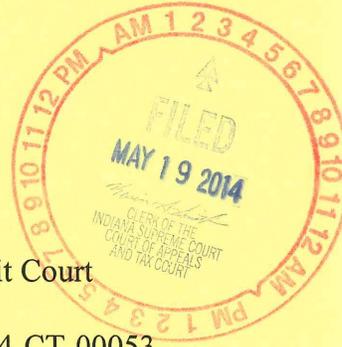


ORIGINAL

IN THE INDIANA COURT OF APPEALS  
CAUSE NO. 71A03-1308-CT-301



JASON AND JUSTINA KRAMER,	)	
Appellants/Plaintiffs	)	Appeal from the St. Joseph Circuit Court
	)	
v.	)	Trial Court Case No.: 71C01-1104-CT-00053
	)	
CATHOLIC CHARITIES OF THE DIOCESE	)	
OF FORT WAYNE-SOUTH BEND, INC.	)	The Honorable Michael G. Gotsch, Sr., Judge.
Appellee/Defendant.	)	

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RESPONSE TO PETITION FOR TRANSFER

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## **I. Supplementary Statement of Facts**

Catholic Charities, in its answer, conceded that RM had registered with the Putative Father Registry (PFR) on January 8, 2010. (App. 16, 23) Yet, in its Petition for Transfer, Catholic Charities creates the false impression that there was only one registration:

But Ella's father *had* registered. On April 27, 2010, four days before his daughter was born, a man named [RM] filled out a registration for and filed it with the health department.

(Catholic Charities' Petition at 5.) RM had, in fact, registered twice for the Putative Father Registry. (App. 16, 23, 89-90).<sup>1</sup>

## **II. The Court of Appeals' decision is consistent with *Wal-Mart Stores, Inc. v. Wright*.**

In *Wal-Mart Stores, Inc. v. Wright*, 774 N.E.2d 891 (Ind.2002) this Court, in analyzing the correctness of a jury instruction, confirmed that work rules and policies are admissible evidence of negligence: "defendant's rules or practices are evidence bearing on the reasonable care issue....company rules are generally admissible but not conclusive on the question of the standard of care.....a party's own rules of conduct are relevant and can be received into

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<sup>1</sup>Having admitted in its answer that there were in fact two registrations with the Putative Father Registry, Catholic Charities simply ignores the first registration made over 3 months before placement of the child. However,

Unless a pleading is withdrawn or superseded, any admission contained in the pleading is conclusive as to that party. The reason for this is that pleadings are designed to narrow the issues required to be tried. Opposing parties prepare their case on the assumption that facts admitted by other parties require no proof. For this scheme to work properly, parties must be entitled to rely on trial courts to treat admissions in pleadings as binding on the party making the admission.

*Lutz v. Erie Ins. Exchange* 848 N.E.2d 675, 678 (Ind.2006)(citation omitted). The Kramers did not place a copy of the first registration in the summary judgment record because it was already admitted.

evidence....” *Wal-Mart* at 894-5 (*Citations omitted.*)<sup>2</sup>

Similarly, the Court of Appeals, in reversing the trial court’s grant of summary judgment to Catholic Charities, simply considered Catholic Charities’ failure to follow its own policies as “designated evidence” in opposition to the motion for summary judgment. *Kramer v. Catholic Charities*, 6 N.E.3d 984, (Ind.Ct.App.2014), *Slip Opinion* at 7. The Court of Appeals did not, as Catholic Charities attempts to mis-characterize, “assume[d] that Catholic Charities was negligent for not following its own policy.” (Catholic Charities’ Petition, p. 11) Rather, the Court of Appeals simply construed all “designated evidence and reasonable inferences....in favor of the non-moving party, and doubts resolved against the moving party.” *Town of Avon v. W. Cent. Conservancy Dist.*, 957 N.E.2d 598, 602 (Ind.2011). This is confirmed by the Court of Appeals’ reference to “Catholic Charities’ alleged negligence” in a footnote to the very sentence to which Catholic Charities objects. *Kramer v. Catholic Charities*, 6 N.E.3d 984 (Ind.Ct.App.2014), FN 2.

