

# SUPREME COURT OF VERMONT

## In re E.C.

188 Vt. 546 (2010) · Decided June 2, 2010

### SUMMARY

The Vermont Supreme Court affirmed the Human Services Board's reversal of the Department's substantiation of abuse by an individual assistant who dunked a vulnerable adult three times during a physical therapy session. The court held that 33 V.S.A. § 6902(1)(E) incorporates a subjective intent element and an objective standard for whether conduct should reasonably be expected to cause serious emotional distress. It further held that the Board applied the proper standard and made sufficient findings to support its decision.

### CASE DETAILS

|                    |                                                                                                                                                                                                                                                                                                                                                                                      |
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| COURT              | Supreme Court of Vermont                                                                                                                                                                                                                                                                                                                                                             |
| JURISDICTION       | Vermont                                                                                                                                                                                                                                                                                                                                                                              |
| DECIDED            | June 2, 2010                                                                                                                                                                                                                                                                                                                                                                         |
| DISPOSITION        | affirmed                                                                                                                                                                                                                                                                                                                                                                             |
| PROCEDURAL POSTURE | The Department appealed the Human Services Board's reversal of its substantiation of abuse by E.C. The Vermont Supreme Court affirmed the Board's decision.                                                                                                                                                                                                                          |
| STANDARD OF REVIEW | The Court deferred to the Board's decisions and would not set aside its findings unless clearly erroneous. It reviewed whether the Board applied the proper legal standard, whether the evidence reasonably supported its findings, and whether the findings reasonably supported its conclusions. The record was construed in the manner most favorable to the Board's conclusions. |
| PRECEDENTIAL VALUE | Published Vermont Supreme Court opinion; precedential.                                                                                                                                                                                                                                                                                                                               |
| PARTIES            | Department of Disabilities, Aging and Independent Living v. E.C.                                                                                                                                                                                                                                                                                                                     |

### TOPICS

agency adjudication

judicial review of agency action

statutory interpretation

noscitur a sociis

standard of review

### PRACTICE AREAS

## QUESTIONS PRESENTED

1. Whether 33 V.S.A. § 6902(1)(E) requires an objective or subjective standard for determining whether intentional conduct should reasonably be expected to cause a vulnerable adult serious emotional distress.
2. Whether the Board properly applied the statutory standard in concluding that E.C.'s conduct did not constitute abuse.
3. Whether the Board made sufficient factual findings to support its reversal of the Department's abuse substantiation.

## HOLDINGS

1. Section 6902(1)(E) contains both subjective and objective elements: the actor must intentionally engage in the conduct, but whether the conduct should reasonably be expected to cause serious emotional distress is determined objectively.
2. The objective standard did not establish abuse as a matter of law, and the Board acted within its discretion in concluding that E.C.'s brief conduct did not reasonably appear likely to cause the serious emotional distress contemplated by § 6902(1)(E).
3. The Board's findings were sufficient to support its reversal of the Department's substantiation, even though some findings appeared in the reasons section rather than the section labeled findings of fact.

## KEY QUOTATIONS

*“The mental element of the statute is subjective — the individual in question must have acted intentionally. The result of the individual’s behavior is measured by an objective standard — whether it is reasonably to be expected that the individual’s behavior will result in serious emotional distress in the vulnerable adult.” (at 548)*

*“The application of an objective reasonableness test does not preclude the Board from considering the actual consequences of petitioner’s conduct to assist it in determining how a reasonable person would view such conduct.” (at 549)*

## FACTUAL BACKGROUND

E.C. worked for approximately seventeen years as an individual assistant for special-needs students and had worked with A.M., a nineteen-year-old vulnerable adult with significant physical and developmental disabilities, for four years. During a swimming-pool physical therapy session, A.M. refused to perform abdominal exercises, and E.C. unexpectedly placed her hands on his shoulders and dunked him underwater three times over approximately twenty-five seconds. A.M. was agitated before and during the incident but not afterward, resumed the exercises, and completed the remainder of the therapy program.

