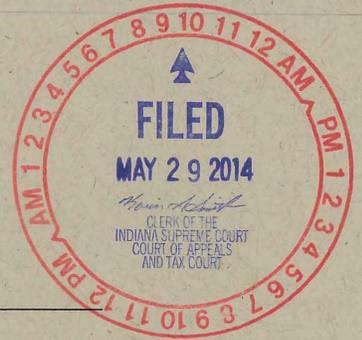


ORIGINAL

IN THE  
INDIANA SUPREME COURT  
CAUSE No.



Jason and Justina Kramer  
APPELLANTS

ON PETITION TO TRANSFER  
FROM THE INDIANA COURT OF APPEALS  
No. 71A03-1308-CT-301

-v-

Catholic Charities of the Diocese  
of Fort Wayne-South Bend, Inc.  
APPELLEE

ON APPEAL FROM THE  
ST. JOSEPH CIRCUIT COURT  
CAUSE No. 71C01-1104-CT-00053

CATHOLIC CHARITIES OF THE DIOCESE  
OF FORT WAYNE-SOUTH BEND, INC.'S  
REPLY BRIEF

J. Thomas Vetne | 19606-64  
Colin J. Reilly | 21058-71  
Robert M. Edwards, Jr. | 8031-71

**JONES OBENCHAIN, LLP**

600 KEYBANK BUILDING  
202 S. MICHIGAN ST.  
POST OFFICE BOX 4577  
SOUTH BEND, IN 46634-4577

574.233.1194 | 574.233.8957 FAX

Catholic Charities' Attorneys

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## ARGUMENT

### 1.0 Robert McCoy's registration.

Robert McCoy put his name on the putative-father registry *before* Catholic Charities requested a registry check. But whether he registered once, twice, or 30 times in the days, weeks, and months before that request is immaterial. What matters is that he *had* registered—apparently multiple times—yet when Catholic Charities requested a registry check, the state health department certified that no one had stepped forward to claim paternity of Myesha's daughter.<sup>1</sup>

### 2.0 Catholic Charities' unwritten policies are admissible, but standing alone aren't evidence of negligence.

The Kramers frame the issue over Catholic Charities' unwritten registry-check policy as one of admissibility. But Catholic Charities doesn't quibble about admissibility. The *Wal-Mart* court observed that “company rules are generally admissible but not conclusive” of the standard of care. *Wal-Mart Stores, Inc. v. Wright*, 774 N.E.2d 891, 894–95 (Ind. 2002).

Yet its unwritten registry-check policy was the *only* thing the Kramers cited to argue that Catholic Charities negligently handled

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<sup>1</sup> App. pp. 85 & 87.

Ella's adoption. That evidence was considered in a vacuum. The Kramers didn't introduce any admissible evidence about whether adoption agencies owe prospective adoptive parents a duty of care or what the standard of care, if any, is. They didn't introduce any evidence about how the rest of the adoption field handles pre-adoption registry checks, or any evidence that Catholic Charities' actions fell below the standard in this situation.

So the only evidence about the standard of care was Catholic Charities' own subjective belief about how it should handle registry checks. Based on *Wal-Mart*, that subjective belief, *standing alone and without more*, isn't evidence of negligence:

the standard of conduct which the community demands must be an external and objective one, rather than the individual judgment, good or bad, of the particular actor.

—*Wal-Mart*, 774 N.E.2d at 895.

By holding that Catholic Charities' failure to follow its usual practice, without more, was evidence of negligence, the appellate court's decision contravened *Wal-Mart*.

### **3.0 Catholic Charities had no duty to check the registry for the Kramers' benefit.**

Catholic Charities wasn't obligated to check the registry for the Kramers' benefit in any event. It argued and supported the point

extensively in its transfer petition. If the lack of argument in their brief is any indication, the Kramers have abandoned their contention that it did. *Doughty v. Review Bd. of Dep't of Workforce Dev.*, 784 N.E.2d 524, 527 (Ind. Ct. App. 2003) (noting that failure to present cogent argument or citation to authority waives issue for appellate review).

Instead, they pivot to a new argument: they maintain that Catholic Charities *must* have owed them some duty as their “paid agents.”<sup>2</sup> They then define the duty they believe they’re owed as one “to act as a reasonably prudent adoption agency to take precautions against” reasonably discoverable risks.<sup>3</sup> But they cite no authority for this proposition, either from this state or any other.

And they overlook three important points. First, Catholic Charities wasn’t only their agent. It works for families exploring adoption as an option to childrearing *and* for families looking to adopt.<sup>4</sup> So it worked with Myesha to help her find a suitable home for her daughter, and it worked with the Kramers to help them find a suitable child. It is misleading for the Kramers to suggest that Catholic Charities worked exclusively for them.

