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COURT OF APPEALS
STATE OF NEW YORK

NELLENBACK,

Appellant,

-against-

MADISON COUNTY,

Respondent.

NO. 37

92 Court Street
Binghamton, New York
March 13, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE WILSON: First case on today's
2 calendar is Nellenback v. Madison County.

3 Counsel?

4 MS. NAPPI: Good morning, Your Honor. May it
5 please the court. Hillary Nappi on behalf of the
6 appellant.

7 Your Honors, this case - - -

8 CHIEF JUDGE WILSON: Counsel, just for a minute.
9 Do you want to save any time for rebuttal?

10 MS. NAPPI: Oh, I'm sorry, Your Honors. Yes.
11 Three minutes, please.

12 CHIEF JUDGE WILSON: Three minutes? Yes.

13 MS. NAPPI: This case presents a very simple
14 question. Whether the clear red flags presented in the
15 record are enough to establish that a jury should be able
16 to decide - - -

17 JUDGE SINGAS: And what are those red flags?

18 MS. NAPPI: Yes, Your Honor. So starting with
19 the testimony of Ms. Hogg, who was the supervisor of Carl
20 Hoch on record cite 127, she acknowledges that the job
21 duties of the caseworker were to meet with the child in an
22 - - - in an effort to reunify the family. He was also
23 supposed to meet with the family. He was supposed to
24 provide counseling and arrange services and transportation
25 for mental health and court appearances. He was supposed

1 to document his visits for the purpose of report writing
2 and even testifying in court.

3 Ms. Hogg also admittedly said that the training
4 that she received and the direction she received with how
5 to manage her division was learned by - - -

6 JUDGE TROUTMAN: With respect to the failings
7 that it seems that you're going to, as to following the
8 protocols, what about those failures gave a clear
9 indication that there was an issue here?

10 MS. NAPPI: So Your Honor, it is the totality of
11 the circumstance coupled with the lax environment of this
12 division that allowed Mr. Hoch - - -

13 JUDGE TROUTMAN: How you get from the type of
14 behavior that was engaged in as against the child, based on
15 a failure to document information?

16 MS. NAPPI: The failure of documenting the
17 information is not necessarily what led to him to be able
18 to conceal his behavior.

19 CHIEF JUDGE WILSON: Well, how do we know that
20 the documentation was not made, as opposed to lost in the
21 interim period?

22 MS. NAPPI: The file was otherwise relatively
23 complete. We had visitation records showing who went to
24 visit Mr. Nellenback at the group homes that he was at.
25 There were notes from providers in different homes that he

1 had been assigned. There were even logs that showed, in
2 discovery, other transportation that did not occur with Mr.
3 Hoch.

4 CHIEF JUDGE WILSON: Was that the court file or
5 the DSS file?

6 MS. NAPPI: The DSS file.

7 CHIEF JUDGE WILSON: And - - -

8 JUDGE HALLIGAN: How - - - go ahead. Sorry.

9 CHIEF JUDGE WILSON: Go ahead.

10 JUDGE HALLIGAN: How would we know from that
11 missing material, what - - - why would they have had reason
12 to infer that abuse was occurring, as opposed to - - - you
13 know, looking at the logs and seeing whatever the time
14 allocated was?

15 MS. NAPPI: So the notes should have encompassed
16 - - - and our expert provided a report - - - the detailing
17 - - - the detailing of the interactions spent with the
18 child, what was happening, what was discussed, what
19 progress was being made. If Ms. Hogue had supervised Mr.
20 Hoch, she would have been able to see the nature of the
21 interaction, the frequency - - -

22 JUDGE HALLIGAN: Well, it seems to me you're
23 talking about two different points here. But correct me if
24 I'm misunderstanding you. One is, what do we see about her
25 supervision, and the second is, what might the notes

1 themselves have revealed; is that right?

2 MS. NAPPI: Correct, Your Honor. And I'm
3 focusing on her ability to supervise someone who was a
4 known, albeit later on - - -

5 JUDGE HALLIGAN: And what exactly - - -

6 MS. NAPPI: - - - a convicted child sex offender.

7 JUDGE HALLIGAN: And what exactly in the record
8 shows that she failed in her supervision in a way that, had
9 she fulfilled her obligations, would have given them reason
10 to think that he was engaged in this conduct?