## PROCEDURAL HISTORY

After an incident involving E.C.'s dunking of a vulnerable adult during a physical therapy session, the Department substantiated abuse under several provisions of 33 V.S.A. § 6902(1). E.C. appealed to the Human Services Board, which reversed the substantiation. The Department appealed that decision to the Vermont Supreme Court, arguing that the Board applied the wrong legal standard and made insufficient findings.

## DISPOSITION

affirmed

## CASES CITED

- In re P.J., 2009 VT 5, ¶ 7, 185 Vt. 606, 969 A.2d 133 (mem.)
- Zingher v. Dep't of Aging & Disabilities, 163 Vt. 566, 572, 664 A.2d 256, 259 (1995)
- In re Tinker, 165 Vt. 621, 622, 686 A.2d 946, 948 (1996) (mem.)
- Harrington v. Dep't of Emp't Sec., 142 Vt. 340, 344, 455 A.2d 333, 336 (1982)
- In re Entergy Nuclear Vt. Yankee Discharge Permit, 2009 VT 124, ¶ 36, 187 Vt. 142, 989 A.2d 563
- Chayer v. Ethan Allen, Inc., 2008 VT 45, ¶ 10, 183 Vt. 439, 954 A.2d 783
- Devers-Scott v. Office of Prof'l Regulation, 2007 VT 4, ¶ 34, 181 Vt. 248, 918 A.2d 230
- In re Kleven, 736 N.W.2d 707 (Minn. Ct. App. 2007)
- Williams v. Watkins, 665 S.E.2d 243, 246 (S.C. Ct. App. 2008)
- MacDonough-Webster Lodge No. 26 v. Wells, 2003 VT 70, ¶ 11 n.2, 175 Vt. 382, 834 A.2d 25
- Parks' Adm'r v. Am. Home Missionary Soc'y, 62 Vt. 19, 25, 20 A. 107, 108 (1890)
- Murphy v. City of Aventura, 616 F. Supp. 2d 1267, 1274-75 (S.D. Fla. 2009)
- Almond v. Tarver, 468 F. Supp. 2d 886, 899 (E.D. Tex. 2006)
- Fluor Alaska, Inc. v. Mendoza, 616 P.2d 25, 27 (Alaska 1980)
- Krupp v. Krupp, 126 Vt. 511, 514, 236 A.2d 653, 655 (1967)
- In re Twenty-Four Elec. Utils., 160 Vt. 227, 237, 627 A.2d 355, 361 (1993)
- Harrington v. Dep't of Emp't Sec., 142 Vt. 340, 346, 455 A.2d 333, 337 (1982)
- LaFountain v. Emp't Sec. Bd., 133 Vt. 42, 45, 330 A.2d 468, 470 (1974)

## OPINION

In re E.C.

188 Vt. 546

PER CURIAM.

¶ 1. Appellant Department of Disabilities, Aging and Independent Living appeals a decision by the Human Services Board reversing the Department's substantiation of abuse by petitioner E.C. The Department contends that the Board misapplied 33 V.S.A. § 6902(1)(E) in its determination that petitioner's conduct did not meet the definition of abuse and that the Board did not set forth sufficient findings to form the basis for a decision. We affirm. ¶ 2. Petitioner worked as an

