FIRST DIVISION
September 18, 2017

No. 1-17-1130

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

IN THE INTEREST OF:	)	Appeal from the Circuit Court of
	)	Cook County, Illinois
J.R., T.R. and P.H.,	)	Juvenile Justice and Protection
	)	Department, Child Protection
Minors-Respondents-Appellees,	)	Division
	)	
(The People of the State of Illinois,	)	
	)	Nos. 16 JA 490
Petitioner-Appellee,	)	16 JA 491
	)	16 JA 492
v.	)	
	)	
LINDSEY H.,	)	Honorable
	)	Maxwell Griffin Jr.,
Mother-Respondent-Appellant).	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Simon and Mikva concurred in the judgment.

ORDER[1]

¶ 1 ***Held*:** We affirm the trial court's findings of abuse and neglect as to P.H. We also affirm the trial court's finding of neglect as to J.R. and T.R.

[1] This accelerated child abuse case was briefed and marked ready for determination on August 22, 2017.

¶ 2 On March 30, 2017, the trial court held an adjudication hearing to determine whether P.H. was abused and neglected. In the same proceeding, the trial court had to determine whether J.R. and T.R. were neglected.

¶ 3 After hearing the evidence, the trial court determined that P.H. was abused due to physical abuse and a substantial risk of physical injury and neglected due to an injurious environment. The same order also found J.R. and T.R. neglected due to an injurious environment. The trial court held a dispositional hearing on the same day and adjudged the minors as wards of court. The trial court found respondent-appellant, Lindsey H., fit, willing and able to care for the three minors and awarded her custody.

¶ 4 On appeal, respondent challenges several aspects of the adjudication hearing. She contends: (1) the trial court erred in proceeding with the adjudication hearing in her absence; (2) the trial court erred in admitting certain hearsay testimony; and (3) the trial court erred in finding P.H. abused and neglected and J.R. and T.R. neglected.[2] For the reasons stated below, we affirm.

¶ 5 JURISDICTION

¶ 6 The trial court entered final orders regarding both the adjudication and dispositional hearings on March 30, 2017. On May 1, 2017 respondent filed her notice of appeal.[3] Accordingly, this court has jurisdiction over this matter pursuant to Article VI, Section 6 of the Illinois Constitution, and Illinois Supreme Court Rules 301, 303, and 311. Ill. Const. 1970, art. VI, § 6; Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. May 30, 2008); R. 311 (eff. Mar. 8, 2016).

[2] Neither the father of P.H. nor the father of J.R. and T.R. are parties to this appeal.
[3] Thirty days from March 30, 2017 was Saturday, April 29, 2017 and therefore the notice of appeal was timely on May 1, 2017.

¶ 7 BACKGROUND

¶ 8 On June 6, 2016, the State filed petitions for the adjudication of wardship, alleging then seven-year-old J.R., four-year-old T.R., and two-month-old P.H. were abused and neglected. P.H. had suffered fractures to her femur and skull when she was 3 weeks old. Specifically, the State alleged that P.H., J.R., and T.R. were abused pursuant to 705 ILCS 405/2-3(2)(ii) in that they faced a substantial risk of injury and that they were neglected pursuant to 705 ILCS 405/2-3(1)(b) in that their environment was injurious to their health and welfare. The State also alleged there was immediate and urgent necessity to remove the children from their mother, Lindsay H.'s, care. Furthermore, the State asked the trial court to enter an order appointing the Department of Child and Family Services (DCFS) guardianship administrator as the children's temporary custodian.

¶ 9 On the same day the petition was filed, the juvenile court commenced a temporary custody hearing. The trial court found probable cause existed that the children were abused and neglected, and appointed the DCFS guardianship administrator as their temporary custodian. The basis of the finding was that two-month-old P.H. was diagnosed with an acute subgaleal hematoma, subarachnoid hemorrhages, a skull fracture and a femur fracture. The finding was also based on the fact that respondent was unable to provide a plausible explanation for the injuries.

¶ 10 The trial court held an adjudication hearing on March 30, 2017. At the start of the hearing, the State moved for a continuance because neither the State's main witness, Dr. Jill Glick, nor the respondent was present in court. Counsel for the respondent objected to any continuance and the trial court denied the State's motion. Respondent's counsel represented that respondent was on her way to court at that moment. The trial court then proceeded with the adjudication hearing.