11 MS. NAPPI: She consistently testified that she
12 did not review the notes. That she did not - - -

13 JUDGE HALLIGAN: Did she not - - -

14 JUDGE SINGAS: Well, she also testified that she
15 regularly - - -

16 JUDGE HALLIGAN: She said regularly looked at the
17 - - -

18 JUDGE SINGAS: - - - had face-to-face meetings
19 with him. So why are the note - - - why is the notetaking
20 superior to the actual meetings that she had face-to-face,
21 where she could assess credibility; she could look at him;
22 she could understand what was going on, and there was no
23 requirement that she - - -

24 MS. NAPPI: I think, Your Honor, and I understand
25 the court's point. But part of Mr. Hoch's job

1 responsibility was to create these reports to monitor
2 progress for further assessment, if other needs were met,
3 if the child needed additional mental health services, or
4 further supervision, with the goal that he might have to
5 actually testify in court or prepare a report.

6 JUDGE RIVERA: Did she ever summarize any of
7 these meetings she said she had with him?

8 MS. NAPPI: She did not.

9 JUDGE RIVERA: So there's no record of any
10 conversations?

11 MS. NAPPI: Correct.

12 JUDGE RIVERA: Dates? Times?

13 MS. NAPPI: Correct.

14 JUDGE RIVERA: What she might have asked?

15 MS. NAPPI: And she did not remember or recall
16 who Mr. Nellenback was, despite the fact, as counsel likes
17 to point out, that it was a smaller caseload with a very
18 closeknit unit. There were several boys that were part of
19 an investigation later on.

20 JUDGE RIVERA: Did she say she met with the
21 victim?

22 MS. NAPPI: No. No one met with Mr. Nellenback.
23 There was one question by a counselor - - -

24 JUDGE RIVERA: I thought she - - - I thought she
25 stated that part of the intent of the supervisory approach

1 was to develop a positive relationship with the children so
2 that they would be very candid?

3 MS. NAPPI: That's correct, Your Honor.

4 JUDGE RIVERA: Did she explain why - - - how - -
5 - how she could achieve that goal if she never met with
6 them?

7 MS. NAPPI: She did not, Your Honor. And it was
8 left to the caseworker, with the supervisor having
9 discretion over what ultimate decisions would be made. And
10 that feedback was coming directly from the caseworker.

11 JUDGE TROUTMAN: Is it - - - what evidence can
12 you point to in the record that would suggest actual
13 knowledge of sexual abuse of the child?

14 MS. NAPPI: I don't believe that there is actual
15 knowledge of sexual abuse in this case.

16 JUDGE CANNATARO: What about constructive
17 knowledge?

18 MS. NAPPI: Yes, Your Honor. So that was why I
19 was laying out these red flags. In a totality of the
20 circumstance, you have what the goal of the caseworker was.
21 You also have Ms. Hogg explaining that because she was
22 learning by the seat of her pants, to quote her, it - - -
23 you need to look at the entire picture. And so keeping the
24 goal in mind, there was a lack of documentation of these
25 visits.

1 JUDGE CANNATARO: Counsel, I mean, I've - - -

2 MS. NAPPI: If we look at the record - - -

3 JUDGE CANNATARO: - - - I think we've all looked
4 at the record and we understand. And my problem is, even
5 if I accept your assertion that the supervision was
6 deficient in certain respects, and we can say that the
7 recordkeeping of the supervision was wholly inadequate, I
8 still don't understand the leap to that would somehow
9 disclose evidence of the type of notice that you need to go
10 forward in this case.

11 MS. NAPPI: So if we look at Mr. Nellenback's
12 testimony, he testifies that the sexual abuse occurred
13 almost immediately within two weeks of his encounter with
14 Mr. Hoch. I think that that testimony and the fact that it
15 had occurred over a period of years, always in these
16 clandestine-esque visits that were not for the purpose of
17 where he was supposed to have been through these
18 transports. It falls in line directly with the case law
19 that we're seeing coming out of the Second and Fourth
20 Department, which focuses on the frequency and nature of
21 the abuse and the ability for a jury to question whether
22 the supervision of the abuser and the lack thereof allowed
23 that abuser to conceal his true efforts with the child.

24 JUDGE CANNATARO: So the opportunity to conceal
25 abuse equates to constructive notice of abuse; is that what

1 it comes down to?