individual assistant for special-needs students, providing one-on-one services to severely disabled students for approximately seventeen years. For four years, petitioner worked with A.M., a nineteen-year-old who has difficulty ambulating, impaired vision, a seizure disorder, and significant developmental delays and learning needs. A.M. uses a walker and has limited ability to walk and stand in a swimming pool, but has good upper body strength. He has the cognitive abilities of a child between the ages of two and four years old. ¶ 3. On February 21, 2008, petitioner and A.M. attended a physical therapy program for special-needs students in the swimming pool of a local fitness center. A.M.'s program included a series of abdominal crunches, which required petitioner to stand with her back against the wall of the pool and to support A.M. from behind. Petitioner would typically hold A.M. under his arms and around his chest while A.M. would lift his knees up toward his chest. On this particular day, however, A.M. did not want to do the exercises. He was noncompliant, splashing and vocalizing, rather than following petitioner's instructions. Petitioner asked A.M. to do the crunches, and he refused. When he said "no," petitioner, without warning, put her hands on A.M.'s shoulders and dunked him underwater three times. After the third time, A.M. refocused and continued his program. The entire incident lasted for approximately twenty-five seconds. ¶ 4. The incident was promptly reported to the Department. Under Vermont law, upon receiving a report of abuse, the Department must investigate the report to determine if it can be substantiated. 33 V.S.A. § 6906. A person whose abuse has been substantiated has his or her name added to a registry of persons found to have committed abuse that is maintained by the Department. *Id.* § 6911(b). The registry is used by, among others, state agencies and prospective employers. See *id.* § 6911(c). Once listed, a person may seek to have his or her name expunged from the registry. *Id.* § 6911(f). ¶ 5. On September 9, 2008, the Department informed petitioner of its decision to substantiate the report of her abuse of a vulnerable adult, concluding that she had violated §§ 6902(1)(B) and 6902(1)(E), which define two types of abuse.<sup>1</sup> Petitioner appealed the Department's sub\*547stantiation to the Human Services Board, see § 6906(d), which held a fair hearing on November 17, 2008. See 3 V.S.A. § 3091. Both parties stipulated prior to the hearing that A.M. was a "vulnerable adult" within the meaning of the statute. See 33 V.S.A. § 6902(14). Therefore, the only issue before the Board was whether petitioner's conduct constituted abuse. On January 12, 2009, the Board reversed the Department's decision to substantiate the report of abuse. The Board concluded that petitioner's actions, although "troubling" and "unprofessional," did not fall within any of the statutory definitions of abuse set forth in § 6902(1). The Department timely appealed the Board's decision to this Court. ¶ 6. We generally give deference to the Board's decisions, *In re P.J.*, 2009 VT 5, ¶ 7, 185 Vt. 606, 969 A.2d 133 (mem.), and will not set aside the Board's findings unless they are clearly erroneous. *Zingher v. Dep't of Aging & Disabilities*, 163 Vt. 566, 572, 664 A.2d 256, 259 (1995). Our review is thus limited to determining whether the Board applied the proper legal standard, whether the evidence before the Board reasonably supports its findings, and whether the Board's findings reasonably support its conclusions. *In re Tinker*, 165 Vt. 621, 622, 686 A.2d 946,

948 (1996) (mem.); *Harrington v. Dep't of Emp't Sec.*, 142 Vt. 340, 344, 455 A.2d 333, 336 (1982); cf. *In re Entergy Nuclear Vt. Yankee Discharge Permit*, 2009 VT 124, ¶ 36, 187 Vt. 142, 989 A.2d 563 (“[W]here the trial court has applied the proper legal standard, we will uphold its conclusions of law if reasonably supported by its findings.” (quotation omitted)). In reviewing the sufficiency of the Board’s findings, “we will construe the record in a manner most favorable to the Board’s conclusions.” *Harrington*, 142 Vt. at 344, 455 A.2d at 336. ¶ 7. The Department’s first contention on appeal is that the Board applied the incorrect legal standard when it determined that petitioner did not abuse A.M. This contention is limited to the Board’s conclusion that petitioner did not violate § 6902(1)(E).<sup>2</sup> That section defines abuse to mean “[i]ntentionally subjecting a vulnerable adult to behavior which should reasonably be expected to result in intimidation, fear, humiliation, degradation, agitation, disorientation, or other forms of serious emotional distress.” The Department argues that this definition embodies an objective standard; that is, that the Board should have determined whether petitioner’s conduct, from a reasonable person’s perspective, “should reasonably be expected” to result in the enumerated types of emotional distress. The Department adds that the Board instead focused on whether A.M. actually suffered emotional distress, noting the Board’s reliance on the fact that “A.M. was agitated prior to and during the dunking but not afterwards” and on A.M.’s “ability to get back on track.” Furthermore, the Department contends if the correct standard had been applied, that the Board would have had no choice but to substantiate the abuse as a matter of law. Although we agree that the legal standard at issue is an objective standard, we do not agree that the facts demonstrate abuse as a matter of law. We conclude that the Board’s decision was consistent with an objective standard and that the Board acted within its discretion. ¶ 8. Our first recourse when interpreting a statute is to look to the plain language of the enactment. *Chayer v. Ethan Allen, Inc.*, 2008 VT 45, ¶ 10, 183 Vt. 439, 954 A.2d 783. The plain meaning of the statute indicates that it has both subjective and objective elements. The mental element of the statute is subjective — the individual in question must have acted intentionally. The result of the individual’s behavior is measured by an objective standard — whether it is reasonably to be expected that the individual’s behavior will result in serious emotional distress in the vulnerable adult. Although we can reach this construction relying on the plain meaning of the language, our conclusion is also supported by the underlying purpose of the statute. See *Devers-Scott v. Office of Prof’l Regulation*, 2007 VT 4, ¶ 34, 181 Vt. 248, 918 A.2d 230 (noting that when plain meaning is not clear, underlying purpose of statute should guide analysis). Section 6901 indicates that the underlying purpose of the abuse-of-vulnerable-adults provisions is to “protect vulnerable adults whose health and welfare may be adversely affected through abuse.” An objective standard of behavior best furthers this purpose. ¶ 9. The Minnesota Court of Appeals recently addressed the same issue when construing a similar statute and arrived at the same conclusion. *In re Kleven*, 736 N.W.2d 707 (Minn. Ct. App. 2007). The Minnesota statute at issue defined abuse as “[c]onduct which is not an accident or therapeutic conduct... which produces or could reasonably be expected to produce physical pain or injury or emotional

