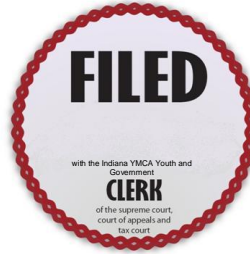


FOR PUBLICATION



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**IN THE
COURT OF APPEALS OF INDIANA YMCA YOUTH AND
GOVERNMENT**

DAN DEVINE; YONTO CHURCH, INC.)	
)	
Appellant-Defendants,)	
)	
vs.)	No. 96A04-1109-PL-999
)	
JOHN O’HARE)	
)	
Appellees-Plaintiff)	

Appeal from the Sippich Circuit Court, No. 96C01-0308-PL-321
The Honorable Roland Steele, Judge

July 27, 2010

Reuttiger, Chief Judge.

John O’Hare instituted this action in the Rockne Circuit Court against Yonto Church, Inc. (the “Church”) and several of its members (collectively, the “Defendants”). O’Hare’s lawsuit complains about a protest the Defendants conducted in Rockne, Indiana, near the funeral of

O'Hare's son Army Corporal James O'Hare, who tragically died in Iraq in October 2007, O'Hare's complaint alleged three state law tort claims: invasion of privacy by intrusion upon seclusion, intentional infliction of emotional distress (IIED) and civil conspiracy. After a trial in October 2009, the jury found the Defendants liable for ten million dollars in damages. We reverse the Circuit Court.

Facts and Procedural History

On October 3, 2007, Army Corporal James O'Hare was killed in Iraq in the line of duty. As James O'Hare had lived in Rockne, Indiana, and graduated from Rockne High School, Holy Cross Roman Catholic Church in Rockne was selected as the site for his funeral, which was scheduled for October 10, 2007. Obituary notices were placed in local newspapers providing notice of the time and location of the funeral.

Defendant Rev. Dan Devine, founded Defendant Yonto Church, Inc. in Yonto, Nebraska, in 1958. Since then, he has been the only pastor of the church. According to the testimony of Defendants' expert, the members of this church practice a "fire and brimstone" fundamentalist religious faith. The church believes that God hates homosexuality and hates and punishes America for its tolerance of homosexuality, particularly in the United States military. Members of the Church have increasingly picketed funerals to assert these beliefs.

Devine testified that members of the Yonto Church learned of Cpl. O'Hare's funeral and issued a news release on October 9, 2007, announcing that members of the Devine family intended to come to Rockne, Indiana, and picket the funeral. On October 10, 2007, Devine and other church members arrived in Rockne to picket Cpl. O'Hare's funeral. None of the Defendants ever met any members of the O'Hare family.

Defendants' rationale was quite simple. They traveled to Cpl. O'Hare's funeral in order to publicize their message of God's hatred of America for its tolerance of homosexuality. In

Plaintiff's eyes, Defendants turned the funeral for his son into a "media circus for their benefit." By notifying police officials in advance, Defendants recognized that there would be a reaction in the community. They carried signs which expressed general messages such as "God Hates the USA," "America is doomed," and "Pope in hell." The signs also carried more specific messages, including: "You're going to hell," "God hates you," and "Thank God for dead soldiers." Devine testified that it was Defendants' "duty" to deliver the message "whether they want to hear it or not." It was undisputed at trial that Defendants complied with local ordinances and police directions with respect to being a certain distance from the church.¹

The Plaintiff's complaint alleged three state law tort claims: intrusion upon seclusion, publicity given to private life, IIED, and civil conspiracy. The Defendants moved for summary judgment on those claims, contending, among other things, that their challenged words "constitute expressions of opinion, which are not actionable." They asserted that their words "are clearly rhetorical, hypothetical, religious, and laced with opinion," and that "it is impossible to prove or disprove these things, particularly given that doctrinal viewpoints drive the opinions."

At trial O'Hare testified, "recount[ing] fond memories of his son . . . and the traumatic news of his passing." In its Post-Trial Opinion, the trial court summarized O'Hare's testimony:

He described the severity of his emotional injury, stating that he is often tearful and angry, and that he becomes so sick to his stomach that he actually physically vomits. He testified that Defendants placed a "bug" in his head, such that he is unable to separate thoughts of his son from the [Defendants'] actions: "there are nights that I just, you know, I try to think of my son at times and every time I think of my son or pass his picture hanging on the wall or see the medals hanging on the wall that he received from the Army, I see those signs." He testified also that "I want so badly

¹ We note that Indiana has had a statute specifically regulating funeral protests since 2006. P.L. 3-2006 § 1. Indiana Code § 35-45-1-3(c) makes disorderly conduct within five hundred feet of a funeral a class D felony if it adversely affects the funeral. The only other scenario in which disorderly conduct brings such a penalty is when it adversely affects airport security or is committed at an airport, I.C. 35-45-1-3(b). Disorderly conduct is otherwise a class B misdemeanor. I.C. 35-45-1-3(a). A federal statute similarly regulates activity near funerals of members of the military and veterans. 18 U.S.C. § 1388. Nevertheless, because Defendants complied with this statute, we do not consider the constitutionality of either of these statutes.

to remember all the good stuff and so far, I remember the good stuff, but it always turns into the bad.”

Plaintiff also testified as to the permanency of the emotional injury. He testified that “I think about the sign [i.e., Thank God for dead soldiers] every day of my life. . . . I see that sign when I lay in bed at nights. I had one chance to bury my son and they took the dignity away from it. I cannot re-bury my son. For the rest of my life, I will remember what they did to me and it has tarnished the memory of my son’s last hour on earth.” He stated also that “somebody could have stabbed me in the arm or in the back and the wound would have healed. But I don’t think this will heal.”

On October 31, 2009, the jury found for O’Hare on the three tort claims. After the circuit court entered judgment on November 5, 2009, the Defendants filed post-trial motions seeking judgment as a matter of law. The trial court denied each of these motions by its Post-Trial Opinion.

In its Post-Trial Opinion of February 4, 2009, the trial court disposed of the Defendants’ various legal challenges. The Post-Trial Opinion explained that this case “involves balancing [the Defendants’ First Amendment rights of religious expression] with the rights of other private citizens to avoid being verbally assaulted by outrageous speech and comment during a time of bereavement.” The court also rejected the Defendants’ post-trial contention that the court “should have held as a matter of law that [the Defendants] were entitled to First Amendment protection.” The court emphasized that it had permitted the jury to decide if the Defendants’ conduct was sufficient to hold them liable on the three Indiana tort claims, and the jury had found the Defendants liable.

On appeal Defendants challenge the jury verdict arguing that insufficient evidence supported it because their protests are an exercise of freedom of expression protected by the U.S. and Indiana constitutions.

Standard of Review

Our standard of review for a sufficiency of the evidence claim is well settled. In reviewing such a claim, we will affirm the conviction unless, considering only the evidence and all reasonable inferences favorable to the judgment, and neither reweighing the evidence nor judging the credibility of the witnesses, we conclude that no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *See Blackman v. State*, 868 N.E.2d 579, 583 (Ind. Ct. App. 2007).

I. The Decision of the Rockne Circuit Court Violates the First Amendment to the United States Constitution.

The Defendants' primary appellate contention is that the judgment contravenes the First Amendment as it fully protects their speech at the Indiana protest. It is well established that tort liability under state law is circumscribed by the First Amendment. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 264–65 (1964). Although the Supreme Court in *New York Times* specifically addressed the common-law tort of defamation, the Court explained that its reasoning did not turn on the precise “form in which state power has been applied.” *Id.* at 265. Accordingly, the Court later applied the First Amendment to other torts not involving reputational damages, *see Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53 (1988) (IIED), and federal courts have applied these controlling principles to other state law torts, *see Food Lion v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 511, 522 (4th Cir.1999) (fraud, breach of duty of loyalty, and trespass). Thus, regardless of the specific tort being employed, the First Amendment applies when a plaintiff seeks damages for reputational, mental, or emotional injury allegedly resulting from the defendant's speech. *See id.* at 523.

In a distinct but related line of decisions, the Court has recognized that there are constitutional limits on the type of speech to which state tort liability may attach. *See Hustler Magazine*, 485 U.S. at 50 (recognizing that certain types of speech are protected regardless of

plaintiff's status as private or public figure). Thus, although there is no categorical constitutional defense for statements of "opinion," the First Amendment will fully protect "statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual." *Milkovich*, 497 U.S. at 20.

In *Milkovich v. Lorain Journal Co.* 497 U.S. 1 (1990), which is a crucial precedent in our disposition of this appeal, the Supreme Court declined to adopt an artificial dichotomy between "opinion" and "fact." *See* 497 U.S. at 19. In *Milkovich*, the Court assessed whether a newspaper enjoyed First Amendment protection for a column that referred to a wrestling coach as a "liar," based on his allegedly deceitful testimony before a state athletics council. 497 U.S. at 4-5, n. 2. The newspaper maintained that the column merely stated its author's opinion and was thus subject to categorical First Amendment protection. *Id.* at 17-18. The Court rejected this contention, ruling instead that the "dispositive question" was "whether a reasonable factfinder could conclude that the statements in the [newspaper] column imply an assertion that [the coach] perjured himself in a judicial proceeding." *Id.* at 21. Because the column's assertions were "susceptible of being proved true or false," the Court determined that the speech was not protected. *Id.*

In light of *Milkovich*, we are obliged to assess how an objective, reasonable reader would understand a challenged statement by focusing on the plain language of the statement and the context and general tenor of its message. We must emphasize the "verifiability of the statement," because a statement not subject to objective verification is not likely to assert actual facts. *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1093 (4th Cir.1993).

There are two subcategories of speech that cannot reasonably be interpreted as stating actual facts about an individual, and that thus constitute speech that is constitutionally protected. First, the First Amendment serves to protect statements on matters of public concern that fail to contain a "provably false factual connotation." *Milkovich*, 497 U.S. at 20. We assess as a matter of law whether challenged speech involves a matter of public concern by examining the content, form, and context of such speech, as revealed by the whole record. *See Dun & Bradstreet, Inc. v.*

Greenmoss Builders, Inc., 472 U.S. 749, 761, (1985). “Speech involves a matter of public concern when it involves an issue of social, political, or other interest to a community.” *Kirby v. City of Elizabeth City, N.C.*, 388 F.3d 440, 446 (4th Cir.2004).

Second, rhetorical statements employing “loose, figurative, or hyperbolic language” are entitled to First Amendment protection to ensure that “public debate will not suffer for lack of ‘imaginative expression’ or the ‘rhetorical hyperbole’ which has traditionally added much to the discourse of our Nation.” *Milkovich*, 497 U.S. at 20–21. The general tenor of rhetorical speech, as well as the use of “loose, figurative, or hyperbolic language” sufficiently negates any impression that the speaker is asserting actual facts. *Id.* at 21.

A good example of a case where the question of whether speech contains protected rhetorical hyperbole is *CACI Premier Tech., Inc. v. Rhodes*, 536 F.3d 280, 294 (4th Cir.2008). CACI was a civilian defense contractor that performed interrogation services for the military at Abu Ghraib prison in Iraq. CACI claimed that it had been defamed by a talk radio host who had made on-air statements blaming CACI for the mistreatment of detainees at the prison and criticizing the use of wartime contractors in general. *See id.* at 288–92. The radio host, for example, had claimed that CACI and other defense contractors employed “[m]ercenaries all over the country, killing people,” and she had characterized CACI as “hired killers.” *CACI*, 536 F.3d at 301. The court awarded judgment to the host, based in part on the determination that her statements were protected by the First Amendment because they “did not state actual facts about CACI.” and most people would understand the statements as “exaggerated rhetoric intended to spark the debate about the wisdom of the use of contractors in Iraq.” *Id.* at 301–02. The court said the host had simply used “loose and hyperbolic terms” to advance her policy argument.

In this proceeding, O’Hare was awarded judgment against the Defendants on three of the tort claims: intrusion upon seclusion, IIED, and civil conspiracy. The verdict in favor of O’Hare can only be sustained if it is consistent with the Defendants’ First Amendment guarantees.

The trial court erred when it utilized an incorrect legal standard in its Post-Trial Opinion. The court only assessed whether O'Hare was a "public figure" under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and whether Cpl. O'Hare's funeral was a "public event." However, the Supreme Court has created a separate line of First Amendment precedent that does not depend upon the public or private status of the speech's target. See *Milkovich*, 497 U.S. at 16. Thus, even if the circuit court concluded that O'Hare and his son were not "public figures," such a conclusion did not dispose of the Defendants' First Amendment arguments. In focusing on the status of the O'Hares and the funeral, and not the nature of the speech itself, the court failed to assess whether the statements could be interpreted as asserting "actual facts" about an individual or contained hyperbole.

The following signs displayed by the Defendants, which are similar in both their message and syntax, can readily be assessed together: "America is Doomed," "God Hates the USA/Thank God for 9/11," "No Gay Soldiers," "Pope in Hell," "Thank God for Dead Soldiers," "Don't Pray for the USA," and "Thank God for IEDs," As a threshold matter, as utterly distasteful as these signs are, they involve matters of public concern, including the issue of homosexuals in the military and the political and moral conduct of the United States and its citizens. Such issues are not subjects of "purely private concern," *Dun & Bradstreet*, 472 U.S. at 759, but rather are issues of social, political, or other interest to the community. For example, a public firestorm erupted in 2001 after two prominent religious figures, Jerry Falwell and Pat Robertson, alleged that the September 11th terrorist attacks represented God's punishment for our country's attitudes regarding homosexuality and abortion.

