and said look at these; is

25 that right?

- 1 A I went there to say: Is this what it looks like? It looks
2 like fingerprints to me. Does it look like that to you? And
3 what should I do.
- 4 Q Did you take the child to be examined by your brother who's a
5 member of the police department?
- 6 A Um, he briefly stopped over before.
- 7 Q Okay. And your brother's name is Corey and he's in the
8 courtroom?
- 9 A Correct.
- 10 Q So Corey came over to your house and you showed the bruising
11 on the child to him?
- 12 A I had shown them to my parents first of all and they said,
13 yeah, so Corey came after they looked at him too.
- 14 Q Did you ask Corey to come over?
- 15 A Yes, I did.
- 16 Q And he came over and did he tell you to take the child down to
17 UW Hospital?
- 18 A No, he did not.
- 19 Q Did he refer you to the police department?
- 20 A Um, I asked what I should do and he said you could go to the
21 police department.
- 22 Q And did somebody at the police department tell you to take the
23 child to UW Hospital?
- 24 A Yes.
- 25 Q And you -- you did that; correct?

- 1 A Correct.
- 2 Q And then did you contact Social Services on did they--
- 3 A The police officer contacted Social Services.
- 4 Q And which police officer was that?
- 5 A Officer Jones.
- 6 Q And then Social Services contacted you?
- 7 A They -- they came to the police department.
- 8 Q All right. And did they file a temporary placement order?
- 9 A Yes, they did.
- 10 Q And that expired?
- 11 A Correct.
- 12 Q And the Corporation Counsel elected not to proceed with a
13 Chips proceeding; correct?
- 14 A Right. Correct.
- 15 Q And then at that point you contacted UW Hospital again; is
16 that right?
- 17 A I don't recall.
- 18 Q Well, Dr. Greenbaum got involved in this case just this week;
19 correct?
- 20 A Correct.
- 21 Q And the temporary physical placement order expired on Monday;
22 correct?
- 23 A Correct.
- 24 Q And then you got UW Hospital involved subsequent to that;
25 correct?

STATE OF WISCONSIN, CIRCUIT COURT, DODGE COUNTY

DODGE COUNTY

For Official Use
IN THE CIRCUIT COURT

J.K.M.

Please print or type KRISTI L. MAYS 3/14/05 (MOTHER)
AND J.M.

Address: 908 MacArthur Drive
(Optional) Beaver Dam, WI 53916

Petition in Civil Court for
Temporary Restraining
Order and/or Injunction
(Child Abuse - 30710)

APR 4 2005

Respondent: DENNIS E. MAYS
Address: 102 HELLER ST
BEAVER DAM WI 53916

Case No. 05 CV 193

DODGE COUNTY, WIS
LYNN M. HIRON
CLERK OF COURTS

Respondent's	Date of Birth	Sex	Race	Height	Weight	Hair color	Eye color
	10-11-68	Male	White	6'1"	340	brown	blue

Under oath, I petition the court for a temporary restraining order and/or injunction against the respondent under §813.122, Wis. Stats, based upon the following:

- The petitioner is petitioners are children a child. parent. stepparent. legal guardian.
- The child is J.K.M. and J.M. whose date of birth is 4-14-04 and 2-8-02
- The respondent is an adult and is is not a parent of the child.
- The respondent has engaged in, or based on prior conduct of the child and the respondent may engage in: (Mark any of the following boxes that apply.)
 - a. Physical injury inflicted on the child by other than accidental means.
 - b. Sexual intercourse or sexual contact contrary to §§940.225, 948.02, 948.025, 948.095, Wis. Stats.
 - c. Sexual exploitation of the child contrary to §948.05, Wis. Stats.
 - d. Permitting, allowing or encouraging the child to violate the prostitution laws contrary to §944.30, Wis. Stats.
 - e. Forcing the child to view sexual activity contrary to §948.055, Wis. Stats.
 - f. Exposing genitals or pubic area to the child contrary to §948.10, Wis. Stats.
 - g. Causing the child to expose genitals or pubic area contrary to §948.10, Wis. Stats.
 - g. Emotional damage to the child as defined in §48.02(1)(gm), Wis. Stats.
- Stated below or attached as part of this petition is a statement of facts indicating that the respondent has engaged in, or based on prior conduct of the child and the respondent may engage in, abuse of the child. (State when, where, what happened, and who did what to whom.) See Attached.

REQUEST THAT THE COURT: (Mark any of the following boxes that apply.)

- Immediately issue a temporary restraining order and set a time for a hearing on an injunction requiring the respondent to:
 - a. avoid the residence of the child and any premises temporarily occupied by him or her.
 - b. avoid contacting the child and causing any other person to have contact with him or her in any way unless the court agrees such contact is in the best interest of the child.
 - c. other:
2. Appoint a guardian ad litem for the child.
3. Set reasonable or necessary child support.
4. Grant an award in a reasonable amount for the costs of maintaining this action and attorney fees, if deemed appropriate, and such other relief as may be just and equitable.
5. Direct the sheriff to assist in executing or serving this temporary restraining order and injunction.

Subscribed and sworn to before me

- Distribution:
- Original - Court
 - Petitioner
 - Respondent
 - Law Enforcement
 - Other

on 4-4-2005

 Notary Public, State of Wisconsin
 My commission expires 6-10-2009

Kristi L. Mays
 Signature of Petitioner
Kristi L. Mays
 Name Printed or Typed
April 4, 2005
 Date

04/04 05 16:27 NO.088 02/07 1 920 386 3587 DODGE CO CLERK OF CT

05CU192

The respondent and myself are in the process of a divorce action. During the respondent's last visit with the minor children, our 11 month old son came back to my residence with bruises on his head consistent with fingerprints. Dodge County Human Services took both J.K.M. [redacted] and [redacted] into physical custody and an Order for Temporary Physical Custody was issued on March 30, 2005. Because the attorney for the Department of Health and Human Services does not believe that he has sufficient evidence to meet the burden of proof in Children's Court, Attorney Kianovsky stated to my attorney that he will not be filing a Petition for Children in Need of Protection or Services. Thus, the Order for Temporary Physical Custody expires today.

