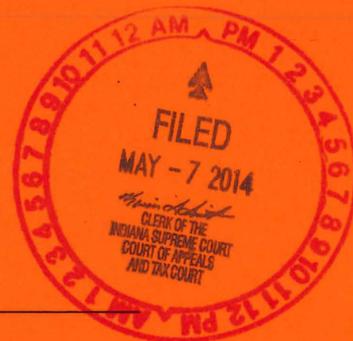


ORIGINAL

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  
PETITION TO TRANSFER

J. Thomas Vetne | 19606-64  
Colin J. Reilly | 21058-71  
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## QUESTIONS PRESENTED

1. In *Wal-Mart v. Wright*, this Court observed that a party's failure to follow its own procedures isn't necessarily evidence of negligence. The plaintiffs claim that Catholic Charities negligently failed to follow its policy of checking Indiana's putative-father registry twice before placing a newborn with them for adoption. The appeals court agreed, holding that the charity's failure to follow its policy was negligence. Does its opinion conflict with *Wal-Mart*?
  
2. Indiana's putative-father statute requires adoption agencies to check a registry so putative fathers can be notified of adoption proceedings involving their offspring. Catholic Charities placed a newborn with the plaintiffs for adoption. A registry check later disclosed the newborn's father, who took custody. The plaintiffs then sued the charity, claiming it owed them a duty to check the registry. Does the statute create duties owed to putative fathers *and* adoptive parents?

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## BACKGROUND

### The parties

Catholic Charities is an adoption agency.<sup>1</sup> It works with birth parents wishing to explore adoption as an alternative to parenting.<sup>2</sup> It also performs home studies and places children for adoption with prospective parents.<sup>3</sup> A 501(c)(3) non-profit,<sup>4</sup> it has been a licensed adoption agency in Indiana for decades.<sup>5</sup>

In March 2010, an expectant mother named Myesha Salas approached Catholic Charities about placing her unborn child for adoption.<sup>6</sup> The charity tried to determine paternity, but Myesha wasn't certain who'd impregnated her<sup>7</sup>— it could have been either of two men—and she was reluctant to identify them.<sup>8</sup>

An unidentified father isn't a bar to adoption,<sup>9</sup> but it does put any potential placement “at-risk”: putative fathers can exercise their

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<sup>1</sup> App. p. 93.

<sup>2</sup> *Id.* at pp. 175–76.

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

<sup>4</sup> *Id.* at p. 156.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at p. 81.

<sup>7</sup> *Id.* at p. 362.

<sup>8</sup> *Id.* at p. 81.

<sup>9</sup> Ind. Code § 31-19-5-5.

paternal rights at any point until adoption proceedings are final.<sup>10</sup>

Catholic Charities helped Myesha identify Jason and Justina Kramer as potential adoptive parents.<sup>11</sup> They'd approached the charity a year before about adopting a child, and welcomed the chance to adopt Myesha's.<sup>12</sup>

Myesha's daughter, Ella,<sup>13</sup> was born on May 1, 2010.<sup>14</sup> The next day, Myesha signed the adoption paperwork and Catholic Charities placed Ella with the Kramers.<sup>15</sup>

#### The pre-adoption placement

Jason and Justina knew when they accepted the child that the placement wasn't final: Ella's father, whoever he was, could learn of the birth and contest her adoption.<sup>16</sup> They expressed their understanding in an "Acknowledgment of At-Risk Placement,"<sup>17</sup> in which they

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<sup>10</sup> App. pp. 75 & 77. Until those proceedings were finalized, a birth mother could also change her mind about adopting away her baby.

<sup>11</sup> *Id.* at pp. 81–82.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at p. 17.

<sup>14</sup> *Id.* at pp. 175–76.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at p. 120.

