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May 23 **2014**

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Indiana Court Examines Discretionary Function Immunity After Middle School Shooting Case

This week, despite being a fairly quiet week in both the Seventh Circuit and the Indiana appellate courts, there still managed to be several cases that merit a blog post. Depending on what decisions we see next week, we just might see a post on *Pierson ex rel. Pierson v. Service America Corp.*–addressing Indiana's dram shop law (liability for servers of alcohol) in light of a drunk driver striking and killing a young girl who had been served at Lucas Oil Stadium–or *Arnold v. KJD Real Estate, LLC*–addressing the Rooker-Feldman Doctrine and Rule 22 interpleader. Today, however, our discussion will focus on a case out of the Indiana Court of Appeals stemming from a shooting incident in March 2011 at Martinsville West Middle School. The resulting lawsuit and appeal probe numerous issues of Indiana's Tort Claims Act–the statute that controls how claims against Indiana governmental entities are handled.

The case begins on March 25, 2011 when the plaintiff (C.J.), an eighth-grader was shot by a former friend, turned competitor (Phelps) for the affections of the same girl (N.A.). Toward the end of the 2010-11 school year, "C.J. allegedly began to spread offensive rumors about N.A., which caused further hostility between C.J. and Phelps." Prior to the shooting, Phelps and C.J. had not resorted to a physical confrontation, though Phelps had attempted to do so "on a local street after a school basketball game" prior to the shooting (the opinion does not say when exactly).

Phelps, having repeated the sixth grade, had been a student at the middle school for four years. In that time, "he accumulated a total of fifty discipline referrals, forty-three of which were for disrespect toward school personnel or failure to follow school rules." The other seven, "for harassing, threatening, and physically assaulting other students."

Three weeks prior to the shooting, "Phelps commented to some of his classmates that he wanted to 'just blow up the school.'" The comments resulted in a ten-day suspension for Phelps. The school further limited his access to the school "except to take the ISTEP test" (Indiana's standard exams). The school principal also instituted expulsion proceedings. Before completion of the expulsion, and a week before the shooting, Phelps's mother withdrew him from the school.

Prior to withdrawing, Phelps was at the school to take the ISTEP exam and argued with C.J. about N.A. This argument was overheard by a teacher who "told C.J. 'not to feed into it and to walk away.'" Phelps would again threaten C.J. after a school basketball game shortly thereafter. C.J.'s current girlfriend (A.M.) told teachers at the school about the threat. The teachers did not report the threats to the administration.

A week before the shooting, A.M. overheard N.A. talking to Phelps on the phone and gathered that "Phelps apparently made yet another threat against C.J." After N.A. finished the call, she told A.M. that "C.J. is doomed." This threat was not reported to the school.

Finally, on March 25, no longer a student at the school, Phelps posted a facebook status stating, "Today is the day . . . . Don't use your mind, use your nine." Phelps, donning "a dark-colored hooded sweatshirt with the hood pulled over his head [ ] moved toward the building so as to avoid detection." Despite three surveillance cameras meant to guard the safety of the school, "[n]one of the monitors noticed Phelps when he arrived at the school, although several students did. No students reported Phelps's presence[.]" Phelps's girlfriend, N.A., found C.J. and "told him that Phelps had arrived at the school and planned to 'kick his ass.'" C.J. disregarded the warning and sent a text message to his mother saying "that Phelps wanted to fight[.]" C.J.'s mother responded telling him to go to the school's office. C.J. did not listen to his mother.

> Phelps found and confronted C.J. at around a quarter past seven. He threatened that C.J. "was about to get [expletive] up." Phelps then left the vestibule, only to return a few minutes later. C.J. and B.K. were both still in the vestibule when Phelps arrived. C.J. told Phelps

> that he did not wish to fight and Phelps responded, "too bad," pulled a stolen handgun from his waistband, and fired two shots into C.J.'s stomach. The ejected shell casings from the bullets hit B.K., injuring his hand. After the shooting, Phelps fled the scene. C.J. was transported via Lifeline to Methodist Hospital in Indianapolis.