Additionally, no reasonable reader could interpret any of these signs as asserting actual and objectively verifiable facts about O'Hare or his son. The signs reading "God Hates the USA/Thank God for 9/11" and "Don't Pray for the USA," for example, are not concerned with any individual, but rather with the nation as a whole. Other signs (those referring to "troops," and "dead soldiers") use the plural form, which would lead a reasonable reader to conclude that the speaker is referring to a group rather than an individual. Additional signs are concerned with individuals, such as the Pope, who are entirely distinct from O'Hare and his son, or with groups,

such as priests, to which neither O'Hare nor his son belong. Finally, those signs stating "Thank God for Dead Soldiers" and "Thank God for IEDs" only constitute a reference to O'Hare's son if the reader makes the assumption that their only object is Cpl. O'Hare and not the thousands of other soldiers who have died in Iraq and Afghanistan, often as a result of IEDs.

The statements are protected by the Constitution for two additional reasons: they do not assert provable facts about an individual, and they clearly contain imaginative and hyperbolic rhetoric intended to spark debate about issues with which the Defendants are concerned. Whether "God hates" the United States or a particular group, or whether America is "doomed," cannot be objectively verified. The statement "Thank God," is incapable of objective verification. Many of the signs also consist of offensive and hyperbolic rhetoric designed to spark controversy and debate. By employing God, the strong verb "hate," and graphic references to terrorist attacks, the Defendants used the sort of "loose, figurative, or hyperbolic language" that seriously negates any impression that the speaker is asserting actual facts about an individual. *Milkovich*, 497 U.S. at 21. Accordingly, we are constrained to agree that these signs—"America is Doomed," "God Hates the USA/Thank God for 9/11," "Pope in Hell," "Thank God for Dead Soldiers," "Don't Pray for the USA," and "Thank God for IEDs"—are entitled to First Amendment protection.

II. The Trial Court's Decision Violates Article 1, Section 9 of the Indiana Constitution.

Article 1, Section 9 of the Indiana Constitution provides "[n]o law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible." This Court has never considered whether Article 1, Section 9 of the Indiana Constitution limits the availability of the torts of which O'Hare complains. However, Article 1, Section 9 of the Indiana Constitution has been used to limit the effect of private torts. For example, this Court has held that in the context of a defamation case, if the alleged defamatory statement was made regarding a matter of public concern, then the speech is protected by Article

1, Section 9 of the Indiana Constitution. *Aafco Heating & Air Conditioning Co. v. Nw. Publications, Inc.*, 679, 321 N.E.2d 580, 586 (Ind. Ct. App. 1974).

In the landmark case of *Price v. State*, 622 N.E.2d 954 (Ind. 1993), our Supreme Court held that Article 1, Section 9 provides protections to Indiana citizens of the right of freedom of expression independent of its federal counterpart and that the State may not materially burden political expression, which is a core value under Indiana's Bill of Rights. The Court reversed Price's conviction holding that her loud and profanity-laced complaints about police officers conducting an arrest of a third party and then of Price herself was political expression which the State could not materially burden.

Above, we held that Cpl. O'Hare's funeral was a public event and the matters upon which the Defendants spoke are matters of public concern. For these same reasons, the court's decision, which is a state action, violates Article 1, Section 9's protection of political expression.

Conclusion

Despite the distasteful and repugnant nature of the words being challenged in these proceedings, we are constrained to conclude that the Defendants' signs are constitutionally protected by the United States and Indiana constitutions.

ZAPPALA, J, concurs. CROOK, J., dissents with separate opinion.

**IN THE
COURT OF APPEALS OF INDIANA YMCA YOUTH
AND GOVERNMENT**

DAN DEVINE; YONTO CHURCH, INC.)	
)	
Appellant-Defendants,)	
)	
vs.)	No. 96A04-1109-PL-999
)	
JOHN O’HARE)	
)	
Appellees-Plaintiff)	

CROOK, Judge, dissenting

I respectfully dissent from the judgment of this Court because I conclude that neither the First Amendment of the U.S. Constitution nor Article 1, Section 9 of the Indiana Constitution provide protection to the Defendants.

I. First Amendment

The Supreme Court of the United States has long recognized that “not all speech is of equal First Amendment importance.” *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985). In *Dun & Bradstreet, Inc.*, the Supreme Court held that a private individual could recover damages under a common law defamation claim where the subject of the lawsuit was a matter of private concern. *Id.* at 763. The Supreme Court cited its previous

opinion in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), in which it held that the First Amendment interest in protecting speech must be balanced against a state's interest in protecting its residents from tortious injury. Quite simply, the Supreme Court has recognized that there is not an absolute First Amendment right for any and all speech directed by private individuals against other private individuals.

Recognizing the significance of the Supreme Court's holding that "not all speech is of equal First Amendment importance," *Dun & Bradstreet, Inc.*, 472 U.S. at 758, Defendants argue that the funeral was both a matter of public concern and a public event. They further contend that Cpl. O'Hare became a public figure and his funeral became a public event when his father, John O'Hare, filed a notice of the funeral in the obituary section of a local newspaper and later spoke with reporters about his son. Defendants' theory is that an individual becomes a public figure upon the filing of information in the obituary section of any newspaper. This argument is without merit. The test for public figures was articulated by Justice Powell in *Gertz*:

For the most part, . . . [they] have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

418 U.S. at 345. The evidence in this case was quite clear that John O'Hare did not "invite attention and comment" when he prepared a funeral for his son, but rather he intended for the funeral to be private.

Indeed, the evidence in this case was undisputed that Defendants traveled to the funerals of young men such as Cpl. O'Hare so as to publicize their religious opinions and the alleged participation of homosexuals in the military. While earlier religious demonstrations had received little publicity, the demonstrations by the Yonto Church at the funerals of soldiers generated

greater publicity. Rev. Devine explained the usual *modus operandi* of his church as applied to Cpl. O'Hare's funeral. First, Defendants provided notice to law enforcement personnel in Rockne, Indiana, of their intent to picket at Cpl. O'Hare's funeral. In light of past problems arising from the Yonto Church's demonstrations at military funerals, this notice necessarily resulted in increased police presence and media coverage at Cpl. O'Hare's funeral. Defendants cannot by their own actions transform a private funeral into a public event and then bootstrap their position by arguing that Cpl. O'Hare was a public figure.

By their own actions, Defendants also created an atmosphere of confrontation. This atmosphere was created by signs carrying both a general message as well as signs that could reasonably be interpreted as being directed at the O'Hare family. There were signs expressing general points of view such as "America is doomed" and "God hates America." However, there were also signs stating "Thank God for dead soldiers," "You are going to hell," and "God hates you." While signs expressing general points of view are afforded First Amendment protection, these additional signs, which could be interpreted as being directed at the O'Hare family, they were also found by the jury to constitute tortuous activity. The jury addressed these issues and determined that such comments on signs so outrageous as to inflict severe emotional distress and invade the privacy of a private citizen during a time of bereavement. Pursuant to *Gertz*, the Defendants' statements are not protected by the First Amendment.

II. Article 1, Section 9

While Indiana's Constitution provides for protection of speech when the matter touches upon a matter of public concern, the Indiana Constitution also provides that when a person abuses the right to free speech, that person will be responsible for the consequences of that abuse. The Indiana Supreme Court has long held that "[w]hen the expressions of one person cause harm to another in a way consistent with common law tort, an abuse under § 9 has occurred." *Price v. State*, 622 N.E.2d 954, 964 (Ind. 1993). Accordingly, the Supreme Court has held that even if the speech is protected, a person cannot use that right to inflict a private tort upon another.

In *J. D. v. State*, 859 N.E.2d 341 (Ind. 2007), our Supreme Court held that speech, albeit political, was not entitled to constitutional protection under Article 1, section 9 of the Indiana Constitution where the speech "consisted of persistent loud yelling over and obscuring of [the arresting officer's] attempts to speak and function as a law officer." *Id.* at 344. The Court, distinguishing the facts from those in *Price*, concluded that the speech "clearly amounted to an abuse of the right to free speech" and thus subjected J.D. to accountability under Article 1, section 9. *Id.* Similarly, we recently held in *Al-Awadi v. State*, 901 N.E.2d 81 (Ind. Ct. App. 2009), that an arrestee's "partially political and partially personal" speech about the war in Iraq and consisting of "belligerent, aggressive, loud, and hostile . . . talking very loudly and making gestures with his arms" "is precisely the kind of speech found not to be protected in *J.D.*"

In the instant case, the Defendants were speaking regarding matters of public concern. Normally this speech would be protected. However, because the jury found that the torts committed by the Defendants constituted private torts, an abuse of the Defendants' free speech rights has occurred. Accordingly, the Defendants' speech is not protected by Article 1, Section 9 of the Indiana Constitution.

I therefore dissent.

Resources

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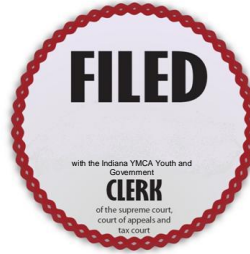
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Case Based On

SCOTUSblog entry on *Snyder v. Phelps* (summary, link to oral argument audio, academic and news coverage, U.S. Supreme Court briefs, 4th Circuit opinion)
<http://www.scotusblog.com/case-files/cases/snyder-v-phelps/>

FOR PUBLICATION



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**IN THE
COURT OF APPEALS OF INDIANA YMCA YOUTH AND
GOVERNMENT**

LEON HART)	
)	
Defendant-Appellant,)	
)	
vs.)	No. 94A04-1209-CR-1359
)	
STATE OF INDIANA)	
)	
Plaintiff-Appellee)	

Appeal from the Fligg Superior Court, No. 94D03-1008-FB-1201
The Honorable Terry Hanratty, Judge

August 30, 2010

Fogarty, Judge.

This case requires us to determine the constitutionality of a novel police procedure which, as far as we can tell, has never been reviewed on appeal by this court or any other. An officer

investigating a suspected drug deal directed appellant Leon Hart from a car, ordered him to raise his hands high overhead, and then discovered a handgun in his pocket when she hoisted up his sagging pants that had dropped to hang around his knees. Hart appeals from his conviction of possession of a firearm by a serious violent felon. We must decide whether the unique wardrobe assist was a search subject to constitutional regulation and, if not, whether it was the kind of seizure-related contact otherwise prohibited by the Fourth Amendment. Because we hold that the officer's tactic was neither a search nor an unreasonable touching during a lawful investigative detention, we affirm.

Facts and Procedural History

Whittacker police officer Donna Anderson and her partner, John Cavanaugh, were on patrol on a November 2008 afternoon in a high-drug-activity area when they noticed a car parked with its engine idling in a Corby's Restaurant parking lot. Officer Donna had seen many drug deals, and several things in addition to the location aroused her suspicion that she was witnessing another one. The driver, Moose Krause and a man later identified as appellant Leon Hart sat in the front seat, and a third man, Dan Dorman, approached and entered the back seat without any food from Corby's Restaurant. No one in the car appeared to be eating. Dorman began to look down at his lap. As the officers walked to the car they saw the rear occupant drop a plastic bag to the floor. They asked the man what the bag contained, and he replied, "Some weed." Hart seemed nervous to Officer Anderson while her partner was questioning the rear occupant.

The officers ordered the men out of the car. Officer Anderson directed Hart to raise his hands above his head. Hart wore loose-fitting jeans, which, when he stood, were hanging down around his knees. Officer Anderson decided to pat-frisk Hart for weapons. But first, she pulled his pants up. As she lifted Hart's pants, she felt a hard object in his front pocket. She asked Hart what it was, and he responded that he did not know. The officer surmised that it was a handgun and removed a .380 caliber pistol from Hart's pocket.

Because Hart had prior violent-crime convictions, the state charged him with possession of a firearm by a serious violent felon. Hart moved the trial court to suppress the gun evidence, arguing that the seizure of the car and its occupants was unsupported by reasonable suspicion and that the officer conducted an unconstitutional frisk when she hoisted his pants. The trial court denied Hart's motion to suppress, reasoning that the officers lawfully approached the car and ordered the occupants out based on their seeing the marijuana, that Officer Anderson reasonably chose not to direct Hart to reach for his own pants out of concerns for her own safety, and that Officer Donna did not search Hart but instead found the gun by accident as she was "help[ing] him get his pants into a decent position."

Hart waived his right to a jury trial and submitted the case to the trial court on stipulated facts, preserving for appeal his challenge to the stop and alleged search. The trial court found Hart guilty of possession of a firearm by a serious violent felon. Hart appeals, challenging the trial court's admission of the gun evidence as a result of an unconstitutional seizure and search.

Standard of Review

Hart first challenged the admission of evidence through a motion to suppress but now appeals following a completed trial. Thus, the issue is appropriately framed as whether the trial court abused its discretion by admitting the evidence at trial. *Washington v. State*, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003). A trial court is afforded broad discretion in ruling on the admissibility of evidence, and we will reverse such a ruling only upon a showing of an abuse of discretion. *Id.* An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court. *Id.* We will not reweigh the evidence, and we consider conflicting evidence in the light most favorable to the trial court's ruling. *Cole v. State*, 878 N.E.2d 882, 885 (Ind. Ct. App. 2007).

Hart argues that the district court failed to vindicate his state and federal constitutional rights by denying his motion to suppress the gun evidence that resulted from the officer's alleged

search. The United States and Indiana constitutions guarantee the right of persons not to be subjected to “unreasonable searches and seizures.” U.S. Const. amend. IV; Ind. Const. art. 1, § 11. Evidence seized in violation of this guarantee generally must be suppressed. *Duran v. State*, 930 N.E.2d 10 (Ind. 2010). Hart correctly argues that in limited circumstances the Supreme Court has interpreted the state constitution to provide greater protection than the Fourth Amendment provides. *Holder v. State*, 847 N.E.2d 930, 940 (Ind. 2006); *Litchfield v. State*, 824 N.E.2d at 358–59; *Mitchell v. State*, 745 N.E.2d 775, 786 (Ind. 2001); see Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 Ind. L.Rev. 575, 577 (1989). But Hart does not contend that this is such a circumstance, and we will analyze his constitutional claims under a single standard.

