

***RADKE V. COUNTY OF FREEBORN: THE RETURN OF THE
PUBLIC DUTY RULE?***

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I. INTRODUCTION

On April 21, 2005, the Minnesota Supreme Court held that county child protection workers may be liable at common law for negligent investigations under the Child Abuse Reporting Act (CARA).¹ In so doing, the court waded once again into a thicket of

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¹ *Radke v. County of Freeborn*, 694 N.W.2d 788, 799 (Minn. 2005).

legal doctrines used to determine when Minnesota law provides a cause of action against government actors who are negligent in the performance of their duties.

Much of the confusion in this area flows from cases discussing—and sometimes conflating—two separate legal doctrines: (1) the so-called “public duty” rule governing *common law* negligence actions arising from an official’s performance of statutory duties,² and (2) the distinct analysis used to divine whether the legislature has implicitly provided for a *statutory* cause of action in such cases. In *Radke v. County of Freeborn*, the court restored some clarity to this area by overruling its earlier decision in *Hoppe v. Kandiyohi County*,³ a case which seemed to merge these two analyses. In *Radke*, the court confirmed that the public duty rule can give rise to common law tort liability based upon child protection workers’ duties to a victim under CARA, separate and apart from the question of whether the legislature implicitly provided for such a cause of action in the statute itself.⁴ However, the court passed up the opportunity to clarify the status of other precedents, leaving some questions in this area still unanswered.

Part II of this Article traces the separate development of the common law public duty rule and the implied statutory cause of action analysis. Part III examines the *Hoppe* case, where the supreme court seemed to hold that the absence of an implied statutory cause of action precluded the existence of a common law cause of action. Part IV then assesses the *Radke* court’s effort to resolve the confusion flowing from *Hoppe*.

II. LEGAL BACKGROUND

This section discusses the key cases underlying the two distinct doctrines relating to whether a cause of action exists for negligence by government actors: the common law public duty rule and the implied statutory cause of action analysis.

2. “[T]he ‘public duty rule’ requires that a governmental unit owe the plaintiff a duty different from that owed to the general public in order for the governmental unit to be found liable. In other words, a purely ‘public duty’—as opposed to a ‘special duty’—cannot give rise to government tort liability.” *Id.* at 793 (citations omitted).

3. 543 N.W.2d 635 (Minn. 1996).

4. 694 N.W.2d at 798-99.

A. *The Common Law Public Duty Rule*

It is settled law that a person has no duty to prevent a third party from physically harming a victim unless either (1) the person and the third party have a special relationship that imposes a duty upon the person to control the third party's conduct, or (2) the person has a special relationship with the victim that gives the injured party a right to protection.⁵ Three cases illustrate how this principle has developed under Minnesota law where the alleged tortfeasor is a government actor.

1. *Lorshbough v. Township of Buzzle*

In *Lorshbough v. Township of Buzzle*, a landowner sued a township and a county for damages to his property resulting from a fire that started in the township's dump.⁶ Lorshbough brought a common law negligence action, relying on solid waste management laws to establish the township's duty of care.⁷ The Minnesota Supreme Court held that the plaintiff must either show that the township or county owed him a duty that it did not owe the general public,⁸ or that the plaintiff "distinguished himself from other members of the public" through "some sort of contact between the governmental unit and the plaintiff" that induced detrimental reliance by the plaintiff.⁹ Because the county had "actual knowledge of the risk of serious harm" and was "in a position and had the authority to abate the risk," the plaintiff was able to establish that the county owed him a duty derived from statute that was not owed to the general public.¹⁰

2. *Cracraft v. City of St. Louis Park*

Seven years later, a divided Minnesota Supreme Court provided further guidance for determining whether a duty owed was "public" or "private." The court held that even if a municipality enacts a general ordinance or makes inspections, it has no common law duty to prevent a third person from harming another

5. RESTATEMENT (SECOND) OF TORTS § 315 (1965).

6. 258 N.W.2d 96, 97 (Minn. 1977).

7. *Id.* at 97-98.

8. *Id.* at 98-99 (citing *Hoffert v. Owatonna Inn Towne Motel, Inc.*, 293 Minn. 220, 222, 199 N.W.2d 158, 160 (1972)).

