

HOOSIER LITIGATION BLOG

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Indiana Supreme Court Answers Questions of Application of Discovery Rule and Fraudulent Concealment in Tort Claims

Our first addition to the Hoosier Litigation Blog today was a post that was two weeks delayed. This installment is more recent. This past week, the Indiana Supreme Court handed down its decision in *Lyons v. Richmond Community School Corporation*. The unanimous decision was authored by Justice Mark Massa, who our frequent readers should recognize is the author of a great many extremely well-written and well-reasoned cases since he took the bench in 2012. This is yet another case added to that ever-growing list.

This case is the result of particularly tragic circumstances. Miss Megan Lyons was a seventeen-year-old high school student who was severely disabled. As a result of her disability, Megan “had difficulty eating and sometimes failed to chew her food sufficiently or took too many bites before swallowing.” Due to these issues, the school had an established policy for Megan: they were to have a supervisor assigned to her when she ate who would cut Megan food into manageable pieces for her. On January 7, 2009, a supervisor, Cindy DeLucio, who had not previously been assigned to Miss Lyons was charged with supervising her eat. Due to this supervisor’s lack of familiarity with the established policy for Megan, she failed to cut Megan’s sandwich for her. Megan choked on the sandwich.

What happened next is so egregious, at least as dictated by the court's opinion, that it truly shocks the conscience.

DeLucio sought help from Assistant Principal Joe Spicer, who was in the hallway outside the cafeteria. When she was unable to get his attention, DeLucio called [Meagan's usual supervisor, Vicki] Lett, who was stationed at a nearby table. Lett began pounding Megan's back and told DeLucio to get help. DeLucio returned with Assistant Principal Jeff Thorne, who also pounded Megan on the back. These efforts were unsuccessful, so DeLucio approached Spicer and told him he was needed in the cafeteria. Spicer went to Megan and began trying to assist Thorne. During this time, no one attempted the Heimlich maneuver or CPR, and despite the fact that the School's Quick Response Guide recommends calling 911 immediately in the event of an emergency, no one did. Toni Amburgey, a health teacher responsible for training students in CPR, was standing in the cafeteria doorway but did not offer any assistance.

Three or four minutes after Megan began choking, someone contacted the nurse's station. Nurse Sharon Provance received the call and assumed there had been a fight, so before walking to the cafeteria, she gathered first-aid supplies and prepared a bag of ice. She arrived about ten minutes after receiving the call, at which point she removed a tennis ball-sized clump of bread from Megan's mouth but was unable to clear her airway. Provance then instructed Spicer to call 911, which he did. Emergency medical technicians arrived approximately three minutes later and restored Megan's airway before taking her to the hospital.

Shortly afterward, Principal Barbara Bergdoll and Food Services Coordinator Margaret LaRue held a meeting with cafeteria worker Rhonda Swearingen, who had witnessed the entire incident, and three other cafeteria workers. LaRue, while pointing at Swearingen, told the cafeteria workers that if they spoke to anyone about the incident, they would be fired on the spot. That same afternoon, Bergdoll also held a second meeting with various school administrators, including Assistant Principal Rusty Hensley, at which attendees "discussed what could have been done better" during the incident. Someone also brought up the fact that the School's video surveillance system covered the area of the cafeteria where Megan was sitting, and the cameras were angled such that they would have recorded the entire choking incident. Administrators can download

video footage to their computers in 10 minutes, and they routinely review it anytime there is a fight or a theft. The footage is preserved for 90 days and then overwritten to conserve space on the hard drive.

This video footage was not preserved. Megan passed away the following day.

After trying numerous times unsuccessfully to schedule a meeting with the principle, on January 11, 2010, Megan's parents filed a Tort Claim Notice. Six months later they filed suit. The defendants sought and were granted summary judgment on the basis that the Megan's parents' notice was untimely. The case was appealed. The majority of the divided panel (2-1), affirmed the summary judgment.

The Lyonses appealed, and in a published opinion, a divided panel of our Court of Appeals affirmed in part and reversed in part, concluding the defendants were entitled to summary judgment on the Lyonses' federal claims but not on the [Indiana Tort Claims Act (ITCA)] notice issue or on the state law claims. The majority also affirmed the trial court's decision to quash the Lyonses' third-party discovery requests and to deny their motion for leave to amend their complaint to add Indiana Insurance as a defendant.

Then-Chief Judge Robb wrote separately, believing the defendants were not entitled to summary judgment on the ITCA notice issue for two reasons: (1) as the majority concluded, because there was a question of fact as to whether the discovery rule might apply to toll the 180-day time limit, and (2) as Chief Judge Robb believed, there was also a question of fact as to whether "RCSC was fraudulently concealing material facts concerning the Lyonses' cause of action." She noted this issue was particularly suited for the trier of fact because "it requires weighing the evidence to determine whether there was intent and reasonable reliance." Finally, she would have reversed the trial court's grant of summary judgment as to the Lyonses' federal claims.

The School successfully sought rehearing, but the panel affirmed its original opinion in all respects, granting the petition only to clarify that ITCA notice requirement compliance is a question of law for the court to decide before trial, although it may depend upon the resolution of disputed facts.

The case then progressed to the Indiana Supreme Court.

The first and primary issue addressed by the Indiana Supreme Court was

whether Megans' parents' claims were barred by the ITCA, which requires that Tort Claim Notice be filed within 180 days "after the loss occurred." Here, the injury occurred to Megan on January 9, 2009. She passed on the 10th. It was not until more than a year later—January 11, 2010—that the parents filed notice. However, the parents argued that the notice period did not begin to accrue until well after their daughter passed away. The parents argued three alternative theories: (1) that they substantially complied with the requirements of the ITCA even if they did not meet the formal requirements; (2) by application of the discovery rule, the notice period did not begin until later because, "in the exercise of ordinary diligence, the parents could not have discovered the tortious actions of the school personnel; and (3) that the school personnel fraudulently concealed their tortious conduct.