My husband has a long history of mental illness and an inability to cope with stressful situations. He has not been able to manage the children on his own for any great length of time. Added to this problem, along with the bruising left on our 11 month old son, is my husband's long history of psychological instability and problems. In June of 2000, the Lake Delton Police Department did an Emergency Detention and took Dennis to Escobedo Memorial Hospital, Psychiatric Unit. At this point in time, Dennis was threatening to take an overdose of pills. Dennis was in the care of Dr. Don Ferguson of Madison, Wisconsin from approximately 2003 to 2005.

In December of 2004, ~~he~~ Dennis called me at work and told me he had made his final goodbyes to his children and told me he wasn't coming home after work and I wouldn't see him again. This was another suicide threat.

On January 17, 2005, ~~he~~ Dennis called a Crisis Line which in turn notified the Beaver Dam Police Department that the caller was suicidal. Beaver Dam Police responded to our residence and two officers, Officer Heather Johnson and Officer Mattheal Biel, both talked to Dennis about why he called the Crisis Line. They filed a report indicating he was in a depressed state.

On February 8, 2005, Dennis called me at work to tell me he was going to the cemetery to spend the day.

Within the last several weeks, the defendant asked if I was familiar with the man from Montello who, upon being served with divorce papers from his wife, killed himself and his young son. Then Dennis told me that he could relate to this man and started crying.

I have discovered recently that Dennis has made calls to sex hotlines while the children were in his care.

Our three year old son, just yesterday, told me that "daddy said we're going to die." When I asked [redacted] further what he was talking about and he explained that daddy had told him that all four of us, mom, [redacted], [redacted] and daddy were all going to die.
J.K.M. J.M.

My husband has been in an extreme agitated state since the filing of this divorce action. He has made numerous threats and inferences that he is either going to kill himself or kill himself and the children. Now he is openly talking to our three year old son about dying.

J.K.M.

I believe it is in my children's best interest that they be protected from their father given his current emotional state and given the fact that [REDACTED] our 11 month old son returned home on March 28, 2005 with bruises on his head consistent with fingerprints.

Now that the Order for Temporary Physical Custody has expired, my husband is demanding overnight placement with the children. I do not believe the children will be safe in his care. I am asking this Court to issue a Temporary Restraining Order on their behalf.

Kristi L. Mays
Kristi L. Mays

Subscribed and sworn to before
me this 4th day of April, 2005.

Patricia C. Veling
Patricia C. Veling
Notary Public, Dodge County, WI
My Commission expires 6/10/2007

FILED
IN THE CIRCUIT COURT

APR 4 2005

DODGE COUNTY, WIS
LYNN M. HRON
CLERK OF COURTS

STATE OF WISCONSIN, CIRCUIT COURT, DODGE COUNTY, For Official Use

D.O.B. FIRST MIDDLE INIT. LAST
 Petitioner: Kristi L. Mayo (Mother) Injunction
 Address: For [redacted] J.K.M. [redacted] J.M. (Child Abuse)
 (Optional) 4-14-04 2-8-02
 VS. FIRST MIDDLE INIT. LAST
 Respondent: Dennis C. Mayo
 Address: 109 Helber Street
Beaver Dam WI 53916 Case No. 05 CV 192

Respondent's	Date of Birth	Sex	Race	Height	Weight	Hair color	Eye color
	<u>10-11-68</u>	<u>M</u>	<u>BMW White</u>	<u>6'1"</u>	<u>340</u>	<u>Brown</u>	<u>Blue</u>

THE COURT FINDS:

1. The petitioner has filed a petition alleging child abuse.
2. The petitioner has served upon the respondent a copy of the petition and notice of the time for a hearing on the issuance of the injunction; or the respondent has served upon the petitioner notice of the time for a hearing on the issuance of the injunction. The respondent had an opportunity to be heard. This court has personal and subject matter jurisdiction. J.K.M. + J.M.
3. The child is [redacted], whose birth date is 4-14-04 + 2-8-02.
4. Based on the hearing held on the petition, there are reasonable grounds to believe that the respondent has engaged in, or threatened to engage in abuse to the child.

IT IS ORDERED:

1. The respondent avoid the child's residence and/or any premises temporarily occupied by the child now and in the future.
2. The respondent avoid contacting or causing any person other than a party's attorney to contact the child unless petitioner consents in writing and the court agrees the contact is in the best interest of the child. Contact means knowingly touching, meeting, communicating or being in visual or audio contact with the child.
3. If requested, the sheriff shall serve and assist in executing this injunction; other: _____
4. Other: _____

IT IS FURTHER ORDERED the respondent is prohibited from possessing a firearm until the expiration of this injunction. Possession of a firearm is a Class E Felony punishable by a maximum of 2 years in prison or \$10,000 in fines, or both. A respondent may retain a firearm only if the respondent is a peace officer and only to the extent required by the peace officer's employer. The respondent shall immediately surrender any firearm(s) that he or she owns or has in his or her possession to:

- the sheriff of this county. the sheriff of the county in which the respondent resides: _____
 another person: _____

THIS INJUNCTION SHALL BE EFFECTIVE UNTIL 4/8/2009

Violation of this order shall result in immediate arrest and is punishable by imprisonment not to exceed 9 months or a fine not to exceed \$1,000, or both, and payment of filing and service fees.