2 MS. NAPPI: No, I think it's just one sign of it,
3 Your Honor. Right? In this particular instance, you have
4 to take all of these pieces together, right? There is a
5 very clear focus of what Mr. Hoch was supposed to be doing.
6 There were state guidelines - - -

7 JUDGE HALLIGAN: What do you - - - what do you
8 mean by that, a clear focus of what he was doing?

9 MS. NAPPI: He - - - his purpose was to provide
10 services to this child, to reunify him with his family.
11 Yet on a very base level he never documented, so we don't
12 know if he ever met with the family. And there are no
13 documents or notes concerning the progress of his meetings
14 with Mr. Nellenback, which would have potentially included
15 some of the signs that were noted in the other parts of the
16 record.

17 JUDGE HALLIGAN: But that last point, maybe you
18 can say more about that? As Judge Cannataro said, if we
19 were to accept that there were deficiencies in the
20 recordkeeping - - - you know, how then does that lead to
21 constructive notice for the agency at the time?

22 MS. NAPPI: So I think the record is replete, and
23 I think it's undisputed that Mr. Nellenback was receiving
24 mental health counseling and needed further services. The
25 progress notes that Mr. Hoch should have been documenting

1 would have included that. It would have included - - -

2 JUDGE GARCIA: Where does that get you to the
3 final step?

4 MS. NAPPI: Yes, Your Honor. So if Mr.
5 Nellenback were experiencing any of the mental health
6 symptoms or signs that are commonly associated with child
7 sexual abuse, and it had been documented, and Ms. Hogg had
8 read them or spoke with Mr. Hoch about them, perhaps
9 intervention would have happened, and actual notice would
10 have happened.

11 JUDGE GARCIA: It's so speculative.

12 MS. NAPPI: I understand, Your Honor. The point
13 that I'm trying to make, though, is that without those
14 progress notes, which should have been there, there is no
15 way that we can tell how Mr. Hoch - - - Ms. Hogg supervised
16 Mr. Hoch - - -

17 JUDGE RIVERA: So what is the - - - just to be
18 clear from your perspective. What is the notice that's
19 necessary? That constructive notice of what? Just to be
20 clear.

21 MS. NAPPI: I think it's notice in this
22 particular case, right, of whether or not - - - it's not
23 about propensity, I think, in this particular situation. I
24 think it's the question of whether or not Mr. Hoch was
25 being supervised appropriately. All of these facts go to a

1 question - - -

2 JUDGE GARCIA: Notice of what? Notice of what is
3 the judge's question.

4 JUDGE RIVERA: Because you said, "not
5 propensity", which - - -

6 MS. NAPPI: It's - - - it's - - -

7 JUDGE RIVERA: - - - seems at odds with - - -
8 with their position. But no - - - what are they - - - what
9 are the red flags?

10 MS. NAPPI: Well - - -

11 JUDGE RIVERA: I understand red flags that
12 there's not - - - that there's lack of supervision, if any.
13 I get that point. But then notice of what? That the child
14 maybe is in danger? Or that this gentleman is just not
15 doing his job?

16 MS. NAPPI: I think it's both. It - - -
17 particularly in this case, because this was a child
18 predisposed - - -

19 JUDGE HALLIGAN: We have - - -

20 CHIEF JUDGE WILSON: So the question is what
21 matters legally? Notice of - - - construct - - - there has
22 to be constructive notice of something to matter legally.

23 MS. NAPPI: Correct, Your Honor.

24 CHIEF JUDGE WILSON: Right? So it's constructive
25 notice of what that matters legally?

1 MS. NAPPI: I think Mr. Hoch's failure to do his
2 job was actually also a red flag, because the behavioral
3 pattern that might have been established, right, that he
4 was taking this county vehicle, not going where he was
5 supposed to go, not taking the child where he was supposed
6 to take him - - -

7 CHIEF JUDGE WILSON: It seems to me like you're
8 talking more about causation than you - - -

9 MS. NAPPI: Well - - -

10 CHIEF JUDGE WILSON: - - - are about notice.

11 MS. NAPPI: I - - - Your Honor, if I just may
12 finish my sentence? Because I hope that it will answer
13 your question.

14 CHIEF JUDGE WILSON: Okay.

15 MS. NAPPI: That would get you to the fact that
16 he was concealing his behavior. And for what purpose?

17 JUDGE TROUTMAN: What about the fact - - -

18 MS. NAPPI: Which I think was his propensity.

19 JUDGE SINGAS: Yeah. But that same behavior - -
20 -

21 JUDGE TROUTMAN: What about - - -

22 JUDGE SINGAS: - - - could be concealing drug use
23 or something else. Like, how - - - where's the linkage to
24 the sexual assault?

