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Indiana Court Examines Whether Failure Breach of Pedestrian Law is Contributory Negligence on Summary Judgment

Here at the Hoosier Litigation Blog, we usually delve into cases that explore some new dynamic in the law. But that's not always the case. Today is one of the less frequent occasions when we look at a case that delves into largely settled law but provides a great overview of important issues of law. Today's case for discussion comes to us this morning from the Court of Appeals of Indiana: *Hill v. Gephart*. The case allows us to examine a great many important issues of law through a personal injury case.

Before we jump into the legal issues of the case, we must start with the facts of the case. In the evening hours of a late November day in Indianapolis, Charles Hill and his daughter walked to a nearby school so the daughter could play at the school's playground. When they left for the playground, it was still light. The playground was a five-minute walk away. After the sun set, the father and daughter began their walk back home. On the way to the school, the duo walked facing toward the oncoming traffic–the way my grandfather taught me. But, because the school was on the same side of the road as their home, on the walk back they traversed with their backs to the traffic. As they walked, the young girl was in front of her father as he talked on his cell phone.

At approximately 6 p.m. (sundown in the late autumn months in central Indiana), a jail transport van struck the father.

> As Deputy Gephart was driving around the 900 block of Fox Hill Drive, he heard a loud collision with the transport vehicle but did not see anything in the road. At the time, it was dark outside, and Deputy Gephart reported a glare reflecting off of his laptop. He immediately stopped the transport vehicle about fifty feet after the collision occurred and exited the vehicle to determine what had happened. Deputy Gephart observed damage to the passenger side windshield, mirror, and headlight.
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> At that same time, Deputy Gephart saw Macey run across the grass and noticed that she was crying. He heard her say, "Somebody hit my. . ." However, Macey did not see, but only heard Deputy Gephart hit Charles because she was walking in front of him while Charles remained on the phone. When she turned around, she saw Charles lying in the grass north of the road. She also saw Deputy Gephart driving the transport vehicle but only "on the road surface."
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> Still unsure of what had happened, Deputy Gephart grabbed his flashlight and looked back to the east of where he was standing. He saw a man, later identified as Charles, lying face down on the ground in the grass and noticed that he was unresponsive, but still breathing. Deputy Gephart then observed a large gash on the top of Charles's head. He immediately contacted his control operator and explained that he had hit someone with the transport vehicle. Deputy Gephart also requested an ambulance.

Now that we know what happened, we can look into the legal aspects of this case. Because the jail transport van belongs to and was operated by an employee of the Marion County Sheriff's Department, this is not like most motor vehicle accidents. Any lawsuit would be a case against the sovereign–i.e. a state actor. We have previously discussed the basics of bringing a case against governmental entities. In short, under Indiana law, in order to bring a claim against a state actor a person must first file a tort claims notice. The time period for doing so will depend on the defendant and may be subject to extension based on certain legal doctrines, as we've discussed before. The hills timely filed their tort claims notice then filed suit against the deputy driving the van, the city of Indianapolis and the sheriff's department. The theory of liability tying the city and the sheriff's department being that of *respondeat superior* as the deputy's employer.

The case was assigned to Judge James Joven of the Marion County Superior Court. Based upon the facts and evidence, the defendants argued that the case should be summarily decided against Mr. Hill. The argument was that Mr. Hill, as a matter of law, to some degree negligent aiding in the creation of the accident in the first place. Those who remember our discussion on comparative fault may well wonder how this is an issue that could be decided on summary judgment. The reason, however, is because this case is not governed by comparative fault. Rather, the Indiana Tort Claims Act perpetuates the antiquated harsh standard of contributory negligence where the defendant is a state actor.

For those that have not read our prior discussion on comparative fault or have forgotten it, a brief refresher: under the classical approach to negligence law if an injured person was any degree negligent in creating the harm that happened to him or her, even if it was 1% at fault, that was enough to bar recovery no matter how egregious the defendant's actions. That was the "contributory negligence" standard. In the twentieth century, that approach was abandoned en masse as unduly harsh. In its place, Indiana and other states either through changes of course in the common law or by statute–in Indiana it is the Comparative Fault Act–adopted the comparative fault approach. Under this scheme, a jury determines what, if any, percentage of fault to allocate to the injured person. So long as that allocation of fault does not exceed 50% the injured person will be able to recover damages for his injuries. His damages, however, are lessened in proportion to his apportioned fault. For example, if a jury finds the plaintiff and defendant each 50% at fault and that the plaintiff suffered $100,000 in damages, then the plaintiff can recover $50,000.

Here, the standard was contributory negligence. Judge Joven, an excellent jurist with an extremely bright future, determined that as a matter of law, Mr. Hill was at least 1% at fault for his injuries and could not recover damages. The Hills appealed the decision.

On appeal, the divided panel (2–1) chose to reverse and reinstate the case. Crucially for the majority's decision is the well-settled rule in Indiana: "summary judgment is rarely appropriate in negligence actions, since negligence cases are particularly fact sensitive and are governed by a standard of the objective reasonable person. This standard is best applied by a jury after hearing all of the evidence." Before you leap to the conclusion that Judge Joven was way off base, given this plaintiff-friendly standard, let us look at how he reached his conclusion–mind you, one of the three appellate judges agreed. I can also assure you that few judges are as contemplative and thorough as Judge Joven. I have no doubt that it was not a decision entered lightly.