Hart retreats somewhat from his argument to the trial court, conceding now that the police lawfully approached the parked car and looked inside and that, on observing the bag of marijuana in plain view in the rear passenger compartment, they could also order the three occupants out to search the car. Hart challenges only the police conduct that occurred after he left the car. He argues that police unlawfully seized and pat-searched him without having a reasonable, articulable suspicion that he was involved in criminal activity and that he was armed and dangerous. His arguments do not persuade us.

I. The Seizure

Hart was seized when the officer ordered him from the car and instructed him to raise his hands. A person has been “seized” when, “in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” *In re Welfare of E.D.J.*, 502 N.W.2d 779, 781 (Minn. 1993). A reasonable person would not have believed that he was free to leave after a police officer discovered illegal drugs in his car and ordered him to get out and to raise his hands. So Hart was seized and we must decide whether the seizure was lawful.

To lawfully seize a person temporarily to investigate a crime, a police officer must have a reasonable, articulable suspicion that the person was or will be engaged in criminal activity. *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968). This is not a high standard, and we apply it in view of the totality of the circumstances from an objectively reasonable officer’s perspective. *Shotts v. State*, 925 N.E.2d 719 (Ind. 2010). In doing so, we recognize that trained law enforcement officers may interpret circumstances using inferences and deductions beyond the competence of untrained persons.

One factor courts have considered is whether a reasonable person in the defendant’s position would feel free to leave, *Campos v. State*, 885 N.E.2d 590, 601 (Ind. 2008), but the law is clear that in the context of an investigatory stop a person is, at least temporarily, not free to leave. Established law allows an officer making a traffic stop to detain a person upon reasonable suspicion of criminal activity and to ask questions to determine identity and verify or disprove the officer’s suspicions. *State v. Washington*, 898 N.E.2d 1200, 1204 (citing *Berkemer v. McCarty*, 468 U.S. 420, 439-40, (1984)). A person stopped by police, while “seized” and momentarily not free to go, is ordinarily not considered in custody. *Clarke v. State*, 868 N.E.2d 1114, 1118–19 (Ind. 2007).

Hart argues that the bag of marijuana found in the passenger compartment cannot justify his detention because spotting the drugs would not reasonably lead an officer to suspect that Hart was involved with them. Hart casts the episode with himself as the uninvolved occupant of a car in which someone else’s contraband just happened to be discovered in the back seat. But his characterization misses the bigger scene: police came upon a stopped and idling car in a fast-food restaurant’s parking lot in an area known to them as a place of drug dealing; they observed that the car was occupied by three men having no apparent business with the restaurant, including a man who wandered up to the car and into the back seat; and they watched Hart sitting nervously when the back-seat occupant told the officers that the bag he had tried to hide on the floor contained “some weed.” These circumstances would lead a reasonable officer to suspect that Hart was engaging in a drug deal. The seizure and brief investigative detention that arose

from that suspicion therefore did not violate the Fourth Amendment or Indiana Constitution Article 1, Section 11.

II. The Search

During an investigative detention, an officer may conduct a pat-search if she has a reasonable, articulable suspicion that the suspect might be armed and dangerous. *Terry*, 392 U.S. at 30; *Lawrence v. State*, 375 N.E.2d 208 (Ind. 1978). This pat-search is “a carefully limited search of the outer clothing . . . to discover weapons which might be used” against the officer. *Terry*, 392 U.S. at 30. Hart argues that the officers did not reasonably suspect that he was armed and dangerous and that the pat-search revealing the handgun was therefore illegal.

The trial court found that the contact that revealed the gun was not a search at all. It described the officer’s conduct as “an accidental finding of a gun as she’s trying to help him get his pants into a decent position.” The description fits.

As a result of the lawful seizure and the officer’s specific directions, which effectively prevented Hart from holding his own pants up or raising them, Hart was standing in a public parking lot on a busy Whittacker street with his hands high in the air and his pants drooping at his knees. Even assuming that Hart intended his pants to sag somewhat, the district court aptly construed the knee-level positioning as “extreme.” The record indicates that the officer had decided to conduct a pat-search, but that before beginning she wanted to hoist Hart’s pants. She did not testify about her motive. Perhaps she decided to raise Hart’s pants to afford him a bit of dignity regardless of her planned search. Or perhaps she wanted to avoid the risk of contacting his private parts through his underwear during her pat-search. Either way, we agree with the district court that the officer’s incidental contact with the gun while lifting Hart’s pants on decency grounds was not a search.

A “search” is an intrusion into an area in which a person has a reasonable expectation of privacy. *Terry*, 392 U.S. at 9, 17 n. 15. An intrusion that constitutes a search also tends to reveal the contents of the area. *See State v. Hardy*, 577 N.E.2d 212 (Ind. App. Ct. 1998) (concluding that search occurred when police ordered suspect to open his mouth so they could look for contraband).

Officer Anderson’s adjusting Hart’s pants was not a search. She hoisted his pants presumably to conceal rather than to reveal. Her contact with his pants may have been a precursor to her pat-search, but it was not itself the search. We need not decide whether Officer Anderson would have inevitably discovered the handgun during the eventual pat-frisk or whether the eventual pat-frisk was justified. She had already discovered the gun before she began the pat-frisk, and we hold that her contact with Hart’s clothing during the constitutionally justified investigative stop under these circumstances was not a search requiring additional justification.

We emphasize that the officer’s conduct was objectively reasonable despite its arguably invasive nature. We acknowledge that one might be offended by an officer’s realigning of his pants: it is the sort of thing that one usually prefers to do for himself. But Officer Anderson’s action arose from her legitimate concerns about her own safety and about potential unnecessary embarrassment to Hart. By prohibiting Hart from raising his own pants, she prevented him from accessing the handgun that she reasonably and correctly suspected he possessed. Moreover, by refusing to leave the pants hanging at his knees, she avoided potential claims that she unreasonably humiliated Hart by public exposure or by incidentally groping his inadequately covered crotch during the planned pat-frisk. *See United States v. Ford*, 232 F.Supp.2d 625, 630 (E.D. Va. 2002) (concluding that officer “engaged in a highly invasive search by exposing the defendant’s buttocks on the side of a public highway in broad daylight” and that the search was unreasonable under the Fourth Amendment); *Garcia v. N.Y. State Police Investigator Aguiar*, 138 F.Supp.2d 298, 303–04 (N.D. N.Y. 2001) (analyzing claim of officer’s inappropriate touching of woman’s crotch and breasts during pat-search for reasonableness under the Fourth Amendment). And even if Hart would take no personal offense at being pat-frisked in only his

underwear, we do not interpret the Fourth Amendment as requiring the officer to subject herself unnecessarily to that indignity.

Hart argues that affirming the trial court would encourage officers to trample the privacy of young people who participate in the baggy-pants-fashion trend. The concern is unwarranted. Our holding arises from the unique facts here. Because judicial holdings are limited by their facts, we are confident that our opinion will not be misconstrued to suggest that an officer can freely meddle with a person's clothes to the refrain, "Pants on the ground, pants on the ground" under the guise of providing public assistance.

Hart has not made and the facts would not support the claim that the officer's raising of his pants was a pretext to explore for contraband in his pockets; the officer had no motive to look for justification to search because she had already concluded that a pat-search was justified and she intended to conduct one immediately after Hart's pants were suitably rearranged. Hart also did not raise any credibility challenge in the trial court to the officer's underlying testimony that her quick encounter with the outside of his pants led her immediately to perceive the detail that Hart had "a semiautomatic handgun" in his pocket. *See Minnesota v. Dickerson*, 508 U.S. 366, 375–76 (1993) (stating that the warrantless seizure of contraband is justified when an "officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent"). Our holding rests on the uncontested fact that the officer became immediately aware that Hart possessed a handgun after she inadvertently felt the gun through his pants while realigning them to allay her legitimate safety and decency concerns.

Hart raises other arguments that mistakenly assume that the officer's touching of his pants constituted a search. We do not address these arguments.

Conclusion

Police lawfully detained Hart after reasonably suspecting that he and others were exchanging illegal drugs. The officer reasonably ordered Hart to raise his hands and reasonably decided to adjust his excessively sagging pants. The adjustment did not constitute a search and was not conducted in a manner that raises any constitutional concerns. Therefore, we affirm Hart's conviction.

CASSIDY, J, concurs. MATEUS, J., dissents with separate opinion.

**IN THE
COURT OF APPEALS OF INDIANA YMCA YOUTH
AND GOVERNMENT**

LEON HART)	
)	
Defendant-Appellant,)	
)	
vs.)	No. 96A01-0812-CV-0020
)	
STATE OF INDIANA)	
)	
Plaintiff-Appellee)	

MATEUS, Judge, dissenting

I respectfully dissent from the majority’s conclusion that “hoisting” Hart’s pants was not a search. A warrantless protective search is permissible under the Fourth Amendment, however, adjustments to one’s clothing exceeds the scope of the exception. Thus, the evidence discovered pursuant to the search was improperly admitted.

I. Unconstitutional Seizure and Search

The distinction between a consensual police-citizen encounter requiring no justification and an encounter requiring reasonable and articulable suspicion that the individual is involved in criminal activity is based on whether a seizure has taken place. *Terry v. Ohio*, 392 U.S. 1, 16 (1968). The general Fourth Amendment rule is that a seizure “requires either physical force . . . or, where that is absent, submission to the assertion of authority.” *California v. Hodari D.*, 499 U.S. 621, 626 (1991). Under the Indiana Constitution, a seizure occurs when “a reasonable

person in the defendant's shoes would have concluded that he or she was not free to leave.”
Duran v. State, 930 N.E.2d 10 (Ind. 2010)

The officer testified that after removing the occupants from the vehicle she intended to conduct a pat-search to determine if the occupants had weapons because “a lot of times weapons are involved in narcotics activity.” To that end, after the officer got Hart out of the car, she “had his hands up behind his head and asked him to put his legs together so [she] could pull his pants up.”² This conduct transformed what had been a consensual encounter into a seizure requiring constitutional justification. The officer asserted her authority over Hart and he submitted to that authority: she gave him two directions beyond getting out of the car—hands up behind his head and move his legs together—and he complied with those directions. *See, e.g., United States v. Brown*, 401 F3d 588, 595 (4th Cir. 2005) (“Brown was seized, and his Fourth Amendment rights triggered, at least as early as when he submitted to Officer Lewis’ order by leaning toward and placing his hands on the adjacent car.”). Moreover, no reasonable person in Hart’s position would have concluded that he was free to leave. Hart was seized before the officer put her hands on his pants.

The police, however, did not have reasonable and articulable suspicion that Hart was involved in criminal activity. The officer did not testify to any observations of Hart suggesting he was involved in criminal activity. In the short period of time she observed the occupants of the car—about a minute— she did not notice any furtive movements or anything about his behavior.

The officer’s observation of the rear seat passenger’s possession of a small amount of marijuana, as the trial court noted, “a bag of pot, however small the amount of pot may have been,” did not provide police with a reasonable articulable suspicion that Hart was involved in

² The officer said that when Hart got out of the car, “his pants were—his jeans were down around his knees.” (R at 15.)

criminal activity. The trial court did not make any findings that Hart was involved with the rear passenger's possession of the marijuana.

Mere presence in a vehicle does not provide an inference of association with the contraband by other occupants. *See State v. Slifka*, 256 N.E.2d 90, 91 (Ind. 1977) (passenger's mere presence in motor vehicle did not provide probable cause to believe he constructively possessed marijuana in closed glove compartment); *State v. Eggersgluess*, 483 N.W.2d 94, 97 (Minn. App. 1992) (other vehicle occupants' possession of open bottles did not provide reasonable suspicion that everyone in car was involved in criminal activity); *see also Ybarra v. Illinois*, 444 U.S. 85, 90–92 (1979) (search warrant for bar tender and bar did not permit search of patrons).

Mere presence in a vehicle also does not permit an inference that all occupants are engaged in a joint enterprise. *See Maryland v. Pringle*, 540 U.S. 366, 372 (2003) (evidence indicated occupants were engaged in common enterprise to conceal wrongdoing and there was no information about which of three occupants owned contraband). When evidence links contraband with a particular individual, the inference that another particular person may be the possessor of the contraband may be negated. *See United States v. Di Re*, 332 U.S. 581, 584 (1948) (informant singled out guilty party from many at scene of crime). Here, officers observed only the rear seat passenger possess or do anything with the small amount of marijuana.

There must be an additional basis, independent of an officer's command for a driver to exit a vehicle, before a more serious intrusion is permitted. *See Pennsylvania v. Mimms*, 434 U.S. at 111–12 (holding that the *Terry* test controls when determining the validity of a pat-down search after a driver has been ordered out of a vehicle). In this case, the trial court noted only that Hart's sagging pants as the additional basis for the officer's conduct: the officer would not want Hart "holding onto his pants because it gives him the opportunity to reach for something that could be there" and that the officer "lifted up those pants to presumably get them up to his waist area . . . trying to help him get his pants into a decent position."

Sagging pants, as the trial court had noted, represent a current fashion popular with many young people. As such, they do not represent reasonable and articulable suspicion that the wearer is involved in criminal activity. *See, e.g., State v. Eli L.*, 947 P.2d 162, 166 (N. M. App. 1997) (facts, including sagging pants, did not constitute a reasonable inference that child was involved in criminal activity); *State v. Jones*, 835 P.2d 863, 867 (N. M. App. 1992) (defendant’s style of dress—sweat pants partially sagging down his buttocks—“was not furtive” conduct permitting detention). Even the court failed to articulate that whatever item might have been in the pants—and that Hart might have reached it—constituted a reasonable suspicion of criminal activity. Moreover, on the record it appeared that Hart’ pants stayed above his knees without him holding on to them.