This injunction is entitled to full faith and credit in every civil or criminal court of the United States or any other state, or Indian tribal courts (to the extent such tribal courts have personal jurisdiction over non tribal members).

DISTRIBUTION:

1. Original - Court
2. Petitioner
3. Respondent
4. Law Enforcement
5. Department of Justice or Designee

Personally Handed To the Respondent
 CV-414, 07100 Injunction (Child Abuse)

BY THE COURT:

[Signature]
 Signature of Circuit Judge
Richard J. Callahan
 Name Printed or Typed
4/8/05
 Date

This form shall not be modified. It may be supplemented with additional _____

Domestic abuse/child abuse attachment

Case # 05CV192

Divorce/child visitation. The respondent may exercise such child visitation rights as are permitted herein or by the Family Court Commissioner or Family Court Judge, and on such conditions as they shall determine. If the child(ren) is old enough, this may include reasonable telephone access to the child(ren). Visitation shall be exercised away from the petitioner's residence. The respondent may call the petitioner solely for the purpose of arranging or canceling child visitation or for discussing any emergencies involving the child(ren). The parties may also have contact for the purpose of attending marriage counseling if both are interested. Finally, this injunction does not prohibit the respondent from coming to court for Family Court hearings or from participating in meetings to discuss the divorce at an attorney's office even if the petitioner is also present. Any visitation set up under this injunction may be subject to modification by order of the Family Court and exercise of such visitation will not be deemed a violation of this injunction.

Visitation schedule. Respondent may exercise visitation at the following times and under the following terms: SUPERVISED VISITATION PT TWICE
PER WEEK BY G.P.L.

Personal property pickup. The respondent may make arrangements to pick up his clothing, shaving kit and other personal effects, but not furniture, but only in the presence of a uniformed police officer. This pickup of property must be at a mutually agreeable time and the respondent must make the arrangements for the police to be there unless the petitioner assumes that responsibility. This order was made with petitioner's approval.

No relief under §767.23/§767.24. The Court has only exercised its inherent authority to do substantial justice between the parties in the context of §813.12/§813.122, including to clarify whether child visitation is a violation of the injunction. The Court is not granting any relief under any section of chapter 767 of the Wis. Stats., including §767.24 and §767.24.

No child custody/primary placement award is made herein.

STATE
OF
WISCONSIN

CIRCUIT COURT
CIVIL DIVISION

COUNTY
OF
DODGE

KRISTI MAYS (Mother) for
[REDACTED] AND [REDACTED]

J.K.M.

J.M.

Petitioners,

vs.

NOTICE OF APPEAL

DENNIS MAYS,

Case No. 05-CV-192

Respondent.

TO: Dodge County Clerk of Court
Dodge County Justice Facility
210 W. Center Street
Juneau, WI 53039

Attorney Dawn P. Gergen
Gergen, Gergen & Pretto SC
105 Front Street, P.O. Box 453
Beaver Dam, WI 53916

Clerk of Court of Appeals
P.O. Box 1688
Madison, WI 53701-1688

Attorney Alana Busch-Ell, GAL
Buchholz Law Office LLC
999B W. Main Street, P.O. Box 310
Waupun, WI 53963

NOTICE IS HEREBY GIVEN THAT the respondent, Dennis Mays, appeals to the Court of Appeals, District IV, from the Child Abuse Injunction, in Case Number 05-CV-192, entered April 8, 2005, in the Circuit Court for Dodge County, Honorable Richard J. Callaway presiding, in which the Court, after hearing testimony, granted the petitioners' request to grant the injunction.

This is not an appeal within Sec. 752.31(2) Stats.

This is not an appeal entitled to preference by statute.

Dated this 15th day of April, 2005.

FILED
IN THE CIRCUIT COURT

APR 15 2005

DODGE COUNTY, WIS
LYNN M. HEON
CLERK OF COURTS

ELBERT & PFITZINGER, LTD.

Jacquelyn L. Walter
Jacquelyn L. Walter, State Bar No. 1052322 FOR:
Brian A. Pfitzinger, State Bar No. 1000509
210 E. Center Street, P.O. Box 203
Juneau, WI 53039

SUPREME COURT OF WISCONSIN

District A
Appeal No. 05-AP-1034
Circuit Court Case No. 05-CV-192

KRISTI L.M., J.K.M. and J.M.,
Petitioners-Respondents,

v.

DENNIS E.M.,
Respondent-Appellant-Petitioner.

SUPREME COURT REPLY BRIEF

Respectfully submitted,

Elbert & Pfitzinger, Ltd.
Brian A. Pfitzinger, SBN: 1000509

Attorney for Respondent-Appellant-
Petitioner, Dennis E.M.