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<sup>2</sup> Kramers’ brief, p. 5.

<sup>3</sup> *Id.*

<sup>4</sup> App. pp. 93; 175–76.

It is also misleading to suggest that, as the party footing the bill for the adoption, prospective adopters are owed a heightened duty. The economics of adoptions means that adoptive parents are the ones who must pay most, if not all, of the expenses involved. If single mothers like Myesha had the resources to raise their children, they likely wouldn't be placing them up for adoption in the first place.

Finally, unlike the typical negligence case where there is no formal relationship between the litigants (think of passing motorists who get into an accident or the invitee who slips and falls in a storekeeper's shop), the Kramers' relationship with Catholic Charities was governed by an adoption contract. Catholic Charities had a duty to comply with the contract. The Kramers haven't cited any law of any kind that Catholic Charities owed them duties above and beyond those in the contract, or that Catholic Charities breached any duties outlined in the contract.

#### **4.0 The Kramers' immunity argument is a straw man.**

The Kramers read Catholic Charities' policy argument—and Judge Baker's endorsement of it—too broadly. It's never sought immunity and isn't seeking it now. It's just asking that adoption proceedings' inherently risky realities be recognized: birth fathers may step forward and claim paternity, and birth mothers may have second

thoughts about putting a child up for adoption. The public should applaud fathers and mothers who step forward and take responsibility for their offspring.

But it doesn't serve the public's interest to penalize adoption agencies when birth parents step forward and do the right thing. And that's especially true when prospective adopters, like the Kramers, knew full well that the adoption can fall through in either event.

The Kramers suggest that giving folks like them a chance to sue adoption charities in negligence when a parent does change his or her mind will keep the agencies honest, and it will only cost the agencies a few more dollars in insurance premiums.<sup>5</sup>

Adoption charities operate on a shoe-string budget as it is, and would only have to pass on increased costs to prospective adopters like the Kramers—who complain that “adoption costs are already expensive.”<sup>6</sup> And that's assuming that insurance coverage exists. Catholic Charities, contrary to the Kramers' assertion, doesn't have “insurance” coverage. It is a member Catholic Mutual, a self-protection fund of the Catholic Church in North America.<sup>7</sup> Catholic

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<sup>5</sup> Kramers' brief, p. 8.

<sup>6</sup> *Id.*

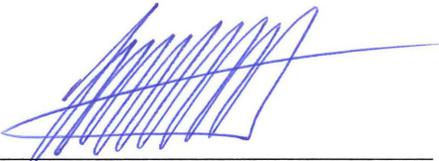
<sup>7</sup> App. p. 156.

Mutual isn't an insurance company.<sup>8</sup>

## CONCLUSION

The Court should grant transfer and vacate the Court of Appeals' opinion.

Date: May 29, 2014



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J. Thomas Vetne | 19606-64  
Colin J. Reilly | 21058-71  
Robert M. Edwards, Jr. | 8031-71

### **JONES OBENCHAIN, LLP**

600 KEYBANK BUILDING  
202 S. MICHIGAN ST.  
POST OFFICE BOX 4577  
SOUTH BEND, IN 46634-4577

574.233.1194 | 574.233.8957 FAX

JTV@JONESOBENCHAIN.COM  
CJR@JONESOBENCHAIN.COM  
BOB@JONESOBENCHAIN.COM

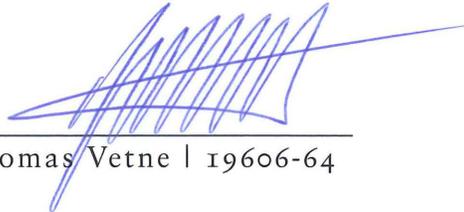
Catholic Charities' Attorneys

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<sup>8</sup> *Id.*

## WORD-COUNT CERTIFICATE

I verify that this reply brief contains no more than 1,000 words.

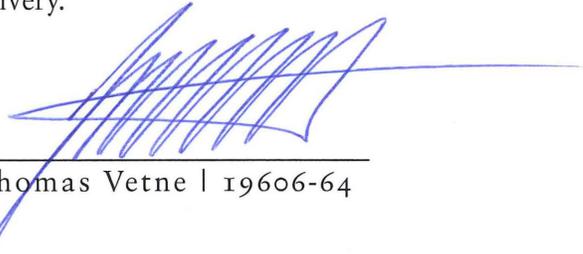


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J. Thomas Vetne | 19606-64

## CERTIFICATE OF SERVICE

On May 29, 2014, I served this reply brief on Mr. Charles P. Rice, at Boveri Murphy Rice, LLP, 400 Plaza Building, 210 South Michigan Street, South Bend 46601, via hand delivery.



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J. Thomas Vetne | 19606-64