Even if the circumstances, with or without the sagging pants, constituted reasonable and articulable suspicion that Hart was involved in criminal activity, they did not constitute reasonable and articulable suspicion that he was armed and dangerous. Possession of a small amount of marijuana is not the type of offense that warrants an inference that weapons may be involved. *See State v. Eggersglues*, 483 N.W.2d 79 (Minn App. 2002) (possession of open container not the type of infraction where individual would likely be armed and dangerous). The suggestion that any drug “activity” warrants a presumption that weapon may be involved and a pat-search is always appropriate, as expressed by the officer in this case, is wrong. *See Eggersgluess*, 483 N.W.2d at 97 (assumption that weapons might always be present does not amount to cause to pat-search for weapons).

The United States Supreme Court has rejected such blanket exceptions to the constitutional requirement of individualized suspicion. *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997) (rejecting blanket exception to knock and announce requirement for drug cases based on generalizations involving drugs and guns). Similarly, the sagging pants did not constitute reasonable and articulable suspicion that Hart was armed and dangerous. *See e.g., State v. Eli L.*, 947 P.2d 162, 166 (N. M. App. 1997) (facts, including sagging pants, did not constitute a reasonable inference that child was armed and dangerous).

The trial court's comment that the officer "lifted up those pants to presumably get them up to his waist area . . . trying to help him get his pants into a decent position," also failed to provide a constitutional justification for the officer's intrusion. The suggestion that the officer was helping Hart get decent sounds at first blush like the officer was performing a community caretaking function. However, the officer's action here is not even remotely connected with any permissible caretaking role for police. *See Holly v. State*, 918 N.E.2d 323 (Ind. 2009) (warrant requirement exception where pursuing a community-caretaking function to render emergency assistance). There was no evidence of any emergency requiring police action. Moreover, there was not even any evidence that Hart's sagging pants—however low they were—created any indecency whatsoever, much less one requiring police intervention. There was no indication of any nudity or indecency caused by Hart's choice to let his jeans sag or that he wanted any assistance from police.³

For these reasons, the district court erred by denying the motion to suppress. Under the exclusionary rule, evidence recovered during an unlawful search is inadmissible at trial. *Trotter v. State*, 933 N.E.2d 572 (Ind. Ct. App. 2010). The gun seized from Hart must be suppressed. Without that evidence, there is no basis for the charge of possession of a firearm by a serious violent felon. Therefore, Hart's conviction should be reversed.

³ The trial court's position, that police could help return an individual with sagging pants to decency, would permit officers to approach many, many young people because of their fashion choice not because of any public safety or decency issues. The Constitution forbids that broad an interpretation of the exceptions permitting police to intrude upon an individual's privacy. The approach urged by the government would allow a stop and frisk whenever an officer in a high-crime area encounters an individual with a criminal history who wears baggy clothing, including pants so saggy and loose they have to be held up, appears nervous in reaction to seeing the police, but does not try to evade or flee. Finding reasonable suspicion here does not merely recognize that some innocent people may be permissibly stopped, but would cast a much wider net.

Resources

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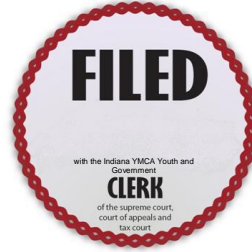
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List attorney names, titles, and addresses here.

**IN THE
COURT OF APPEALS OF INDIANA YMCA YOUTH AND
GOVERNMENT**

JOHNNY LUJACK,)
)
 Plaintiff-Appellant,)
)
 vs.)
)
 ANGELO E. BERTELLI, GIPPER’S BAR AND)
 WINE CLUB, INC, HILLTOPPER COUNTRY)
 CLUB, and THE ESTATE OF BOB GLADIEUX)
)
 Appellees-Defendants

No. 95A05-0209-CT-205

Appeal from the Halfacre Circuit Court, No. 95C01-0307-CT-237
The Honorable Frank Ruettiger, Judge

August 30, 2010

Rock, Judge.

Johnny E. Lujack appeals the trial court’s entries of summary judgment in favor of Angelo E. Bertelli; Gipper’s Bar and Wine Club, Inc. (“Gipper’s”), an Indiana corporation;

Hilltopper Country Club (the “Hilltopper”), a fraternal organization; and the Estate of Bob Gladieux (collectively, the “Defendants”).⁴ We affirm.

Issue

Whether the trial court erred in granting summary judgment to the Defendants.

Facts and Procedural History

The facts most favorable to Lujack as the non-moving party indicate that Gipper’s, a bar, sponsored a golf scramble at the Hilltopper’ golf course on September 1, 2006. Gipper’s enlisted golfers by posting sign-up sheets in the bar. It also provided sign-up sheets for volunteers to serve beverages from golf carts. The forty-five dollar entrance fee covered the costs of green fees, prizes, golf carts, and beverages. The Hilltopper did not sponsor the event but merely supplied the golf carts and beverages, including beer, for the event. Bob Gladieux, Lujack’s grandfather, signed up to drive a beverage cart.

The morning of the scramble, Gladieux invited the then-sixteen-year-old Lujack to ride in a beverage cart with him during the tournament. With his mother’s permission, Lujack agreed to join Gladieux. Upon arriving at the golf course, Gladieux retrieved a beverage cart for his and Lujack’s use and brought it to where Lujack was waiting in front of the clubhouse. The cart had a large cooler in the back for drinks but no roof or windshield. Lujack received no instructions regarding how or where to operate the cart; he was unfamiliar with golf etiquette and had been to a golf course only once. Lujack initially did not assist in loading the cart’s cooler with beverages and did not meet the other two beverage cart operators out on the course during the scramble.

⁴ Lujack’s mother originally filed the complaint on behalf of Lujack, as Lujack’s parent and natural guardian. The trial court subsequently granted the motion to substitute Lujack as the plaintiff after he turned eighteen years old. Lujack, by his mother, originally filed the complaint against Bob Gladieux. Upon his death, the trial court substituted his Estate’s personal representative as a defendant.

Prior to the start of the scramble, Gladieux decided to join one of the teams playing in the scramble as it was short a player. He left Lujack with his sister, Colleen Kipper. Kipper and Lujack drove the beverage cart together briefly until Kipper also decided to play in a foursome. Elza Fox, a Gipper's employee, took Kipper's place in the beverage cart. Lujack drove the cart, and Fox dispensed the beverages to the scramble's participants. Approximately three hours into the tournament, Bertelli, a participant in the scramble, hit a drive on the sixteenth. The ball traveled straight for approximately sixty to seventy yards before "turn[ing] directly left." As Bertelli followed the ball's trajectory, he observed the roof of a golf cart, belonging to another foursome, in the ball's path. Lujack, who was driving the beverage cart on a cart path near the eighteenth hole, did not hear any warning regarding the ball's approach. After traveling more than two hundred feet, the ball struck Lujack in the nose, causing injuries to his nose and facial bones, and placing his prospective modeling career in jeopardy.

On March 7, 2007, Lujack filed a complaint against the Defendants alleging

22. The Defendants failed to exercise reasonable care for the safety of [Lujack] by failing to provide him with a beverage cart that contained a canopy or a windshield to provide [him] with some measure of protection from the risks associated with being struck by a flying golf ball.

23. The Defendants failed to exercise reasonable care for the safety of [Lujack] by failing to provide him with any warnings, any information or any safety instructions prior to sending him onto a golf course that was full of golfers (most of which were drinking alcohol) to dispense beverages.

24. The Defendants negligently failed to exercise reasonable care for the safety of [Lujack] while he was on the premises of the [Hilltopper'] golf course.

25. As a direct and proximate result of the Defendants' negligent conduct, [Lujack] suffered painful and permanent injuries and incurred significant medical and dental expenses. His nose was broken and his left orbital bone was cracked leaving both disfigured. As a result, he will incur significant plastic surgery expenses in the future.

26. As a direct and proximate result of the Defendants' negligent conduct, [Lujack] suffered mental and emotional pain and anguish.

27. As a direct and proximate result of the Defendants' negligent conduct, [Lujack]'s ability to function as a whole person has been impaired. The quality of [his] life has been significantly diminished as a result of the Defendants' negligent conduct.

The Hilltopper, Bertelli, and Gladieux filed motions for summary judgment on December 4, 2008. Gipper's filed a motion for summary judgment on January 10, 2009. Lujack filed a brief in opposition to the Defendants' motions for summary judgment on January 31, 2009. The trial court held a hearing on the motions for summary judgment on February 12, 2009. During the hearing, Lujack raised the issue of Gladieux' purported negligent supervision. On March 5, 2009, the trial court entered its orders, granting the Defendants' motions for summary judgment.

Decision

Lujack asserts that the trial court erred in granting summary judgment to the Defendants. Specifically, he contends that 1) the Defendants owed him a duty; and there exists genuine issues of material fact regarding whether 2) Bertelli's conduct was reckless; 3) Gladieux, Gipper's, and the Hilltopper were negligent in their supervision of him; and 4) the Hilltopper and Gipper's breached a duty of reasonable care owed to him under the theory of premises liability.

When reviewing a grant or denial of summary judgment, our well-settled standard of review is the same as it was for the trial court: whether there is a genuine issue of material fact, and whether the moving party is entitled to judgment as a matter of law. Summary judgment should be granted only if the evidence sanctioned by Indiana Trial Rule 56(C) shows that there is no genuine issue of material fact and the moving party deserves judgment as a matter of law. Ind. T.R. 56(C). "A genuine issue of material fact exists where facts concerning an issue which would dispose of the litigation are in dispute or where the undisputed facts are capable of supporting conflicting inferences on such an issue." *Scott v. Bodor, Inc.*, 571 N.E.2d 313, 318 (Ind. Ct. App.

1991). All evidence must be construed in favor of the opposing party, and all doubts as to the existence of a material issue must be resolved against the moving party. However, once the movant has carried his initial burden of going forward under Trial Rule 56(C), the nonmovant must come forward with sufficient evidence demonstrating the existence of genuine factual issues, which should be resolved at trial. *Otto v. Park Garden Assocs.*, 612 N.E.2d 135, 138 (Ind.Ct.App. 1993), *trans. denied*. If the nonmovant fails to meet his burden, and the law is with the movant, summary judgment should be granted. *Id.*

“Additionally, when material facts are not in dispute, our review is limited to determining whether the trial court correctly applied the law to the undisputed facts.” *Mills v. Berrios*, 851 N.E.2d 1066, 1069 (Ind. Ct. App. 2006). We review a question of law de novo. “Finally, if the trial court’s grant of summary judgment can be sustained on any theory or basis in the record, we will affirm.” *Beck v. City of Evansville*, 842 N.E.2d 856, 860 (Ind. Ct. App. 2006), *trans. denied*.

1. Duty

Lujack asserts that the trial court erred in granting summary judgment in favor of the Defendants. He argues that the Defendants owed him a duty to prevent him from being injured and were negligent in breaching that duty.

To recover on a theory of negligence, a plaintiff must establish three elements: (1) defendant’s duty to conform his conduct to a standard of care arising from his relationship with the plaintiff, (2) a failure of the defendant to conform his conduct to that standard of care, and (3) an injury to the plaintiff proximately caused by the breach. Whether the defendant must conform his conduct to a certain standard for the plaintiff’s benefit is a question of law for the court to decide. Courts will generally find a duty where reasonable persons would recognize and agree that it exists. This analysis involves a balancing of three factors: (1) the relationship between the parties, (2) the reasonable foreseeability of harm to the person injured, and (3) public policy concerns.

Estate of Heck ex rel. Heck v. Stoffer, 786 N.E.2d 265, 268 (Ind. 2003), *reh'g denied*. “Generally, whether a duty exists is a question of law for the court to decide, although sometimes the existence of a duty depends upon underlying facts that require resolution by a trier of fact.” *Parsons v. Arrowhead Golf, Inc.*, 874 N.E.2d 993, 996 (Ind.Ct.App.2007)).

This court had consistently held that “there is no duty from one participant in a sports activity to another to prevent injury resulting from an inherent risk of the sport.” *Bowman ex rel. Bowman v. McNary*, 853 N.E.2d 984, 990 (Ind. Ct. App. 2006); *see also Geiersbach v. Frieje*, 807 N.E.2d 114 (Ind. Ct. App. 2004), *trans. denied*; *Gyuriak v. Millice*, 775 N.E.2d 391 (Ind.Ct.App. 2002), *trans. denied*; *Mark v. Moser*, 746 N.E.2d 410 (Ind.Ct.App. 2001). In *Geiersbach*, a panel of this court extended “participant” to include “any person who is part of the sporting event or practice involved.” 807 N.E.2d at 120. “By participant,” the *Geiersbach* court included “players, coaches, and players who are sitting on the bench during play.” *Id.* Furthermore, in *Parsons*, we held that an owner of a golf course did not owe a duty to a golfer, where the golfer was “a voluntary participant in the sporting activity of golf,” and the golfer’s injury “was an inherent risk of the game of golf.” 874 N.E.2d at 997.

a. Participant. Here, Lujack maintains that he was not a participant in the golf scramble because “he was not playing; he was not watching the event; he was not signed up on a team; nor was he doing anything related to the activity of golf.” Thus, he argues that the Defendants owed him a duty to prevent his injury. We disagree.