Phelps was arrested and charged with attempted murder and numerous other charges. "Phelps was found guilty of attempted murder. He was sentenced to thirty-five years executed in the Department of Correction, with five years suspended and five years of probation."

Following the shooting, C.J., through his mother (because he is a minor), sued the school district "claiming that the School District failed to protect [him] from Phelps. Specifically, [he] argued that the School District was negligent when it left [a door] unlocked [contrary to the school's safety plan], allowing Phelps to enter the school; when it failed to warn personnel monitors that Phelps posed a threat and to instruct them to specifically look for Phelps on school grounds after he was suspended; and when it failed to instruct personnel monitors to call 911 if Phelps was spotted on school property." Seven months later, a student that was present during the shooting and injured by the shell casing from the gun also filed suit.

The school district sought "summary judgment, arguing that it was immune from liability pursuant to the Indiana Tort Claims Act, that C.J. was contributorily negligent, and that the School District did not breach its duty to C.J. and B.K." The trial court denied the motion. The school district appealed.

A couple points to allow you to follow the rest of the discussion. The touchstone of motions for summary judgment is whether there are unresolved issues of fact that are material to determining the case. If there are such factual issues, then the case goes to trial to decide those issues. The second point is what the Indiana Tort Claims Act (ITCA) is. We have discussed the ITCA at length before. In short, the classic rule was that the government was immune from lawsuit. As the law evolved, the rule flipped and allowed the government to be sued as anyone else. Government's across the country responded by passing tort claims acts to prescribe the procedure for suing governmental entities and to provide immunity for certain actions. The issue of immunity was at the forefront in this case.

The ITCA provides immunity for "the performance of a discretionary function." Exactly what constitutes a "discretionary function" has been the subject of numerous cases over the years. At one time, the approach was to distinguish

actions as either ministerial or discretionary, the former not immune.

> Historically, Indiana courts defined a ministerial act as "one which a person performs in a given state of facts in a prescribed manner, in obedience to the mandate of legal authority without regard to, or the exercise of, his own judgment upon the propriety of the act being done." We classified conduct as discretionary "when it involves [discretion] on the part of the officer to determine whether or not he should perform a certain act, and, if so, in what particular way[.]"

This distinction went the way of the dodo in 1988 when the Indiana Supreme Court decided *Peavler v. Board of Commissioners of Monroe County*. The new rule became that immunity only attached if the function "can be properly characterized as policy decisions that have resulted from a conscious balancing of risks and benefits and/or weighing of priorities[.]" This became known as the "planning/operational test."

The school district argued that the discretionary function at issue was the school safety plan established and implemented by the school's principal. In support, the school district looked to decisions from Oregon, Oklahoma, Georgia, and Minnesota. The school district also relied upon a passage from a prior Indiana case–*Beeching v. Levee*–in which "another panel of th[e] court [of appeals] noted that school principals 'have the authority to write regulations governing student conduct' and that 'to the general public, a principal is perceived to have responsibility and authority for operating a school and overseeing the education of its students.'"

However, the court looking to further language in *Beeching* and elsewhere, determined that the primary function of a school principal is administrative. Consequently, the court concluded:

> Under our reading of Indiana case law, Indiana statutes, and the evidence before us, [the principal]'s safety plan does not entitle the School District to discretionary function immunity under the [ITCA] and the *Peavler* planning/operation test. . . . And it is apparent that [the principal], a person to whom Indiana law grants no policy-making authority, was largely, if not entirely, the person responsible for developing the MWMS safety plan. . . . .
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> While it may be the case that, in developing the MWMS safety plan, [the principal] was required to "balance competing factors and resource

> limitations that must be considered in providing a learning environment for an educationally diverse student population," it is important to note that [the principal]'s development of the plan was not an action mandated by statute under the General Assembly's policy-making authority. Furthermore, unlike the Oregon, Oklahoma, and Minnesota cases cited by the School District, . . . there is no evidence in the record that the elected officials on the school board, the School District's policy-making body, played any role in developing or approving the safety plan. And the Georgia appellate court case . . . has marginal, if any, relevance to our inquiry since it reaches its conclusion using a ministerial/discretionary function analysis that has been considered and rejected by our supreme court.