<sup>17</sup> *Id.* at pp. 82–83.

declared that “Catholic Charities has made no promise or representations to us regarding the permanency of this placement,” and that “the placement is at-risk and subject to termination.”<sup>18</sup>

Jason knew that *at risk* meant the biological father could come forward and jeopardize the adoption process by trying to take the baby back.<sup>19</sup> Justina’s understanding was similar.<sup>20</sup>

And eight days after accepting Ella, the Kramers reaffirmed the risks inherent in the pre-adoption placement when they signed an “Acknowledgment of Temporary At-Risk Placement.”<sup>21</sup> Its language was largely identical to the earlier acknowledgement.<sup>22</sup> They also signed a “placement agreement”<sup>23</sup> releasing Catholic Charities from any claims the couple had arising from Ella’s pre-adoption placement.<sup>24</sup>

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<sup>18</sup> *Id.* at p. 84.

<sup>19</sup> *Id.* at pp. 98-99.

<sup>20</sup> *Id.* at p. 116.

<sup>21</sup> *Id.* at p. 92.

<sup>22</sup> *Id.* at p. 103.

<sup>23</sup> *Id.* at pp. 106-07.

<sup>24</sup> *Id.* at p. 95.

### The putative-father registry<sup>25</sup>

To minimize the risk that a child's biological father might show up weeks, months, or even years later to challenge an adoption, Indiana instituted a putative-father registry.<sup>26</sup> Men who think they may have impregnated a woman can register with the state's health department.<sup>27</sup> But they only have 30 days after their child's birth to do it or they impliedly consent to the adoption and lose their right to receive notice of adoption proceedings.<sup>28</sup>

When arranging an adoption, attorneys and adoption agencies must check the registry.<sup>29</sup> But the law only requires them to do this once: they must check it at least one day after the 30-day deadline within which putative fathers must register.<sup>30</sup>

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<sup>25</sup> *Putative* is synonymous with *supposed*. BLACK'S LAW DICTIONARY 1356 (9th ed. 2009). To make it clear that *putative* describes the word *father* and not the registry itself, Black's hyphenates the phrase *putative father* when it precedes *registry*. *Id.* So Black's treats *putative father* as a phrasal adjective when describing *registry*. This petition, like Judge Baker's dissent (and unlike the statute and the majority opinion), follows Black's lead.

<sup>26</sup> See Ind. Code §§ 31-19-5-1, *et seq.*

<sup>27</sup> Ind. Code §§ 31-19-5-9 and 31-19-5-10.

<sup>28</sup> Ind. Code §§ 31-19-5-12 and 31-19-5-18.

<sup>29</sup> Ind. Code § 31-19-5-15(b)(1).

<sup>30</sup> *Id.*

### Catholic Charities' registry-check policy and practice

Catholic Charities' written policy was to comply with Indiana law by checking the registry no earlier than 31 days after a baby's birth.<sup>31</sup> But in practice, it would also check the registry when a birth mother first contacted it and again just before the birth.<sup>32</sup>

Catholic Charities, however, didn't follow its usual practice with Ella's placement. It checked the registry for the first time three weeks after Myesha gave birth.<sup>33</sup> That check, requested on May 25, 2010, was negative: the health department certified that no one had stepped forward to claim paternity.<sup>34</sup>

### Ella's father surfaces and seeks custody

But Ella's father *had* registered. On April 27, 2010,<sup>35</sup> four days before his daughter was born, a man named Robert McCoy filled out a registration form and filed it with the health department.<sup>36</sup>

It wasn't until Catholic Charities requested a second search on June 1, 2010 (the 30-days-plus-one search mandated by statute)

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<sup>31</sup> App. pp. 154–55.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at p. 85.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at p. 90.

<sup>36</sup> *Id.* at p. 89.

that it learned McCoy had claimed paternity.<sup>37</sup> The Kramers' attorney then served McCoy with their adoption notice.<sup>38</sup> McCoy contested the adoption and sought custody.<sup>39</sup> In January 2011, after a trial court granted his request, the Kramers relinquished custody.<sup>40</sup> Three months later they sued Catholic Charities for negligently handling Ella's pre-adoption placement.<sup>41</sup>

#### PRIOR TREATMENT OF THE ISSUES

Because the Kramers twice acknowledged that Ella's placement was at-risk, and had released Catholic Charities from any claims they had arising from the placement, the charity sought summary judgment.<sup>42</sup> But the Kramers argued the release didn't bind them because the charity hadn't disclosed *all* the risks.<sup>43</sup> Had the charity told them that it usually checked the registry twice pre-placement, and that it hadn't done so in this case, the Kramers say they would not have accepted Ella until Catholic Charities requested a check.<sup>44</sup>

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<sup>37</sup> *Id.* at p. 86.