Lujack’s presence on the golf course was due to the fact there was a golf scramble; he had agreed to drive or ride in a beverage cart provided for the golf scramble; and he performed this function and assisted in providing beverages to players in the golf scramble. If not for the golf scramble, Lujack would not have been on the golf course the day of the incident. Although not a player himself, he clearly was “part of the sporting event . . . involved,” and we hereby expand the language in *Geiersbach* to include sporting event volunteers such as Lujack. *Geiersbach*, 807 N.E.2d at 120. We therefore find that Lujack was a participant in the golf scramble.

b. Inherent risks. Lujack, however, also seems to argue that he could not have consented to the inherent risks of golf as “he knew nothing about golf and could not appreciate any risk involved with being near a golf course.” We find this argument unavailing. We have said,

Those participating in the event or practice should be precluded from recovering for injuries received resulting from dangers or conduct inherent in the game unless they prove that the conduct was reckless or the injury intentional. . . . Such a danger is inherent in the game and the participant should not be able to recover from the player, team, or stadium without proving recklessness or that the injury was somehow intentional.

Geiersbach, 807 N.E.2d at 120.

Even if we were to assume that Lujack arrived at the golf course utterly ignorant of the game, the undisputed facts show that Lujack had been participating in the golf scramble event for approximately three hours prior to being struck by the golf ball. Over this extended time period, he had been delivering beverages to foursomes during play. We find that this supports an inference that Lujack was aware of the inherent risks of golf; namely, that it involves players hitting golf balls long distances and that some, if not many, of these balls invariably fail to land where intended.⁵ See, e.g., *Beckett v. Clinton Prairie Sch. Corp.*, 504 N.E.2d 552, 555 (Ind.1987) (holding that while actual knowledge is a prerequisite element of incurred risk, the “plaintiff’s actual knowledge may be proven by circumstantial evidence notwithstanding the absence of a plaintiff’s admission of such knowledge”).

We also note that Lujack makes much ado regarding not receiving instructions on how or where to operate the beverage cart. We, however, question the import of this argument inasmuch it is undisputed that he was struck while operating the beverage cart on a cart path. As to not being told to drive “toward the golfers who are approaching a hole” and “the importance of keeping his eye on the group of golfers who were on the tee box hitting,” the undisputed facts are

⁵ Lujack does not assert that being struck with a golf ball while driving a golf cart is not an inherent risk of golf. Nonetheless, we note that “[c]onsideration of whether the injury-causing event was an inherent or reasonably foreseeable part of the game is a correct evaluation, under an objective standard as a question of law for courts to decide.” *Parsons*, 874 N.E.2d at 998. We believe that being struck by an errant golf ball while operating a golf cart on a golf course’s cart path is an inherent risk of the game of golf.

that he was at the eighteenth hole when struck by a golf ball hit from the sixteenth hole. As to not being instructed “to duck or cover up if he saw or heard a golfer or group of golfers yell fore,” we fail to see how this is relevant as Lujack admits that he did not hear anyone yell, “fore.”

Given Lujack’s status as a participant in the golf scramble, with its inherent risks, we conclude that the Defendants did not owe him a duty. He is therefore precluded from recovering from the Defendants without proving recklessness or that his injury was intentional.

2. Recklessness.

Lujack asserts that the trial court erred in granting summary judgment in favor of Bertelli. Specifically, he contends that there is a material issue of fact as to whether Bertelli’s conduct rose to the level of recklessness, given the conflicting testimony regarding whether he yelled, “fore” after hitting his ball from the sixteenth hole.⁶

[P]recluding liability for negligent conduct but allowing recovery for reckless or more serious conduct in the context of sporting activities “will avoid judicial review of the kind of risk-laden conduct that is inherent in sports and generally considered to be part of the game, while at the same time imposing liability for acts that are clearly unreasonable and beyond the realm of fair play.”

Bowman, 853 N.E.2d at 994 (quoting *Mark v. Moser*, 746 N.E.2d 410, 422 (Ind. Ct. App. 2001)). The conduct, however, “must be so reckless as to be totally outside the range of ordinary activity involved in the sport.” *Id.*

In the context of an event, such as a golf scramble or game,

recklessness requires that a participant in a sporting activity be (1) conscious of his or her misconduct; (2) motivated by indifference

⁶ “If a player plays a ball in a direction where there is a danger of hitting someone, he should immediately shout a warning. The traditional word of warning in such a situation is ‘fore.’” [http:// www. usga. org/ etiquette/ tips/ Golf- Etiquette- 101/](http://www.usga.org/etiquette/tips/Golf-Etiquette-101/) (last visited Nov. 30, 2009).

for the safety of a co-participant or co-participants; and (3) know that his or her conduct subjects a co-participant or co-participants to a probability of injury. A mistake in judgment is not sufficient to support a finding of recklessness. Rather, there must be a conscious indifference to the consequences of one's actions.

Id. at 995.

At the time of the incident, Lujack was operating a cart on the cart path near the eighteenth hole. Bertelli was at the sixteenth hole's tee box. He hit the ball, which initially traveled straight for approximately sixty to seventy yards. Apparently, Bertelli hooked the ball, causing it to shift direction to the left. After traveling over two hundred feet, the golf ball struck Lujack. At no time did Bertelli see Lujack or his cart, and he was not in the line of play.

Given the definition of recklessness, even assuming that Bertelli did not yell "fore" after hitting an errant golf ball, we cannot say that there are genuine issues of material fact precluding summary judgment. There is no indication that Bertelli acted with "conscious indifference to the consequences of [his] actions." *Id.* At most, Bertelli's failure to audibly warn other participants potentially in the line of his errant ball is a mistake in judgment, which is insufficient to support a finding of recklessness. *See id.* at 996 n.7 (finding that acting in violation of golf's standards of etiquette does not per se establish reckless or intentional conduct). This is particularly so given that Lujack was not "within range in [Bertelli]'s own fairway." *See Gyuriak*, 775 N.E.2d at 396 (finding no recklessness, where a golfer accidentally shanked his ball, causing it to strike another golfer, who was "not within the appropriate and anticipated range of the first player's ball"). Accordingly, we conclude that, as a matter of law, Bertelli's conduct was not reckless; therefore, we find no error in granting summary judgment in his favor.⁷

⁷ Lujack does not assert that Gladieux, Gipper's, or the Hilltopper were reckless or intentionally caused his injury.

3. Negligent Supervision

Lujack asserts that the trial court erred in granting summary judgment on the issue of negligent supervision. He argues that “Gladieux, Gipper’s and [the] Hilltopper all had a duty of reasonable care as to [her] because her care had been entrusted in them.”⁸

[T]here is a well-recognized duty in tort law that persons entrusted with children have a duty to supervise their charges. The duty is to exercise ordinary care on behalf of the child in custody. The duty exists whether or not the supervising party has agreed to watch over the child for some form of compensation. However, the caretaker is not an insurer of the safety of the child and has no duty to foresee and guard against every possible hazard.

Davis v. LeCuyer, 849 N.E.2d 750, 757 (Ind. Ct. App. 2006) (internal citations omitted), *trans. denied*. The duty to supervise children in one’s charge exists because children’s “characteristics make it likely that they may do somewhat unreasonable things[.]” *Johnson v. Pettigrew*, 595 N.E.2d 747, 752 (Ind. Ct. App. 1992), *trans. denied*.

Although the existence of duty is a matter of law for the courts to decide, a breach of duty is usually a matter left to the trier of fact. Only where the facts are undisputed and lead to but a single inference or conclusion may the court as a matter of law determine whether a breach of duty has occurred.

King v. Northeast Security, Inc., 790 N.E.2d 474, 484 (Ind. 2003) (internal citations omitted), *reh’g denied*.

In *Johnson*, thirteen-year-old Johnson went to the Pettigrews’ farm to visit with their son Joel. The Pettigrews asked Johnson, Joel, and Joel’s cousin to burn some debris. At some point,

⁸ Gipper’s and Gladieux assert that Lujack has waived this issue for failure to raise the claim in her memorandum in opposition to the Defendants’ motions for summary judgment. Generally, “matters not designated as genuine issues of material fact cannot be relied upon on appeal.” *Poulard v. Lauth*, 793 N.E.2d 1120, 1123 (Ind. Ct. App. 2003). Any waiver notwithstanding, we choose to address this issue on the merits

the Pettigrews left the farm to run some errands, leaving Joel's eighteen-year-old brother, Jason, and their hired hand, Derrick, in charge of the younger boys.

At first, the younger boys continued to burn the debris as directed, but they soon tired of the routine and decided to "mess around" with the fire. The boys took a lighted shop rag on a stick and started another fire out of sight of the tool shed, fueling it with boxes, wood and other debris. Then, with Chuck acting as a lookout to ensure that Jason and Derrick would not see, they filled a plastic jug partially full of gasoline which they obtained from a tank used for farm purposes. The boys then laid the jug on its side near the fire and took turns stomping on it, propelling the gasoline into the fire and causing small explosions. When Jeff took his turn to stomp on the jug, gasoline splattered onto his leg and he caught fire. Though the boys were able to put the fire out, Jeff sustained second- and third-degree burns to his legs.

595 N.E.2d at 749.

The Johnsons sued the Pettigrews, alleging negligence. The Johnsons subsequently appealed from the trial court's granting of summary judgment in favor of the Pettigrews. This Court reversed, finding "genuine issues of fact remained as to whether the Pettigrews were negligent for their failure to properly supervise" Johnson, where the record revealed that "the Pettigrews, who *assumed the supervision* of Jeff Johnson, left the three boys in the custody of their employee and their son, who were instructed to change the tires on a truck in addition to watching over the boys as they burned debris." *Id.* at 753 (emphasis added).

In *Davis*, sixteen-year-old Benton went to the home of his friend, Doug, and Doug's mother and step-father, the Stones. Doug's mother gave the boys permission to take the Stones' jet skis out on Geist Reservoir. Doug's stepfather observed the boys putting the jet skis in the water. Neither adult instructed Benton on how to operate a jet ski, "but he did not consider such instruction necessary" as he had operated jet skis in the past; had a driver's license; and had completed a boating safety course. 849 N.E.2d at 751. At some point, Doug and Benton started spraying each other with water by accelerating and sharply turning the jet skis. When Benton

made a turn directly in Doug's path, Doug's jet ski collided with Benton's jet ski, causing a serious injury to Benton.

Benton's parents filed a complaint against the Stones, asserting that they negligently instructed and supervised both Doug and Benton on the use and operation of the jet skis. The trial court denied the Stones' motion for summary judgment. Finding the Stones' "in loco parentis argument unpersuasive," this Court held that issues of material fact remained regarding the Stones' supervision of Benton.

In both *Johnson* and *Davis*, the child's parent entrusted him to another's care and supervision, or someone assumed the supervision of the child. Here, there is no evidence that Lujack had been entrusted to the care, or was in the custody, of either Gipper's or the Hilltopper. There is also no evidence that Gipper's or the Hilltopper assumed the supervision of Lujack; as a matter of fact, there is no evidence that the Hilltopper even knew that Lujack was on the golf course. Rather, Lujack's mother left him in the care and supervision of Gladieux. Gladieux then left him in the care and custody of his sister.

There was no relationship between Lujack and the Hilltopper or Gipper's that would give rise to a duty under a negligent entrustment theory. Accordingly, we find no error in granting summary judgment to Gipper's and the Hilltopper on Lujack's claim of negligent entrustment. As to Gladieux, the facts reveal that he left him in the care of his sister, an experienced golfer. Furthermore, at the time she was struck, Lujack was operating the beverage cart on a designated cart path. Even if, as Lujack suggests, Gladieux had "checked on" him "throughout the course of the day," there is no evidence that this would have prevented his injury. There is also no evidence that adequate instructions would have prevented Lujack's injuries given that, at the time of being struck, he was on a designated cart path and not in the line of play. To the contrary, according to the deposition of the Hilltopper' golf professional, Lujack was exactly where he, in his professional opinion, would have recommended him to be—namely, at the eighteenth hole—in order to best avoid being struck by golf balls being hit from other holes. Lujack has failed to designate any evidence to rebut his professional opinion.

Under these facts, we find, as a matter of law, that Gladieux did not breach his duty to exercise ordinary care on behalf of Lujack, where neither he nor anyone on the golf course was engaged, or likely to engage, in “unreasonable” activities or conduct. See *Johnson*, 595 N.E.2d at 753. To hold otherwise would impose an unreasonable duty upon Gladieux to insure Lujack’s safety and “guard against every possible hazard.” *Davis*, 849 N.E.2d at 757. Thus, we conclude that the trial court properly granted Gladieux summary judgment on Lujack’s claim of negligent entrustment.

4. Premises Liability

Lujack also asserts that there is a genuine issue of material fact as to whether the Hilltopper and Gipper’s breached a duty of care owed to him under the theory of premises liability. Citing to *Hayden v. Univ. of Notre Dame*, 716 N.E.2d 603 (Ind. Ct. App. 1999), *trans. denied*, he contends that “the trial court should have looked to the totality of the circumstances and should have determined that questions exist for jury determination.”

In *Hayden*, William and Letitia Hayden were attending a football game on the Notre Dame campus. They sat in their assigned seats, which were located in one of the end zones, behind the goalpost. During the game, a football kicked toward the goal landed in the stands, near the Haydens’ seats. Several people attempted to retrieve the football; one person struck Letitia, knocking her down. The Haydens brought suit against Notre Dame for failing to exercise care to protect Letitia. Notre Dame moved for summary judgment, arguing that it did not have a legal duty to protect Letitia from the intentional criminal acts of an unknown third person.

