In the
Indiana Supreme Court

"F.B.C.", a Pseudonym,
Appellant(s),

v.

MDWISE, Inc., d/b/a MDWISE, MDWISE Network, Inc., MDWISE Marketplace, Inc.,
Appellee(s).

Court of Appeals Case No.
18A-CT-01934

Trial Court Case No.
49D01-1801-CT-1781

Order

This matter has come before the Indiana Supreme Court on a petition to transfer jurisdiction, filed pursuant to Indiana Appellate Rules 56(B) and 57, following the issuance of a decision by the Court of Appeals. The Court has reviewed the decision of the Court of Appeals, and the submitted record on appeal, all briefs filed in the Court of Appeals, and all materials filed in connection with the request to transfer jurisdiction have been made available to the Court for review. Each participating member has had the opportunity to voice that Justice's views on the case in conference with the other Justices, and each participating member of the Court has voted on the petition.

Being duly advised, the Court DENIES the petition to transfer.

Done at Indianapolis, Indiana, on 9/24/2019.

FOR THE COURT

Loretta H. Rush
Chief Justice of Indiana

David, J., Massa, J., and Slaughter, J., vote to deny transfer.
Rush, C.J., dissents from the denial of transfer with separate opinion in which Goff, J., joins.

Rush, Chief Justice, dissenting.

Today, this Court passes up an important opportunity—to clear up uncertainty and declare that Indiana recognizes a claim of public disclosure of private facts. Because our guidance on this issue is necessary, I respectfully dissent from the denial of transfer.

Public disclosure of private facts is a distinct wrong that falls under the broad tort of invasion of privacy. Restatement (Second) of Torts § 652A cmt. b (Am. Law Inst. 1977). According to the Restatement, a person is subject to liability for the sub-tort of public disclosure if the person gives "publicity" to a matter that concerns the private life of another, that would be highly offensive to a reasonable person, and that is not of legitimate public concern. *Id.* § 652D. For purposes of this rule, "publicity" means communication "that reaches, or is sure to reach, the public," but not communication "to a single person or even to a small group of persons." *Id.* § 652D cmt. a.

This Court discussed the Restatement's definition of public disclosure of private facts in *Doe v. Methodist Hospital*, 690 N.E.2d 681 (Ind. 1997) (plurality opinion). There, Doe sued his co-worker for invasion of privacy after the co-worker disclosed to two fellow employees that Doe tested positive for HIV. *Id.* at 683. In a plurality opinion, this Court affirmed summary judgment for Doe's co-worker, concluding that "[t]he facts and the complaint in this particular case do not persuade us to endorse the sub-tort of disclosure." *Id.* at 693.

In a separate opinion, then-Justice Dickson agreed with the result—given that Doe failed to show "publicity"—but disagreed that the sub-tort of public disclosure wasn't cognizable. *Id.* (Dickson, J., concurring in result). Rather, his separate opinion maintained that public disclosure of private facts was already established under Indiana common law; that the state constitution supported recognition of disclosure claims; and that significant policy concerns counseled against abrogating the sub-tort. *Id.* at 693–95.

Fast forward a few years to *Felsher v. University of Evansville*, 755 N.E.2d 589 (Ind. 2001). That case did not involve the sub-tort of public disclosure but, rather, another distinct wrong under the umbrella of invasion of privacy—appropriation of name or likeness. *Id.* at 593. Before analyzing the appropriation claim, this Court briefly brought up *Doe* and characterized that plurality opinion as a "decision not to recognize a branch of the [invasion of privacy] tort involving public disclosure of private facts." *Id.* (citing 690 N.E.2d at 682, 693). *Felsher*'s pronouncement on the sub-tort arguably closed the door to disclosure claims in Indiana.

But less than three months later, this Court cast doubt on *Felsher*'s seemingly decisive statement that the sub-tort of public disclosure was not cognizable. In *Allstate*, this Court said that "[t]he extent to which the tort of invasion of privacy is recognized in Indiana is not yet settled." *Allstate Ins. Co. v. Dana Corp.*, 759 N.E.2d 1049, 1056–57 (Ind. 2001). In making that statement, the Court described *Doe* as a "disagreement whether to recognize a claim for 'public disclosure of private facts.'" *Id.* at 1057 (citing 690 N.E.2d 681). Notably missing from *Allstate*'s invasion-of-privacy discussion was any mention of *Felsher*.

