AN INCOMPLETE "PASS": WHY THE ILLINOIS SUPREME COURT DROPPED THE BALL IN *JANE DOE-3 V. MCLEAN CNTY. UNIT DIST. NO. 5 BD. OF DIRS.*, 973 N.E.2D 880 (ILL. 2012)

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I. INTRODUCTION

As of January 23, 2012, there were 747,408 registered sex offenders in the United States.[1] This number is up 23.2% from 2006 and continues to be a growing problem.[2] Those convicted of sexual offenses risk spending the rest of their lives in prison.[3] Jon A. White is one of these offenders.[4] White is currently set to spend the next eighteen years of his life at the Pontiac Correctional Center in Pontiac, Illinois.[5] As a society, it is easy to hold White accountable for his actions, but how do we punish those who contributed indirectly to the abuse of his victims? The Illinois Abused and Neglected Child Reporting Abuse Act (ANCRA) provides the answer.[6] ANCRA calls for severe criminal penalties for those directly or indirectly responsible for child abuse for their failures to report misconduct.[7] However, ANCRA provides no private cause of action for these offenses.[8] Looking to tort law for an alternative, it is axiomatic that "every person owes a duty of ordinary care to all others to guard against injuries which naturally flow as a reasonably probable and foreseeable consequence of an act."[9] However, a person ordinarily "has no duty to act affirmatively to protect another from a criminal attack by a third person."[10]

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1. *Number of Registered Sex Offenders in the US Nears Three-Quarters of a Million*, NAT'L CENTER FOR MISSING & EXPLOITED CHILDREN (Jan. 23, 2012), http://www.missingkids.com/News/page/4615.
2. *Id*.
3. *See* 720 ILL. COMP. STAT. 5/12-14 (2006).
4. *Inmate Search*, ILL. DEPARTMENT OF CORRECTIONS, http://www2.illinois.gov/idoc/Offender/Pages/InmateSearch.aspx (last visited Oct. 7, 2012).
5. *Id*.
6. *See* 325 ILL. COMP. STAT. 5/4 (2006).
7. *Id*.
8. *Id*.
9. Simpkins v. CSX Transp., Inc., 965 N.E.2d 1092, 1097 (Ill. 2012).
10. Iseberg v. Gross, 879 N.E.2d 278, 287 (Ill. 2007).

Jane Doe-3 v. McLean County Unit District No. 5 Board of Directors is a case about the duty of care.[11] The majority waived all discussion of ANCRA and focused on whether a school district owes a duty of care to plaintiffs in a different school district.[12]

This Note will argue that in *Jane Doe-3 v. McLean County Unit District No. 5 Board of Directors*, the Illinois Supreme Court erroneously held that school officials owe a duty of care to provide accurate information on an employment verification form supplied by another school district.[13] Although the court furthers the public policy of protecting children in creating a new cause of action for "passing" a suspected pedophile to another district, it disregards the common law requirements for the establishment of a duty of care.[14] The court further allowed the plaintiff to essentially "repackage" a nonviable fraudulent misrepresentation or negligent misrepresentation claim, harming the future of Illinois tort law.[15] For these reasons, the holding in *Jane Doe-3* was incorrect.

Section II of this Note will provide an overview of the relevant Illinois tort law and will expound specific case law relied on by the majority in *Jane Doe-3* in holding there to be a duty of care. Next, Section III will specifically examine the majority and dissenting opinions of the Illinois Supreme Court in *Jane Doe-3*. Finally, Section IV will analyze why the majority in *Jane Doe-3* was incorrect in finding a duty of care to provide accurate information on an employment verification form, how the court should have applied long-held precedent to come to a different result, and the effects *Jane Doe-3* will have on future Illinois tort actions.

II. BACKGROUND

A summary of the relevant case law dealing with tort actions for both negligence and fraudulent or negligent misrepresentation is necessary to understand the decision rendered by the court in *Jane Doe-3*. This summary will begin by examining the prima facie case requirements for the establishment of these causes of action by exploring Illinois Supreme Court precedent. It will then examine the New Mexico, California, and Texas Supreme Court cases referenced by the majority to bolster their finding of the "reasonably foreseeable" factor involved in the duty of care analysis.[16] This summary will conclude with an examination of how the Court of Appeals for the Seventh Circuit interpreted the same facts presented in *Jane*

11. 973 N.E.2d 880 (Ill. 2012).
12. *See id.*
13. *Id.* at 889.
14. *See id.* at 889, 892.
15. *Id*. at 889.
16. *Id*. at 891.