210 E. Center Street
P.O. Box 203
Juneau, WI 53039-0203
(920) 386-2505

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TABLE OF AUTHORITIES

Cases

Supreme Court

Hatleberg v. Norwest Bank Wisconsin, 2005 WI 109,
283 Wis.2d 234, 252, 700 N.W.2d 15 4

Wirtz v. Fleischman, 97 Wis.2d 100, 108,
293 N.W.2d 155 (1980) 4

Court of Appeals

M.O. v. Z.O., 152 Wis.2d 701, 708,
449 N.W.2d 75, 78 (Ct. App. 1989). 3

Yahn v. Doocy, 288 Wis.2d 460,
706 N.W.2d 703 (Ct. App. 2005). 6

Statutes

Wis. Stat. § 48.02(14g) (2003-04) 3, 5

Wis. Stat. § 805.17(2) (2003-04) 5

Wis. Stat. § 809.62(6) (2003-04) 5

Wis. Stat. § 813.122(5)(a) (2003-04) 5

ARGUMENT

Kristi correctly sets forth the standard of review in her brief. The determination of whether reasonable grounds exist for the issuance of a child abuse injunction is a mixed question of fact and law. M.Q. v. Z.Q., 152 Wis.2d 701, 708, 449 N.W.2d 75, 78 (Ct. App. 1989). The Trial Court findings can be set aside if the findings are clearly erroneous. Wis. Stat. § 805.17(2) (2003-04)¹. Then this Court is to draw an independent conclusion as to whether the established facts fulfill the legal standard for physical abuse. M.Q., 152 Wis.2d at 708.

However, the issue before this Court is not simply whether or not the Trial Court's findings were clearly erroneous. Rather, the larger issue presented to the Court by Dennis is whether the Trial Court and Court of Appeals infringed on his constitutional right to have a relationship with his child. To answer that question, this Court must clarify how Wis. Stat. § 48.02(14g) should be applied and the legislative intent of the Statute.

First, Kristi argues that the Trial Court did not err in finding the medical testimony credible regarding J.K.M.'s injuries. The Trial Court did not find that the testimony

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

of Dr. Greenbaum was credible and the testimony of Dr. Hennes was incredible. The Trial Court made no findings as to witness credibility in its decision. The Trial Court did not discuss in its decision the degree, if any, to which it relied on either of the doctors' testimony in making its decision.

Next, Kristi argues that the Trial Court and Court of Appeals did not err in holding that the injuries to J.K.M. support the finding that Dennis has engaged or may engage in child abuse. This Court "is not qualified to make findings of fact", that is the function of the trial court.

Hatleberg v. Norwest Bank Wisconsin, 2005 WI 109, 283 Wis.2d 234, 252, 700 N.W.2d 15, citing Wirtz v. Fleischman, 97 Wis.2d 100, 108, 293 N.W.2d 155 (1980). However, Kristi spends the majority of her brief trying to convince this Court that the Trial Court found the bruises to J.K.M. to be severe. Her argument appears to extend as far as to insinuate that the testimony regarding Dennis' mental health supports her argument that the bruises to J.K.M. were severe.

To the contrary, the Trial Court did not make any clear findings. It did not find that the bruises to J.K.M. were severe. The very fact that the Trial Court did not make any clear findings goes to the crux of Dennis' argument. The

Trial Court failed to apply Wis. Stat. § 48.02(14g) to the facts of the case, thereby infringing on his constitutional right to have a relationship with his child.

Further, the issue before this Court is the definition of severe bruising and the bruises to J.K.M.'s head. According to Wis. Stat. § 809.62(6), the petitioner cannot raise or argue issues not set forth in the petition. Therefore, Dennis asserts this Court must disregard Kristi's arguments regarding the "may engage in" component of Wis. Stat. § 813.122(5)(a) and Dennis' mental health, as those issues were not petitioned for review.

Finally, Kristi pointed out to the Court that Yahn v. Doocy, 2005 WI App 254, 288 Wis.2d 460, 706 N.W.2d 703 is an unpublished decision. Counsel for Dennis did not believe they were citing to an unpublished decision. On Friday, March 9, 2007, counsel revisited Loislaw Legal Research website to confirm the decision was published. The decision again appeared to be published (A-Ap. 102-104). Counsel then contacted a colleague and requested that the colleague confirm on the Lexis Nexis website that the case was published. The colleague reported the decision was unpublished. Counsel then contacted Loislaw. A Loislaw representative confirmed that the website was wrong, the decision was unpublished, and the problem was being fixed

immediately. As the Court can see by looking at the Yahn decisions printed on March 9, 2007 and March 12, 2007, the March 9, 2007 decision appears to be a published decision and the March 12, 2007 decision is designated as unpublished (A-Ap. 102-105). Counsel was not in any way trying to mislead or deceive the Court in citing the Yahn decision.

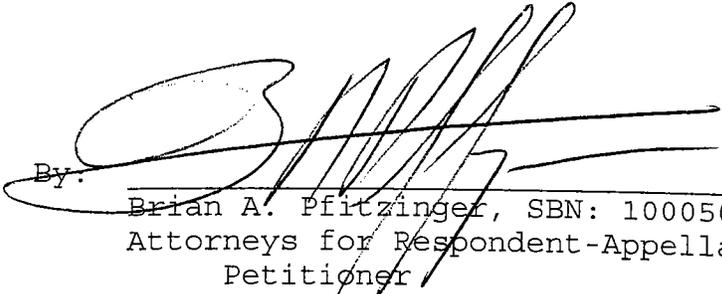
CONCLUSION

Kristi argues that this Court should make findings of fact that were not found by the Trial Court. This Court is not qualified to make those findings. Even if this Court looks at all of the facts combined, the facts do not rise to the requisite level for a finding of "severe" bruising.

Dated this 15th day of March, 2007.

Signed,

ELBERT & PFITZINGER, LTD.

