

Children's Law Center of Indiana



CHINS (DCS Liability)

11/26/13

In **F.D. v. Indiana Dept. of Child Services**, 1 N.E. 3d 131 (Ind. 2013), the Supreme Court affirmed summary judgment in favor of the Evansville Police Department (EPD), but reversed the summary judgment entered in favor of the Department of Child Services (DCS) in a lawsuit brought by Parents against EPD and DCS. In June of 2007, Mother informed DCS that her then four-year-old son (Son) had been molested by her then twelve-year-old nephew (Nephew). DCS initiated an investigation and interviewed Son and Mother's twin two-year-old daughters. Son disclosed that he had been inappropriately touched by Nephew, but the twins denied being inappropriately touched by Nephew. DCS referred the matter to EPD for a delinquency investigation. During an interview with the EPD detective, Nephew admitted to inappropriately touching four of his cousins, including Son and one of the twin daughters (Daughter). The detective informed DCS of Nephew's admissions, including the touching of Daughter, and DCS chronicled the admissions in a "Contact Log Report," but neither DCS nor EPD informed Mother or Father of Nephew's admission to inappropriately touching Daughter. EPD referred Nephew's case to the Vanderburgh Juvenile Court for delinquency proceedings. Nephew was adjudicated delinquent on August 27, 2007, and was placed on probation for nine months. On July 31, 2008, Mother learned from a third party of Nephew's admission to molesting Daughter, and on August 8, 2008, this fact was confirmed by DCS. Parents filed suit, contending that DCS was negligent in failing to perform its duty pursuant to IC 31-33-18-4 to notify them of Nephew's alleged molestation of Daughter. Parents also argued that EPD was negligent in failing to notify them of Nephew's alleged molestation of Daughter and for not pursuing separate charges against Nephew for molesting Daughter. The trial court granted summary judgment in favor of DCS and EPD. On appeal, Parents argued that the Indiana Tort Claims Act (ITCA) and the child abuse reporting statute do not confer immunity on EPD and DCS. The Court of Appeals affirmed the trial court in **F.D. v. Ind. Dept. of Family Services**, 973 N.E. 2d 1186 (Ind. Ct. App. 2012). The Indiana Supreme Court granted transfer. The Supreme Court clarified that this appeal involves only the question of immunity; thus, the Court did not address any questions regarding whether or not Parents have a valid cause of action against the defendants.

The Court found that IC 34-13-3-3(6) of the Indiana Tort Claims Act does not provide DCS with immunity; thus, summary judgment in favor of DCS is improper. *Id.* at 139. The Court, citing **Mangold Ex Rel. Mangold v. Ind. Dept. of Natural Res.**, 756 N.E. 2d 970, 975 (Ind. 2001), observed that whether immunity applies is a question of law for the court, and the party seeking

immunity bears the burden of demonstrating that its conduct is within the protection afforded by the ITCA. F.D. at 136. The Court said that “[b]ecause the ITCA is in derogation of common law, we construe it narrowly against the grant of immunity.” Mangold at 975. F.D. at 136. The Court noted that, in seeking summary judgment, DCS contended that it is immune under IC 34-13-3-3(6), “A governmental entity or an employee acting within the scope of the employee’s employment is not liable if a loss results from the following:… (6) the initiation of a judicial or an administrative proceeding.” The Court observed that the provision of the ITCA upon which DCS relied is most commonly associated with suits for malicious prosecution or abuse of process (multiple citations omitted). Id. at 137. DCS contended that its investigation and referral to EPD for delinquency proceedings against Nephew should bring DCS under the protection of ITCA for the “initiation of a judicial or administrative proceeding.” The Court opined that DCS was not immune under IC 34-13-3-3(6) because: (1) Parents’ claims do not relate to the allegation that resulted in Nephew’s delinquency adjudication (the molestation of Son) but instead relate to DCS’s failure to notify Parents of the information DCS received regarding the molestation of Daughter, which was not used in the delinquency proceeding against Nephew; and (2) Parents do not assert that any harm to them *resulted from* the initiation of the proceeding against Nephew (emphasis added). Id. at 137-38.

The Court concluded that EPD had no duty to report the molestation of Daughter to parents and that EPD is immune under the ITCA, IC 34-13-3-3(8). The Court found that summary judgment in favor of EPD is proper. Id. at 139. Parents claimed that EPD was negligent in failing to notify them of Nephew’s admission to the molestation of Daughter. The Court said that, at the time of the events of this case, EPD had no duty to disclose information about the molestation of Daughter to parents; however, the General Assembly had imposed such a duty in new legislation (IC 5-2-18-13) effective July 1, 2011. Id. at 138. n.8. The Court observed that EPD’s duty under the child abuse reporting statute (IC 31-33-5-1) was to report the alleged abuse to DCS, and Parents do not dispute that EPD disclosed the information regarding the molestation of Daughter to DCS. Id. at 138. Parents further claimed that EPD had been negligent in not pursuing separate charges against Nephew for the molestation of Daughter, but EPD asserted immunity under IC 34-13-3-3(8), which grants immunity where the loss results from “[t]he adoption and enforcement of or failure to adopt or enforce a law (including rules and regulations), unless the act of enforcement constitutes false arrest or false imprisonment.” Quoting Davis v. Animal Control--City of Evansville, 948 N.E. 2d 1161, 1164 (Ind. 2011), the Court said that what is “required to establish immunity [is] that the activity be one in which government either compels obedience to laws, rules, or regulations or sanctions or attempts to sanction violations thereof.” F.D. at 138. The Court, noting that it is undisputed that EPD was investigating an alleged offense, the molestation of Son by Nephew, could not see how Parents’ claim can be classified as anything other than an assertion that EPD was deficient in its “attempt [] to sanction [a] violation” of the law, so IC 34-13-3-3-8 plainly grants immunity. Id. at 139.

The Court found that DCS did not have immunity under the child abuse reporting statute (IC 31-33-6-1) and that summary judgment in favor of DCS was not proper. Id. at 140.

DCS contended that it is immune under IC 31-33-6-1(4), which states, in pertinent part, that “a person...who:...(4) participates in any judicial proceeding or other proceeding: (A) resulting from a report that a child may be a victim of child abuse or neglect; or (B) relating to the subject matter of the report; is immune from any civil or criminal liability that might otherwise be imposed because of such actions.” The Court found that DCS’s contention fails as a matter of law. Id. The Court said that IC 31-33-6-1 provides immunity from liability “that might otherwise be imposed *because of*” participation in a judicial proceeding resulting from a report of child abuse (emphasis in opinion). Id. The Court said that Parents’ suit is founded upon DCS’s statutorily delineated duty to “initiate an immediate and appropriately thorough child protection investigation of every report” (IC 31-33-8-1(a)) and to “give verbal and written notice to each parent, guardian, or custodian of the child that: (1) the reports and information... relating to the child abuse or neglect investigation... are available upon the request of the parent...” (IC 31-33-18-4(a)). Id. The Court said that Parents contend that DCS’s *inaction* with respect to the *separate report* of abuse to Daughter hindered their ability to obtain proper treatment for her (emphasis in opinion). Id. The Court found that the facts, which must be construed in favor of Parents as the non-moving party on summary judgment, do not fall within the circumstances granting immunity under the plain words of the statute, which is in derogation of the common law and must be narrowly construed against immunity. Id.