9. *Id.* at 99.

10. *Id.* at 103.

unless there is some sort of special duty arising from a special relationship between the municipality and the third person.¹¹ In *Cracraft v. City of St. Louis Park*, two fathers sued the City of St. Louis Park, alleging that a city inspector negligently failed to discover a fire ordinance violation at a school.¹² Two boys died and another suffered severe burns when a fifty-five-gallon drum of highly flammable duplicating fluid exploded on a loading dock near a frequently used entrance.¹³

The court explained that, regardless of whether the defendant is a natural person or a municipality, a duty owed to the public in general cannot form the basis of a negligence action.¹⁴ It then discussed four non-exclusive factors to be considered when evaluating whether a municipality has voluntarily assumed a special duty to protect others and not merely itself.¹⁵ The court stated that two factors which tend to impose a duty of care are the municipality's actual knowledge of the dangerous condition and a person's reliance on the municipality's representations and conduct, neither of which were present on the facts of *Cracraft*.¹⁶ The third factor identified by the court was the possibility that an ordinance or statute may have created a duty of care by setting forth "mandatory acts clearly for the protection of a particular class of persons rather than the public as a whole."¹⁷ On this factor, the court refused to impose a duty of care merely because an inspection was undertaken, stating that the codes, ordinances, and statutes were not "drawn with sufficient specificity to create an inspection duty in favor of a class of individuals."¹⁸ The fourth factor considered was whether the municipality used due care to avoid increasing the risk of harm.¹⁹ The court found that the defendant-municipality in *Cracraft* did nothing to increase the risk of harm.²⁰ Based on its analysis of these factors, the court concluded that the City of St. Louis Park owed only a general duty to the public rather than a more specific duty to a special class of

11. *Cracraft v. City of St. Louis Park*, 279 N.W.2d 801, 806 (Minn. 1979).

12. *Id.* at 802-03.

13. *Id.*

14. *Id.* at 804.

15. *Id.* at 806-07.

16. *Id.*

17. *Id.* at 807.

18. *Id.* at 807-08.

19. *Id.*

20. *Id.*

individuals, and as a result no cause of action could be maintained at common law.²¹

3. Andrade v. Ellefson

In 1986, the Minnesota Supreme Court, with three justices concurring specially, applied the four *Cracraft* factors to find that Anoka County owed children and their parents a special duty different from the duty owed to the general public when it inspected and licensed daycare facilities.²² In *Andrade v. Ellefson*, two fathers sued an in-home day care operator and Anoka County for injuries their children sustained while at the day care center.²³ The plaintiffs alleged that they had a special relationship with Anoka County and that the county was therefore required to exercise due care when inspecting and supervising day care centers it licensed.²⁴

The court first found that Anoka County had waived immunity to the extent that it purchased liability insurance, and then turned to the special duty issue.²⁵ After noting the general rule that a person has no common law duty to prevent a third person from injuring another absent a special relationship, the court explained that not all four *Cracraft* factors need be satisfied to find a cause of action, especially where one factor predominates.²⁶ The court also reiterated that other, unarticulated factors may be relevant.²⁷ The court then relied on the third *Cracraft* factor—the existence of a statute requiring “mandatory acts clearly for the protection of a particular class of persons rather than the public as a whole”²⁸—to find that the Public Welfare Licensing Act²⁹ mandated that small children in a licensed day care facility be considered a particular protected class because of their unique vulnerability and because the statute’s focus on children demonstrated a clear intent to

21. *Id.* at 808.

22. *Andrade v. Ellefson*, 391 N.W.2d 836, 840-43 (Minn. 1986).

23. *Id.* at 837.

24. *Id.*

25. *Id.* at 840-42.

26. *Id.* at 841.

27. *Id.*

28. *Id.* at 807.