By: 

Brian A. Pfitzinger, SBN: 1000509
Attorneys for Respondent-Appellant-
Petitioner
210 E. Center Street
P.O. Box 203
Juneau, WI 53039-0203
(920) 386-2505

CERTIFICATION

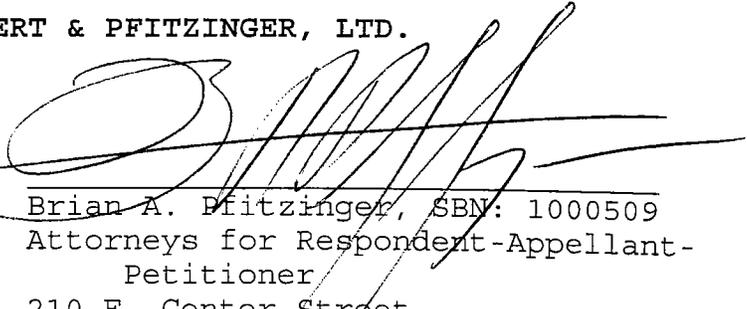
I certify that this reply brief conforms to form and length requirements of Wis. Stat. § 809.19(8)(b) & (c) in that it is Desktop Publishing or Other Means (monospaced font, 10 characters per inch, double spaced, a 1.5 inch left margin, and all other margins 1 inch). The length of the reply brief is 7 pages.

Three copies of the Petitioner's brief were served by hand delivery on counsel for the Petitioners-Respondents, as well as the Guardian ad Litem.

Dated this 15th day of March, 2007.

Signed,

ELBERT & PFITZINGER, LTD.

By: 

Brian A. Pfitzinger, SBN: 1000509
Attorneys for Respondent-Appellant-
Petitioner
210 E. Center Street
P.O. Box 203
Juneau, WI 53039-0203
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Yahn v. Doocy, 2005 WI App 254,
288 Wis.2d 460, 706 N.W.2d 702
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Printed March 12, 2007 A-Ap. 104-105

Wisconsin Case Law

YAHN v. DOOCY, 2005 WI App 254

288 Wis.2d 460, 706 N.W.2d 702

Luke Yahn, Petitioner-Respondent. Payton Yahn and Isaac Yahn,
Petitioners, v. Brian P. Doocy, Respondent-Appellant.

Court of Appeals of Wisconsin, District IV.

No. 2004AP3018.

Opinion Filed: October 20, 2005.

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. § 813.02 (2003-04) [fn1] 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.*, 282 Wis.2d 701, 706, 449 N.W.2d 775 (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 punch, [fn2] 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

A-Ap. 102

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. §§ 939.22(1)(a) and 939.23(1)(a). Section 939.23(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 limited to other things "of the same kind, class, character, or nature." *State v. Ambrose*, 198 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.

[fn1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[fn2] 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.

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Wisconsin Case Law

YAHN v. DOOCY, 2005 WI App 254

288 Wis.2d 460, 706 N.W.2d 702

Luke Yahn, Petitioner-Respondent. Payton Yahn and Isaac Yahn,
Petitioners, v. Brian P. Doocy, Respondent-Appellant.

Court of Appeals of Wisconsin, District IV.

No. 2004AP3018.

Opinion Filed: October 20, 2005.

[EDITOR'S NOTE: This case is unpublished as indicated by the issuing court.]

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. § 93.122 (2003-04) [fn1] 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.*, 157 Wis.2d 701, 708, 448 N.W.2d 775 (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 punch, [fn2] 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. §§ 49.02(1)(a) and 49.03(1)(a). Section 49.03(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 limited to other things "of the same kind, class, character, or nature." *State v. Ambrose*, 198 Wis. 2d 762, 777, 540 N.W.2d 203 (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. § 49.03(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 § 49.03(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 809.03(1)(b)5.

[fn1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[fn2] 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.

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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2005 AP 1034

Kristie L. M., et al.
Petitioner-Respondent,

v.

Dennis E. M.
Respondent- Appellant-Petitioner

ON REVIEW OF A DECISION OF
THE COURT OF APPEALS, DISTRICT IV,
FILED SEPTEMBER 14, 2006

BRIEF OF DODGE COUNTY CORPORATION
COUNSEL, BY ASSISTANT CORPORATION COUNSEL
ZEV D. KIANOVSKY, AS AMICUS CURIAE

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ISSUES PRESENTED FOR REVIEW

May a fact finder, in determining whether a bruise is “severe,” as that term is used in Section 48.02(14g) Wis. Stats., consider the totality of the circumstances, including characteristics of the child, characteristics and behavior of the perpetrator, mechanism of injury, medical significance of the bruise, and medical significance of the mechanism of infliction of injury?

The circuit court answered yes.

The Court of Appeals answered yes.

STATEMENT OF THE CASE

The statement of the case and statement of facts provided by the litigants are sufficient.

ARGUMENT

This Brief suggests that the word “severe” used in Section 48.02(14g) Wis. Stats. might be considered ambiguous because there may be bruises which are described as not severe when viewed from a strictly medical standpoint, but which may yet be properly determined to be “severe” when examining all of the related circumstances which are relevant to the inquiry. This Brief argues, however, that if this different meaning constitutes an ambiguity, that ambiguity is easily resolved by reading the language in the context of the statute as a whole. In the alternative, this Brief argues that even if the term “severe” is unambiguous, and is limited to a concept determined solely by medical examination of the bruise, the statutory provision within Section 48.02(14g) Wis. Stats. that ““physical injury” includes but is not limited to . . .severe or frequent bruising . . .” is sufficiently broad to encompass non-severe and non-

frequent bruising when such injuries are accompanied by sufficiently aggravating circumstances.

I. THE TERM “SEVERE” AS USED IN SECTION 48.02(14g) WIS. STATS. INCLUDES BRUISE INJURIES WHICH ARE MEDICALLY NON-SEVERE WHEN THE SURROUNDING CIRCUMSTANCES ARE SUFFICIENTLY AGGRAVATED.