<sup>38</sup> *Id.* at p. 18.

<sup>39</sup> *Id.* at p. 19.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at pp. 15–21.

<sup>42</sup> *Id.* at p. 40, *et seq.*

<sup>43</sup> *Id.* at pp. 130–31.

<sup>44</sup> *Id.*

The trial court saw things the charity's way.<sup>45</sup> It reasoned that even though Catholic Charities hadn't performed its customary pre-placement registry checks, it's not likely an earlier check would have uncovered Ella's father when the May 25 check hadn't.<sup>46</sup> And because the language in the "Acknowledgement of At-Risk Placement," "Acknowledgement of Temporary At-Risk Placement," and the placement agreement was clear—and Jason and Justina understood it—the court granted judgment for Catholic Charities summarily.<sup>47</sup>

The Kramers appealed and advanced two main arguments. First, as before, they claimed that the charity hadn't been forthcoming about its customary registry-checking practice and its failure to follow that practice with them. This failure was negligence, they claimed, and the release they signed didn't expressly release Catholic Charities from its own negligence.

Second, they claimed that the charity hadn't met its summary-judgment burden. It wasn't enough for Catholic Charities to show that it complied with Indiana law when it performed the second check; they maintained that it may still have been negligent by not following its own unwritten registry-check policy.

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<sup>45</sup> *Id.* at pp. 3–14.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

The charity denied that it had been negligent, but countered that even if it had been, the release didn't *have* to refer to its own negligence because the risk the Kramers actually encountered—a biological father appearing and challenging an adoption at the last minute—is inherent in pre-adoption placements. And it didn't make for good policy to hold the charity liable when a father did appear at the last minute. Charities serve the public good, and by upholding Catholic Charities' release, the court would permit it to continue serving that interest without fear of liability if a mother suddenly changed her mind or if a previously unknown father appeared at the 11<sup>th</sup> hour. Finally, by demonstrating that it had fully complied with Indiana law when it checked the registry on June 1, Catholic Charities maintained that it met its summary-judgment burden.

A divided appellate panel agreed with the Kramers. In a published opinion the majority held that the charity's failure to follow its unwritten registry-check policy was negligence that the Kramers hadn't been warned about. And because the release didn't refer to the charity's negligence, it didn't bar the Kramers' lawsuit. The majority went on to hold that it wasn't enough for the charity to show that its June 1 registry check was all the law required. In the face of evidence that it hadn't followed its own policy, the majority ruled that Catholic Charities hadn't met its summary-judgment burden.

Judge Baker dissented. He felt that the release plainly applied to the risk that a putative father might come forward at any time and upset the adoption applet. He also agreed with the charity's policy argument: the law should encourage fathers to accept responsibility and claim paternity, and it shouldn't hold charities liable when they do.

Catholic Charities now petitions this Court to grant transfer and remand the matter with instructions to enter summary judgment on its behalf.

## ARGUMENT

### 1.0 The majority's opinion conflicts with *Wal-Mart Stores, Inc. v. Wright*.

Procedurally speaking, *Wal-Mart Stores, Inc. v. Wright*<sup>48</sup> is nothing like this case. *Wal-Mart* is a premises-liability claim that arose from a defendant's objection to a jury instruction. This, on the other hand, is a negligent-pre-adoption-placement lawsuit arising from a trial court's grant of summary judgment for a defendant. On the surface at least, the two cases couldn't be more dissimilar.

But the core issue in *Wal-Mart* is whether a defendant's failure to follow its own policies and procedures is evidence of negligence.

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<sup>48</sup> 774 N.E.2d 891 (Ind. 2002).

In this substantive respect, if nowhere else, *Wal-Mart* and this case are identical.

The store in *Wal-Mart* was sued after a customer slipped in a puddle in an outdoor lawn-and-garden display. At trial, the customer introduced evidence of the store's floor-cleaning policies and argued that it hadn't lived up to its own policies in maintaining the display. She claimed that this failure was evidence of the store's negligence.