25 MS. NAPPI: Your Honor, I think that would have

1 come with the mental health evaluation of Mr. Nellenback.

2 JUDGE TROUTMAN: You said he wasn't doing his
3 job. What about the records saying that he was commended
4 for doing good work?

5 MS. NAPPI: Well, I think that goes to the lax
6 performance and performance reviews that Ms. Hogg also said
7 was not taken seriously, right? It was just a pro forma
8 job review. So without documenting progress of children
9 that you are tasked with supervising and coordinating
10 services for, I'm not sure what the standard was in terms
11 of job performance that led to a commendable performance.

12 I just wanted to point out - - -

13 JUDGE RIVERA: With - - - let me ask you this.
14 Other than the fact that you don't have notes from the
15 caseworker, which, yes, a supervisor maybe finds that
16 disturbing. But put that aside for one moment. Are there
17 other records that, perhaps in combination with the lack of
18 notetaking or proper recordkeeping, might have put the
19 county on some type of notice?

20 MS. NAPPI: I believe so. I mean, and I would
21 point the court to record 266, 267. Those are the
22 visitation records showing that Mr. Hoch was not either
23 visiting or signing in and memorializing when he was
24 actually making contact with the child. Unfortunately,
25 he's deceased, and we couldn't explore - - -

1 JUDGE RIVERA: Yes.

2 MS. NAPPI: - - - that particular answer through
3 a deposition.

4 JUDGE RIVERA: What about - - - what is it that
5 Dr. Nunno, your expert, looked at with respect to the
6 victim's behavior?

7 MS. NAPPI: So he examined the DSS and court file
8 that we received showing the mental health progress notes,
9 showing Mr. Nellenback's time at George Junior Republic,
10 which coincided with some of the abuse. There were clear
11 indication of certain behavioral outbursts, which together
12 are classic signs that we now know, and I think that they
13 knew at the time, indicated that the child was in distress.

14 JUDGE RIVERA: So to be clear, these are notes
15 taken by the staff?

16 MS. NAPPI: Yes.

17 JUDGE RIVERA: And then where do these notes go?

18 MS. NAPPI: They were in Mr. Nellenback's file.

19 JUDGE RIVERA: Which would have been available to
20 - - -

21 MS. NAPPI: Mr. Hoch and Ms. Hogg.

22 Which was actually where I wanted to point the
23 court. Dr. Nunno's report is also very clear, I think, on
24 what the best practices were with respect to supervision,
25 and it coincides with the New York State standards. And

1 that is - - -

2 CHIEF JUDGE WILSON: Your time is up, Counsel.

3 MS. NAPPI: I'm sorry. Thank you, Your Honor.

4 CHIEF JUDGE WILSON: Thank you.

5 MR. MARTIN: May it please the court. My name is
6 Kevin Martin. I represent the respondent, Madison County.
7 And I think maybe I'll - - -

8 JUDGE TROUTMAN: What do you say with respect to
9 the suggestion that there was records - - - there were
10 records, in fact, with respect to his psychiatric or
11 psychological care that, if reviewed properly and the other
12 recordkeeping had been done, clearly established that there
13 was an issue with this child?

14 MR. MARTIN: So I probably should have emphasized
15 this a little more in the briefing. But this was a PINS
16 case. So the parents of Mr. Nellenback petitioned the
17 family court for assistance, and an order was granted. So
18 the family court was in control of the records, not the
19 DSS. So the family court - - -

20 JUDGE RIVERA: I'm a little confused. There are
21 records regarding the type of conduct that, at a minimum,
22 seems associated with some - - - a child's potential sexual
23 abuse. These are records about behavior at the children's
24 home of Jefferson County. The county has no interest in
25 knowing what is going on while the child is in - - -

1 MR. MARTIN: I didn't say that. So we actually
2 work with the counselors. So Mr. Hoch, just to correct one
3 thing, he did not give counseling. He's not a counselor.
4 He's not certified. The counseling was provided at the
5 group home. Initially in Watertown, New York, at Jefferson
6 - - - the Jefferson home, and then subsequently at the
7 George Junior Republic in Freeville, New York. And
8 following that, a try-on, over in Johnstown, New York. And
9 so - - -

10 JUDGE RIVERA: These are private homes?

11 MR. MARTIN: Correct. And so - - -

12 JUDGE RIVERA: But they're - - - they're overseen
13 by the County DSS?

14 MR. MARTIN: Correct.

15 JUDGE RIVERA: Okay.

16 MR. MARTIN: Correct. Exactly. And we would
17 work together to create a plan which would be updated with
18 - - - and if you look at - - -

19 JUDGE RIVERA: So you're working together?

20 MR. MARTIN: Yes. And if you look at the - - -

21 JUDGE RIVERA: So the staff on the site documents
22 his various types of behavior, urinating in bed, wearing
23 diapers. I mean, they're - - - I don't have to go through
24 them. You know what they are, in the record. Which are
25 signs of potential abuse - - - sexual abuse. What? The

1 county does nothing?