On appeal, this Court found the only element at issue to be whether Notre Dame owed Letitia a duty under the circumstances. It therefore applied the totality of the circumstances test, which “requires landowners to take reasonable precautions to prevent foreseeable criminal actions against invitees.” *Hayden*, 716 N.E.2d at 605 (quoting *Delta Tau Delta v. Johnson*, 712 N.E.2d 968, 973 (Ind. 1999)). Under this test, “a court considers all of the circumstances

surrounding an event, including the nature, condition, and location of the land, as well as prior similar incidents, to determine whether a criminal act was foreseeable.” *Id.* at 605–06 (quoting *Delta Tau Delta*, 712 N.E.2d at 972).

Applying the totality of the circumstances test, the *Hayden* court found that the totality of the circumstances established that Notre Dame “should have foreseen that injury would likely result from the actions of a third party in lunging for the football after it landed in the seating area.” *Id.* at 606. Specifically, “[t]here was evidence that there were many prior incidents of people being jostled or injured by efforts of fans to retrieve the ball.” *Id.* Thus, Notre Dame owed Letitia a duty to protect her from such injury.

Here, Lujack does not assert that a third party’s criminal act caused his injury; that the act was foreseeable, or that there had been similar prior incidents. We therefore find no error in finding that the Hilltopper and Gipper’s did not have a duty to protect him from injury due to him being struck by an errant golf ball while he operated a beverage cart.

Finding no issues of material fact and that the Defendants are entitled to summary judgment as a matter of law, we conclude that the trial court properly granted summary judgment in favor of the Defendants. Affirmed.

COWLINGS, J., concurs, FORTUNE, J., concurs in part and dissents in part with separate opinion.

**IN THE
COURT OF APPEALS OF INDIANA YMCA YOUTH
AND GOVERNMENT**

JOHNNY LUJACK,)

Plaintiff-Appellant,)

vs.)

ANGELO E. BERTELLI, GIPPER’S BAR AND)
WINE CLUB, INC, HILLTOPPER COUNTRY)
CLUB, and THE ESTATE OF BOB GLADIEUX)

No. 95A05-0209-CT-205

Appellees-Defendants

FORTUNE, Judge, dissenting

Hmmm. After being abandoned by his uncle and his sister, in whose care he had been entrusted, a sixteen-year-old boy, without training or experience in golf course safety or etiquette, is injured at a golf outing sponsored by a bar, while he is driving a beverage cart loaded with beer dispensed by one of the bar’s employees. Surely, there is a duty here someplace.

Unlike my colleagues, I do not think this case hinges on the issue of duty. Rather, I think the duty issues can be easily and quickly resolved, and that this case does not turn upon a determination of duty, but whether the defendants breached the duties that they clearly owed to the plaintiff and whether any such breach was the proximate cause of the plaintiff’s injuries. In *Webb v. Jarvis*, 575 N.E.2d 992, 995 (Ind. 1991), our Supreme Court set out the decisional framework by which our courts determine the issue of duty in a negligence action and provided that courts shall look to the relationship between the parties, the foreseeability of the harm, and the public policy. Here is how I analyze the duty issues in the present case:

1. The Hilltopper Club

The Hilltopper Club was the owner of the premises upon which the golf outing was held and the owner of the beverage cart in which the plaintiff was injured. The Hilltopper Club was in the business of making its golf course and golf carts available for outings such as the one sponsored by Gipper's Bar. It derived a financial return from doing so. Johnny Lujack was upon the Hilltopper Club property and in the beverage cart because of the golf outing from which the club was receiving a financial return. As such, the relationship between the club and Lujack was that of business and business invitee and clearly weighs in favor of finding a duty of due care. Similarly, the club provided the golf and beverage carts as part of its business operation. Doing so also weighs in favor of finding a duty owed by the club. Secondly, it is clearly foreseeable that people upon a golf course may be injured from time to time by golf balls. Similarly, it is foreseeable that persons may be injured riding or driving golf carts if they fail to understand the risks of the game or the reasonable precautions to be taken when driving a golf cart. Finally, those in the business of operating golf courses for profit should take all reasonable steps to prevent an unreasonable risk of harm to those people who come upon the course. They are also in the best place to spread the risk of such injuries through liability insurance. Thus, public policy favors the imposition of such a duty.

2. Gipper's Bar

Gipper's organized and sponsored the tournament as part of its business and derived a financial benefit from the outing. It provided the beer for the beverage cart. It was also the employer of Elza Fox, whom it put in charge of the beverage cart in which Lujack was injured and in whose care Lujack was entrusted by Kipper, who had assumed such responsibility from Gladieux. Gipper's was the entity that allowed Lujack to drive the cart without instruction. Lujack acted as an unpaid agent of Gipper's, under the control and supervision of Fox. Thus, the relationship weighs in favor of the imposition of a duty. The foreseeability and public policy considerations are the same as above and also weigh in favor of a duty.

3. The Estate of Bob Gladieux

Bob Gladieux was Lujack's uncle. He was the one to whom Lujack's mother entrusted his care, the person whom Lujack agreed to accompany, and the person who represented that he would be driving the beverage cart. Thus, the relationship factor weighs in favor of the imposition of a duty. The foreseeability issue is again the same as above. Regarding the public policy issue, I believe it strongly weighs in favor of finding a duty on the part of a uncle to whom care of a minor is being entrusted in a setting in which alcoholic beverages are being served. Moreover, even in the absence of a legal duty, there is a question of material fact whether Gladieux assumed such a duty of reasonable care for Lujack's safety.

4. Bob Bertelli

Bob Bertelli was the participant in the golf outing who struck the errant shot that struck Lujack. Bertelli had no relationship with Lujack and did not derive a financial benefit from either the outing or Lujack's presence. Nothing in the designated materials discloses a special relationship between Bertelli and Lujack or shows that either foreseeability of the harm or public policy considerations are different *vis-à-vis* Lujack than any golfer who was present on the course. Thus, I concur with my colleagues that summary judgment was properly entered for Bertelli.

As I analyze this case, the Hilltopper Club, Gipper's and Gladieux all owed a duty of reasonable care to Lujack. The dispositive questions are not those of duty, but whether any such duty was breached and whether any such breach was a proximate cause of the plaintiff's injuries. Breach of duty and proximate cause are both issues of fact to be resolved by the trier of fact. Indeed, as we have often said, summary judgment is rarely appropriate in a negligence action and is not appropriate here. It may well be determined that the Hilltopper Club, Gipper's Bar, and Bob Gladieux did not breach any duty or that such breach was not a proximate cause of Lujack's injuries. That is not for us to determine.

In addition to analyzing the duty issues differently than my colleagues, I reach a very different result on the question of whether Lujack was a participant in the golf scramble. I do so along the following line of reasoning: Lujack was a minor under his mother's care and control. His mother agreed only that her son could attend the golf outing with his uncle in whose care he was entrusted. Had Lujack been riding in the beverage cart with his uncle when he was struck with the errant ball, I might well agree with my colleagues that he was a participant in the outing because his mother consented to the inherent risks of golf to which the uncle exposed him. But that is not the case we have. Lujack's mother did not agree that her son could attend the outing without his uncle's supervision or could drive the beverage cart without instruction, in the company of an employee of Gipper's Bar whom he did not know. I do not believe that *Geiersbach v. Frieje*, 807 N.E.2d 114 (Ind. Ct. App. 2004), should be expanded to include the facts of this case.

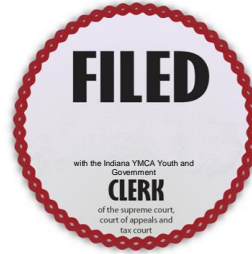
To me, there may be several levels of participation in a sporting event, and they should not all be treated the same. Although sporting events pose inherent risks, the risks are different for those at different levels of participation. Thus, a batter playing in a baseball game may well be said to have assumed the risk of getting hit with a wild pitch, and a shortstop may assume the risk of being spiked by a runner sliding into second base. A fan watching the game from the stands, however, would not have assumed such risks, but may have assumed the risk of being hit by a foul ball that goes into the stands. Lujack was not playing golf at the Hilltopper Club when he was injured and should not be said to have assumed the risks inherent to playing golf.

I would reverse the summary judgment in favor of the Hilltopper Club, Gipper's Bar and the Estate of Bob Gladieux and remand for further proceedings, and I respectfully dissent from the opinion of my colleagues holding that none of these entities owed a duty of due care to Johnny Lujack. I therefore dissent.

Resources

- Delta Tau Delta v. Johnson*, 712 N.E.2d 968, 973 (Ind. 1999),
<http://www.law.indiana.edu/instruction/dongjerd/tortsvault/deltataudelta.pdf>
- Webb v. Jarvis*, 575 N.E.2d 992 (Ind. 1991),
http://www.leagle.com/xmlResult.aspx?xmlDoc=19911567575NE2d992_11515.xml&docbase=CSLWAR2-1986-2006
- Parsons v. Arrowhead Golf, Inc.*, 874 N.E.2d 993 (Ind. Ct. App. 2007),
<http://www.in.gov/judiciary/opinions/pdf/08210702mgr.pdf>
- Bowman ex rel. Bowman v. McNary*, 853 N.E.2d 984 (Ind. Ct. App. 2006),
<http://www.in.gov/judiciary/opinions/pdf/08310602mpb.pdf>
- Davis v. LeCuyer*, 849 N.E.2d 750 (Ind. Ct. App. 2006),
<http://www.in.gov/judiciary/opinions/pdf/06260610pdm.pdf>
- Geiersbach v. Frieje*, 807 N.E.2d 114 (Ind. Ct. App. 2004), <http://caselaw.findlaw.com/in-court-of-appeals/1229663.html>
- King v. Northeast Security, Inc.*, 790 N.E.2d 474 (Ind. 2003), <http://caselaw.findlaw.com/in-supreme-court/1053248.html>
- Estate of Heck ex rel. Heck v. Stoffer*, 786 N.E.2d 265 (Ind. 2003),
<http://caselaw.findlaw.com/in-supreme-court/1479927.html>
- Gyuriak v. Millice*, 775 N.E.2d 391 (Ind. Ct. App. 2002),
<http://www.in.gov/judiciary/opinions/previous/archive/09240201.lmb.html>
- Mark v. Moser*, 746 N.E.2d 410 (Ind. Ct. App. 2001),
<http://www.in.gov/judiciary/opinions/previous/archive/04190103.jgb.html>
- Hayden v. Univ. of Notre Dame*, 716 N.E.2d 603 (Ind. Ct. App. 1999),
<http://caselaw.findlaw.com/in-court-of-appeals/1309715.html>
- Opinion based on** *Pfenning v. Lineman, et al*, No. 27A02-0905-CV-444 (Ind. Ct. App. Feb. 12, 2010) <http://indiana.gov/judiciary/opinions/pdf/02121001cld.pdf>;
<http://mycourts.in.gov/arguments/default.aspx?view=detail&id=1069>
- Stan Jastrzebski, September 13, 2010, Indiana Supreme Court Hears Golf Course Suit at IU Law School, *Indiana Public Media*, <http://indianapublicmedia.org/news/indiana-supreme-court-hears-golf-suit-iu-law-school/>; <http://www.youtube.com/watch?v=WqkYHdTppGs>

FOR PUBLICATION



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**IN THE
COURT OF APPEALS OF INDIANA YMCA YOUTH AND
GOVERNMENT**

DENNIS ROBERT WALINSKI EX REL. BOB)
WALISKIS AND SHERRY WALISNKI,)

Appellants-Plaintiffs,)

vs.)

PAHLA SCHOOL DISTRICT)

Appellee-Defendant.)

No. 93A05-0110-PL-5

Appeal from the Bullock Superior Court, No. 93D01-0109-PL-10
The Honorable John Lattner, Judge.

August 3, 2010

CASSIDY, Judge.

This appeal presents a challenge to Dennis Robert Walinski’s (known as “D-Bob”) suspension from Pahla Middle School (the “School”) after he created from his home computer a

FacePage.com Internet profile featuring his principal, Richard Payne. The profile stated Payne's name, and included his photograph from the website of Pahla School District (the "District"), as well as profanity-laced statements insinuating that he was a sex addict and a pedophile. On appeal, D-Bob and his parents assert that the Superior Court erred in granting summary judgment in favor of the District, arguing that the District violated D-Bob's First Amendment and Article I, § 9 free speech rights by punishing him for creating the profile. We believe school authorities could reasonably have forecasted a substantial disruption of, or material interference with the school as a result of the FacePage profile, as defined by *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). Therefore, we conclude that the District did not violate D-Bob's First Amendment free speech rights by disciplining him for creating the profile. We therefore affirm.

Facts and Procedural History

In spring 2008, D-Bob was a fourteen-year-old eighth grader at Pahla Middle School. He was an honor roll student and had faced discipline at school only in the form of two or three dress code violations. On Sunday, April 4, 2008, D-Bob and his friend Eric Penick created a fictitious profile on FacePage.com from D-Bob's house using a computer belonging to D-Bob's parents. The profile's direct URL was <http://www.facebook.com/kidsrockmybed>. Although D-Bob and Penick were at their respective houses, the two boys communicated over an instant-messaging service, and they took turns adding to the profile from their separate locations. The profile featured Payne's photograph, which the students copied and pasted from the District's website. The profile identified Payne by name, school, and location. The profile described Payne as a married bisexual forty-year-old man, a Virgo, and a "[p]roud parent" who lived in Indiana with his wife and child. His "Interests" section read as follows:

General detention. being a tight *ss. riding the paynetrain.⁹
spending time with my child (who looks like a gorilla).
baseball.my golden pen. f**king in my office. hitting on students
and their parents. Music i love all kinds. favorite is techno.

Television almost anything. i mainly watch-the playboy channel on
directv. OH YEAH B**CH!

Heroes myself. ofcourse.