Doe-3 using Illinois tort law, yet found there to be no duty of care on the part of school officials to protect children from another school district.[17]

A. Illinois Tort Law: Willful and Wanton Conduct

The Illinois Supreme Court has long recognized that there is no separate, independent tort of willful and wanton conduct.[18] Rather, willful and wanton conduct is regarded as an aggravated form of negligence.[19] In order to properly plead a claim and recover damages for willful and wanton conduct, one must plead: (1) a duty of care owed to the plaintiff by the defendant; (2) a breach of that duty; (3) that the breach was the proximate cause of the plaintiff's injury; and (4) either a deliberate intention to harm, or a conscious disregard for the plaintiff's welfare.[20]

However, Illinois recognizes an "affirmative" duty to protect third persons from harm only in the context of a legally recognized "special relationship," such as an employer/employee, or doctor/patient relationship.[21] In order to find a duty of care when no "special relationship" exists, it must be asked whether the plaintiff and defendant stood in such a relationship to one another that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff.[22] Such a relationship is determined in Illinois by analyzing the facts of each case under four factors as set out in *Simpkins v. CSX Transportation*: (1) the reasonable foreseeability of the injury; (2) the likelihood of the injury; (3) the magnitude of the burden of guarding against the injury; and (4) the consequences of placing the burden on the defendant.[23]

B. Illinois Tort Law: Fraudulent Misrepresentation

In order to state a claim for fraudulent misrepresentation under Illinois tort law, the complaint must allege: (1) a false statement of material fact; (2) knowledge or belief of the falsity by the person making it; (3) intention to induce the other party to act; (4) action by the other party in reliance on the truth of the statements; and (5) damage to the other party resulting from such reliance.[24] Historically, fraudulent misrepresentation has been treated

17. Jane Doe-2 v. McLean Cnty. Unit Dist. No. 5 Bd. of Dirs., 593 F.3d 507, 515 (7th Cir. 2010).
18. *See* Krywin v. Chi. Transit Auth., 938 N.E.2d 440, 452 (Ill. 2010).
19. *Id*.
20. *Id*.; Doe v. Chi. Bd. of Educ., 820 N.E.2d 418, 423 (Ill. 2004).
21. Simpkins v. CSX Transp., Inc., 965 N.E.2d 1092, 1097-98 (Ill. 2012).
22. *Id*.
23. *Id*.
24. Doe v. Dilling, 888 N.E.2d 24, 35-36 (Ill. 2008).

as an economic tort, unavailable as a cause of action for personal injury claims.[25]

In *Doe v. Dilling*, the Illinois Supreme Court had to determine whether the parents of the plaintiff's fiancé could be held liable under the theory of fraudulent misrepresentation when they told the plaintiff that their son suffered from heavy-metal poisoning when, in fact, he was HIV-positive and had been diagnosed with AIDS.[26] The court refused to expand the concept of fraudulent misrepresentation beyond its traditional commercial setting, citing the United States Supreme Court's decision in *United States v. Neustadt*:

> [m]any familiar forms of . . . conduct may be said to involve an element of "misrepresentation," in the generic sense of that word, but "so far as misrepresentation has been treated as giving rise in and of itself to a distinct cause of action in tort, it has been identified with the common law action of deceit," and has been confined "very largely to the invasion of interests of a financial or commercial character, in the course of business dealings."[27]

C. Out-of-State Case Law Reference

In determining that Jane Doe's injury was "reasonably foreseeable," the majority in *Jane Doe-3* analogized two out-of-state cases with similar facts to come to the ultimate conclusion that the defendant owed the Illinois plaintiff a duty of care.[28] Understanding each of these cases in context will help distinguish the facts of those cases from the case at bar.

1. Randi W. v. Muroc Joint Unified School District

In *Randi W. v. Muroc Joint Unified School District*, the Supreme Court of California determined that the defendant writer of a recommendation letter owed a duty of care to a third party because it was reasonably foreseeable that the receiver of positive recommendations would rely on that letter in deciding to hire the employee.[29] Furthermore, it was reasonably foreseeable that, had the defendant not unqualifiedly recommended the employee, he would not have been hired.[30] Thus, these facts in their totality amounted to a reasonably foreseeable injury.[31]

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25. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS §§ 105, 502, 726 (5th ed. 1984).
26. *Dilling*, 888 N.E.2d at 27.
27. *Id*. at 36 (quoting United States v. Neustadt, 366 U.S. 696, 711 n.26 (1961)).
28. Jane Doe-3 v. McLean Cnty. Unit Dist. No. 5 Bd. of Dirs., 973 N.E.2d 880, 891 (Ill. 2012).
29. 929 P.2d 582, 589 (Cal. 1997).
30. *Id*.
31. *Id*.

