HOOSIER LITIGATION BLOG

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Can Indiana Department of Child Services Be Liable for Disclosing Confidential Identification Information?

Despite yet another week with a plethora of Indiana cases to choose from, we must settle on one to discuss. This week, we look to *John Doe #1 v. Indiana Department of Child Services* from the Indiana Court of Appeals. The primary reason we focus on *John Doe #1* is because it tackles an issue long overdue for discussion here: the analysis for determining the existence of a previously unrecognized duty. Those familiar with Indiana law will instantly know this implicates *Webb v. Jarvis*, and those of you unfamiliar with that aspect of Indiana law, well that's why you have me. Two other reasons lead us to focus on *John Doe #1*. First, it asked a serious and interesting question: whether the department of child services ("DCS") could be held liable for inadvertently disclosing the identity of a person who was informed his identity would remain anonymous when reporting suspected child neglect. Second, the majority opinion–Chief Judge Nancy Vaidik dissented–was authored by the newest member to the Indiana Court of Appeals, Judge Robert Altice, and the case gives me a chance to discuss the first Altice decision on the Hoosier Litigation Blog.

Prior to jumping into the focus of this week's discussion, I will note one case that was worthy of discussion, but got bumped for a slightly more interesting case:

Megenity v. Dunn. *Megenity* was a case in which a woman was injured in a karate class when another participant chose to do a jump kick in a front kick exercise. The trial court granted summary judgment, applying the broad-reaching golf-injury case *Pfenning v. Lineman*, which held "that, in negligence claims against a participant in a sports activity, if the conduct of such participant is within the range of ordinary behavior of participants in the sport, the conduct is reasonable as a matter of law and does not constitute a breach of duty." The majority (2–1 split), reversed the dismissal finding the action was outside the scope of the specific activity–the practice drill–and therefore summary judgment was improper. Interestingly, a distinguishing factor, though largely one of an evidentiary nature akin to whether expert testimony is needed for certain medical injuries, was "unlike baseball, football, basketball, or golf, as likely examples, karate is not a sport with which most Americans are familiar, either through personal participation or through enjoyment as a spectator." The dissent thought the majority focused too narrowly on whether the jump kick was outside the scope of the particular drill as compared to whether the kick and resulting injury were outside the scope of karate as a whole.

Somewhat surprisingly, the court makes no mention of *Clark v. Wiegand*. *Clark* affirmed a jury verdict for an Indiana State student who suffered a knee injury in a judo class, finding the doctrine of incurred the risk did not bar the claim. Although *Clark* predates *Pfenning* by almost two decades, there is no indication in *Pfenning*–in fact, *Pfenning* cites *Clark* in passing–that *Clark* has been overruled, nor is there reason to think that Justice Brent Dickson, author of each, would have overruled his prior decision without mention. I think *Clark* distinguishable from *Megenity*, in that *Megenity* focuses on the act causing the injury being outside the scope of the activity, whereas *Clark* focuses on whether the specific injury was within the actual knowledge of the injured person. In fact, the dissent in *Megenity* goes so far as to say, "Even though no Indiana case has addressed sport injuries as a result of participating in karate, the sport is generally commonly understood as a high contact sport, involving throws, strikes, and other techniques encouraging physical contact between the participants." In a technical sense, this is true–*Clark* was judo, not karate–but I think the words "martial arts" could just as easily be substituted into the dissent and express the author's intent. My guess is that *Clark* was never argued by the parties and the panel was unaware of it. Like I said, I think it is distinguishable, but I am surprised to not see it mentioned.

That foray concluded, let us now turn to *John Doe #1*. Our regular readers know I hate to get bogged down with the facts of a case, but in a *Webb v. Jarvis* analysis, the facts are always important. It all started with a call from John Doe #1 to DCS. (Of course, the plaintiff's real name is certainly not John Doe #1, but in a case about whether DCS could be liable for releasing a person's identity, would you

expect the identity to be further publicized?) He suspected that

> five homes on his street were in need of services due to dangerous living situations. Doe believed the adult subjects of his report were involved in drugs or other criminal activities and were associated with serious and violent criminals. When he was about to end the call, the DCS employee asked for his name and phone number. Doe expressed reluctance and indicated that he did not want anyone to know that he had called. The employee responded that the information was confidential and nobody would find out that he made the report. Doe then agreed to give his first name and phone number, but not his last name. Of course, DCS also had the name of the street on which he lived.
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> About a week later, . . . Doe was confronted in his front yard by Heather Ditton, who lived across the street and was one of the neighbors Doe reported. While screaming and yelling obscenities, Ditton angrily accused Doe of calling DCS. Ditton had in her possession an unredacted copy of the DCS report, which identified Doe as the reporting source. Other neighbors quickly became aware of the report Doe made. Upon realizing the report was not kept confidential, Doe felt like "somebody ripped [his] heart out."