29. MINN. STAT. §§ 245.781-.812 (1984) (repealed 1987); *see* MINN. STAT. § 252.28, subd. 2 (2004). *See generally* MINN. STAT. §§ 245A.01-.65 (incorporating many provisions of the Public Welfare Licensing Act in the Human Services Licensing Act).

benefit these children specifically rather than the public generally.³⁰ The court held that the Act created a duty of care because the Act set forth mandatory acts for the protection of a particular class of persons.³¹

These cases thus established the contours of the common law public duty analysis: *Lorshbough* demonstrated that the special relationship exception to general tort principles regarding duty of care could be applied to government actors, *Cracraft* introduced four factors to guide courts when dealing with such claims, and *Andrade* explained how those factors should be applied.³²

B. *Implied Statutory Causes of Action*

Up to this point, the discussion has focused on the common law's recognition of causes of action derived from statutory duties. But, in addition to judge-made common law causes of action, new causes of action may also be created by the legislature. When the legislature is explicit about its intent to create a new cause of action, courts ordinarily do not hesitate to apply the new cause of action, even alongside traditional common law causes of action.³³

30. *Andrade*, 391 N.W.2d at 842.

31. *Id.* Justices Wahl and Yetka concurred specially, due to their belief that two other *Cracraft* factors (actual knowledge and reasonable reliance) had been satisfied. *Id.* at 843-44. Justice Scott concurred in the result, arguing that in these cases, the court should not analyze whether a county owes a special duty to the plaintiff, but rather the court should impose a duty of care on the county because it undertook the inspection of the facility. *Id.* at 845-46.

32. The four-factor analysis articulated in *Cracraft* for determining whether a governmental entity owes the plaintiff a special duty, different from the duty owed the general public, now appears to be settled law. *See, e.g.*, *Radke v. County of Freeborn*, 694 N.W.2d 788, 796-98 (Minn. 2005); *Andrade*, 391 N.W.2d at 841-43. However, it is important to note that the holding in *Cracraft* was not unanimous. Three justices, including Justice Scott, dissented in *Cracraft*, arguing that the majority's approach departed from the Restatement (Second) of Torts. *Cracraft v. City of St. Paul*, 279 N.W.2d 801, 808-13 (Minn. 1979). Two years later in *Hage v. Stade*, the Minnesota Supreme Court relied on *Cracraft* when holding that a cause of action could not be brought against the State for an allegedly negligent fire inspection. 304 N.W.2d 283, 285-88 (Minn. 1981). This time, three justices joined Justice Scott in his detailed dissent, which discussed how *Cracraft* departed from the common law. *Id.* at 291-96. Justice Scott also noted that *Cracraft* conflicted with *Lorshbaugh*, which allowed constructive knowledge of a dangerous condition to create a duty; *Cracraft* limited its first factor to actual knowledge of a dangerous conditions. *Id.* at 294 n.8. In addition, Justice Scott argued that the artificial distinction between a public duty and a private duty essentially grants sovereign immunity where the legislature has not spoken. *Id.* at 289.

33. For example, the Minnesota Environmental Rights Act (MERA) created a cause of action allowing any person to bring a civil action for protection of natural

Problems arise, however, when the legislature is unclear about its intention to create—or withhold—a cause of action to enforce statutory rights. In those situations, Minnesota’s appellate courts have taken markedly different approaches to determining whether an implied statutory cause of action can be found.

1. *The Minnesota Court of Appeals’ Approach*

In the Minnesota Court of Appeals, this issue is usually addressed under the framework established in *Counties of Blue Earth v. Minnesota Department of Labor and Industry*³⁴ and *Flour Exchange Building Corp. v. State*.³⁵ That analysis follows the U.S. Supreme Court’s analysis of this issue in *Cort v. Ash*³⁶ and requires the examination of three factors:

- (1) whether the plaintiff belongs to the class for whose benefit the statute was enacted;
- (2) whether the legislature indicated an intent to create or deny a remedy; and
- (3) whether implying a remedy would be consistent with the underlying purposes of the legislative enactment.³⁷

The court of appeals has applied this analysis to a range of statutes but has yet to find an implied statutory cause of action under this approach.³⁸

resources located in Minnesota against “pollution, impairment, or destruction.” MINN. STAT. § 116B.03 (2004). This express statutory cause of action has been successfully used alongside traditional common law causes of action like trespass. *See, e.g.,* *Citizens for a Safe Grant v. Lone Oak Sportsmen’s Club, Inc.*, 624 N.W.2d 796 (Minn. Ct. App. 2001) (affirming injunction against gun club based on MERA as well as common law nuisance and trespass causes of action).