(App. at 38 (all text and formatting as in original).) Another section, entitled “About me,” stated:

HELLO CHILDREN

yes. it’s your oh so wonderful, hairy, expressionless,
sex addict, ***hole, put on this world with a small d**k

PRINCIPAL

I have come to facepage so i can pervert the minds of other
principal’s to be just like me. I know, I know, you’re all
thrilled

Another reason I came to face space is because-I am
keeping an eye on you students
(who i care for so much)

For those who want to be my friend, and aren’t in my school
I love children, sex (any kind), dogs, long walks on the
beach, tv, being a d**k head, and last but not least my
darling wife who looks like a man (who satisfies my needs)

MY PAYNETRAIN

so please, feel free to add me, message me whatever

(*Id.* (all text and formatting as in original).) D-Bob testified before the trial court at a preliminary injunction hearing that he created this profile because he was “mad” at Payne due to the way he treated him during his dress code violation, stating that he believed Payne handled the situation inappropriately and yelled at him unnecessarily and that the profile was simply a joke between him and his friends. He stated that he included in the profile things he had heard other students say about Payne. At his later deposition, D-Bob testified that he and Penick created the profile thinking “it would be comical” because “it’s outrageous,” and not really for any other reason.

⁹ This appears to be a reference to Payne’s wife, Rhonda Payne, a guidance counselor at the Middle School. Also, next to Payne’s picture on the profile is a quote that reads as follows: “paynetrain- it’s a slow ride but you’ll get there eventually.” (App. at 38.)

D-Bob and Penick initially set the FacePage profile as “public.” At school on Monday, April 5, 2008, the day after the profile was created, numerous friends at the School approached D-Bob to talk about the profile, generally saying they found it funny. D-Bob made the profile “private” after school that evening, so it could be viewed only by those people whom he and Penick invited to be “Payne’s” online “friends.” The two then granted “friend” status to approximately twenty-two other students. Because the School computers block access to FacePage, students could have viewed the profile only from an off-campus location.

On the morning of Tuesday, April 6, 2008, a student, Deangelo, informed Payne of the profile and told him it contained disturbing comments about him. Payne asked Deangelo to try to find the profile’s creator. He then unsuccessfully attempted to find the profile from his office computer, which did not block access to FacePage. By Tuesday afternoon, Deangelo told Payne that D-Bob had created the profile. Payne asked Deangelo to bring him a printout of the FacePage profile, which Deangelo did the next morning. Payne apparently was then able to open and view the profile directly from the FacePage website, despite the students having made it private. Payne informed Superintendent Wobkenbe, and they reviewed the profile. They concluded it violated the District’s Acceptable Use Policy because it violated copyright laws in misappropriating Payne’s photograph from the District’s website without permission.

Payne next showed the profile to two guidance counselors, Rhonda Payne (his wife) and John Likovich. By the end of Wednesday, Payne sought to discipline the students responsible for the profile’s creation. Payne testified that he did not believe the profile launched accusations against him, but rather that it was an imposter profile, purporting to be created by him. When D-Bob returned to school on Thursday, April 8, 2008, Payne called him and Penick to his office to meet with him and Likovich. Although D-Bob initially denied creating the profile, he ultimately admitted his role. Payne met with D-Bob and his mother, Sherry Walinski, and showed her the profile. He informed them that he was punishing D-Bob and Penick with a ten-day suspension.

The District argued that the profile disrupted school because (1) two teachers, Ron Dushney and Paul Hornung, had to quiet their classes while students talked about the profile; (2)

one guidance counselor had to proctor a test so another administrator could sit in on the meetings between Payne, D-Bob, and Penick; and (3) two students decorated D-Bob and Penick's lockers to welcome them back upon their return to school following the suspension, and students congregated in the hallway at that time. Specifically, Dushney testified that on Thursday, April 18, 2008, when Payne called D-Bob and Penick into his office, a group of six or seven students disrupted his second period eighth-grade Algebra class by talking about the profile and the boys' suspensions during their unstructured classroom work time and by continuing to talk after he told them several times to stop. After some effort by Dushney, the talking stopped; the entire incident lasted five or six minutes. Dushney also reported that he heard general "rumblings" that week indicating that students were discussing the profile, but he did not yet fully understand the situation when he overheard the comments, and could not give any specific details about these rumblings. Hornung testified that during his History class, girls approached him after the lesson was finished to tell him about the profile. They mentioned that they were concerned about some specific comments in the profile regarding Payne and his family. Additionally, Likovich was scheduled to administer a makeup test when Payne met with D-Bob, Penick, and their mothers. He had to ask Mrs. Payne to supervise the testing for twenty-five to thirty minutes, requiring Mrs. Payne to cancel some counseling appointments. The affected students proceeded to their normal classes instead, and rescheduled these counseling meetings with her.

Upon D-Bob and Penick's return from suspension, some students decorated the boys' lockers to welcome them back and congratulate them. Payne said these "created quite a buzz and a stir in the eighth grade hallway with about twenty to thirty students in a circle that had to be broken up by teachers." As a result, he "severely reprimanded" the students who decorated the lockers and called their parents to inform them. He did not reprimand the students who congregated in the hall. Finally, Payne testified that he noticed a severe deterioration in discipline in the School, especially among the eighth graders, following the creation of the profile, his corresponding discipline of D-Bob and Penick, and D-Bob and the Walinskis' filing of this lawsuit. He attributed this to a new culture of students rallying against the administration. Payne also had stress-related health problems as a result of the profile and this litigation.

D-Bob and his parents filed this 42 U.S.C. § 1983 action and a claim under the Indiana Constitution against the District. They argued that the suspension violated D-Bob's First Amendment and Article I, § 9 free speech rights. Both parties moved for summary judgment. The trial court denied summary judgment as to D-Bob and the Walinskis, but granted it as to the District on December 7, 2009. D-Bob and his parents appealed.

Standard of Review

In reviewing the trial court's grant of summary judgment, we apply the same standard as the trial court: Summary judgment should be granted "if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the [District] is entitled to a judgment as a matter of law." Ind. Trial Rule 56(c). "The movant bears the burden of establishing the propriety of summary judgment, and all facts and inferences to be drawn therefrom are viewed in a light most favorable to the non-movant" which, here, is D-Bob. *Ellerbusch v. Myers*, 683 N.E.2d 1352, 1354 (Ind. Ct. App. 1997).

II. Free Speech Protection

We begin with a brief overview of the four Supreme Court cases that provide the applicable body of law for determining when school administrators can restrict student speech. We also note the Court has not yet spoken on the relatively new area of student Internet speech. The Court has noted that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506. Nevertheless, "the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Id.* at 507.

In *Tinker*, school officials learned of students' plans to wear black armbands in objection to the Vietnam War. *Id.* at 504. In response, the officials adopted a policy that any student wearing an armband to school would be asked to remove it and, if he refused, he would be suspended until he returned without the armband. *Id.* The Court stated that wearing the armbands was "closely akin to 'pure speech'" entitled to First Amendment protection, *id.* at 505–06, and noted that this action espoused a political opinion, *id.* at 510–11. In rejecting disruption as justification for the policy, the Court explained that "[c]ertainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained." *Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)). The Court then found that the record did not contain any facts that indicated the wearing of the armbands "might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, [that] no disturbances or disorders on the school premises in fact occurred," *id.* at 514, and the case did "not concern speech or action that intrudes upon the work of the schools or the rights of other students," *id.* at 508–09. It therefore held that the policy violated the students' First Amendment free speech rights. *Id.* at 514.

Since *Tinker*, the Supreme Court has carved out a number of narrow categories of speech that schools may restrict even without the threat of substantial disruption. First, the Court created an exception in a case in which a high school student was punished for delivering a speech full of "pervasive sexual innuendo" in front of approximately fellow high school students at a school assembly while nominating another student for a student government office. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 677–78 (1986). The Court noted that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *Id.* at 682. It stated that "[t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech . . . would undermine the school's basic educational mission." *Id.* at 685. It then held that, even without engaging in a substantial disruption analysis, "it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education." *Id.* at 685–86.

The Supreme Court further limited the application of the First Amendment in the context of student speech in a case involving a principal's decision to withhold two pages of a high school student-run newspaper from publication. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 262 (1988). The Court recognized that schools “are entitled to exercise greater control” over speech that appears to be school-sponsored and held that the *Tinker* substantial disruption standard does not apply in such a scenario. *Id.* at 270–73. Thus, school officials “do not offend the First Amendment by exercising editorial control over . . . student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.” *Id.* at 273.

Finally, the Supreme Court recently explored whether a principal violated a student's First Amendment rights in forcing him to take down a fourteen-foot banner, unfurled at a school-sanctioned and school-supervised event that read “BONG HiTS 4 JESUS.” *Morse v. Frederick*, 551 U.S. 393, 396–97 (2007). The Court found that the principal reasonably believed the banner was advocating the use of illegal drugs despite its admittedly unclear language, noted schools' important interest in deterring illegal drug use by schoolchildren, and held that “a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use.” *Id.* at 400–03, 407–10.

Student Speech

D-Bob argues initially that the First Amendment protects his speech, even if it was lewd and offensive pursuant to *Fraser*, because it occurred entirely outside the School. The First Amendment generally protects lewd, offensive, and vulgar speech outside the school context. *See Cohen v. California*, 403 U.S. 15, 16 (1971). The trial court characterized the profile as “lewd and vulgar,” a finding D-Bob does not dispute, and we agree fully with this characterization. D-Bob argues, however, that the court erred in concluding that Payne was free to discipline him for its creation because the profile was lewd and vulgar and had an effect on campus. We decline today to decide whether a school official may discipline a student for his

lewd, vulgar, or offensive off-campus speech that has an effect on-campus because we conclude that the profile at issue, though created off-campus, falls within the realm of student speech subject to regulation under *Tinker*.

Substantial Disruption

Under *Tinker*, we must determine whether D-Bob’s speech created a significant threat of substantial disruption in the School. *Tinker* states that

conduct by the student, in class or out of it [while still under school control], which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

393 U.S. at 513. This disruption must be substantial. *Id.* at 508. School officials may not limit student speech solely on account of a “mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint,” but they need not wait until a substantial disruption actually occurs if they can “demonstrate any facts which might reasonably have led [them] to forecast substantial disruption of or material interference with school activities.” *Id.* at 509, 514. Nevertheless, we balance this exception based on substantial disruption or invasion of the rights of others against the protected nature of off-campus student speech. *See Morse*, 551 U.S. at 405 (“Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected.”); *Fraser*, 478 U.S. at 688 (Brennan, J., concurring) (“If respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate . . .”).

Application of Law to the Facts of the Instant Case

The District advances, and the trial court focused on, specific examples of actual disruption that occurred as a result of the profile. These minor inconveniences associated with the profile may have resulted in some disruption, but certainly did not rise to a substantial one. It is also difficult to separate the effects that the profile itself had on the school from the effects attributable to Payne's investigation of the profile and subsequent punishment of D-Bob and Penick. The District, however, also argues that, given the profile's immediate impact on the School, absent Payne's quick corrective actions to curb its effect, the profile's potential to cause a substantial disruption of the school was reasonably foreseeable. It is apparent that the underlying cause for Payne's concern about the profile was its particularly disturbing content, not a petty desire to stifle speech critical of him, and we proceed with our analysis with this in mind. Therefore, we are sufficiently persuaded that the profile presented a reasonable possibility of a future disruption, which was preempted by Payne's quick actions. We are especially concerned about the profile's blatant allusions to Payne engaging in sexual misconduct.

The boys embarrassed, belittled, and possibly defamed Payne. They created the profile not as a personal, private, or anonymous expression of frustration or anger, but as a public means of humiliating Payne before those who knew him in the context of his role as School principal. Undoubtedly, students have made fun of or made distasteful jokes about school officials, free from the consequences of school punishment, either out of earshot or outside the school context since the advent of our modern educational system. Due to the technological advances of the Internet, however, D-Bob and Penick created a profile that could be, and in fact was, viewed by at least twenty-two members of the School community within a matter of days. *Cf. Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 617–18 (5th Cir. 2004) (holding that a violent drawing concealed in a student's nightstand for two years, and only inadvertently taken to school by the student's brother, removed the speech from the realm of *Tinker* because it was not created on campus or directed at campus). Students discussed the profile in school and undoubtedly talked about it out of school as well. It is also reasonable to infer that some students initiated

conversation about or shared the profile with their parents, or that parents overheard their children discussing the profile.

It seems just as likely that students and parents inevitably would have begun to question Payne's demeanor and conduct at school, the nature of his personal interests, and his character and fitness to occupy a position of trust with adolescent children, on account of the profile's contents. Accordingly, D-Bob's argument for a strict application of *Tinker*, limited to the physical boundaries of school campuses, is unavailing. Instead, we hold that off-campus speech that causes or reasonably threatens to cause a substantial disruption of or material interference with a school need not satisfy any geographical technicality to be regulated pursuant to *Tinker*.

The dissent argues that the "profile was so outrageous that no one could have taken it seriously, and no one did" and therefore it was not reasonable for the school district to foresee a significant disruption. We disagree. As the FacePage page spread to concerned parents who may have had little interaction with Payne, some would have believed the principal was unfit to care for their children. The disruption that would have resulted from the meetings necessary to alleviate these parents' concerns and the strong possibility that some parents would choose to keep their children away from Payne and the school until they could be assured he was not a threat likens this case to case where a significant likelihood of a substantial disruption was found. We conclude, based on the profile's nature and its threat of substantial disruption of the School, that the District did not offend D-Bob's's First Amendment free speech rights by punishing him for creating the profile.