The Court of Appeals did not, as Catholic Charities attempts to portray, decide that Catholic Charities was negligent. The Court of Appeals simply reversed the entry of summary judgment, thus leaving the determination of negligence to the jury. *Slip Opinion* at 10.

### **III. Catholic Charities did not base its summary judgment upon whether a duty existed to check the putative father registry.**

Catholic Charities sole argument to the trial court regarding duty<sup>3</sup> was restricted to the issue of

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<sup>2</sup>Catholic Charities’ characterization of *Wal-Mart* as deciding whether “a defendant’s failure to follow its own policies and procedures is evidence of negligence” is misplaced. (Catholic Charities’ Petition p. 9-10.) *Wal-Mart* affirmed that such evidence is admissible.

<sup>3</sup>As noted by the Court of Appeals, Catholic Charities’ counsel only argued “breach of duty” and did not argue to the trial court that it had no duty to check the putative father registry: “They certainly can, but whether or not they have a duty is certainly unclear.” Transcript 10. *Kramer v. Catholic Charities*, 6 N.E.3d 984 (Ind.Ct.App.2014) at FN4.

breach of duty:

Additionally, Catholic Charities breached no duty to the Kramers. It fully complied with the mandate of the statute, IC 31-19-5-15 (b)(1), by requesting “that the state department of health search the registry under this section at least one (1) day after the expiration of the period specified by section 12 of this chapter”. That second inquiry disclosed the identity of the putative father, which Catholic Charities then disclosed to the Kramers, who made the decision to challenge the rights of the putative father. Unfortunately, the Kramers lost their fight and ultimately turned over the child to the father.

(App. 53) In support of this argument, Catholic Charities did not present an affidavit from an expert in adoptions regarding the standard of care required from an adoption agency for pre-placement checks of the putative father registry. Catholic Charities did not present the trial court with evidence of what other adoption agencies do as far as pre-birth or pre-placement checks of the putative father registry. As Catholic Charities only presented evidence to the trial court that it complied with IC 31-19-5-15<sup>4</sup>, the Court of Appeals correctly held:

But, as the Kramers point out, it is well settled that, [w]here the unjustified or unexcused violation of a duty prescribed by statute may constitute negligence per se, *see French v. Bristol Myers Co.*, 574 N.E.2d 940 (Ind.Ct.App.1991), *trans. denied*, it does not follow that compliance with a statute or ordinance constitutes the exercise of reasonable care. W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser & Keeton on the Law of Torts* § 36, p. 233 (5th ed. 1984). “While compliance with a statutory standard is evidence of due care, it is not conclusive on the issue. Such standard is no more than a minimum, and it does not necessarily preclude a finding that the actor was negligent in failing to take additional precautions.” *Id.*; *see also Restatement (Second) of Torts* § 288C(1965).

*See Northern Ind. Pub. Serv. Co. v. Sell*, 597 N.E.2d 329, 331 (Ind.Ct.App.1992),

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<sup>4</sup>IC 31-19-5-15 only addresses what actions an attorney or agency must take in order to finalize an adoption. It does not address what actions need to be taken in order to prevent a wrongful placement. Catholic Charities’ argument is akin to a real estate professional who failed to obtain a title search before the purchase of property pointing to the statutes on what documents are needed to record a transfer of property as the appropriate standard of care.

*trans. denied.* Thus, Catholic Charities' only argument as to why it did not breach its duty must fail as a matter of law.

*Kramer v. Catholic Charities*, 6 N.E.3d 984 (Ind.Ct.App.2014), *Slip Opinion* at 8-9. Catholic

Charities failed to demonstrate the absence of an issue of fact on the issue of breach of duty.

Accordingly, the Court of Appeals found that:

Catholic Charities did not satisfy its burden to make a prima facie showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. Thus, the burden to prove the existence of a genuine issue of material fact did not shift to the Kramers.

*Kramer v. Catholic Charities*, 6 N.E.3d 984 (Ind.Ct.App.2014), *Slip Opinion* at 10.