¶ 11 The State, without objection, requested the trial court take judicial notice of the testimony of Halema Townsend, a DCFS Division of Child Protection investigator. On June 29, 2016, Townsend testified that she was assigned to the children's case on April 8, 2016. She learned that P.H. arrived at the University of Chicago hospital emergency room with two injuries that were not adequately explained by her parents, and that the hospital had concerns about possible child abuse. P.H. had suffered a fractured skull and femur. Respondent informed Townsend that P.H. had fallen off her lap and rolled onto the hardwood floor from the couch. Respondent denied grabbing P.H.'s leg when she fell. Townsend took protective custody of all 3 children and brought the case to the State in June 2016.

¶ 12 The trial court took judicial notice of the testimony of Helen R., the maternal grandmother. Helen R. was not in the room when P.H. was injured, but had previously testified respondent yelled to her that P.H. had fallen.

¶ 13 The State then moved to enter People's Exhibit #1 into evidence, which the respondent had no objection to admitting. People's Exhibit #1 was P.H.'s certified and delegated medical records from the University of Chicago children's hospital. The records stated that P.H. arrived at the emergency room on April 8, 2016 at 10:32 a.m. with reported injuries to her leg. P.H. was diagnosed by the Emergency Department with a femur fracture and a skull fracture. Physician Assistant (PA) Kristen Bilka belonged to the hospital's Child Advocacy and Protective Services Team. On April 8, 2016 PA Bilka listed the injuries she observed: skull fractures, significant left parietal scalp swelling, possible acute subarachnoid bleed, and an angulated and displaced fracture of the right femur. She also noted in her diagnostic impressions that respondent's explanation of events did not adequately explain P.H.'s injuries. Dr. Alisa McQueen, M.D. entered a pediatric attending attestation statement which opined that the "[c]onstellation of injuries is concerning given the reported mechanism." On April 12, 2016, Dr. Heidi So examined

P.H. and reviewed her records. Dr. So opined that there was a high level of risk to P.H. based on multiple non-accidental trauma.

¶ 14 Dr. Jill Glick entered her notes on May 11, 2016 after reviewing P.H.'s records. She noted that P.H. had multiple skull fractures, several of which were acute and one which possibly predated the April 2016 incident. The records further indicated that P.H. had an acute hematoma which could be observed both upon physical exam and in the CT/MRI scan. P.H. had a left acute skull fracture, which extended from the top of her head to the right side of the skull. P.H. also had a right posterior skull fracture, the age of which could not be determined. Dr. Glick also noted the right femur fracture. Based on the injuries, Dr. Glick agreed with PA Bilka's decision to contact DCFS and the police. Dr. Glick agreed that respondent's statements did not explain P.H.'s injuries. P.H. would have had to hit her head and at the same time have another force applied to her leg in order to sustain both injuries. Respondent had not raised any concerns about P.H.'s head, denied P.H. had hit her head, and denied grabbing P.H.'s right leg. Dr. Glick was also concerned by the fact that the injuries possibly occurred on different dates.

¶ 15 After entering these records into evidence the State rested. By this time, respondent had appeared in court. The Public Guardian representing the minors and respondent rested without presenting any additional evidence. The trial court noted that under section 705 ILCS 405/2-18(2)(e) (West 2016) of the Juvenile Court Act proof that injuries would not ordinarily be sustained by a child except by the acts or omissions of the parents is *prima facia* evidence of abuse and neglect. The trial court then stated that the evidence showed P.H. suffered from femur and skull fractures and respondent's statements did not sufficiently explain their occurrence. The hospital records also indicated one of the skull fractures occurred prior to the other skull and femur fracture. The court found the evidence unrebutted. Based on this evidence, the trial court found P.H. physically abused, and at risk for further abuse. The trial court found all three were

neglected due to an injurious environment because the perpetrator of P.H.'s physical abuse was unknown to the court.

¶ 16 The trial court immediately proceeded to a dispositional hearing and adjudged all three minors wards of the court. However, the trial court found it was in the minor's best interest to remain with respondent. Respondent was found fit, willing, and able to care for, protect, train and discipline the minors. The trial court also found P.H.'s father, D.H., to be fit, willing, and able to care for P.H. The trial court found J.R. and T.R.'s father unfit. The court then terminated the temporary custody order, which had given custody of all three minors to DCFS.

¶ 17 On May 1, 2017, respondent filed her notice of appeal regarding the trial court's findings at the adjudication hearing. No issue was raised concerning the dispositional hearing.

¶ 18 ANALYSIS

¶ 19 On appeal, respondent raises three issues concerning the adjudication hearing: (1) the trial court erred in conducting the hearing in her absence; (2) the trial court erred in relying on the statements made by PA Bilka and Dr. Glick contained within the hospital records; and (3) the trial court erred in finding P.H. abused and all three minors neglected.