Over the store's objection, the trial court instructed the jury that it could consider the store's violation of its own rules and procedures as evidence of negligence. It also instructed the jury that it could consider what the store viewed as the degree of care required as evidence of what "ordinary care" actually was. The store lost at trial and appealed.

The appeals court sided with the customer. But this Court granted the store's transfer petition and reversed. It observed that parties are free to set goals that exceed legal minimums. And if a party doesn't live up to its goals, that failure alone isn't evidence of a failure to exercise ordinary care.

This Court also noted that what amounts to ordinary care must be based on an *objective* standard and not on the defendant's own *subjective* belief about what best practices are or ought to be.

Returning to our case, Catholic Charities had an established practice for checking the putative-father registry. That practice was to request a check on three separate occasions: when a birth mother first contacts it about putting a child up for adoption, again just before the child's birth,<sup>49</sup> and on the 31<sup>st</sup> day after the child's birth.<sup>50</sup> Indiana law only requires the latter check.

We know that Catholic Charities didn't follow this practice before placing Ella with the Kramers. Is this negligence? Is it a failure to exercise ordinary care? The Kramers think so. They say that Catholic Charities' failure to follow its own internal procedure is negligence, and that it is negligence even though its policies exceed what the law might have required.

The majority agreed with the Kramers, holding that the charity's negligence in not following its own policy wasn't something the Kramers could have anticipated, so it wasn't something they could have released.

To reach this conclusion, the majority assumed that Catholic Charities was negligent for not following its own policy. And that's where it went astray. This Court put that notion to bed in *Wal-Mart*, where it observed that parties are free to set standards that

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<sup>49</sup> App. pp. 154–55.

<sup>50</sup> *Id.*

exceed ordinary care, and when they do, an injured plaintiff should not be able to come along and cry foul just because the standards weren't met in every detail.

The majority's holding discourages organizations and individuals from setting their standards higher than the law calls for from a fear of getting sued later. Is this really where we want the law to take us? Or should Indiana encourage Hoosiers to follow "the best practices without necessarily establishing them as a legal norm"? *Wal-Mart*, 774 N.E.2d at 895.

And by relying on Catholic Charities' subjective belief about what ordinary care calls for in the pre-adoption-placement arena—namely three registry checks rather than the one mandated by law—the majority runs afoul of *Wal-Mart*'s admonition that the standard of care to be applied must be an objective one:

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.

The objective standard, fixed by statute, is one registry check no earlier than the 31<sup>st</sup> day after a child's birth.<sup>51</sup> That's ordinary care. Catholic Charities met its obligation. The majority ran afoul of *Wal-Mart* when it found otherwise.

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<sup>51</sup> Ind. Code § 31-19-5-15(b)(1).

**2.0 The majority decided an important legal question that should be decided by the Supreme Court.**

The putative-father statute requires adoption agencies to check the registry.<sup>52</sup> Implicit in the majority's opinion is the notion that adoption agencies must check the registry for the benefit of the couples accepting a pre-adoption placement. In other words, the majority held that adoption agencies owe couples a duty to check the putative-father registry.

Whether adoption agencies owe adopting couples this duty—and face potentially crippling tort damages for a breach—hasn't been decided before. And it's an important legal question this Court should decide.

Judge Baker correctly observed that a “‘registry check’ is not a proper duty to be imposed”<sup>53</sup> on adoption agencies. There are at least two reasons why. First, a putative father could always surface sometime after the check.<sup>54</sup> Or, as happened in this case, the putative father may have registered before the registry check, but the check may not have uncovered his registration. All pre-adoption placements remain inherently risky no matter how many checks are requested before the adoption is finalized.<sup>55</sup>

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<sup>52</sup> *Id.*

<sup>53</sup> Slip. Op. p. 13.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

Second, and perhaps most importantly, violating a statute that imposes a duty is only negligence per se when it involves those persons the law is designed to protect. *Zimmerman v. Moore*, 441 N.E.2d 690 (Ind. Ct. App. 1982). So for a statutory violation to constitute negligence per se, the statute must have been enacted to prevent the injury the plaintiff complains about, and the statute must be designed to protect the class of people the plaintiff belongs to. *Elder v. Fisher*, 217 N.E.2d 847 (Ind. 1966).