In this case, both parties have staked out positions which are dangerous, and contrary to the public interest. Nevertheless, the decision in this case will guide judges, juries, investigators and attorneys representing the public interests in future physical injury cases. These issues are extremely common, not only in the context of child abuse restraining orders, such as the instant case, but in determining when a child may be in need of protection or services as provided by Section 48.13(3) Wis. Stats. It is therefore critical that judges and juries be given guidance as to whether, and how, to consider the relevant surrounding circumstances

when deciding if a particular bruise injury is "severe" under the statute and therefore constitutes abuse.

The legislature has directed that Chapter 48 be "liberally construed" to effectuate the expressed legislative purposes which include "to recognize that children have certain basic needs which must be provided for, including . . . the need to be free from physical . . . injury . . ." Section 48.01(1)(intro.) and Section 48.01(1)(ag), Wis. Stats.

The phrase "liberally construed" was added to the statute as part of 1995 Act 275 which was the same Act in which the legislature included the definition of "physical injury" which is at the heart of the dispute. The Act also added the following language to 48.01(1) (intro.): "In construing this chapter the best interests of the child shall always be of paramount consideration."

By including this language, the legislature could not have intended for fact finders to turn a blind eye to

circumstances surrounding the infliction of a bruise injury, which, if looked at in isolation, might not be regarded as medically severe. Such a pinched interpretation of the statute would result in many children being left at great risk of more maltreatment. This absurd and manifestly unjust result is what would occur should the Court adopt either of the two approaches propounded by the litigants in this matter. ¹

As noted above, the “severe bruising” “liberally construed” and “best interests... shall be paramount” language was all added to the statute simultaneously in 1995 Act 275. Thus, read *in pari materia*, the term “severe bruising” should be construed liberally so as to encompass bruising which is “severe” in light of all of the surrounding circumstances and not merely bruising which is “medically severe” when viewed in an information vacuum or in isolation. This is consistent with the principle that :

¹ In the view of this Amicus Curiae, the position advocated by Kristie, which seems focused on allowing the court to consider the age of the child, is only marginally better than the rule urged by Dennis, and still falls short of the degree of latitude which should be granted to fact finders in bruise injury cases.

“statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid unreasonable or absurd results.”

State ex.rel. Kalal, et al. v. Circuit Court, et al., 2004 WI 58, P46, 271 Wis. 2d 633, 663, 681 N.W. 2d 110, 124 (internal citations omitted.)

The Court should not be concerned that such a rule will lead to the situation envisioned by Judge Dykman’s dissent or described by Dennis where all minor bruises become evidence of abuse—most minor bruises on children are in fact of the type normally acquired by children, and looking at the surrounding circumstances in those cases will not result in determinations of abuse. But the degree of medical severity of the bruise cannot, alone, be the determinative factor.

Fact finders are in the best position to determine when all those other relevant factors are such that what might be a medically non-severe bruise should be determined to be severe for purposes of the statute. Some of those factors could include the location or type of bruising, including patterning, the age or stage of development of the child, the statements of witnesses, and of alleged perpetrators, the behaviors of the alleged perpetrator towards the child or others, the mechanism of injury (often related to patterning) and whether the bruise was incurred with a high risk of greater harm (e.g. a “medically minor” bruise to the forehead inflicted in a manner which exposed the child to a large risk of concussion or skull fracture.)

Judge Dyckman's dissent and Dennis's brief and argument focus on the normal bruises and minor injuries that are acquired as the badges of a happy and playful childhood. But these types of injuries are not the concern of the statute. The marks and bruises with which the statute is concerned are

those that are the badges of non-accidental maltreatment. The hard part is distinguishing the two. In order to make such a distinction, it is imperative that fact finders be given the opportunity to consider all the relevant factors bearing upon whether a given bruise is "severe" for purposes of the statute.

It is worth emphasizing that only non-accidental injuries are at issue here. Accidental injuries, whether burn, cut, fracture, or bruise, do not qualify as abuse. The intentionally inflicted burn, whether by cigarette pressed into the palm or by scalding, is always a form of abuse under the statute. Intentional or reckless causation of broken bones or lacerations are also abuse.

Only bruises are given the "severe or frequent" qualifier. This may be because it is possible that children can pick up bruises, even non-accidentally, quite often, without there being an implication of abuse. Thus a parent or caretaker who engages in a non-accidental act which results in a minor bruise, should not, *without more*, be found to have

engaged in abuse. Judge Dyckman's concern about turning "ordinary bruising" into abuse is in fact greatly alleviated by allowing the fact finder to consider the surrounding facts and circumstances of the incident.

As to bruises, the question is whether a fact finder should be able to consider the totality of the circumstances in determining whether a bruise injury is "severe." A bruise may be thought to be medically non-severe because the doctor sees that the bruise is of a type which usually heals quickly, does not affect other body systems besides the affected skin, is not likely to lead to blood clots, infection, impairment of function, scarring or disfigurement.

Nevertheless that same bruise may be "severe" when that term is interpreted within the context and in light of the purposes of Chapter 48. Similarly, it may be that some medically severe bruises are not "accidental" and yet not "severe" for purposes of the statute. For example a child may get a medically significant bruise while playing certain

contact sports, yet even when the cause is not an accident, it is not automatically abuse.

Both the terms “severe” and “frequent” are left undefined within the statute-- it is for the fact finder to determine how many times in a given time frame is “frequent” or how severe is severe enough to render the bruising abuse.

Human behavior and maltreatment of children takes on an infinite variety of guises. Medical severity as described above should be one factor, but not the only factor be considered in deciding whether a bruise is severe so as to fit under the definition of physical abuse.