¶ 20 In her first issue, respondent argues that she should receive a new adjudication hearing because the court began the proceedings without her despite being told by counsel that respondent was on her way. Respondent concedes that her attorney did not object, but maintains the trial court abused its discretion despite the lack of contemporaneous objection. Both the State and the Public Guardian argue the lack of an objection has resulted in forfeiture of the issue on appeal or, alternatively, if the issue is not forfeited, no abuse of discretion occurred.

¶ 21 After a review of the record, we agree with the State and Public Guardian that respondent forfeited review of this issue by failing to object. Our supreme court has stated that a defendant who fails to object to an error before the trial court may forfeit appellate review of the error.

People v. Enoch, 122 Ill. 2d 176, 186 (2010). Respondent's counsel did not object to the trial court proceeding in respondent's absence, consequently, respondent has forfeited appellate review of the issue.

¶ 22 While forfeiture of an issue is a harsh sanction for a respondent whose attorney failed to raise an objection below (*People v. Herron*, 215 Ill.2d 167, 176 (2005)), the record reflects that respondent's attorney objected to the State's motion for a continuance the day of the adjudication hearing. It would make no sense to allow respondent to object to a continuance before the trial court and then argue before this court that the trial court should have granted her a continuance so she can obtain a new hearing on remand. See *In re S.L.*, 2014 IL 115424, ¶ 23 (finding parent forfeited review of an issue where she raised it for the first time on appeal in an attempt to receive a second proceeding on remand). Accordingly, respondent has forfeited review of her claim that the trial court erred in commencing with the adjudicatory hearing before she arrived.

¶ 23 In her next issue, respondent argues that the trial court erred by relying on inadmissible hearsay evidence contained within the University of Chicago medical record which the trial court admitted. Specifically, respondent argues the trial court should not have considered the opinions of PA Bilka and Dr. Glick which were contained within the record. The State responds by arguing that respondent has forfeited this issue as well by failing to object before the trial court. The Public Guardian argues the statements were properly admitted pursuant to section 2-18(4)(a) of the Juvenile Court Act. 705 ILCS 405/2-18(4)(a) (West 2016).

¶ 24 We agree with the State that respondent's failure to raise any objection concerning the admission of the medical records and the statements contained therein has resulted in forfeiture. The record reflects that when the State moved to admit P.H.'s medical records, including the now challenged portions, respondent's attorney affirmatively stated she had no objection to their admission. Given that respondent had no objection to the record's admission during the trial, this

court will not allow her to try and litigate the issue for the first time on appeal. *In re K.T.*, 361 Ill. App. 3d 187, 202 (2005). Respondent has therefore forfeited review of the admission PA Bilka and Dr. Glick's statements.

¶ 25 Respondent argues that in the event this court finds the issue forfeit, we should still review it under a plain-error analysis. Under the plain-error doctrine, an appellate court may "reach a forfeited error affecting substantial rights in two circumstances." *Herron*, 215 Ill.2d at 178. A plain-error analysis may take place where: (1) the evidence is closely balanced or (2) the error is so serious that the respondent was "denied a substantial right, and thus a fair trial." *Id.* at 179. However, before reaching either prong, a reviewing court must first determine whether an error has occurred. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 26 Section 2–18(4)(a) of the Juvenile Court Act of 1987, which contains a variation of the common law business records exception, provides:

> "Any writing, record, photograph or x-ray of any hospital or public or private agency, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any condition, act, transaction, occurrence or event relating to a minor in an abuse, neglect or dependency proceeding, shall be admissible in evidence as proof of that condition, act, transaction, occurrence or event, if the court finds that the document was made in the regular course of the business of the hospital or agency and that it was in the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter." 705 ILCS 405/2–18(4)(a) (West 2016).

To be admissible under section 2-18(4)(a), the record must have been "(1) made as a memorandum or record of the event, (2) made in the ordinary course of business, and (3) made at the time of the event or within a reasonable time thereafter." *In re A.B.*, Ill. App. 3d 227, 236

(1999). While section 2-18(4)(a) does provide a variation on the common law business records exception, records made in anticipation of litigation are not records made in the regular course of business and are not admissible under the business records exception. *Id.* at 236.

¶ 27 A review of both Dr. Glick's report and PA Bilka's "manner" section of her report demonstrates they meet the required criteria to be admitted under section 2-18(4)(a).[4] In the report created by PA Bilka, it states that the reason for the referral was "[h]ospital protocol for evaluation of injury assessment." This report was created a mere 4 hours after P.H.'s admission and was created as part of P.H.'s admission and treatment at the hospital. Dr. Glick's report was also created due to P.H.'s admittance and treatment at the University of Chicago hospital. It begins by stating "CAPS Attending Case Review Note,"[5] indicating that it was also created as part of the hospital's internal protocol. We also conclude Glick's report, authored one month after the incident, was created within a "reasonable time" as contemplated by section 2-18(4)(a). 705 ILCS 2-18(4)(a) (West 2016).