The Kramers aren't in the class of people the putative-father registry was designed to protect. As the statute itself says, it "applies to a *putative father*...." I.C. § 31-19-5-1(a) (emphasis supplied). It doesn't apply to anyone else.

And its only purpose is to give putative fathers some way to ensure that they get notice of any proceeding that might involve the children they've conceived:

The registry's purpose is to determine the name and address of a father:

- (1) whose name and address have not been disclosed by the mother of the child, on or before the date the mother executes a consent to the child's adoption, to:
  - (A) an attorney; or
  - (B) an agency;that is arranging the adoption of the child; and
- (2) who may have conceived a child for whom a petition for

adoption has been or may be filed;  
*so that notice of the adoption may be provided to the putative  
father.*

— Ind. Code § 31-19-5-3. Emphasis supplied.

The statute doesn't explicitly or impliedly require adoption agencies to check the registry *for an adoptive couple's benefit*. It doesn't even mention couples hoping to adopt. The only class of people who may have any rights under the statute are putative fathers, so only they may have a private right of action to sue for the statute's violation. *See, e.g., Blanck v. Ind. Dep't of Corr.*, 829 N.E.2d 505, 509–10 (Ind. 2005) (noting that a private cause of action generally will be inferred where a statute imposes a duty for a particular individual's benefit but will not be where the legislature imposes a duty for the public's benefit).

At the end of the day, a registry check isn't meant to provide any measure of certainty—or source of tort recovery—to couples hoping to adopt. No matter how many registry checks one makes, hopeful adopters can't rest easy until the adoption process is final. And the Kramers knew this full well, having gone into the process with their eyes wide open.

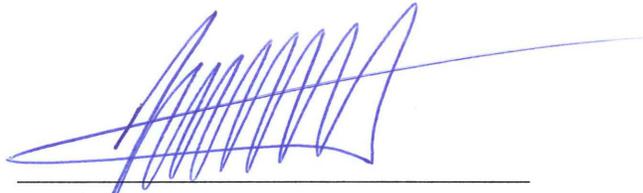
## CONCLUSION

The majority's published decision conflicts with binding precedent on an important legal subject. By equating Catholic Charities' subjective view of what the law required of it with an objective determination of what ordinary care is in these circumstances, the majority's opinion conflicts with *Wal-Mart Stores, Inc. v. Wright*.

The majority also decided an important legal question that ought be decided by this Court. It found that adoption agencies owe prospective adoptive parents a duty to check the putative-father registry before making a pre-adoption placement. This Court has never found that any such duty exists, and likely wouldn't since prospective adoptive parents aren't in the class of persons the legislature intended to benefit via the putative-father registry. Because they aren't protected by the statute, the Kramers aren't owed a duty under it.

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

Date: May 7, 2014



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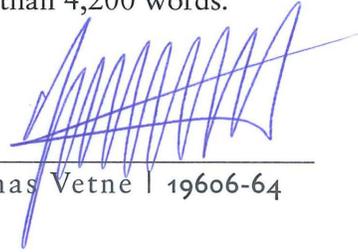
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### WORD-COUNT CERTIFICATE

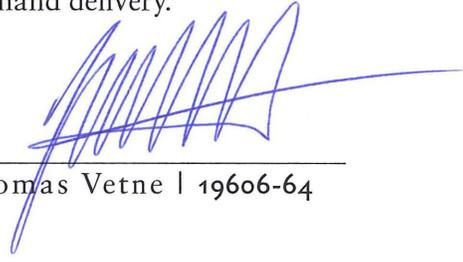
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\_\_\_\_\_  
J. Thomas Vetne | 19606-64

### CERTIFICATE OF SERVICE

On May 7, 2014, I served this petition to transfer on Mr. Charles P. Rice, at Boveri Murphy Rice, LLP, 400 Plaza Building, 210 South Michigan Street, South Bend 46601, via hand delivery.



\_\_\_\_\_  
J. Thomas Vetne | 19606-64