Writing for the majority, Judge Paul Mathias, began his analysis by looking to an Indiana statute governing pedestrians along roadways when there is neither a sidewalk nor a shoulder:

> If neither a sidewalk nor a shoulder is available, a pedestrian walking along and upon a highway shall walk as near as practicable to an outside edge to the roadway. If the roadway is two-way, the pedestrian shall walk only on the left side of the roadway.

The Charles Hill and his daughter were in compliance with this statute when they walked to the school, but not when they returned home. The reason for noncompliance is simple: they did not wish to run the risk of crossing the road when they were already on the same side as their home.

Judge Joven, looking at this statute, looked to an Indiana Supreme Court case from 1951–*Larkins v. Kohlmeyer*–for guidance. Like I said, contributory negligence is a fairly antiquated legal doctrine, so guidance often must be found in dusty books. Judge Joven relied on *Larkins* "for the proposition that it must be impossible to comply with a statute for the violation to be excused." Thus, because it was not impossible to have crossed the road, Hills must lose his case. Fortunately for the Hills, in the majority's esteem, *Larkins* was not the final word:

> However, our supreme court in *Davison v. Williams* established that proof of the violation of a safety regulation creates a rebuttable presumption of negligence. Our supreme court concluded, "As for the question of what will constitute proof sufficient to rebut the presumption of negligence raised by violation of safety regulation, we believe the best test to follow is:
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> > Where a person has disobeyed a statute he may excuse or justify the violation in a civil action for negligence by sustaining the burden of showing that he did what might be reasonably expected by a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law.

Expanding the *Davison* approach from a driver's violation of a motor vehicle statute to the pedestrian statutes, the majority turned to whether the violation here "was justifiable reasonable because by remaining on the right side of [the road], Charels and [his daughter] did not have to cross the busy street." The court recognized that the decision was "arguably a safer option for the father-daughter duo because no cross-walk existed." The majority further looked to the underlying purpose of the pedestrian statute: "to promote safety." Thus, "it is counterintuitive

to bar the Hills's claim without allowing Charles to explain why he was walking on the right side instead of the left side of the road." This explanation is to occur by trial and to be decided by a jury. Consequently, the court reversed and, assuming the Indiana Supreme Court does not grant review–I doubt it will–the case will be sent back to Judge Joven for trial.

I agree with the majority, but there was a dissenting voice from the bench. Judge Elaine Brown dissented. The dissent is brief, so I reproduce it here in full:

> I respectfully dissent from the majority's conclusion that a genuine issue of material fact exists as to whether Charles was contributorily negligent and its decision to reverse and remand on the trial court's entry of summary judgment in favor of the Defendants. Charles walked along [the road] in a manner which violated Ind. Code § 9–21–17–14, and there is nothing in the designated evidence to demonstrate he "desired to comply with the law," which is required in order to rebut the presumption of negligence [under *Davison v. Williams*]. Indeed, the designated evidence shows that Charles, in failing to comply with the statute enacted for his safety, did not contravene the statute in a manner which might reasonably be expected of a person of ordinary prudence, but instead walked along the wrong side of the road clad in dark clothing and talking on his cell phone. Under these circumstances, I cannot say that the Hills have rebutted the presumption of negligence, and accordingly I would affirm the trial court's grant of summary judgment in favor of the Defendants.

As I said, I agree with the majority on this one. First, under the Indiana summary judgment standard, Judge Brown's view that there is nothing in the designated evidence to rebut the presumption of negligence because there was no evidence that Charles Hill "desired to comply with the law" seems an overly narrow view. Contributory negligence is an affirmative defense whose burden is born by the defendant. Certainly, where a statute is violated, it is not an overly high burden, but defendant's burden nonetheless. Unlike federal summary judgment practice, in which a party need only state a prima facie entitlement to summary judgment before the other side is required to put up or shut up, Indiana practice requires the moving party to affirmatively foreclose the reasonable inferences on behalf of the non-moving party. The absence of evidence is not the evidence of absence. That there was no evidence to rebut the presumption is not the appropriate view at this juncture. Rather, the requirement is that there be evidence to foreclose the possibility that testimony at trial might rebut the presumption. No such evidence was referenced in the opinion.

Second, reference to use of the cell phone and clothing, though certainly relevant at trial, seem wholly irrelevant in this appeal. The issue presented on appeal appears to simply have been whether violation of the statute was sufficient for contributory negligence. The statute makes no reference to cell phone use or color of clothing. As I said, these are certainly considerations for the jury but I fail to see how these matters should alter the appellate disposition.

Ultimately, this is an extremely tough case. I cannot fault Judges Joven and Brown for seeing it differently than I. Were I a juror in this matter, I think I may have difficulty not finding contributory negligence. The default in our system, however, is not to cast lots on what the jury will likely do. In Indiana, as throughout the nation, the right to a jury is held in high regard. Consequently, the benefit of the doubt goes to allowing a man his day in court. That is how the majority saw it, and I must agree.

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

Sources

- *Hill v. Gephart*, ---N.E.3d---, No. 49A02-1509-CT-1288, 2016 Ind. App. LEXIS 142, (Ind. Ct. App. May 6, 2016) (Mathias, J.).
- *Larkins v. Kohlmeyer*, 98 N.E.2d 896 (Ind. 1951).
- *Davison v. Williams*, 242 N.E.2d 101 (Ind. 1968).
- Indiana Tort Claims Act – codified at Ind. Code chapter 34–13–3.
- Indiana Comparative Fault Act, codified at Ind. Code ch. 34–51–2.
- Ind. Code § 9–21–17–14 Sidewalk or shoulder unavailable; use of outside edge of roadway
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