¶ 28 Nothing in the document indicates it was prepared in anticipation of litigation. While it is foreseeable such a record will be used in litigation should it arise that does not automatically result in the records inadmissibility. See *In re A.B.*, 308 Ill. App. 3d 227, 236 (1999) (noting it is of no consequence if a document may be used in an adversarial-type proceeding if the record is created in the regular course of business).

¶ 29 We find respondent's reliance on *In re A.P. and J.P.*, 2012 IL App (3d) 110191, misplaced. In that case, the appellate court concluded the trial court erred in admitting an examination and doctor's report. 2012 IL App (3d) 110191, ¶ 16. Unlike the record currently

[4] Given respondent's failure to object before the trial court, our analysis is based solely on a review of the hospital record itself.

[5] CAPS is an acronym for the University of Chicago Comer Children's Hospital Child Advocacy and Protective Services.

before this court, the documents at issue in *A.P.* were created because DCFS had referred the minor for an examination over concerns about possible child abuse. *Id.* The examination was not a part of the minor's medical care, was not part of a follow-up at the treating hospital, and the report was issued three months later. *Id.* Moreover, the issued report concluded the injuries were consistent with child abuse. *Id.* Based on these facts, the reviewing court concluded the records were made in anticipation of litigation and therefore the trial court abused its discretion in admitting them. *Id.* Unlike the record at issue in *A.P.*, the record before this court was created by the treating hospital following its own internal procedures within a reasonable time of the incident. It was not created at the direction of DCFS and does not opine the injuries are consistent with child abuse, but rather opines that the injuries could not be explained given the respondent's statement of events.

¶ 30 The record sought to be admitted here met the three elements in section 2-18(4)(a) and the trial court did not err in admitting it. Since no error occurred, no plain-error analysis is required. *People v. Hudson*, 228 Ill. 2d 181, 191-195 (2008).

¶ 31 In her last issue, respondent argues that the trial court erred in finding that P.H. was abused and neglected and that T.R and J.R. were neglected. She argues that State failed to prove by a preponderance of the evidence that the three minors were abused or neglected. See *In re Arthur H.*, 212 Ill. 2d 441, 464 (2004) (articulating that the State must prove abuse or neglect allegations by a preponderance of the evidence). A preponderance of the evidence has been defined as "[e]vidence which is of greater weight or more convincing than the evidence which is offered in opposition to it." *Board of Education of the City of Chicago v. Johnson*, 211 Ill. App. 3d 359, 364 (1991). This standard "allocates the risk of error roughly equally between the litigants [citation], reflecting the view that the interests at stake are of relatively equal societal importance [citation]." *In re D.T.*, 212 Ill. 2d 347, 362 (2004).

¶ 32 In most cases, a trial court's findings of abuse and neglect will not be overturned unless the decision is against the manifest weight of the evidence. *In re Arthur H.*, 212 Ill. 2d at 443. However, when, as here, the trial court's decision rests solely on the documentary evidence, the trial court's findings are "not based upon any observations of the witnesses or witnesses' testimony" and its decision is not entitled to deference. *In re Zion M.*, 2015 IL App (1st) 151119, ¶ 28. Accordingly, our review of this issue is *de novo*. *Id.*

¶ 33 We first review whether P.H. was abused. Under the Juvenile Court Act injuries to a minor "of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent *** shall be prima facie evidence of abuse or neglect, as the case may be." 705 ILCS 405/2-18(2)(e) (West 2016). An abused child also includes any child under 18 years of age whose parent creates a substantial risk of injury to such child "other than by accidental means which would be likely to cause death, disfigurement, impairment of emotional health, or loss or impairment of any bodily function." 705 ILCS 405/2-3(2)(ii) (West 2016). Cases involving the abuse and neglect of a minor must be decided based upon the unique facts of the case. *In re Zion M.*, 2015 IL App (1st) 151119, ¶ 31.

¶ 34 In the present case, the trial court determined that P.H. was physically abused and abused with a substantial risk of physical injury. The evidence showed that P.H. arrived at the emergency room at the University of Chicago hospital after rolling off respondent's lap and onto the floor. P.H. had a fracture to her right femur, and imaging of her head revealed two skull fractures, scalp swelling, and a possible acute subarachnoid hemorrhage. While respondent did tell the hospital P.H. had fallen off her lap, she specifically denied grabbing P.H.'s leg or that P.H. hit her head when she fell. The records indicate that respondent did not raise a concern about a possible head injury. PA Bilka, who examined P.H. and talked with respondent, concluded that a fall from a couch did not adequately explain the injuries she observed. Both Dr.

