

Children's Law Center of Indiana



CHINS (Child Abuse/Neglect Reporting)

6/10/10

In **C.T. v. Gammon**, 928 N.E.2d 847 (Ind. Ct. App. 2010), a medical malpractice case, the Court affirmed the trial court's entry of summary judgment in favor of the child's physician (Physician), whom Father accused of negligence for failing to report alleged child abuse or neglect of the child by Mother. On December 6, 1997, the child was born prematurely at 28 weeks' gestation in Anderson and was then transferred to Riley Hospital in Indianapolis. The child was diagnosed with bronchopulmonary dysplasia, and was hospitalized at Riley for two and a half months, spending two months on a respirator. Physician served as the child's pediatrician from 1998 to 2006 in Anderson and was also listed as the child's physician in the newborn medical records. Physician saw the child for routine check-ups and childhood ailments, including respiratory illnesses. Physician's office records note that the child "lives in smoke." Father and Mother, who never married, separated at some point, and Mother, a smoker, received physical custody of the child. Father made reports to the Indiana Department of Child Services (DCS) in April 2004 and October 2006 that the child was neglected because Mother exposed him to second-hand smoke, but DCS, after investigating, concluded that both reports were unsubstantiated. Father also instituted proceedings in Madison Superior Court because of Mother's exposing the child to second-hand smoke. On December 12, 2005, the trial court issued an order prohibiting Mother from smoking in the child's presence. In early September 2006, the court held a hearing on Father's petition for physical custody. On September 29, 2006, the court entered an order which, inter alia, found that: (1) the child should be in a smoke-free environment according to the recommendation of Physician; (2) Mother violated the court order of December 12, 2005, in that the child is still exposed to smoke; (3) Father is able to provide a stable, smoke-free environment for the child (4) the care, custody, and control of the child should be with Father. In August 2006, before Father was awarded physical custody of the child, Father filed a pro se complaint in Madison Circuit Court against Physician, alleging that Physician was negligent for not reporting the child's smoky living conditions to the proper authorities. Father also named Mother and DCS in the complaint. DCS was later dismissed, and the appeal only concerns Physician. Father amended his complaint on October 25, 2006, seeking the court to "declare" that Physician did not meet the standard of care in his treatment of the child. On the following day, Father filed a pro se Proposed Complaint for malpractice with the Indiana Department of Insurance. In August 2008, Physician moved for summary judgment in Madison Circuit Court, asserting, inter alia, that he "had no duty to [the child] to protect the child from alleged exposure to environmental tobacco smoke while in the care of his parent" and there "exists no precedent under Indiana law imposing a duty on a physician to report a child's

exposure to second-hand tobacco smoke at home as child abuse.” In October 2008, Father filed his own motion for summary judgment against Physician and designated numerous items of evidence which were properly before the Court on appeal. After a summary judgment hearing, the special judge entered summary judgment in favor of Physician, finding that Physician is entitled to judgment as a matter of law. Father appealed pro se after his motion to correct errors was denied by the trial court.

The Court found that the trial court properly handled this matter as a preliminary determination of law under IC 34-18-11-1(a)(1). Id. at 852. The Court determined that this case is one of medical malpractice and not ordinary negligence, because it arises out of the special relationship between a doctor and his patient during the course of health care or professional services that were provided or should have been provided by a doctor to his patient. Id. at 851, citing IC 34-18-2-18. Physician’s alleged duty to report Mother arose in the context of providing health care or professional services to the child. Id. The Court said that ordinarily a medical malpractice case may not be resolved on summary judgment by a trial court until after a complaint has been submitted to the medical review panel and the panel has rendered an opinion, but IC 34-18-11-1 states that a trial court may preliminarily determine an issue of law before a medical review panel’s opinion. Id.

The Court affirmed the summary judgment in favor of Physician because there is not a private right of action for failure to report child abuse or neglect in Indiana. Id. at 854-55. The Court noted that medical malpractice cases are no different from other kinds of negligence actions regarding what the plaintiff must prove, namely: (1) a duty owed to the plaintiff by the defendant; (2) a breach of duty allowing conduct to fall below the applicable standard of care; and (3) a compensable injury proximately caused by defendant’s breach of duty. Id. at 852. Father argued that, as the child’s pediatrician, Physician was therefore in a special relationship with the child and had a duty to report Mother to the proper authorities for exposing the respiratory-challenged child to second-hand smoke, which amounted to child abuse or neglect. Father also alleged that, had Physician fulfilled his duty in a timely manner, this would more than likely have resulted in the child’s more expedient removal from Mother’s home and placement into Father’s custody. The Court considered IC 31-33 regarding the duty to report child abuse or neglect, noting: (1) Indiana law requires an individual who has reason to believe that a child is a victim of child abuse or neglect to make an immediate oral report to either DCS or local law enforcement (IC 31-33-5-1, -4); (2) a person who knowingly fails to make a report commits a Class B misdemeanor (IC 31-33-22-1); (3) a person who makes such a report is immune from any civil or criminal liability because of doing so; however, immunity will not attach if the person acted maliciously or in bad faith (IC 31-33-6-1,-2); (4) a person making a report that a child may be a victim of child abuse or neglect is presumed to have acted in good faith (IC 31-33-6-3). Id. at 852-53. Citing Blanck v. Ind. Dep’t. of Corr., 829 N.E.2d 505, 509 (Ind. 2005), the Court said that when a civil action is premised upon violation of a duty imposed by statute, the question to be determined is whether the statute confers a private right of action. C.T. at 853. The Court stated that the issue of whether Indiana child abuse reporting statutes

create a private right of action has been addressed in Borne ex rel. Borne v. Northwest Allen County School Corp., 532 N.E.2d 1196 (Ind. Ct. App. 1989), trans. denied. Id. at 853. In Borne, a special education student was involved in several incidents of sexual exploration with male classmates over a three-year period culminating in an incident on a field trip in sixth grade. The student's parents sued, among others, the school's principal, alleging that he failed to report the prior incidents of child abuse to child protection services or law enforcement pursuant to the reporting statutes. The parents' apparent theory was that had the principal reported the previous incidents, the incident in sixth grade never would have happened. The Court specifically held in Borne that an examination of the relevant statutes persuaded the Court that the legislature did not intend to confer a private right of action for any breach of duty imposed by the reporting statutes. Borne at 1203. C.T. at 853. The Court noted that the vast majority of states have reached the same conclusion under their reporting statutes. Id. at 854.