A few examples may suffice to illustrate the point:

1. A six month old infant with a single bruise on the thigh, which is medically non-severe in terms of the factors listed above. It involves no major blood vessels, and is not likely to lead to further complications such as clots or

scarring or infection. However, the bruise is in the unmistakable form of an adult human bite mark. It would be absurd to interpret the statute so as to preclude this injury from the definition of abuse.

2. A daycare provider discovers that a one-year-old child's back is covered with crisscrossed, thin linear bruises. She fails to report this in a timely way to law enforcement or social services, and no photographs are taken. By the time this is reported, the injuries have completely healed. Thus, no medical opinion can be provided as to severity. The daycare provider later describes the marks as looking like they were the result of whipping with a shoelace.

3. A parent takes aim at a 14 year-old child's head with a baseball bat and swings hard-- not a playful tap on the shoulder. Because the parent is a very poor hitter, or because the child sneezes at the right instant, or because of some other fortuity, only a glancing blow to the scalp occurs, resulting in a single, medically non-severe bruise. The intent and the

mechanism of the causation of the bruise are quite relevant. The age of the child is of little relevance. It would be absurd to conclude that this medically minor bruise injury is not abuse.²

4. A teacher picks a small 8-year-old child up off the ground and intentionally slams the child, forehead first, into a door. Fortunately, no concussion or fracture results, just a bruise. Older teenage students witnessing the event leave the school, call police and are so distressed they immediately enroll in other schools. They express that they were put in fear for the little boy's safety based on the violence of the teacher's action they had witnessed. Should not a fact finder be able to consider this evidence-- the behavior of the perpetrator at the time of the incident, that others were put in reasonable fear for the boy, the mechanism of causation, and the mere fortuity of avoidance of more serious injury?

Common sense indicates that these surrounding

² Unfortunately, this description is the only example of maltreatment in this brief which is not based upon a real case known to the author.

circumstances must be considered unless the statute is to be rendered absurd in its application.

Medical professionals may use the relevant language differently from the statutory meaning. For instance, it is clear within the record of this case that doctors use the term "abuse" somewhat differently than does the statute. When Dr. Greenbaum testified that the marks were "suspicious for abuse," (Transcript, Appellant-petitioner's appendix, page 117) she was probably not trying to say that they were "suspicious for being severe bruising" Rather she was making a reference to being suspicious as to the mode of infliction-- it was a reference to the primary definition of abuse in Section 48.02(1)(a) -- physical injury inflicted on a child by other than accidental means. In other words, she was suspicious that the injuries were inflicted non-accidentally.

Similarly, it makes sense that a physician may describe a bruise as either severe or non-severe solely with respect to the discrete injury's medical effects. But in the statutory

context, the medical defining of severity, while of some assistance to the fact finder, should not be regarded as the last word any more than would the medical defining of "frequent" in cases of multiple bruising episodes.

Because the purpose of Chapter 48 is to protect the welfare of children, and because human behavior takes on infinite permutations, the definition of physical injury must be interpreted with sufficient elasticity to accomplish the purpose of the statute.³

³ Unfortunately, the diverse and creative methods which parents and other caretakers can use to harm children, particularly in the name of discipline, are innumerable, and no statute can adequately list or define them all-- some forms of maltreatment in cases seen in the Dodge County Corporation Counsel office of the last several years might not fit within the pinched interpretation of the statute proposed by Dennis. Some, such as the use of an electric shock dog training collar on a child, leave no detectable injury on the child's body and result in "pain alone." That method, and others, may be tantamount to torture, and yet may not, at least arguably, fit within a too-narrow *ejusdem generis* analysis because they leave no detectable injuries which are similar to broken bones, burns or lacerations, or detectable internal injuries-- some of these include prolonged kneeling on broomsticks, dry beans, or rice grains, forced ingestion of pain-inducing foods such as hot pepper sauce, or of other food products to the point of causing vomiting, and forced maintenance of painful physical positions for extended periods.

It is also interesting to note that while "torture" can be considered an "aggravated circumstance" justifying a court not requiring

II. EVEN IF THE WORD “SEVERE” IS
NONAMBIGUOUS AND LIMITED TO MEDICAL
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Because, as shown above, the overarching purpose of the statute would be frustrated if fact finders were not able to evaluate non-severe bruising in light of the other relevant circumstances, the catch-all provision should be interpreted so as to allow non-severe bruising, when inflicted with sufficiently serious aggravating circumstances, to be found to constitute abuse. This is because the purpose of the statute is to protect children from serious harm. As shown in several of the examples above, there may be instances when even a

reasonable efforts to prevent removal of a child from the parent's home (see Secs. 48.355(2d) (a)(1) and 48.355 (2d)(b) Wis. Stats.), torture is not specified as a form of abuse, and when it leaves neither detectable injury nor detectable emotional damage, under Dennis's analysis, many cases of “pain alone” torture might not be actionable as abuse at all. As both litigants seem to concede that “pain alone” cases are not abuse, this court might consider clarifying that under sufficiently aggravated circumstances, “pain alone” associated with activities similar to torture may constitute abuse under the catch-all.

minor bruise is inflicted under circumstances which, in terms of the implications for the child's welfare, are equal to or exceed the gravity of instances of the other types of injuries listed without qualification in Section 48.02(14g) Wis. Stats.