So and Dr. Glick agreed with PA Bilka that respondent's description of events did not adequately explain the injuries P.H. had suffered.

¶ 35 Given the above unrebutted evidence, we agree with the trial court that the State met its burden by a preponderance of the evidence that P.H. was abused. Even if this court believed respondent's explanation that the right leg fracture was caused by the fall, it still leaves two unexplained skull fractures and bruising to P.H.'s head. We conclude that two skull fractures to a 3-week-old child, presented without explanation, could not have occurred "absent an act or omission by the parent." 705 ILCS 405/2-18(2)(e). Therefore, the trial court properly found P.H. abused.

¶ 36 In reaching this conclusion, we find the cases *In re Ashley F.*, 265 Ill. App. 3d 419 (1994), and *In the Interest of Piper*, 64 Ill. App. 3d 827 (1978), relied upon by the respondent to be distinguishable. Unlike the current case, where our review is *de novo*, in both *Ashley F.* and *Piper*, the appellate court engaged in a manifest weight of the evidence review. *Ashley F.*, 265 Ill. App. 3d at 425; *Piper*, 64 Ill. App. 3d at 830. While both minors suffered from skull fractures in both cases, the trial courts were presented with explanations as to how the injuries occurred, which were accepted and found not to be unreasonable by the reviewing court. *Ashley F.*, 265 Ill. App. 3d at 421; *Piper*, 64 Ill. App. 3d at 828-29. Unlike in *Ashley F.* and *Piper*, the respondent in this case denied P.H. hit her head or suffered a head injury, yet scans revealed two skull fractures. Respondent presented no evidence to explain the two skull fractures P.H. suffered. Accordingly, we find respondent's reliance on *Ashley F.* and *Piper* misplaced.

¶ 37 We next review the trial court's finding that all three were neglected due to an injurious environment because the perpetrator of P.H.'s injuries was unknown. A "neglected minor" includes any minor under 18 years of age whose environment is injurious to his welfare. 705 ILCS 405/2-3(1)(b) (West 2016). "Neglect" is also defined as the failure to exercise the care that

circumstances justly demand and includes willful as well as unintentional disregard of duty. *In re Arthur H.*, 212 Ill. 2d at 443. While not specifically defined, the term "injurious environment," has been interpreted to include "the breach of a parent's duty to ensure a 'safe and nurturing shelter" for his or her children. *Id.* at 463. Under an anticipatory neglect theory, the State seeks to protect not only children who are direct victims of neglect or abuse, but also those who have a probability to be subject to neglect or abuse because they reside with an individual who has been found to have neglected or abused another child. *Id.* at 468. An adjudication of neglect is reviewed based upon the totality of the evidence and acts occurring outside the presence of the children may be considered. *In re A.W.*, 231 Ill. 2d 241, 261 (2008).

¶ 38 Based on this court's review, we agree with the trial court's finding that all three minors were neglected due to an injurious environment. In this case, both J.R. and T.R. were exposed to the same environment where P.H. received her non-accidental injuries. While the mother, father, and maternal grandmother were all present in the home, none could identify the perpetrator or how P.H. suffered two skull fractures. Respondent failed to seek medical treatment for P.H.'s head injury and only did so after noticing a separate injury to P.H.'s leg. Given the lack of supervision and care surrounding P.H., we agree with the trial court that all three minors were placed at a probable and substantial risk of harm as a result of the abuse suffered by P.H. See *In Erin A.*, 2012 IL App (1st) 120050, ¶ 35 (holding that Erin A.'s sibling was neglected because she lived in an injurious environment in which her sibling was not receiving proper medical care).

¶ 39 We reject respondent's reliance on *In re Arthur H.*, 212 Ill. 2d 441 (2004). *Arthur H.* is factually distinguishable because in that case the evidence established that the minor, Arthur H., did not live in the same home, or even the same state, as the other abused and neglected minors. *Id.* at 472-73. Because the minor was not exposed to same environment as the other abused and

neglected minors, our supreme court concluded Arthur was not exposed to the same risk of harm and therefore not neglected. 212 Ill. 2d at 478. Unlike *Arthur H.*, J.R. and T.R. lived in the same home as the abused minor and were therefore exposed to the same risk of harm. The trial court's finding of neglect as to all three minors is affirmed.

¶ 40 CONCLUSION

¶ 41 For the reasons stated above, we affirm the order of the trial court.

¶ 42 Affirmed.