2. Golden Spread Council, Inc. v. Akins

In *Golden Spread Council, Inc. v. Akins*, the Supreme Court of Texas determined that an injury was reasonably foreseeable when a member of the Golden Spread Council recommended a scoutmaster to a local church with full knowledge that the man had been "messing with" some boy scouts from his prior troop.[32] Because the council member made the positive recommendation, the court held that the defendant council should have foreseen that they were creating an unreasonable risk of harm to the scouts in the newly formed troop and that foreseeability weighed heavily in favor of imposing a duty upon the council.[33]

D. Jane Doe-2 v. McLean County Unit District No. 5 Board of Directors

In *Jane Doe-2 v. McLean County Unit District No. 5 Board of Directors*, the Court of Appeals for the Seventh Circuit was faced with applying Illinois tort law to a complaint identical to the one at issue in *Jane Doe-3*.[34] Because Jane Doe-2 also brought Title IX claims, her case was heard under federal question jurisdiction.[35] Jane Doe-2 alleged willful and wanton conduct under Illinois law.[36] In finding that the defendants possessed no relationship giving rise to a duty, the court noted the absence of any Illinois case law imposing a duty to protect under circumstances where both the student-victim and the place of injury are outside of the defendant school's authority. Furthermore, none of the alleged facts indicated that the defendants encouraged the Urbana School District to hire the alleged perpetrator or otherwise promoted his employment.[37] In fact, the Urbana School District never bothered to check the man's employment record before hiring him.[38]

III. EXPOSITION OF THE CASE

In the case of *Jane Doe-3 v. McLean County Unit District No. 5 Board of Directors*, the Illinois Supreme Court was faced with the same set

32. Golden Spread Council, Inc. No. 562 of Boy Scouts of Am. v. Akins, 926 S.W.2d 287, 290 (Tex. 1996).
33. *Id*.
34. Jane Doe-2 and Jane Doe-3 were both children in the Urbana School District who were molested by Jon White. These two cases are identical in that both Does filed claims for wilfull and wanton conduct in violation of Illinois tort law, and both relied on the same factual allegations in doing so. Jane Doe-2 v. McLean Cnty. Unit Dist. No. 5 Bd. of Dirs., 593 F.3d 507, 516 (7th Cir. 2010).
35. *Id*. at 513.
36. *Id*.
37. *Id*. at 516.
38. *Id*.

of facts seen by the Court of Appeals for the Seventh Circuit in *Jane Doe-2*.[39] The Illinois Supreme Court came to a different conclusion, however, holding that the McLean County administrators owed a duty of care with respect to Jane Doe-3, and the case was remanded for further proceedings consistent with that decision.[40] The Illinois Supreme Court explicitly felt that the longstanding public policy favoring the protection of children required the finding of a duty due to the "frightening" and "high" risk of recidivism posed by sex offenders.[41]

A. Facts and Procedural Posture

Plaintiff Jane Doe-3 was sexually abused by her first-grade teacher, Jon White, in the 2005-06 school year at Thomas Paine Elementary School (Thomas Paine) in Urbana, Illinois.[42] Thomas Paine hired White in August 2005.[43] Prior to teaching at Thomas Paine, White taught in the McLean County School District at two separate schools (Colene Hoose Elementary School in Normal, Illinois, and Brigham Elementary School in Bloomington, Illinois) during the 2002 through 2005 school years.[44] Plaintiff's complaint alleged that, at some time between 2002 and 2005, the McLean County administrators acquired actual knowledge of White's sexual abuse and/or "grooming" of minor female students but never recorded these incidents in White's employment record.[45] In addition, the plaintiff argued that the McLean County administration failed to make timely mandated reports of the abuse and failed to investigate parental complaints.[46]

The complaint further alleged that the administration disciplined White for "sexual harassment, sexual grooming, and/or sexual abuse" in October 2004 and again in April or May 2005.[47] In 2005, prior to the close of the 2004-05 school year, McLean County entered into a severance agreement with White, and he left with a clear record.[48] The bulk of the plaintiff's claim against the McLean County School District rested on a "Verification of Employment Form."[49] The plaintiff alleged that McLean

39. 973 N.E.2d 880, 884-86 (Ill. 2012).
40. *Id*. at 889, 894.
41. *Id*. at 892 (citing McKune v. Lile, 536 U.S. 24, 33-34 (2002)).
42. *Id*. at 885.
43. *Id.*
44. *Id.* at 884.
45. *Id.* at 885.
46. *Id*.
47. *Id*.
48. *Id*.
49. *Id*.