distress.” Minn. Stat. § 626.5572, subd. 2(b) (2004) (emphasis added). The court, in interpreting the statute, was required to choose between applying a subjective standard or an objective standard. The court concluded that the subjective standard was “an affront to the purpose of the act and [would lead] to absurd results,” for application of that standard “would mean that the more vulnerable the adult, the worse his caretaker could permissibly treat him.” *Kleven*, 736 N.W.2d at 711. Therefore, the court interpreted the statute to set an objective standard. *Id.*; see also *Williams v. Watkins*, 665 S.E.2d 243, 246 (S.C. Ct. App. 2008) (citing *Kleven* favorably). We agree with the *Eleven* decision. ¶ 10. We cannot conclude, however, that under the objective standard the facts show that petitioner committed abuse as a matter of law. The Department relies upon the dictionary definitions of “intimidation,” “agitation,” and “disorientation” to show that the terms have relatively low thresholds that must have been met here. Rather than relying on abstract definitions, we must evaluate the meaning of these terms in the context of the statute. The canon of construction, “noseitur a sociis,” which more or less means, “it is known by its associates,” *MacDonough-Webster Lodge No. 26 v. Wells*, 2003 VT 70, ¶ 11 n.2, 175 Vt. 382, 834 A.2d 25, requires us to “seek the meaning from the context, and by the light of what precedes or follows.” *Parks’ Adm’r v. Am. Home Missionary Soc’y*, 62 Vt. 19, 25, 20 A. 107, 108 (1890). The statute contains the terms “intimidation,” “agitation,” and “disorientation,” among others, and importantly concludes with the phrase, “or other forms of serious emotional distress.” 33 V.S.A. § 6902(1)(E) (emphasis added). This catchall indicates that the Legislature intended that the results in the statutory list apply only if they rise to the level of “serious emotional distress.” See *id.* The Department impliedly acknowledges that there is a severity element embodied in the statute in its distinction between playful, pre-warned dunking and that which occurred here. Both the good \*549and bad dunking can cause some degree of disorientation and agitation. We do not believe that we can draw the line so easily between one kind of dunking and another. ¶ 11. Assuming that the facts do not show abuse as a matter of law, the Department next argues that the Board construed the statute as containing a subjective standard because it focused on the effect of the dunking on A.M. The Board never expressly stated whether it adopted an objective standard or a subjective standard when applying § 6902(1)(E), which is not surprising because neither party raised this point in the initial presentations. Nevertheless, the Board described the issue as whether the dunking “should be reasonably expected to result in agitation or disorientation,” the expression of a purely objective standard. It also noted that petitioner’s conduct could cause disorientation or agitation, again an objective standard. ¶ 12. In arguing that the Board did not actually use the objective standard the Department points to the Board’s reliance in part on A.M.’s reaction to the dunking incident. We agree that it would have been improper for the Board to have found A.M.’s reaction alone to be determinative.<sup>3</sup> However, it is not improper for the Board to do what it did here — to consider A.M.’s actual reaction as an important factor in reaching the decision not to substantiate the report of abuse. Cf. *Murphy v. City of Aventura*, 616 F. Supp. 2d 1267, 1274-75 (S.D. Fla. 2009) (including extent to which employer’s conduct adversely affects employee’s job