2 MR. MARTIN: So there - - -

3 JUDGE RIVERA: Would that not have, perhaps,
4 notified the county that it should take further steps?

5 MR. MARTIN: I don't believe - - - I don't recall
6 that there was anything in the UCR reports to that effect.
7 And again, the UCR reports are family court records, which
8 we - - - which are retained by the family court. They are
9 not DSS records.

10 Now, we are - - - we have an interest in them - -
11 - we review them.

12 JUDGE TROUTMAN: So what are the DSS records?

13 MR. MARTIN: So the DS records that we were able
14 to find, we provided, but it wasn't a complete file. So
15 essentially, under the retention rules, once an individual
16 turns eighteen, you retain those files for ten years and
17 then discard. So Mr. Nellenback was born in 1982, so his
18 DSS files were actually discarded in 2010. And I think,
19 probably because of Mr. Hoch's subsequent arrest, there
20 were some records which were retained, which we turned over
21 as best we could. But as Mike Fitzgerald testified, the
22 records were gone by 2010. So - - -

23 JUDGE TROUTMAN: But at the time - - -

24 MR. MARTIN: - - - all the work was done.

25 JUDGE TROUTMAN: But at the time that he was in

1 custody, what type of information was available to DSS with
2 respect to his care and well-being?

3 MR. MARTIN: So they had copies of any reports
4 that were prepared by the Jefferson home up in Watertown.
5 They had copies of reports prepared by the George Junior
6 Republic when he was there down in Freeville. And then
7 some of the services we provided were quarterly visits to
8 these group homes to check in. How are things going?
9 Talking with the counselors at these group homes and those
10 who are providing specific services to Mr. Nellenback, so
11 we kept on top of it.

12 JUDGE RIVERA: So again, if in - - - if you have
13 access to those documents, you're keeping on top of it, in
14 those documents for a particular child, there is documented
15 - - - there are notes indicating behaviors that are
16 associated with potential sexual abuse. What does the
17 county do?

18 MR. MARTIN: I don't know that there was such
19 notes.

20 JUDGE RIVERA: Let's assume for one moment it had
21 that kind of information. What would the county do?

22 MR. MARTIN: If there was any inkling - - -

23 JUDGE RIVERA: Yes.

24 MR. MARTIN: - - - that there was sexual abuse -
25 - -



1 JUDGE RIVERA: Yes.

2 MR. MARTIN: - - - by our employee particularly,
3 we would do exactly as we did in 1996 when we found out
4 that there was a problem with another person.

5 JUDGE RIVERA: But let - - - let - - -

6 MR. MARTIN: This is not - - -

7 JUDGE RIVERA: I appreciate that, but that was
8 not exactly my question. My question is, you just have
9 access to documentation, you said the county stays on top
10 of it, you have access to documentation where there are
11 notes indicating the kinds of behavior that are associated
12 with child sexual abuse. It doesn't say who's the abuser.
13 So what would the county do? I'm just asking what the
14 protocol is.

15 MR. MARTIN: I presume - - - there was no
16 testimony about this? There's nothing in the record?

17 JUDGE RIVERA: Did Dr. Nunno's - - -

18 MR. MARTIN: There's - - -

19 JUDGE RIVERA: You have an expert report about
20 this.

21 MR. MARTIN: I mean about what the protocol is.

22 JUDGE RIVERA: Oh, I'm sorry. I'm sorry.

23 MR. MARTIN: There's no testimony about that.

24 JUDGE RIVERA: Okay.

25 MR. MARTIN: In the record on appeal. And you

1 know, I presume at the time - - -

2 JUDGE RIVERA: Yes. But your position is you
3 don't have notice. So I'm asking about something that
4 looks to me like notice.