The first two bases were easily decided. Though there are certainly cases recognizing that failure to adhere to the formal structure of the tort claim notice is not fatal to a case, this is not such an instance. We discussed such a case in a prior post, in which the Indiana Supreme Court—again an opinion authored by Justice Massa—determined that including inaccurate information in an otherwise timely filed tort claim notice did not undermine the subsequent claims. Here, however, it was not that the parents had provided incorrect or even insufficient information, it is that they did not file any notice within 180 days of the incident. To that end, the Supreme Court agreed with the Court of Appeals: "substantial compliance cannot exist 'when the claimant took no steps whatsoever to comply with the notice statute.'"

The second basis—the discovery rule—was similarly overcome with ease, however, it was not decided against the parents. The court determined that the facts in the record were insufficient to resolve the discovery rule issue on summary judgment, and, therefore, the matter was not ripe for summary judgment.

The third argument required much greater analysis. The parents argued "the defendants should be estopped from asserting their ITCA notice defense because they fraudulently concealed the existence of the Lyonses' claims." Where fraudulent concealment applies, "equity will toll the commencement of the applicable time limitation until such time as the plaintiff discovers, or in the exercise of ordinary diligence should discover, the existence of the cause of action." The court then progressed into a determination of whether the type of concealment at issue was active or passive.

In order to establish "active fraudulent concealment" the plaintiff must show "that the defendant (1) had actual knowledge of the alleged wrongful act and (2) intentionally concealed it from the plaintiff (3) by making some statement or taking some action calculated to prevent inquiry or to mislead, (4) upon which the plaintiff

reasonably relied.” Here, there was sufficient evidence to allow the application of active concealment to go to a jury.

The Lyonses presented evidence that: Hensley told them Megan was deprived of oxygen for “a very short period of time” when in fact it may have been as long as twenty minutes; school officials were aware there was a videotape record of the tragedy that would be destroyed if they took no action to preserve it; that videotape record was subsequently destroyed; and LaRue threatened to fire Swearingen if she discussed the incident with anyone outside the school. Based upon that record, a factfinder could reasonably find the defendants committed active fraudulent concealment.

Passive fraudulent concealment requires a two-part showing: that (1) a relationship between the parties such that the defendant has a duty to disclose the alleged wrongful act to the plaintiff and (2) a breach of that duty.” The court found that there was existing relationship that provided a basis for passive concealment. The parents argued the “doctrine of *in loco parentis*, the Federal Family Educational Rights & Privacy Act, and a general public policy favoring disclosure of student information to parents.” In the absence of any authority to support the first two of these three arguments, the court rejected them without much analysis. The third argument drew further mention.

[A]lthough we are sympathetic to the Lyonses’ public policy arguments, we must decline their invitation to establish a completely new legal duty here. But we encourage our General Assembly, charged with making policy for our state, to consider this issue carefully. It may be that, in this age of near-universal and compulsory education, when our schools provide myriad counseling, physical therapy, recreation, and special needs assistance for our children, they should be required to disclose vital information about a student to the persons most intimately concerned—the student’s parents.

Nevertheless, because both the discovery rule and active fraudulent concealment provide a basis to defeat summary judgment on the ITCA issue, the Supreme Court reversed summary judgment on the issue.

The court added one last bit of clarification in application of the ITCA.

Finally, we note there has been some confusion as to how the trial court should proceed upon remand. In its original opinion, the panel below suggested the application of the discovery rule was a question of

fact for the jury, but upon rehearing, the panel stated it was rather a question of law for the trial court. We agree on both counts.

The question of whether a plaintiff has complied with the requirements of the ITCA is one of law, but the answer may depend upon the resolution of disputed facts. And the application of the discovery rule necessarily involves questions of fact. When the discovery rule applies, the time for filing does not begin to run until the plaintiff knows or in the exercise of ordinary diligence should know of the tort. *Id.* Similarly, the application of the fraudulent concealment doctrine is a question of equity, but it may depend upon questions of fact, which are properly answered by the fact-finder. When the doctrine applies, a plaintiff has a reasonable time after discovery of the tort to bring his action.

Such mixed questions of law and fact are best handled through carefully drafted jury instructions.

After suggesting possible jury instructions, the court ordered the case back to the trial court and to proceed with the question of whether the tort claim notice was filed timely to be decided by the jury.

The case clarifies some confusion in the area of Indiana tort claim law, but most importantly allows a family who seems to have been egregiously wronged, its day in court.

Join us again next time for further discussion of developments in the law.

Sources

- *Lyons v. Richmond Cmty. Sch. Corp.*, ---N.E.3d---, No. 89S04-1312-PL-788, 2014 WL 5461953 (Ind. Oct. 28, 2014) (Massa, J.).
- *Lyons v. Richmond Cmty. Sch. Corp.*, 990 N.E.2d 470 (Ind. Ct. App.), *on reh'g*, 996 N.E.2d 1280 (Ind. Ct. App. 2013), *trans. granted and opinion vacated in part, affirmed in part*.
- Indiana Tort Claims Act – codified at Ind. Code ch. 34-13-3.
- Colin E. Flora, *Indiana Supreme Court Holds: Trial Court Has Discretion to Not Grant Crime Victims Relief Act Award Even When Predicate Act is Proven*, HOOSIER LITIG. BLOG (Oct. 31, 2014).

- Colin E. Flora, *Does Adding Inaccurate and Unnecessary Information in Tort Claim Notice Bar Recovery? Indiana Supreme Court Says No*, HOOSIER LITIG. BLOG (June10, 2013).

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