performance among objective factors to be considered in determining whether hostile work environment exists); *Almond v. Tarver*, 468 F. Supp. 2d 886, 899 (E.D. Tex. 2006) (listing “the extent of the injury suffered” among the objective factors to be considered in evaluating excessive force claim); *Fluor Alaska, Inc. v. Mendoza*, 616 P.2d 25, 27 (Alaska 1980) (concluding that Workers’ Compensation Board acted properly in relying in part on patient’s actual fears in determining whether patient’s refusal to undergo surgery was objectively reasonable). The application of an objective reasonableness test does not preclude the Board from considering the actual consequences of petitioner’s conduct to assist it in determining how a reasonable person would view such conduct. Cf. *Murphy*, 616 F. Supp. 2d at 1275; *Almond*, 468 F. Supp. 2d at 899. Indeed, the Department asks us to look at just this kind of evidence — the reaction of observers of the incident — in evaluation of whether the standard was met. ¶ 13. In viewing the Board’s decision in its entirety, we conclude that the Board applied the proper standard and acted within its discretion. Not only did the Board note that the incident did not appear to cause the adverse results to A.M. enumerated in the statute, it also relied upon the fact that the incident was of brief duration and involved only three dunkings. The Board acted within its discretion in concluding that petitioner’s behavior could not reasonably be expected to cause the disorientation or agitation contemplated in the statute. ¶ 14. The Department last argues that this Court should remand the Board’s decision for further proceedings due to inadequate findings of fact. In *Krupp v. Krupp*, 126 Vt. 511, 514, 236 A.2d 653, 655 (1967), this Court held that a mere recitation of testimony is not the equivalent of a finding of the facts contained in that testimony. Thus, “Krupp findings” cannot form the basis for a decision. See *id.* The Department contends that the Board’s findings consist largely of recitations of the testimony provided by petitioner and \*550six witnesses who were at the pool on the day of the incident, and thus that the Board “stated only what the evidence was and not the facts that were found from the evidence.” In *re Twenty-Four Elec. Utils.*, 160 Vt. 227, 237, 627 A.2d 355, 361 (1993). We disagree. ¶ 15. The Board makes sufficient findings of fact to support its reversal of the Department’s substantiation. Although many of these findings are located in the “Reasons” section of the Board’s decision, rather than in the “Findings of Fact” section, this is not a fatal defect. See *Harrington*, 142 Vt. at 346, 455 A.2d at 337; *LaFountain v. Emp’t Sec. Bd.*, 133 Vt. 42, 45, 330 A.2d 468, 470 (1974). The Board found that: petitioner dunked A.M. three times; the incident lasted less than twenty-five seconds; A.M. was agitated prior to and during the dunking; A.M. was not agitated after the dunking; and after the incident, A.M. started his crunches and completed the remainder of his physical therapy program. These findings are sufficient to support the Board’s determination that petitioner did not abuse A.M. We therefore affirm the Board’s decision. Affirmed. The Deputy Commissioner also substantiated abuse under § 6902(1)(A) (treatment that places life, health or wel\*547fare in jeopardy or which is likely to result in impairment of health), but the Department did not defend the substantiation on that basis before the Human Services Board, and it is therefore no longer an issue in the case. The dissent relies upon the Board’s analysis of § 6902(1)(B) to demonstrate that it relied upon a

subjective, not objective, standard. See post, ¶ 19. The Department's argument that the Board used the wrong standard did not include the Board's analysis of whether petitioner violated § 6902(1)(B). Under these circumstances, its analysis of § 6902(1)(B) is irrelevant to our decision. We would also agree with the dissent that a "no harm no foul" rule would have been inconsistent with the statute. The Board did not adopt such a rule.