

Children's Law Center of Indiana



CHINS

(Child Abuse/Neglect Reporting)

8/24/17

In **Doe #1 v. Indiana Department of Child Services**, 81 N.E.3d 199 (Ind. 2017), the Indiana Supreme Court affirmed the trial court's grant of summary judgment in favor of the Department of Child Services (DCS) on the Doe family's lawsuit for negligently disclosing John Doe's identity as a report of child abuse or neglect to the alleged victims' parents. *Id.* at 207. John Doe lived with his wife, two adult sons, and minor daughter in a small southern Indiana town where "[e]verybody knows everybody." John drove neighborhood children to church each Wednesday. Over time, he suspected that some of the children were victims of abuse and neglect. John called the DCS hotline to report his suspicions. Near the end of the call, the DCS hotline employee asked for John's contact information. John said he did not want anyone to know he had called, but the worker explained, "Well, it's confidential. Nobody will find out." John gave his first name and phone number, then hung up the phone. A few days later, John was mowing the grass when an irate neighbor began screaming at him while waiving the DCS report, which was unredacted. Word spread around town. John was "stared at, glared at, mooned, flipped off, [and] yelled at." His wife was threatened that someone might "cut that smirky grin off" her face. John Doe's daughter required counseling because of bullying at school. His sons hesitated to go outside of the house. All this harassment shook the family, making them wish they could afford to leave their longtime home for a different city. The Does sued DCS for negligently disclosing John's identity, raising two theories: one statutory, the other common-law. First, they claimed that IC 3-33-18-2 (Section 2) implies a private right of action. Second, they asserted that the DCS hotline worker's statement that "[n]obody will find out" was a promise creating a common-law duty of confidentiality. DCS moved for summary judgment, which the trial court granted.

The Court could not infer that the General Assembly intended for IC 31-33-18-2 (Section 2), which requires the protection of reporters' identity from the victims' parents and accused perpetrators, to impose civil liability. *Id.* at 204. DCS and the Does agreed that Section 2 does not expressly provide a private right of action, but disputed whether Section 2 implies a private right of action. Quoting *F.D. v. Ind. Dep't. of Child Services*, 1 N.E. 3d 131, 143-44 (Ind. 2013), the Court said it has "long been reluctant" to infer unwritten legislative intent, since the legislature often creates rights of actions using clear language. *Doe* at 202. Citing *Howard Reg'l. Health Sys. v. Gordon*, 952 N.E.2d 182, 187 (Ind. 2011), the Court explained that the reluctance to invade the legislature's purview has developed into a two-part rule: the Court will not usually infer a private right of action when the statute: (1) primarily protects the public at large and (2) contains an independent enforcement mechanism. *Doe* at 202. The Court clarified that "[w]hen a statute is designed mainly for public benefit, it implies no

right of action; incidental benefits to a private party make no difference.” (Multiple citations omitted.) *Id.* The Court looked to Borne ex rel. Borne v. Nw. Allen Cty. Sch. Corp., 532 N.E.2d 1196, 1203 (Ind. Ct. App. 1989), *trans. denied*, in which a child abuse victim sued an elementary school principal for breaching his statutory duty to report abuse, but the Court of Appeals refused to infer a private right of action since the statute’s “primary thrust” was helping children in general. *Doe* at 203. The Court determined that Section 2 has the same “primary thrust” as the statute in Borne, and that both are part of the “Reporting and Investigation of Child Abuse and Neglect” statutory scheme. *Doe* at 203. The Court looked to IC 31-33-1-1, which declares five purposes of the statutory scheme, all of which revolve around children in general. *Id.* The Court noted that IC 31-33-5-1, IC 31-33-5-4, and IC 31-33-22-1(a) require child abuse and neglect reporting and impose criminal liability, a Class B misdemeanor, for failing to do so. *Id.* The Court also noted that IC 31-33-6-1 and IC 31-33-6-2 immunize good faith reporters from any civil or criminal liability that may arise from their reports. *Id.* The Court concluded that the objective of the statutory scheme is clear: helping and protecting Hoosier youth. *Id.* The Court clarified that the incidental benefit of confidentiality for reporters does not change the statutory goals. *Id.*