"passed"[50] White to the Urbana School District by falsely stating on the form that White had worked during the entire 2004-05 school year.[51] In doing so, McLean County concealed the fact that White had twice been subject to disciplinary removal from his classroom and had left before the end of the school year.[52]

The plaintiff brought an action alleging willful and wanton conduct against the defendant for allegedly providing false information to the Urbana School District.[53] The defendants contended that the plaintiff's claims failed to allege a viable legal duty and that the claims were precluded by the common law public duty rule.[54] The Circuit Court of Champaign County granted the defendants' motion to dismiss with prejudice for failure to state a cause of action upon which relief could be granted and found that the defendants owed no legal duty to the plaintiff.[55] Even if a duty did exist under the law, the trial court held that either the common law public duty rule or the Tort Immunity Act precluded such a duty.[56] The plaintiff brought an interlocutory appeal, and the Appellate Court for the Fourth District reversed and remanded on the grounds that the plaintiff adequately alleged a duty on the part of the defendant.[57] The court held that the defendants' act of "creating and sending" a letter of recommendation on behalf of White supported a duty based on the theory of voluntary undertaking or negligent misrepresentation.[58] The court further held that the defendants owed a duty either to warn Urbana of White's conduct or to report White's conduct to the Department of Children and Family Services.[59] The Supreme Court of Illinois allowed the defendants' petitions for leave to appeal, and the appeals were consolidated.[60]

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50. The complaints defined "passing" as "a School District's conduct in passing a teacher who is known to have committed teacher-on-student sexual harassment and/or sexual grooming and/or sexual abuse to another School District without reporting, and while concealing, known prior teacher-on-student sexual harassment and/or sexual grooming and/or sexual abuse." *Id.* at 913 n.3.
51. *Id*. at 886.
52. *Id*. at 885.
53. *Id*. at 885-86.
54. *Id*. at 886. The public duty rule provides that government officials owe no duty to protect individual citizens. Moran v. City of Chicago, 676 N.E.2d 1316, 1320 (Ill. 1997).
55. *Jane Doe-3*, 973 N.E.2d at 886.
56. *Id*.
57. *Id*.
58. *Id*.
59. *Id*.
60. *Id*.

B. The Majority Opinion

The majority of the Supreme Court of Illinois affirmed the decision of the Court of Appeals for the Fourth Circuit, but did so on wholly different grounds.[61] At the outset, the court noted that none of the circumstances relied upon by the appellate court properly formed the basis for a duty of care.[62] The court dismissed each basis relied upon by the appellate court individually.[63] First, the appellate court held that the defendants' duty arose from failing to warn Urbana of White's conduct.[64] The court noted that nowhere in the complaint did the plaintiff allege an affirmative duty to protect or warn Urbana about White's conduct, nor did she allege a legally recognized "special relationship" that would give rise to such a duty.[65] The court dismissed the appellate court's second basis for the finding of a duty—the failing to report White's conduct to the authorities—by simply noting that the common law does not recognize an affirmative duty to act for the protection of another in the absence of such a "special relationship" between the parties.[66] Finally, the appellate court's third basis—the creating and tendering a false letter of recommendation for White—was improper because the complaint merely alleged that such a letter was only created.[67] Because the plaintiff did not plead that the letter was actually sent, the creation of the letter could form no basis for a duty on the part of the defendant.[68]

Nevertheless, the court found that the defendants owed a duty of care to the plaintiff based on the defendants' act of misstating White's employment history on an employment verification form sent to Urbana.[69] The court determined that by failing to accurately report the correct number of days White worked, the defendants created a risk of harm to the plaintiff and ultimately created a duty of care.[70]

In dealing with the defendants' contention that the misstatement on an employment verification form was merely an attempt to "repackage" a nonviable claim for the torts of either fraudulent or negligent misrepresentation, the court pointed to language in *Doe v. Dilling* recognizing that other tort actions are available in circumstances where

61. *Id*. at 884.
62. *Id*. at 888.
63. *Id*. at 888-89.
64. *Id*. at 888.
65. *Id*.
66. *Id*. at 889.
67. *Id*.
68. *Id*.
69. *Id*.
70. *See id.*

fraudulent misrepresentation is unavailable.[71] The court further noted that the term "misrepresentation" may be used as a description of facts that give rise to legal liability, not merely as a cause of action in and of itself.[72] Because the plaintiff alleged willful and wanton conduct, not fraudulent misrepresentation, the court held that the misrepresentation was not the cause of action; rather, it was the conduct that gave rise to a duty of care.[73]