Thus, the court found that there was no discretionary function immunity for the school.

One argument down, the court then turned to whether the school district had breached a duty to the students. This is a core element in any negligence action, for it is often said to be axiomatic that you cannot be held liable for injury to a person you had not duty to prevent from being harmed. Specifically, the school district argued that "the School exercised reasonable care for the protection of its students and that it was not foreseeable to the School that [Phelps] would trespass onto school property th[at] morning . . . and shoot [C.J.]." Indiana cases have previously recognized that a school owes a "'special duty,' beyond regular premises liability," to its students. Nevertheless, this is not an absolute duty that is violated by mere virtue of an injury to a student. "Because there is 'some risk of injury in all human existence,' the duty imposed upon Indiana schools to protect their students has necessarily been defined by the specific circumstances of each case." Looking to the specific facts of the case, the threats made by Phelps, his lengthy history, and the fact that the school was aware of much of the circumstances left enough factual issues unsettled as to allow the question of duty to go to trial to decide whether the shooting was foreseeable and whether the school should have taken actions beyond the safety policy already in place.

The third and final issue is a something that is fairly unique in Indiana to suits against the government. The issue was whether C.J. was contributorily negligent and therefore incapable of stating a claim for his injuries. Historically, the rule was that if an injured person was even one iota responsible for his/her own injuries, then s/he could not recover anything. This rule was known as contributory negligence. The absurdly harsh results occasioned by this approach was tempered by implementation of the comparative fault standard which permits recovery for an

injured person so long as s/he is not more than fifty percent responsible for his/her own harm. Despite the change in almost all facets of tort law, the ITCA maintains the standard in suits against state actors. It acts as a double-edged sword. You see, in comparative fault, the plaintiff's recovery is diminished by the portion of fault allocable to him/her. So if Jane Doe sues John Smith and the jury determines that Jane's injuries are worth $100,000 but that she was 25% at fault for her own injuries and John 75% at fault, Jane can only recover $75,000. But, in the contributory negligence realm, it is an all or nothing proposition.

In this case, the school district argued that C.J. was negligent for not following his mom's directions to go to the office.

> Contributory negligence is generally a question of fact for the jury where the facts are subject to more than one reasonable inference. However, where the facts are undisputed and only a single inference can reasonably be drawn therefrom, the question of contributory negligence becomes one of law. Indiana courts have found contributory negligence as a matter of law in cases in which the voluntary conduct of the plaintiff exposed him to imminent and obvious dangers which a reasonable man exercising due care for his own safety would have avoided.

Despite C.J. having actual knowledge that Phelps wanted to harm him, that would not be enough to decide "as a matter of law"–the standard phrasing for a summary judgment motion–that he was contributorily negligent. The court's response on this point is extremely informative:

> For the trial court to have ruled that contributory negligence was present as a matter of law, "the evidence would have had to overwhelmingly establish, and without grounds upon which reasonable men may disagree," that C.J. was able to realize and appreciate the danger with which he was confronted The School District has laboriously argued that Phelps's shooting of C.J. was unforeseeable to the School District, yet it claims that C.J. should have foreseen that he would be vulnerable to a shooting when he decided to remain in the vestibule in which Phelps confronted C.J. This is precisely the type of genuine issue of material fact that should be resolved by a jury.
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> Moreover, in a society where bullying is a pervasive and confusing problem, especially among young, school-aged children, we question whether the issue of contributory negligence can be properly resolved

> as a matter of law, especially when, as here, a victim is not the initial aggressor in an altercation, but merely fails to meekly walk away from an attacker who is violently disposed, and especially where the victim appears to have been unaware that the attacker was armed. Because the issue of contributory negligence is generally not appropriate for summary judgment and because, in the present case, the facts are subject to more than one reasonable inference, we conclude that the trial court did not err in finding that the issue of C.J.'s contributory negligence is most appropriately a matter for the jury.

As a result, both C.J. and B.K. will have their day in court, and we have further insight into the function of the ITCA in the school safety setting.

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

Sources

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