As one might expect when one neighbor reports another and the reported-on neighbor finds out, the living conditions for John Doe #1 and his family went downhill quickly. John Doe #1 and his nuclear family (five in all) brought a claim against DCS for the disclosure of his identity.

Before the trial court, DCS successfully argued that while Indiana Code § 31–33–18–2 prohibits the disclosure of the unredacted record, it did not confer a private right of action to allow a lawsuit for its violation. Consequently, the trial court dismissed the case on summary judgment. The Does appealed. The majority, authored by Judge Altice and joined by Judge James Kirsch, reversed.

The analysis began by noting,

> Not every breach of a statutory duty provides plaintiffs with a right of action. The legislature must have intended the violation to give rise to a negligence action. Where, as in this case, the statute does not expressly provide for a private right of action to enforce the statutory duty, we look to whether the legislature intended for a private right of action to be implied. A private cause of action may be inferred where a

> statute imposes a duty for a particular individual's benefit but will not be where the legislature imposes a duty for the public's benefit. But even where a duty benefits an individual, we will not infer a private right of action where it is clear that the legislature did not intend one. "[T]he fact that an individual suffers a distinct injury unique from the general public is not determinative." "Rather, it is legislative intent, as construed from the provisions of the statute, which determines whether a private cause of action is available."

Ironically, the majority ultimately does not decide the issue of whether there is a private right of action under the statute, instead leaving that decision "for another day." The reason the majority saw no need to decide the issue was because, in its esteem, the common law alone provided a sufficient basis for liability. This is where *Webb v. Jarvis* comes in.

In *Webb*, the Indiana Supreme Court created a three factor balancing test to determine whether a duty exists at common law where no case has previously established it: "(1) the relationship between the parties; (2) the reasonable foreseeability of harm to the person injured; and (3) public policy concerns." In a subsequent case, the Supreme Court refined the analysis when the duty is a governmental emergency service: "(1) an explicit assurance by the municipality (through promises or actions) that it would act on behalf of the injured party; (2) knowledge on the part of the municipality that inaction could lead to harm; and (3) justifiable and detrimental reliance by the injured party." An important aspect of this test is that it specifically "does not require direct contact between the municipality's agent and the injured party."

Applying the logic and tests of the emergency services cases–traditionally cases in which the government failed to come to the rescue, not failure to maintain confidentially–the majority determined:

> A special relationship was clearly established when Doe made the call to the DCS hotline and, after making his report, indicated his reluctance to give identifying information. Justifiably relying on the DCS employee's explicit assurance that such information would be kept confidential, Doe then provided the information. The reasonable foreseeability of harm to Doe and his family upon improper disclosure of this information was evident, as implicitly recognized by DCS's own policies and I.C. § 31–33–18–2. Ultimately, the Does were left in a far worse position after Doe called the hotline and relied on DCS's promise.

Based on the specific facts of the case, the majority concluded, "the Does have established the existence of a private duty owed to Doe by DCS."

There was, of course, a dissent. Chief Judge Vaidik's divergence from the majority began with the decision to not determine whether Section 31–33–18–2 creates a private right of action–she believes it does not. Because the statute did not have a private right of action, then, in her opinion, there could not be the requisite special relationship to otherwise trigger a common law duty. "Put differently, no special relationship was created when Doe called the DCS hotline and was told by the DCS employee that his information was confidential, because the DCS employee's response was nothing more than a statement of what Section 31–38–18–2 requires."

Chief Judge Vaidik begins her dissent by looking at the child abuse reporting statutory scheme. Notably, Indiana law requires "an individual who has reason to believe that a child is a victim of child abuse or neglect [to] make a report as required by this article." Failure to do so is a criminal offense. The same statutory scheme also requires the creation of a report and mandates its confidentiality. Elsewhere, Indiana law also requires, "A public employee or official who knowingly or intentionally discloses information classified as confidential by state statute commits a Class A infraction." After looking to the statutory system, the Chief Judge turned her attention to whether the legislature intended to create a private right of action.