The court continued its analysis by determining whether the relationship between the parties gave rise to a legally recognized duty based upon the misstatements on the verification form.[74] In doing so, the court applied the four factor test laid out in *Simpkins v. CSX Transportation*.[75]

In deciding reasonable foreseeability, the court discussed the implication by the false statements on the employment form that White's discharge was routine.[76] In light of the defendants' awareness of White's conduct prior to his discharge, the court concluded that the injury suffered by the plaintiff was not unforeseeable as a matter of law when they failed to address his misconduct.[77] In making this determination, the court placed great weight on the out-of-state supreme court decisions mentioned supra that have interpreted cases with similar facts to find that the plaintiff's injuries were reasonably foreseeable.[78]

The court continued to hold that nothing in the alleged facts suggested that the injuries suffered by the plaintiff were unlikely, as the likelihood students would be abused was "within the realm of reasonable probability," and a truthful disclosure on the verification form may have been a "red flag" to Urbana to investigate the circumstances of White's severance with the McLean County School District.[79] Quickly summing up the final two factors, the court noted that the magnitude of the defendants' burden of guarding against such an injury was not great, as there is no undue burden in requiring accurate information once one has undertaken to fill out an employment verification form.[80] The court also noted how it is difficult to see how any adverse consequences could result from such a slight imposition.[81] Because all four factors, viewed as a whole, led the court to conclude that the plaintiff alleged sufficient facts to support finding a duty

71. *Id*. at 889-90.
72. *Id*. at 890.
73. *Id*.
74. *Id*.
75. *Id*.
76. *Id*.
77. *Id*.
78. *Id*. at 891.
79. *Id*.
80. *Id.*
81. *Id*.

of care, the defendants were obligated to use reasonable care to ensure that they reported accurate information on the verification form.[82]

The court bolstered its opinion with the longstanding public policy in Illinois favoring the protection of children, noting that the welfare and protection of minors has always been a fundamental interest and that even parents' rights are secondary when the potential for child abuse or neglect is present.[83] Because these public policy concerns are particularly strong when dealing with the dangers of sex offenders, the court affirmed the judgment of the appellate court and found that the McLean administrators owed a duty of care to the children of the Urbana School District.[84]

The court quickly addressed the defendants' arguments of the common law public duty rule and the Tort Immunity Act.[85] The majority explained that the public duty rule was of no consequence because the plaintiff did not allege that the defendants failed to protect her, nor that they owed any affirmative duty to do so.[86] Further, the Tort Immunity Act provided no basis for immunity under section 2-204 because that provision has been construed as applying to vicarious liability claims, which the plaintiff did not allege.[87] Thus, section 2-204 was of no help to the defendants, and the court remanded the case.[88]

C. The Dissenting Opinion

Justice Karmeier, joined by Justice Theis, dissented on the grounds that the majority created a new cause of action based on "skeletal complaints" while utilizing a deficient and incomplete analysis.[89] He asserted: "In the end, the majority reaches a decision which may well be popular, given the facts and circumstances of this case and a laudable desire to protect children, but one that is not well-grounded, one that disregards pertinent statutory authority, and one that appears to do violence to precedent."[90] Justice Karmeier addressed four separate points, and this Section will address each of those points in turn.[91]

In his first point, Justice Karmeier discussed the majority's analysis with regard to the defendants' contention that the plaintiff's claim was a

82. *Id*.
83. *Id*. at 892.
84. *Id*.
85. *See id.* at 893-94.
86. *Id*. at 892-93.
87. *Id*. at 893.
88. *Id*. at 893-94.
89. *Id*. at 905 (Karmeier, J., dissenting).
90. *Id*.
91. *Id*.

repackaged cause of action for fraudulent or negligent misrepresentation.[92] He opined that the majority focused its discussion away from these torts, transmuting the claim into a generic cause of action that was not subject to the requirements (that the plaintiff did not and could not allege) of a fraudulent misrepresentation claim, as discussed in *Doe v. Dilling*.[93] He concluded: "Why would a plaintiff ever bring an action for misrepresentation when he or she can simply call it something else?"[94]