5 MR. MARTIN: Well, we had notes, is our position.
6 We had notes. And those notes were destroyed in 2000 - - -

7 JUDGE RIVERA: No, no, not notes. Notice.

8 MR. MARTIN: Oh, notice.

9 JUDGE RIVERA: Yes.

10 MR. MARTIN: I - - - I don't - - -

11 JUDGE RIVERA: It seems to me these are things
12 that would perhaps provide notice. I'm - - - so I'm asking
13 what - - - what would the county do?

14 MR. MARTIN: I don't believe anyone was on notice
15 of child sexual abuse as a result of those notes. The
16 professionals who were providing the services in Jefferson
17 County, in Tompkins County, in Albany County, or - - - I
18 guess it would be Fulton County - - - those folks would be
19 the ones to tell us, hey, you know, there's something - - -
20 there's an issue here. We're not sure where it's coming
21 from. It could be from other students at our group home.
22 It could be from school. Who knows? But that would be
23 brought to our attention, I think, by the - - - you know,
24 by those professionals.

25 Now, Karl Hoch, at that time, he's a caseworker.

1 He's providing occasional transportation. That's it. He's
2 not providing counseling.

3 JUDGE SINGAS: Were they required to log that
4 transportation? The use of the county car?

5 MR. MARTIN: The use of the county car was
6 logged. It wasn't necessarily logged that - - - you know,
7 there was a discussion in the car or we - - - you know, he
8 said this, or he said that. Unless there was something
9 notable, I imagine there would be.

10 JUDGE SINGAS: Well, for example, if they were
11 taking someone from point A to point B, and that should
12 have been a fifteen-minute ride, but they log it in and
13 then two hours later they say they deliver the kid. So
14 that might be something that would raise a red flag. I
15 don't know. I'm just asking you, was there a requirement
16 in that sense? Or just a note a county car was used?

17 MR. MARTIN: Yeah. I don't think it would raise
18 a red flag, and it's kind of sad, quite frankly. Because -
19 - - you know, I think we see these cases with different
20 eyes in 2025 from what we would have seen in 1993. And
21 quite frankly, for a young man who was having the kinds of
22 mental health problems - - - you know, criminal charges,
23 things of that kind, it would be admirable for someone to
24 take extra time - - -

25 JUDGE SINGAS: No, I - - - I - - -

1 MR. MARTIN: - - - try to spend with the child.

2 JUDGE SINGAS: - - - appreciate that. And I
3 appreciate - - -

4 MR. MARTIN: So it wouldn't necessarily mean
5 anything.

6 JUDGE SINGAS: Counsel, I appreciate how we have
7 evolved on these issues. My question is merely would there
8 be a requirement of a logging in? I took the car at this
9 time with a student, and I dropped it off at this time?
10 That's all I'm asking.

11 MR. MARTIN: I don't believe so. So multiple
12 trips were taken sometimes, so someone would take the car
13 in the morning and deliver three or four kids. So Ann Hogg
14 testified about that. So she'd have the car all day, but
15 she would make three or four different trips. Or she would
16 - - - you know, go out of state or - - - so it's - - - the
17 time spent was so variable that I think the main purpose of
18 the log, to be honest, is to get reimbursement for expenses
19 and just to track where the vehicle was.

20 JUDGE RIVERA: But isn't that - - -

21 MR. MARTIN: Because - - -

22 JUDGE RIVERA: - - - isn't that in part the
23 argument that the - - - there was a culture of sort of this
24 lax, almost nonsupervision? Because there wasn't
25 appropriate recordkeeping. There weren't protocols

1 established that might allow a supervisor who is properly
2 trained, to see that maybe there's a problem with the way
3 this caseworker is handling this case. Maybe there's a bit
4 too much attention to this particular child?

5 MR. MARTIN: In 1993, there were no protocols
6 about how to handle transportation logs. All of the
7 training that was required by the State of New York was
8 done - - - it evolved over time. You know, as we pointed
9 out in our brief, Ann Hogg was hired in 1968, five years
10 before the passage of the Child Victims Act, or Child
11 Protection Act, excuse me, in New York State in 1973.

12 And she evolved as the law and the facts and all
13 of us have learned over time of what's possible. So like I
14 said, we see things with different eyes today.

15 JUDGE RIVERA: But the statute was all - - -

16 MR. MARTIN: But there were no protocols in '93.

17 JUDGE RIVERA: The statute was already an
18 indication that the legislature thought there was an issue.
19 And of course, as we know, although we wish everything
20 moved faster, that that would have meant that there was a
21 great deal of, at least, scholarly work on the issue.