CONCLUSION

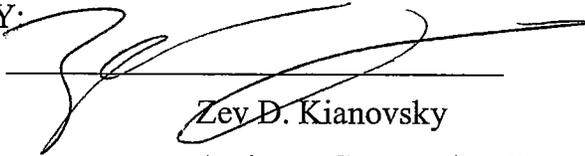
Those who work to give children the benefit of the laws enacted to protect them, would be seriously handicapped if the Court were to adopt an interpretation of Section 48.02(14g) Wis. Stats. which stops the fact finder's inquiry for all bruises which may be, from a medical standpoint, non-severe. This is true even if the age or special vulnerability of the child is allowed to be considered. These injuries don't happen in a vacuum, and courts cannot evaluate them in a vacuum of information. Courts and juries must be permitted to consider the surrounding facts and circumstances when presented with cases of bruise injuries if the purposes of the

statute are to be fulfilled. This Court should issue an opinion which permits finders of fact to consider the totality of the circumstances in determining whether a bruise is severe for purposes of the statute.

Dated April 16, 2007

DODGE COUNTY CORPORATION COUNSEL

BY:

A handwritten signature in black ink, appearing to read 'Zey D. Kianovsky', is written over a horizontal line.

Zey D. Kianovsky

Assistant Corporation Counsel

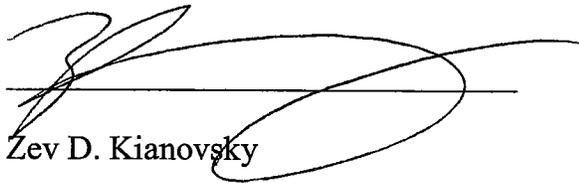
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b) and (c) Wis. Stats. for a brief produced with a proportional serif font. The length of this brief is 2962 words.

Dated April 16, 2007



Zev D. Kianovsky

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SUPREME COURT OF WISCONSIN

District A
Appeal No. 05-AP-1034
Circuit Court Case No. 05-CV-192

KRISTI L.M., J.K.M. and J.M.,
Petitioners-Respondents,

v.

DENNIS E.M.,
Respondent-Appellant-Petitioner.

REPLY TO AMICUS CURIAE BRIEF

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ARGUMENT

Corporation Counsel argues that a trier of fact should look at the totality of the circumstances and determine whether a bruise is "severe" within the meaning of Wis. Stat. § 48.02(14g)(2003-04)¹. Had the legislature wanted to the Statute be applied as Corporation Counsel suggests, the legislature would not have used the specificity it did with the context of the Statute.

Dennis' position in his brief was that, in the instant case, medical testimony was presented that the bruises to J.K.M. were not the result of abuse to a medical degree of certainty. Dennis stresses to the Court that the medical testimony should not have been ignored. Dennis also stresses that the Court needs to make clear to triers of fact that the Statute states "severe or frequent" bruising and that this is not just superfluous language. Dennis believes his argument is in line with what the legislature intended in drafting the Statute. The legislature was trying to draft the Statute in such a way to require some objective evidence of abuse, i.e. lacerations, broken bones. Dennis gleans from the Statute that the legislature was trying to avoid injunctions being issued based on the

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

emotional responses of triers of fact. Corporation Counsel is taking the position if the trier of fact is so outraged by the actions of a person that an injunction can be issued. This is the exact emotional response that the Statute needs to guard against.

Corporation Counsel argues a trier of fact should consider factors such as the location or type of bruising, the age of the child, the statements of witnesses, or behaviors of the perpetrators, among other things. The Statute already addresses a couple of these factors. A severe bruise can only be found to be a basis for an injunction if it is by other than accidental means (behaviors of the perpetrators, statements of witnesses). Further, severe does not and need not depend on location nor age, nor should it. The Court, through questioning at oral arguments, already pointed out how ridiculous age can be as a consideration.

Corporation Counsel argues that only bruises are given the "severe or frequent" qualifier. That is not true. The Statute states that "lacerations" are included in the definition of "abuse". Surely a trier of fact would not believe a scratch or paper cut would be included in the definition of laceration.

Corporation Counsel then suggests four examples to

illustrate its point. The examples brought forth by Corporation Counsel illustrate nothing more than the absolute necessity that the Court by using strict statutory construction guide trial courts. What is necessary, is that the Court not spin-off in a million directions with nuances with different fact patterns. Put simply, speak to the definition of severe and the apparent statutory mandate that bruises be severe or frequent. If the facts alleged in an injunction are of bruising, this Court should require that it be severe regardless of who has been the victim. Bruising that is not severe but may be caused a by dangerous act toward a victim may be considered by the Court in determining where a person may engage in abuse. The arguments being made are an attempt to persuade the Court to relax the language regarding bruising. The strict interpretation prayed for by Dennis does not leave a victim without avenues of protection not the least of which are the other grounds that may be alleged in support of an injunction.

Corporation Counsel states "the catch-all provision should be interpreted so as to allow non-severe bruising, when inflicted with aggravating circumstances, to be found to constitute abuse." The statute is clear: "severe or frequent bruising". Dennis, again argues, that is why the

doctrine of *ejusdem generis* should apply. If the catch-all is not restricted to injures of the same class and character, the definition will be eroded to such a degree to render the rest of the Statute useless.

CONCLUSION

Fore the foregoing reasons the Court should not expand the definition of "severe" bruising to the degree argued by Corporation Counsel.

Dated this 31st day of May, 2007.

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CERTIFICATION

I certify that this reply brief conforms to form and length requirements of Wis. Stat. § 809.19(8)(b) & (c) in that it is Desktop Publishing or Other Means (monospaced font, 10 characters per inch, double spaced, a 1.5 inch left margin, and all other margins 1 inch). The length of the reply brief is 7 pages.

Three copies of the Petitioner's brief were served by mail on counsel for the Petitioners-Respondents, as well as the Guardian ad Litem, and hand delivery to Corporation Counsel.

Dated this 31st day of May, 2007.

Signed,

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