In the second point of the dissent, Justice Karmeier asserted that the majority's duty analysis was insufficient.[95] While recognizing that there was no affirmative duty to warn Urbana of White's conduct, nor a common law duty to report White's conduct to the authorities, the majority found the relationship between the parties to be sufficient to impose a duty upon the defendants to accurately report the exact number of days White taught within the McLean County School District because, had they done so, Urbana may have conducted a better investigation than they did.[96] Justice Karmeier continued to point out the fact that Illinois is a fact-pleading jurisdiction, and the plaintiff failed to allege the precise number of days in which White actually worked in McLean County.[97] Aside from pleading insufficient facts, Justice Karmeier concluded this portion of his dissent by mentioning how unlikely the accurate reporting of days worked would have made any difference, as Urbana (1) hired White before it received the report; (2) never asked the McLean County defendants about any impropriety; and (3) did nothing during the years it employed White to discipline him, though it received numerous complaints about his misconduct dating back to 2005.[98] Because the majority failed to consider these points, their analysis, according to Justice Karmeier, was deficient.[99]

The third point of the dissent discussed the viability of the public duty rule.[100] Because Illinois has not ruled definitively on its continued existence, Justice Karmeier believed that dismissal on those grounds was premature.[101] The majority claimed that the plaintiff did not allege that the defendants failed to protect her, though the plaintiff repeatedly alleged in her complaint that the defendants violated its duty to report White's conduct, which, inter alia, was "clearly intended to protect children like [the

92. *Id*. at 909.
93. *Id*.
94. *Id*.
95. *Id*.
96. *Id*.
97. *Id*.
98. *Id*. at 911.
99. *Id*.
100. *Id*.
101. *See id.* at 912.

plaintiff] from abuse."[102] Justice Karmeier posed a question: If the public duty rule is, in fact, viable, why would any plaintiffs word their complaints in terms that would clearly subject their claims to dismissal?[103] He finalized this thought with another question: "If this action is not about an alleged failure to protect [the plaintiff] from harm, then what *is* it about?"[104]

The final point of Justice Karmeier's dissent discussed the Tort Immunity Act.[105] The majority quickly dismissed this contention by stating that section 2-204 has been applied in the context of vicarious liability claims.[106] However, nothing in the language of the section precludes its application in other contexts.[107] Analyzing the plaintiff's claim under the wording of the section, the defendants, acting within the scope of their employment, misreported the days White actually worked for the McLean County School District, and, as a result, the plaintiff was allegedly injured by the acts of "another person."[108] Justice Karmeier posited that the section arguably applied based solely on the plain language of the section, and the majority's failure to even discuss the possibility of its use was deficient.[109] In sum, Justice Karmeier suggested that the case should have been remanded with the plaintiff being given the opportunity to replead with greater specificity.[110]

IV. ANALYSIS

The Illinois Supreme Court's decision in *Jane Doe-3* created a new cause of action for wrongly "passing" a suspected pedophile from one school district to another.[111] Though a school district has no affirmative duty to warn another school district of an educator's past discretions, the Illinois Supreme Court held that such a duty arises when the first district undertakes the act of filling out an employment verification form.[112] Such a holding is troublesome because it stretches the limits of finding a legal duty, in that it requires an in-depth inference in the areas of reasonable foreseeability and likelihood of injury. This Section will discuss: (1) how the *Jane Doe-3* court's analysis with regard to the finding of a legal duty was incorrect and incomplete; (2) how a correct understanding and

102. *Id*.
103. *Id*.
104. *Id*.
105. *Id*.
106. *Id*.
107. *Id*. at 913.
108. *Id*.
109. *Id*.
110. *Id*.
111. *See id.* at 894 (majority opinion).
112. *Id*. at 891-92.

application of the court's *Doe v. Dilling* precedent would have led the court to reach a correct result; and (3) how the majority's use of judicial activism in *Jane Doe-3* will have negative effects on the future of Illinois tort law.

A. The Decision in *Jane Doe-3* was Incorrect and Incomplete

The majority in *Jane Doe-3* began their analysis with the well-settled proposition that every person owes to all other persons "a duty to exercise ordinary care to guard against injury which naturally flows as a reasonably probable and foreseeable consequence of his act."[113] However, this is the first troublesome spot in the majority's analysis. The "act" in question is the reporting of incorrect dates of employment on a verification form.[114] The "injury" is child molestation.[115] Looking only at these two propositions, it is difficult to see how the injury "naturally flows" from the act.