Summary judgment is rarely appropriate in negligence cases. *Rhodes v. Wright*, 805 N.E.2d 382, 387 (Ind.2004). Whether a particular act or omission is a breach of duty is generally a question of fact for the jury. *Stephenson v. Ledbetter*, 596 N.E.2d 1369, 1372 (Ind.1992). More importantly, under Indiana's standard, the party seeking summary judgment must demonstrate the absence of any genuine issue of fact as to a determinative issue, and only then is the non-movant required to come forward with contrary evidence. *Jarboe v. Landmark Cmty. Newspapers of Indiana, Inc.*, 644 N.E.2d 118, 123 (Ind.1994). Merely alleging that the plaintiff has failed to produce evidence on each element [of a cause of action] is insufficient to entitle the defendant to summary judgment under Indiana law. *Id.*

The Court of Appeals correctly applied the law to the designated evidence and arguments presented on appeal. What Catholic Charities did not do is make a cogent argument at the trial court or the Court of Appeals that it did not owe a duty to the Kramers. Like the other two

arguments it developed on appeal, the “no duty” argument was never presented to the trial court.<sup>5</sup> Moreover, Catholic Charities’ argument on Appeal conceded the existence of a duty and breach of that duty. (Catholic Charities’ Brief, p 10.)

#### **IV. Catholic Charities owed a duty to the Kramers. The extent of that duty is a question of fact for the jury.**

Catholic Charities cannot credibly argue that they did not have a duty to the Kramers. Catholic Charities was acting as the Kramer’s adoption agency. The Kramers were the clients of Catholic Charities. Duty exists according to the relationship of the parties, reasonable foreseeability of harm, and public policy. *Webb v. Jarvis*, 575 N.E.2d 992, 995 (Ind.1991).

Duty is usually created by the normal expectations of our civil society. Those risks against which an actor is required to take precautions are those which society, in general, considers sufficiently great to demand preventive measures. A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another. The duty of reasonable care is not, of course, owed to the world at large, but rather to those who might reasonably be foreseen as being subject to injury by the breach of the duty.

*Key v. Hamilton* 963 N.E.2d 573, 580 (Ind.Ct.App.2012) (citations omitted.)

Catholic Charities, as the paid agents of the Kramers, had a duty to act as a reasonably prudent adoption agency to take precautions against risks which were reasonably discoverable to Catholic Charities. The jury will need to determine, after hearing testimony from the designated experts,

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<sup>5</sup>“Catholic Charities raises two issues for the first time on appeal, namely, whether its alleged negligence proximately caused the Kramers' damages and whether their claims are barred by the doctrine of incurred risk. Because Catholic Charities did not present either of those issues to the trial court, both issues are waived.” *Kramer v. Catholic Charities*, 6 N.E.3d 984,(Ind.Ct.App.2014) *Slip Opinion* at 9. (Citations omitted.)

whether a reasonably prudent adoption agency would have checked the putative father registry prior to the placement of the child with the Kramers.<sup>6</sup> The extent of a duty of care is ordinarily a question for the trier of fact. *Medtronic, Inc. v. Malander* 996 N.E.2d 412, 421 (Ind.Ct.App.2013.) (Citations omitted.)

Catholic Charities attempts to have this Court carve out, as a matter of law, the factual parameters of the boundaries of the duty Catholic Charities owed to its clients. “Although the existence of duty is a matter of law for the court to decide, a breach of duty, which requires a reasonable relationship between the duty imposed and the act alleged to have constituted the breach, is usually a matter left to the trier of fact.” *Mangold ex rel. Mangold v. Ind. Dept. of Natural Res.*, 756 N.E.2d 970, 975 (Ind.2001). “The care required is always reasonable care. This standard never varies, but the care which it is reasonable to require of the actor varies with the danger involved in his act, and is proportionate to it. The greater the danger, the greater the care which must be exercised.” *Estate of Heck v. Stoffer*, 786 N.E.2d 265, 270 (Ind.2003). (*citing Restatement (Second) of Torts* § 298).

Catholic Charities misinterprets the Court of Appeals decision: “It found that adoption agencies owe prospective adoptive parents a duty to check the putative father registry before making a pre-adoptive placement.” (Catholic Charities’ Petition, p. 16) The Court of Appeals simply held that it is to be determined by the jury whether the duty Catholic Charities had to act with reasonable care would include checking the putative father registry before placing a child

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<sup>6</sup>This is no different from any other malpractice case which relies upon expert testimony to educate the jury as to the standard of care of a reasonably prudent professional. While Catholic Charities attempts to cast this issue as a purely legal issue, the ultimate issue of whether a defendant’s conduct conformed to the standard of care is a factual issue reserved for the jury.

with prospective adoptive parents.