When the general assembly has not explicitly provided a private right of action, courts will find an implicit right only where the legislative intent indicates that such a right exists. "[T]he general rule is that a private right of action will not be inferred where a statute (1) is designed to protect the public in general and (2) contains a comprehensive enforcement mechanism." Looking at the entire statutory scheme, the Chief Judge concludes that it is designed to protect children at large, not the individual reporting the abuse. Next, she noted "the statute contains no civil-enforcement provisions, and the legislature has provided that public employees or official who disclose confidential information are subject to a Class A infraction." Further, she noted that the law recognizes that victims of child abuse have no private right of action under the statutory scheme, so it would make little sense for reporters to have such a right.

Lastly, the Chief Judge believed that there was no common law duty either. She disagreed with applying the rescue services test in this scenario and, even if the test were applied, thought no "special relationship was created when Doe called the DCS hotline and the DCS employee told Doe the following about his name and phone number: 'Well, it's confidential. Nobody will find out.'" In her opinion, the

DCS employee did nothing more than inform him of what Section 31–33–18–2 requires.

There are certainly aspects of the Chief Judge's dissent with which I am inclined to agree, but there are others with which I disagree. Let us look first to the two-prong test for determining whether there's an implied private right of action. The first prong is whether "a statute is designed to protect the public in general." If the issue were whether the *entire* child abuse reporting scheme were designed to protect an individual or the public, then I agree, it is not. That is why the victims do not have a private right of action. But I do not see the issue as the scheme as a whole. Rather, as I think the majority would agree, the "statute" is not the entire scheme but merely Section 31–33–18–2. That is a statute not designed to protect children specifically. True, as a potentially integral part in the scheme as an incentive for persons to report abuse–though the law already mandates reporting–it does stand to help protect children, but its push is to emphasize a specific person–the person who has made a report of abuse.

On the second prong–whether there is a comprehensive enforcement mechanism–I further disagree. You may initially assume that the existence of a comprehensive enforcement mechanism would support the finding of an implicit private right, but it does not. Looking to *LTV Steel Co. v. Griffin*, which is the source of the two-prong test, the Indiana Supreme Court stated, "We hold that because the Ethics Code is designed to protect the public in general *and contains a comprehensive enforcement mechanism*, it implies no entitlement for use as a defense against an IOSHA safety order." Here, there is no comprehensive enforcement mechanism; there is merely a general slap on the wrist (infractions are civil offenses like traffic tickets) and can be disciplined in accordance with the agency's policies. That a person who discloses something so important that the law actually says it is "confidential" and can be disciplined for the mistake should not be considered a meaningful enforcement mechanism, it is what happens when you screw up at your job. I see no comprehensive enforcement mechanism of Section 31–33–18–2. In short, I think there is an implicit private right of action. Even if there was not, I agree with the majority that it makes good sense to look to the emergency services caselaw for the issue here. Each is a direct communication with a governmental entity that seeks to implement the police power of the state on someone's behalf. I see no test more well suited.

I also disagree with the Chief Judge's conclusion that there is no common law duty. Were the defendant anyone other than an instrumentality of the government, the law would not hesitate to find an assumed duty when the DCS employee told Doe that his identity would be confidential. If Doe had volunteered his identification information prior to the statement from the employee, then there would be no duty;

there would be no reliance by Doe. But instead, the only reason he provided the information was because he was assured that it was to be confidential. Further, the point that all the employee did was repeat the statute has superficial appeal but does not, in my opinion, withstand the weight of scrutiny. If Section 31–33–18–2 did not exist, what then would happen? If Section 31–33–18–2 did not exist, then the employee was not simply telling Doe what the statute required. An argument could certainly be made that such a representation alone would still not be enough, and I expect the Chief Judge would come to that same conclusion, but in the absence of any indication that Section 31–33–18–2 was to abrogate the common law, I see no distinction between the statement and attributing the statement to merely repeating what the statute says.

As I try to make clear whenever I disagree with an opinion or a portion of an opinion, you need to realize how lucky we are to have the quality of judges that we do in Indiana. Mind you, I don't think Chief Judge Vaidik was just shooting from the hip and making it up as she went along, her dissent, as is always true with her opinions, is well thought out and well reasoned, but I, as the majority did, disagree this time. Then again, it wouldn't be the first time one of her dissents prevailed in the end.

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

Sources

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- *Clark v. Wiegand*, 617 N.E.2d 916 (Ind. 1993) (Dickson, J.; Shepard, C.J., dissenting).

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- Ind. Code § 31–33–18–2.
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