The majority concludes that McLean County's misstatements "created the risk of harm" to the plaintiff.[116] This line of inference the court seeks to draw from misstatements on a standard form leading to child molestation is ungrounded and too far removed from the situations faced in other states where such a duty has been found. In both *Randi W. v. Muroc Joint Unified School District* and *Golden Spread Council, Inc. v. Akins*, the court found a duty based on reasonable foreseeability of harm to the plaintiff.[117] However, the defendants in those cases stood on different ground than McLean County. In *Randi*, it was reasonably foreseeable that the receiver of positive recommendations would rely on those recommendations in deciding to hire the employee.[118] Similarly, in *Golden Spread Council*, injury was reasonably foreseeable when a scoutmaster, on his own initiative, positively recommended a man for a scoutmaster position when he had personal knowledge that the man had been molesting young boys.[119]

The commonality seen in both of these cases is the active, positive recommendation on the part of the defendants. It is one thing to draw an inference saying that child molestation is reasonably foreseeable when the defendant goes out of his way to insure the alleged perpetrator holds the position that allows him to commit such acts. It is a completely different and flawed line of reasoning that allows a simple misstatement of the

113. *Id.* at 890.
114. *Id*. at 889.
115. *Id*. at 885.
116. *Id*. at 889.
117. Randi W. v. Muroc Joint Unified Sch. Dist., 929 P.2d 582, 589 (Cal. 1997); Golden Spread Council, Inc., No. 562 of Boy Scouts of Am. v. Akins, 926 S.W.2d 287, 290 (Tex. 1996).
118. *Randi W.*, 929 P.2d at 589.
119. *Golden Spread Council*, 926 S.W.2d at 290.

correct number of days the employee worked at his prior position to lead to the injuries alleged by the plaintiff in *Jane Doe-3*.

The plaintiff never alleged facts indicating that McLean County encouraged the Urbana School District to hire White, nor was it alleged that McLean County, in any way, promoted his employment.[120] On the contrary, the plaintiff alleged that the Urbana School District relied on false information.[121] Yet Urbana not only failed to verify White's employment, but they also did not bother to inquire with McLean County whatsoever about White's character before they hired him.[122]

The next troublesome point within the majority's analysis is the finding of a relationship that warrants imposing a duty of care upon McLean County School District. Illinois courts have recognized that a referring employer may be liable for failing to disclose a former employee's misconduct, but only if the employer has a "special relationship" with the plaintiff that requires them to speak for the benefit of the plaintiff.[123] The court in *Jane Doe-3* acknowledged that no such "special relationship" existed between the plaintiff and the defendants.[124] However, the court managed to create a "general" relationship between them by finding the plaintiff's injury reasonably foreseeable.[125]

To hold that a relationship existed between the defendants and a child outside their district based only upon a form sent to the Urbana School District after they had already hired the alleged perpetrator is both incorrect and incomplete. In creating this new cause of action, the majority ignored the purpose of the "special relationship" doctrine and completely undermined the legislature's role in determining the laws of Illinois.

B. The Majority's Use of Judicial Activism in *Jane Doe-3* Harms Precedent and Will Have Negative Effects on the Future of Illinois Tort Law

Only two years prior to the *Jane Doe-3* decision, the same court heard another Jane Doe's plea for justice against the parents of the man who had infected her with AIDS.[126] Unfortunately for Doe, her claim was brought under the tort of fraudulent misrepresentation and required not only proof of reliance upon the misrepresentation, but also a commercial or economic

120. *See Jane Doe-3*, 973 N.E.2d at 887.
121. *Id.* at 885.
122. *Id*. at 911 (Karmeier, J., dissenting).
123. Neptuno Treuhand-Und Verwaltungsgesellschaft Mbh v. Arbor, 692 N.E.2d 812, 817-18 (1st Dist. 1998).
124. *Jane Doe-3*, 973 N.E.2d at 888.
125. *Id.* at 890.
126. Doe v. Dilling, 888 N.E.2d 24 (Ill. 2008).

setting.[127] "If the plaintiff in *Dilling* had only known, she could have couched her complaint in the language of simple negligence or characterized *her* cause of action as an 'action for willful and wanton conduct . . . '" and could have completely avoided the longstanding rule applied to her case that afforded her no remedy at all.[128]

Re-analyzing the *Dilling* decision and applying new law discerned from *Jane Doe-3*, the lawyers in *Dilling* certainly would have changed their course of action had they had the benefit of the *Jane Doe-3* decision. Though at first glance there is no obvious "special relationship" between the infected man's parents and the woman he infected, Doe asked the Dillings if their son had AIDS.[129] Their response—that their son suffered from a case of lead poisoning—was false.[130] Applying the *Jane Doe-3* analysis, by undertaking to answer Doe's question, the Dillings created the risk of harm that the plaintiff would become infected with AIDS. Thus, the duty portion of a negligence claim has been met. Adding more icing to this cake of torts, the plaintiff also no longer has to prove that she reasonably relied on the Dillings' representations when she decided to continue her relations with their son.