After this trilogy of opinions—*Doe*, *Felsher*, and *Allstate*—courts have reasonably adopted disparate, and sometimes ambivalent, positions on whether the sub-tort of public disclosure of private facts exists in Indiana. *See Robbins v. Trs. of Ind. Univ.*, 45 N.E.3d 1, 7 n.1 (Ind. Ct. App. 2015) (finding "some support" for the view that "invasion of privacy by public disclosure of private facts is not a valid cause of action in Indiana"); *id*. at 13 (Crone, J., concurring in part and concurring in result in part) ("Whether Indiana recognizes this tort is technically an open question, but for all practical purposes the answer is currently no."); *J.H. v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 19 N.E.3d 811, 815–16 (Ind. Ct. App. 2014) (analyzing the merits of the plaintiff's public-disclosure claim and thus implicitly recognizing the claim's cognizability); *Westminster Presbyterian Church of Muncie v. Younghong Cheng*, 992 N.E.2d 859, 868 (Ind. Ct. App. 2013) (maintaining that "public disclosure of private facts is not a recognized cause of action in Indiana"), *trans. denied*; *see also Brown v. Wabash Nat. Corp.*, 293 F. Supp. 2d 903, 905 (N.D. Ind. 2003) ("Even assuming Indiana courts recognize such a claim for public disclosure of

private facts based on the facts presented in this matter, Plaintiff's allegations . . . cannot meet the threshold necessary to state a claim for tort of invasion of privacy based on public disclosure of private facts.").

This recent history of public-disclosure decisions serves as a backdrop to the current controversy, which unsurprisingly generated a split opinion below. *See F.B.C. v. MDwise, Inc.*, 122 N.E.3d 834 (Ind. Ct. App. 2019). Here, a wife asserted a claim for public disclosure of private facts against an insurance company after her husband logged onto the company's web portal and discovered that she had been tested for a number of sexually transmitted diseases. *Id.* at 836. A majority of the panel found the wife's public-disclosure claim precluded by *Doe* and *Felsher*, reasoning that the particular sub-tort "has not yet been recognized in Indiana." *Id.* Judge Bailey dissented, opining that the "ubiquity of digital data" and the resultant ability "for unwanted third parties to obtain—and share—sensitive information" would compel this Court to recognize the public-disclosure claim. *Id.* at 839 (Bailey, J., dissenting). The dissent further opined that this Court would adopt a looser definition of "publicity," so that disclosures not made to the general public—but made to a "particular public" with a special relationship to the plaintiff—could still be actionable. *Id.*

I agree, in part, with Judge Bailey. The sub-tort of public disclosure of private facts is a "valuable source of deterrence and accountability" because of "the growing technological opportunities for invasive scrutiny into others' lives." *Doe*, 690 N.E.2d at 695 (Dickson, J., concurring in result). And as *Doe*'s separate opinion convincingly maintained, the sub-tort is already established in our jurisprudence. *Id.* at 694 (asserting that "[f]or almost half a century, Indiana courts have clearly recognized the common law tort of invasion of privacy, including the unwarranted public disclosure of private matters" and citing cases in support). That being said, I would adhere to the Restatement's narrower definition of "publicity" and not recognize claims of disclosure to a "particular public."

In other words, I would affirm dismissal of F.B.C.'s disclosure, but not for the reason the Court of Appeals majority advances. Rather, I'd hold that although Indiana recognizes a sub-tort of public disclosure of private

facts, F.B.C. failed to allege the requisite "publicity" to allow her disclosure claim to proceed, given that her medical tests were not communicated "to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge," Restatement (Second) of Torts § 652D cmt. a.

In sum, while I would likewise affirm the trial court's dismissal of F.B.C.'s public-disclosure claim, I would grant transfer to dispel any confusion surrounding the sub-tort. The sub-tort of public disclosure of private facts is cognizable, and we should say so.

Goff, J., joins.