**V. Public policy mandates that a jury determine whether Catholic Charities be held accountable for their negligence.**

The doctrine of charitable immunity has been abolished in Indiana. *Harris v. YWCA of Terre Haute*, 237 N.E.2d 242 (Ind. 1968). If Catholic Charities is to be afforded any protection from liability, it should only be by an act of the General Assembly. *See*. IC 34-30. The General Assembly has not chosen to provide immunity to adoption agencies. *Id.* Accordingly, Catholic Charities cannot assert the nature of their work as a reason why they should not be held accountable.<sup>7</sup>

Moreover, public policy expects that those responsible for causing harm are held accountable:

Society has an expectation that individuals will be held liable for the results of their actions. Public policy, therefore, demands that we hold an individual responsible for the reasonably foreseeable results of his behavior; allowing an individual to escape liability for damage he causes would fly in the face of the normal expectations of our civil society. As a result, we find that imposing a duty of care upon [the defendant] and therefore allowing a jury to weigh the facts and apportion fault as it deemed appropriate is in furtherance of sound public policy.

*Key v. Hamilton* 963 N.E.2d 573, 583 (Ind.Ct.App.,2012)

Indiana courts have often referred to adoption as a process of cutting a child from one family tree and attaching that child to a different tree. *See, e.g., In re Adoption of T.B.*, 622 N.E.2d 921, 924 (Ind.1993) (stating that an adoption “severs the child entirely from its own family tree and engrafts it upon that of another.”) It is also the public policy of this state to

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<sup>7</sup>Catholic Charities’ claim of facing crippling tort damages (Petition, p. 13) is false given Catholic Charities’ declaration page showing excess liability coverage of **20 Million Dollars**. (App. 166.)

promote the speedy placement of children in permanent homes. *See In re Adoption of J.B.S.*, 843 N.E.2d 975, 977 (Ind.Ct.App.2006) (“[E]arly, permanent placement of children with adoptive families furthers the interests of both the child and the State.”). It is inimical to that policy to allow adoption agencies to inoculate themselves from liability for negligently placing a child in a home only to be removed months or years later. The placement with the Kramers was doomed to fail and similar doomed placements must be avoided. Additionally, as the PFR allows fathers who wish to be involved in their child’s life an opportunity to come forward prior to the placement of the child for adoption, the legislative goal of the PFR is also to avoid doomed placements. Catholic Charities’ negligence thwarted the goals of the adoption/PFR scheme and without accountability, Catholic Charities will have no incentive to change. As the lives of five people (birth parents, adoptive parents and child) are directly and profoundly affected by a negligent placement, the stakes are too high for adoption agencies to be given a free pass for negligence.

If by holding Catholic Charities accountable for their sloppy practices in this case, one more failed placement and the disruption of lives can be avoided, then public policy mandates such a result. Adoption costs are already expensive. In this case, the placement fee alone was \$8,000, not to mention the associated costs for the homestudy and program fees. (App. 208). In addition, the Kramers were responsible for paying the attorney fees associated with the contested adoption. Any incremental cost increase because of increased insurance premiums is a far wiser allocation of resources than the hundreds of thousands of dollars of attorney fees which can be incurred in a contested adoption and the untold injury upon the lives of those affected by a negligent placement.

## VI. Conclusion

For the above reasons, this Court should DENY the Petition for Transfer and remand this case for trial.

Respectfully submitted,



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WORD COUNT CERTIFICATE

Pursuant to Indiana Appellate Rule 44(E), I verify that the foregoing appellant's brief contains no more than 4,200 words, including the headings and footnotes and excluding the cover, table of contents, table of authorities, signature block, appealed judgment and orders, word count certificate and certificate of service.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'C. P. Rice', written over a horizontal line.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 19 day of May, 2014, the foregoing was served upon the following persons, in accordance with App Rule 24 by deposit in the United States Mail to:

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