22 MR. MARTIN: In 1973, the focus was on physical
23 abuse. So it wasn't until the early 60s that academic
24 research was done, and it was focused on physical abuse of
25 children. It wasn't until much later that child sexual

1 abuse became an issue. So in 1986, the registry was
2 created by the State of New York, where they started to try
3 to track. And that was still a physical abuse thing, too.
4 But they were trying to track situations where someone was
5 accused of improper interactions with children. That was
6 1986. Ann Hogg had already been working for eighteen years
7 before the registry was even thought of.

8 JUDGE RIVERA: Yes. But of course, he's abused
9 starting in '93.

10 MR. MARTIN: Right. Much later.

11 JUDGE RIVERA: Many years later.

12 MR. MARTIN: Correct. That's correct. So there
13 was recordkeeping. It's been deleted in accordance with
14 the Office of Child and Family Services rules. And they're
15 kind of strict about it, actually. They don't like to have
16 these things hanging around. It's not - - - it's not nice
17 records. And they were actually - - -

18 JUDGE RIVERA: Well, did she testify that there
19 were work records, but they were destroyed?

20 MR. MARTIN: Ann Hogg did not, but Mike
21 Fitzgerald did. So he was the - - - he was the head of the
22 department at the time this case was brought - - -

23 JUDGE RIVERA: Did she testify - - -

24 MR. MARTIN: - - - and he worked for the - - -

25 JUDGE RIVERA: Did she testify she took records

1 of her in-person conversations with the caseworker?

2 MR. MARTIN: She wasn't asked that question. And

3 - - -

4 JUDGE RIVERA: But she was asked about

5 recordkeeping and notes, correct?

6 MR. MARTIN: She wasn't asked if she took any - -

7 - made any notes or did any recordkeep - - - I know that

8 she did some notes because after Mr. Hoch was arrested, she

9 ended up filing the UCR forms, which were required by the

10 family court because Mr. Hoch was arrested in March of

11 1996. So - - -

12 JUDGE HALLIGAN: With respect to the

13 recordkeeping for the cars, it looks to me from your brief

14 that you're saying that there were several pieces of

15 information that have to be - - - had to be included, which

16 - - - which seem to me to turn mostly on mileage for

17 reimbursement purposes. Right?

18 MR. MARTIN: That's true.

19 JUDGE HALLIGAN: Meal vouchers, but not

20 specifically times of pick up and drop off; is that - - -

21 is that right? And - - -

22 MR. MARTIN: I think it is correct.

23 JUDGE HALLIGAN: Do we know whether there were

24 any regulations that specified whether it was in the - - -

25 what is it? The ADM-43 or whatever it is? The - - - the



1 regs that were issued?

2 MR. MARTIN: No such regulations about keeping
3 track of the time. And again, you know, if somebody was
4 going to spend extra time with a child that was having
5 difficulty in school, with criminal charges, things of that
6 kind - - -

7 JUDGE HALLIGAN: Well, I think your - - -

8 MR. MARTIN: - - - why is that a bad thing?

9 JUDGE HALLIGAN: Well, your adversary's argument,
10 I take it, is that the combination of unaccounted-for
11 hours, along with other signs of distress that he might
12 have been exhibiting, might have led someone who was
13 reviewing it to ask some questions. But just in terms of
14 the records themselves, it sounds like reimbursement, meal
15 voucher, location, mileage - - - sorry. Mileage, location,
16 and meal voucher; is that right?

17 MR. MARTIN: And a simple fact of availability.
18 So that if somebody signs the car out, it's not available
19 some - - -

20 JUDGE HALLIGAN: Right.

21 MR. MARTIN: - - - for someone else to use, so
22 that people oftentimes use their own personal vehicles.

23 JUDGE HALLIGAN: But there's not a sort of hour-
24 by-hour - - -

25 MR. MARTIN: No.



1 JUDGE HALLIGAN: - - - log in terms of how - - -
2 how each caseworker has used his or her time?

3 MR. MARTIN: That was not a requirement.

4 JUDGE RIVERA: So if I'm - - - if I could just go
5 back to what you were saying about what was known at the
6 time. And I take your point about learning with respect to
7 sexual abuse of children especially, by those who the
8 government has allowed children - - - to have access to
9 those children. But you - - - I think you said we
10 certainly knew enough by 1993 with respect to physical
11 abuse, yes?