The majority's use of judicial activism has paved the road for bizarre results such as this hypothetical version of *Doe v. Dilling*. Though the risk of sex offender recidivism is undeniably high, such a complex decision in the public policy realm (how to handle situations that arise with regard to such offenders) is best left to the legislature. Seventeen years prior to the *Jane Doe-3* decision, the Illinois Supreme Court recognized this, stating: "The General Assembly, by its very nature, has a superior ability to gather and synthesize data pertinent to the issue . . . it is the only entity with the power to weigh and properly balance the many competing societal, economic, and policy considerations involved."[131]

The Illinois General Assembly *has* gathered and synthesized data pertinent to the issue at hand.[132] ANCRA was formulated and is implemented with the sole goal of protecting children.[133] However, nowhere in this act is there the right to a private cause of action.[134] "It may be significant that since being enacted [almost 30 years ago], the abuse-notification statute has been amended several times, any one of which would have provided an occasion for plugging in a damages remedy had there been legislative sentiment for such a remedy; evidently there was

127. *Id*. at 35.
128. *Jane Doe-3*, 973 N.E.2d at 909 (Karmeier, J., dissenting).
129. *Dilling*, 888 N.E.2d at 31.
130. *See id*.
131. Charles v. Seigfried, 651 N.E.2d 154, 160 (Ill. 1995).
132. *Jane Doe-3*, 973 N.E.2d at 907 (Karmeier, J., dissenting) (emphasis added).
133. *Id*.
134. *See id.*

not."[135] Though the majority displayed the best of intentions, as school administrators are in the position to provide safety for the children of Illinois, it was not their place to create new law. In finding a way to protect children, the court not only opened the door to ungrounded complaints, but also defied the role of the legislature; the same legislature which has had several opportunities to change the law yet has chosen not to do so.[136] Thus, the Illinois Supreme Court's *Jane Doe-3* decision does harm to both the past and future of Illinois law.

C. A Correct Understanding and Application of the Court's *Doe v. Dilling* Precedent Would Have Led to a Correct Result

The majority in *Jane Doe-3* specifically limited their holding to the facts of the case at bar.[137] However, the statement the majority sends to the people of Illinois is that they now have a duty to tell the truth when asked. If they do not, they may be liable for "willful and wanton conduct" for all injuries that naturally flow from their misrepresentation, including the molestation of children they have never met.

In allowing claimants to meet the duty requirement so easily, Illinois has virtually eliminated future claims for fraudulent and negligent misrepresentation. As Justice Karmeier posited, "Why would a plaintiff ever bring an action for misrepresentation when he or she can simply call it something else?"[138]

The new cause of action created by the majority in *Jane Doe-3* disregards the origin and long history of how the common law has treated actions for deceit.[139] Though Justice Burke, writing for the majority, found that the misrepresentation itself is what gave rise to the duty in the case at hand, the very same court stated less than twenty years prior that such "misrepresentations" have been largely confined to the invasion of interests in the course of business dealings.[140] Such was not the case in *Doe v. Dilling*, and such was not the case in *Jane Doe-3 v. Mclean County Board of Directors*. Had the majority seen the plaintiff's claim for what it really was—a misrepresentation—the court would have been required to apply Illinois precedent, and *Jane Doe-3*'s claim would have failed.

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135. Cuyler v. United States, 362 F.3d 949, 955 (7th Cir. 2004).
136. *Id.*
137. *Jane Doe-3*, 973 N.E.2d at 894.
138. *Id*. at 909 (Karmeier, J., dissenting).
139. *See* KEETON ET AL., *supra* note 25, at §§ 105, 502, 726.
140. *See Jane Doe-3*, 962 N.E.2d at 891; United States v. Neustadt, 366 U.S. 696, 711 (1961).

V. CONCLUSION

Though protecting children is of the utmost importance, so is upholding the law. By creating a new cause of action for "passing" unfit educators, the Illinois Supreme Court in *Jane Doe-3* found a way to hold those partially responsible, at least in a moral sense, civilly liable. However, in doing so, the court bent the rules of tort law past their breaking point and opened the door to poorly grounded negligence claims. Not only was the court's reasoning weak, but its lack of regard for its own precedent makes that precedent virtually insignificant. A faithful interpretation of both negligence law and *Doe v. Dilling* would have led the court to a different result. "In the end, the majority reaches a decision which may well be popular, given the facts and circumstances of this case and a laudable desire to protect children, but one that is not well-grounded . . . and one that appears to do violence to precedent."[141]

141. *Jane Doe-3*, 962 N.E.2d at 905 (Karmeier, J., dissenting).