The Court explained that “[w]hen a statute expressly provides one enforcement mechanism, courts may not engraft another.” *Id.* at 204. The Court said that Section 2 contains *two* alternative enforcement mechanisms (emphasis in opinion). *Id.* First, IC 5-14-3-10(a) provides that a public employee, including a DCS hotline worker, who “knowingly or intentionally discloses” confidential information commits a Class A infraction carrying a fine of up to \$10,000. *Id.* Second, IC 5-14-3-10(b) states that the public employee may also be “disciplined in accordance with the personnel policies” of their agency, which, according to DCS personnel policies, may include dismissal. *Id.* The Court opined that separation of powers required the Court to leave the decision on imposing a private right of action for reporters whose confidentiality is breached to the legislature. *Id.* The Court noted the General Assembly has provided a private right of action for persons who are falsely accused of child abuse at IC 31-33-22-3(b), and said that the General Assembly might chose to impose a private right of action for violation of the statutory requirement to protect a reporter’s identity. *Id.*

The Court held that there was no common-law basis to impose a duty to protect John Doe’s identity and rejected the Does’ common-law claim. The Court discussed three theories of common-law duty, but held that none of them created a duty by DCS to the Doe family. *Id.* at 204-07. The Does argued that DCS had a private duty to maintain John Doe’s confidentiality because he detrimentally relied on the DCS hotline employee’s statement that reporter identity is confidential. The Does invoked the “private duty” test from Mullin v. Mun. City of S. Bend, 639 N.E.2d 278 (Ind. 1994), *trans. denied*. In the Mullin case, a mother lost her son to a house fire, and sued the city for breaching its “private duty” to dispatch an ambulance. *Doe* at 204. On appeal, the Court adopted a three-part private duty test rooted in detrimental reliance: (1) the government must give “explicit assurance” that it will assist the plaintiff; (2) the government must know that inaction could harm the plaintiff; and (3) the plaintiff must justifiably and detrimentally rely on the government’s affirmative undertaking. Mullin at 284. *Doe* at 204-05. The Court held in Mullin that the mother’s claim failed the test because the city never promised

an ambulance, and the mother gave no evidence of detrimental reliance. Mullin at 285. Doe at 205. Citing Benton v. City of Oakland City, 721 N.E.2d 224, 233 (Ind. 1999), a case where the plaintiff sued the city for breaching a duty to post shallow water warnings for the lake where he was seriously injured, the Court opined that the private-duty test applies only to situations where a governmental unit is alleged to have breached a duty to provide “emergency services.” Doe at 205. The Court noted that John Doe relied on the hotline employee’s statement that reporter identity was confidential, but since that statement was not about emergency dispatch, the Court opined that the Does could not establish a private duty. Id.

The Does also raised the broader assumed-duty doctrine at the summary judgement hearing. The Court stated that Indiana common law recognizes that one may gratuitously assume a duty by conduct. Id. Quoting Yost v. Wabash Coll., 3 N.E.3d 509, 517 (Ind. 2014), the Court explained that it imposes these duties “cautiously”, and has adopted the demanding test in the Restatement (Third) of Torts section 42, which requires a specific “undertaking”:

An actor who undertakes to render services to another and who knows or should know that the services will reduce the risk of physical harm to the other has a duty of reasonable care to the other in conducting the undertaking if:

- (a) The failure to exercise such care increases the risk of harm beyond that which existed without the undertaking, or
- (b) The person to whom the services are rendered or another relies on the actor’s exercising reasonable care in the undertaking

Doe at 205. The Court explained that the “undertaking” element: (1) sets a high bar; (2) requires “affirmative, deliberate conduct”; and (3) the bar is not cleared when the defendant merely references a pre-existing rule, like a regulation, policy, or statute. Yost at 517-18. Doe at 205. The Court held that, by informing John Doe that his report was confidential, the DCS hotline employee simply communicated an existing rule, so the Court could not read the hotline employee’s words as an offer to take on additional common-law liability. Id. at 206. The Court opined that, when a statute provides no right of action, the fact that a defendant repeats it aloud does not trigger independent liability. Id.

The Court also clarified that DCS had no duty to the Does under the three-part test in Webb v. Jarvis, 575 N.E.2d 992 (Ind. 1991). Doe at 206-07. Under Webb, the Court balances: (1) the parties’ relationship, (2) the foreseeability of harm, and (3) public policy. Webb at 995. Doe at 206-07. The Court acknowledged that John Doe satisfied the foreseeability prong, because retaliation against child abuse reporters is an unfortunate reality, especially in a town where “[e]verybody knows everybody.” Id. at 207. The Court found the other two prongs did not apply because: (1) DCS formed so “special relationship” with the Does by simply communicating a pre-existing rule; and (2) Indiana common law already forecloses a child abuse victim from suing a bystander for failing to report abuse. Id.

The Court did not condone DCS’s actions, which exposed an innocent family to harassment and threats. Id. at 207.