12 MR. MARTIN: Yes.

13 JUDGE RIVERA: So what - - - if he is not taking
14 notes, what would have been available to a supervisor or
15 anyone on the county staff, to check whether or not the
16 child was being subject to physical abuse in foster care or
17 group homes?

18 MR. MARTIN: So the testimony was he was taking
19 notes, and that she was reviewing them. They don't exist
20 because they were discarded. So there's no - - - there's
21 no dispute about the fact that we were doing what was
22 required.

23 JUDGE RIVERA: Well, he might not write down that
24 he physically abused the child. Right?

25 MR. MARTIN: I doubt it.

1 JUDGE RIVERA: You're right. So yes, one would
2 think he would.

3 MR. MARTIN: He fooled a lot of people.

4 JUDGE RIVERA: Yes, I - - - it's unfortunate.

5 MR. MARTIN: It's sad.

6 JUDGE RIVERA: I understand what you're saying.
7 Would there have been some other way, if - - - if the
8 caseworker is the one who's committing physical abuse,
9 there have been some other way for that to have been
10 unearthed?

11 MR. MARTIN: I think the best way - - -

12 JUDGE RIVERA: Yes.

13 MR. MARTIN: - - - was the way that ultimately
14 led to his arrest. And that's a good relationship with the
15 children that are in your charge and those families, the
16 counselors, and we did that. The only other possible - - -

17 JUDGE RIVERA: Who, other than the caseworker,
18 had that relationship? Did - - - did the supervisor have
19 that relationship with the victim?

20 MR. MARTIN: Yeah. That was the testimony of Ann
21 Hogue.

22 JUDGE RIVERA: That she met with the victim - - -

23 MR. MARTIN: She met with - - -

24 JUDGE RIVERA: - - - and the family?

25 MR. MARTIN: She met with each child. She met

1 with the family. She met with the counselors. She went to
2 the facilities in Jefferson County and - - - and George
3 Junior. Had a good relationship with them.

4 JUDGE RIVERA: So your adversary spoke in error
5 when I asked the same question?

6 MR. MARTIN: I think so.

7 JUDGE RIVERA: Okay. All right. Thank you.

8 CHIEF JUDGE WILSON: Thank you.

9 MR. MARTIN: Time up?

10 CHIEF JUDGE WILSON: Yeah.

11 MR. MARTIN: Thank you.

12 MS. NAPPI: Your Honors, I'll be very, very
13 brief. I actually don't believe I spoke in error. The
14 testimony that Ms. Hogg provided was that on intake, she
15 met with families. There was no further follow-up with Mr.
16 Nellenback or his family. And specifically when asked
17 after the discovery of Mr. Hoch's - - - Mr. Hoch's, I'm
18 doing that. I'm so sorry. Mr. Hoch's criminal activity,
19 there was no follow-up with Mr. Nellenback. There was one
20 incident which Mr. Nellenback testified to, that he was
21 asked specifically in the presence of his family and
22 another caseworker who was unidentified by him in his
23 testimony, if Mr. Hoch had sexually abused him and he
24 denied it. And he was young at that age, which we know
25 through tons of research that that's pretty typical.

1 I just also wanted to point out, because I think
 2 that it is important for the court to understand. Ms.
 3 Hogg, while the statute in 1973 didn't account for sexual
 4 abuse, testified in her career, she had worked with
 5 children who had been victims of sexual abuse, and she had
 6 worked predominantly with females. When I specifically
 7 asked her if she had worked with males and had experienced
 8 any males disclosing sexual abuse, she actually pointed to
 9 another victim of Mr. Hoch. So this was a person who had -
 10 - - and she testified about training that she had received
 11 through the state at Cornell, to recognize the signs and
 12 symptoms.

13 But it's our position that without the proper
 14 information or the proper follow-up by Ms. Hogg, she would
 15 not have known what was happening with Mr. Nellenback. And
 16 because there are no indication in the record that anyone
 17 else other than Mr. Hoch actually spoke to Mr. Nellenback
 18 at that time, his purpose of - - - I'm sorry - - -
 19 coordinating the transportation and the visits to different
 20 mental health providers or further treatment, would not
 21 have been found if the facilities were talking directly to
 22 the caseworker, and the caseworker was purposely concealing
 23 his activity. It would not be documented, but follow-up
 24 from a supervisor might have revealed that. And because he
 25 was not the movant, we're just asking to be able to go to a

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jury.

Thank you so much.

CHIEF JUDGE WILSON: Thank you.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of Nellenback v. Madison County, No. 37 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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