III. Article 1, Section 9 Claim

D-Bob also brings a claim under Article I, Section 9 of the Indiana Constitution which states: "No law shall be passed, restraining the free interchange of thought or opinion, or restricting the right to speak, write, or print freely, on any subject whatever; but for the abuse if that right every persons shall be responsible." Ind. Const, art 1, § 1. Unless the speech is

political, we review the State's determination that the right to free speech has been abused for rationality. *Madden v. State*, 786 N.E.2d 1152, 1156 (Ind. Ct. App. 2003). If the speech is political, the State cannot punish speech if doing so would "impose a material burden on a core constitutional value." *Price v. State*, 622 N.E.2d 954, 960 (Ind. 1993).

D-Bob argues that *A.B. v. State*, 863 N.E.2d 1212 (Ind. Ct. App. 2007), prevents the school for punishing him for his FacePage posting because his post was political speech. In *A.B.*, a student created a fake MySpace profile for his principal. A.B. posted several derogatory remarks on the principal's fake MySpace page. Among the derogatory remarks were protests concerning the school's policy on piercings. *Id.* at 1214. The policy was created and enforced by the principal to whom the comments were directed. *Id.* at 1218. This court found that the speech was political commentary on the school's policy and reversed A.B.'s delinquency adjudication.

We find that the facts in this case are distinguishable from the facts in *A.B.* Nothing in D-Bob's FacePage profile is even remotely akin to political speech; therefore, we do not reach the *Price* material burden test. D-Rob's speech was harassment pure and simple. Because the profile caused a disruption to the learning environment and could have caused great harm to Payne's professional reputation, we hold that it was rational for the District to find that D-Rob had abused his section 9 rights.

Conclusion

We hold that *Tinker* applies to student speech, whether on- or off-campus, that causes or threatens to cause a substantial disruption of or material interference with school or invades the rights of other members of the school community. Because the profile alluded to sexually inappropriate behavior and illegal conduct, it threatened to substantially disrupt the School. We conclude that the profile was not protected by the U.S. or Indiana constitutions. For these reasons, we affirm.

THOMPSON, J, concurs. MATEUS, J., dissents with separate opinion.

**IN THE
COURT OF APPEALS OF INDIANA YMCA YOUTH
AND GOVERNMENT**

DENNIS ROBERT WALINSKI EX REL. BOB)
WALISKI AND SHERRY WALISNKI,)

Appellant-Plaintiff Below,)

vs.)

PAHLA SCHOOL DISTRICT)

Appellee-Defendant Below.)

No. 93A05-0110-PL-5

REUTTIGER, Chief Judge, dissenting

D-Bob was suspended from school for speech that took place outside the schoolhouse gates, during nonschool hours, and that indisputably caused no substantial disruption in school. Because I believe that the School District's actions violated D-Bob's free speech rights, I respectfully dissent from the majority's conclusion to the contrary. I would reverse the trial court's grant of summary judgment in favor of the District and denial of D-Bob's motion for summary judgment on his free speech claim.

I.

D-Bob, an Honor Roll eighth-grade student, was punished for creating a fake profile of his middle school principal, Richard Payne, which he and his friend, Penick, posted on FacePage. The profile contained shockingly crude content and vulgar language, ranging from

nonsense and juvenile humor to profanity and personal attacks aimed at the principal and his family. Particularly disturbing were the profile's references to pedophilia. However, the record indicates that the profile was so outrageous that no one took its content seriously. Notably, the District's computers block access to FacePage, so no Pahla student was ever able to view the profile from school. The only printout of the profile that was ever brought to school was one brought at Payne's request. In an attempt to justify punishment, the District asserts that the profile disrupted school, but it only points to three instances of alleged "disruptions." Dushney acknowledged that the talking in class was not a unique occurrence, and admitted that he had to tell his students to stop talking about once a week. Similarly, Hornung stated that the incident he described did not disrupt class because the students spoke to her during the portion of the class when students were permitted to work independently. The substitution of a guidance counselor to proctor a test also did not cause any major inconveniences in school because the meetings only lasted about twenty-five to thirty minutes, and the student counseling appointments that had to be cancelled during that time were all rescheduled.

The majority notes that when D-Bob and Penick returned from suspension, some students decorated the boys' lockers to welcome them back to school, which created "a buzz and a stir" in the hallway. Payne punished the two students who decorated the lockers. The majority also emphasizes Payne's testimony that he "noticed a severe deterioration in discipline in the School . . . following the creation of the profile, his corresponding discipline of D-Bob and Penick, and . . . this lawsuit," and that "he had stress-related health problems as a result of the profile and this litigation." I believe that this testimony is irrelevant to determining the level of disruption that the profile caused because these did not arise out of the creation of the profile itself but were the direct result of the District's response and the ensuing litigation.

Unlawful Suspension

I believe that the Superior Court correctly concluded that the District's suspension of D-Bob was unlawful under *Tinker*. There is no dispute that the profile did not cause a substantial

disruption in the school. Yet, the majority attempts to overcome this considerable hurdle by adopting the standard put forth by several federal courts of appeal, which allow schools to meet the *Tinker* test by showing that a substantial disruption was “reasonably foreseeable.” (citing *Doninger v. Niehoff*, 527 F.3d 41, 51 (2d Cir. 2008)); *Lowery v. Euverard*, 497 F.3d 584, 591–92, 596 (6th Cir. 2007); *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001). To justify the District’s punishment of D-Bob under this test is contrary to *Tinker* itself. Additionally, the cases on which the majority relies are distinguishable from the instant case. These facts do not support the conclusion that a forecast of substantial disruption was reasonable.

In *Tinker* the Supreme Court held that “our independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands [to protest the Vietnam War] would substantially interfere with the work of the school or impinge upon the rights of other students.” 393 U.S. at 509. Given this, it is important to consider the *Tinker* record. *Tinker* took place in December 1965, the year that U.S. troops were deployed to Vietnam as part of Operation Rolling Thunder. Justice Black’s dissent noted that “members of this Court, like all other citizens, know, without being told, that the disputes over the wisdom of the Vietnam war have disrupted and divided this country as few other issues ever have.” *Id.* at 524 (Black, J., dissenting). This was the record, yet the *Tinker* majority held that “the record does not demonstrate *any facts* which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities,” and thus that the school violated the students’ First Amendment rights. *Id.* at 514 (emphasis added).

Now I turn to our record. D-Bob created the profile as a joke, and he took steps to make it “private” so that access was limited to him and his friends. The profile, though indisputably vulgar, was so juvenile and nonsensical that no reasonable person could take its content seriously, and the record clearly demonstrates that no one did. Also, the District’s computers block access to FacePage, so no Pahla student was ever able to view the profile from school. And, the only printout of the profile that was ever brought to school was one that was brought at Payne’s express request. Thus, beyond general rumblings, a few minutes of talking in class, and some officials rearranging their schedules to assist Payne in dealing with the profile, no

disruptions occurred. In comparing our record to the record in *Tinker*, I do not believe that this Court can apply *Tinker*'s holding to justify the District's actions in this case. As my colleagues acknowledge, an "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker*, 393 U.S. at 508. If *Tinker*'s black armbands—an ostentatious reminder of the highly emotional and controversial subject of the Vietnam War—could not "reasonably have led school authorities to forecast substantial disruption of or material interference with school activities," *id.* at 514, neither can D-Bob's profile, despite the unfortunate humiliation it caused for Payne. Moreover, I believe that a comparison of our record to that of *Tinker* demonstrates that to apply the foreseeability standard adopted by our sister courts of appeals in a principled manner, courts need to define "foreseeability" in a way that is harmonious with *Tinker*. That is, courts must determine when an "undifferentiated fear or apprehension of disturbance" transforms into a reasonable forecast that a substantial disruption or material interference will occur. *See, e.g., Doninger*, 527 F.3d at 50–51; *Lowery*, 497 F.3d at 596; *LaVine*, 257 F.3d at 984, 989–90 (both holding that such disturbance occurred).

The majority likens this case to the above cases by stating that the profile was accusatory and capable of "arous[ing] suspicions among the school community about [Payne's] character" because of the "profile's blatant allusions to Payne engaging in sexual misconduct." The record simply does not support this contention. The profile was so outrageous that no one could have taken it seriously, and no one did. It was clearly not reasonably foreseeable that D-Bob's speech would create a substantial disruption or material interference in school. Thus, this case is distinguishable from the student speech at issue in *Doninger*, *Lowery*, and *LaVine*. Moreover, unlike the students in those cases, D-Bob did not intend the speech to reach the school—in fact, he took specific steps to make the profile "private" so that only his friends could access it.

Finally, I am particularly troubled by the majority's holding "that the potential impact of the profile's language alone is enough to satisfy the *Tinker* substantial disruption test." This statement is disconcerting because it appears to be more concerned with the level of vulgarity of D-Bob's speech, than its potential impact. *See id.* ("We simply cannot agree that a principal may

not regulate student speech rising to *this level of vulgarity . . .*” (emphasis added)).¹⁰ In light of the facts of this case—and, specifically, the fact that the profile was so outrageous that no one could have taken it seriously—to focus on the vulgarity of the language is to allow the *Fraser* exception to swallow the *Tinker* rule. The facts simply do not support the conclusion that the District could have reasonably forecasted a substantial disruption of or material interference with the school as a result of D-Bob’s profile. Under *Tinker*, therefore, the District violated D-Bob’s free speech rights when it suspended him for creating the profile.

***Fraser* Exception**

Because *Tinker* does not justify the District’s suspension of D-Bob, the only way for the punishment to pass constitutional muster is if we accept that D-Bob’s speech can be prohibited under the *Fraser* exception to *Tinker*. The majority notes that the exceptions to *Tinker* are “narrow,” and yet it “decline[s] to decide whether a school official may discipline a student for her lewd, vulgar, or offensive off-campus speech that has an effect on-campus.” I submit that this question has already been decided by the Supreme Court—*Fraser* does not apply to off-campus speech. In *Morse*, Chief Justice Roberts, writing for the majority, emphasized that “[h]ad Fraser delivered the same speech in a public forum outside the school context, it would have been protected.” 551 U.S. at 405. The Supreme Court in *Cohen* held that a state may not make a “single four-letter expletive a criminal offense.” 403 U.S. at 26. Accordingly, Chief Justice Roberts’s reliance on the *Cohen* decision reaffirms that a student’s free speech rights outside the school context are coextensive with the rights of an adult, such as Cohen. Thus, under the Supreme Court’s precedent, the *Fraser* exception to *Tinker* does not apply here. In other words, *Fraser*’s “lewdness” standard cannot be extended to justify a school’s punishment of D-Bob for use of profane language outside the school, during nonschool hours. To apply the *Fraser*

¹⁰ To draw distinctions based on “levels of vulgarity” is generally antithetical to the First Amendment. See *Cohen v. California*, 403 U.S. 15, 25 (1971) (noting “one man’s vulgarity is another’s lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style largely to the individual.”); see also *Morse*, 551 U.S. at 409 (declining to extend *Fraser* to cover all speech deemed “offensive” and noting that “much political and religious speech might be perceived as offensive to some.”).

standard to justify the District's punishment of D-Bob's speech is to allow school officials to punish any speech by a student that takes place anywhere, at any time, as long as it is about the school or a school official, is brought to the a school official's attention, and is deemed "offensive" by the prevailing authority. Under this standard, two students can be punished for using a vulgar remark to speak about their teacher at a private party, if another student overhears them, reports it to the school authorities, and the school authorities find the remark "offensive."

II.

I concur in the result on the Indiana Constitutional issue, but not in the reasoning. D-Bob's speech was political. Political speech is "popular comment on public concerns." *Price v. State*, 622 N.E.2d 954, 961 (Ind. 1999). I can think of few matters of greater public concern than a middle school principal engaged in pedophilia and other deviant sexual practices. Although, the content of the FacePageposting was false, its falsity does not remove it from the realm of political speech. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279 n.19 (1964). The next question is whether the state imposed a material burden on D-Bob's speech. *Price*, 622 N.E.2d at 960. The State may punish political speech that inflicts "particularized harm analogous to tortuous injury on readily identifiable private interests." *Shoultz v. State*, 735 N.E.2d 818, 825 (Ind. Ct. App. 2000). The harm must be more than "mere annoyance or inconvenience." *Id.* at 826. Here, Payne was not actually harmed. He suffered some stress, but his reputation was not seriously impugned. According to the record, no one took the accusations of pedophilia seriously. The Superintendent dismissed the accusations. Had parents discovered the profile and been concerned about Payne, this would be a different case. But that did not happen, and Payne's reputation remains intact.

I would hold D-Bob is entitled to relief on his state claim because his speech is political and did not cause sufficient harm to Payne to constitute abuse of the right. For the foregoing reasons, I would reverse the Superior Court's judgment and grant summary judgment to D-Bob on his First Amendment and section 9 free speech claims.

Resources

Based On: *J.S. ex rel. Snyder v. Blue Mountain School Dist.*, 593 F.3d 286 (3d Cir. 2010),
http://scholar.google.com/scholar_case?case=10183595770418300374&q

<http://www.firstamendmentcenter.org/news.aspx?id=20586>

<http://www.citmedialaw.org/threats/blue-mountain-school-district-v-js>

[http://www.firstamendmentcenter.org/faclibrary/case.aspx?case=Tinker v Des Moines Independent Community School Dist](http://www.firstamendmentcenter.org/faclibrary/case.aspx?case=Tinker_v_Des_Moines_Independent_Community_School_District)

[http://www.firstamendmentcenter.org/faclibrary/case.aspx?case=Bethel School Dist No 403 v Fraser](http://www.firstamendmentcenter.org/faclibrary/case.aspx?case=Bethel_School_District_No_403_v_Fraser)

[http://www.firstamendmentcenter.org/faclibrary/case.aspx?case=Morse et al v Frederick](http://www.firstamendmentcenter.org/faclibrary/case.aspx?case=Morse_et_al_v_Frederick)