34. 489 N.W.2d 265 (Minn. Ct. App. 1992).

35. 524 N.W.2d 496 (Minn. Ct. App. 1994).

36. 422 U.S. 66 (1975). There is considerable doubt about whether the Supreme Court continues to strictly adhere to this analysis. *See* *Thompson v. Thompson*, 484 U.S. 174, 189 (Scalia, J., concurring) (“It could not be plainer that we effectively overruled the *Cort v. Ash* analysis . . . converting one of its four factors (congressional intent) into *the determinative factor*, with the other three merely indicative of its presence or absence.”) (citations omitted).

37. *Flour Exch. Bldg.*, 524 N.W.2d at 499.

38. *See, e.g.,* *Mut. Serv. Cas. Ins. Co. v. Midway Massage, Inc.*, 695 N.W.2d 138, 142 (Minn. Ct. App. 2005); *Buck v. Freeman*, 619 N.W.2d 793, 797-98 (Minn. Ct. App. 2000); *Kuelbs v. Williams*, 609 N.W.2d 10, 14-15 (Minn. Ct. App. 2000); *Eason v. Indep. Sch. Dist. No. 11*, 598 N.W.2d 414, 417-18 (Minn. Ct. App. 1999).

2. *The Minnesota Supreme Court's Approach*

Although the Minnesota Supreme Court shares the Minnesota Court of Appeals' reluctance to find implicit statutory causes of action, the precise contours of its analysis are less clear. In *Bruegger v. Faribault County Sheriff's Department*, the supreme court reaffirmed that as a general matter, "[p]rinciples of judicial restraint" precluded it from finding a statutory cause of action "where the legislature has not either by the statute's express terms or by implication provided for civil tort liability."³⁹ However, the court offered no analysis of how or when such an implication may arise, and its discussion seemed to blur the distinction between implying such a statutory cause of action and the common law public duty rule.⁴⁰

In *Bruegger*, the parents of a minor who was a victim of sexual abuse sued the Faribault County Sheriff's Department because officials did not inform them that they might be able to obtain compensation under the Crime Victims Reparations Act (CVRA).⁴¹ The statute required applications for compensation to be made within one year of the injury unless the victim was "unable" to do so; however, the statute further provided that lack of knowledge about the statute—including the failure of law enforcement to inform a claimant about the statute—would not excuse compliance with the one-year filing deadline.⁴² The Brueggers did not learn about their rights under CVRA until after one year had elapsed.⁴³ They then sued the sheriff's department, alleging that the statute created "an affirmative duty on the sheriff's department to inform them of the CVRA and that the department's failure to inform the family was a breach of this duty."⁴⁴

The Brueggers argued that the case was controlled by the supreme court's holding in *Lorshbough v. Township of Buzzle*.⁴⁵ As discussed above, the court held in *Lorshbough* that a statute governing solid waste disposal established the standard of care for the county's management of a garbage dump, and that the county's breach of the duty—created by its actual knowledge of the risk of

39. 497 N.W.2d 260, 262 (Minn. 1993).

40. *Id.*

41. *Id.* at 261.

42. MINN. STAT. § 611A.53, subd. 2(e) (1992).

43. *Bruegger*, 497 N.W.2d at 261.

44. *Id.*

45. *Id.*

serious harm and by its opportunity to abate the risk, which led to a forest fire—gave rise to liability in tort.⁴⁶ The *Bruegger* court rejected the analogy to *Lorshbough* and purported to draw a distinction between situations like *Lorshbough*, where a statutory duty was the basis for a common law negligence action, and the separate question of whether a statute implicitly creates a new cause of action.⁴⁷ The court noted that in *Lorshbough*, even in the absence of a statute, “Beltrami County would still have been subject to suit in common law negligence because of its failure to properly maintain the dump,” presumably because that failure created a common law nuisance.⁴⁸ The court contrasted this with the situation in *Bruegger*, where, according to the court, “no common law duty required the sheriff’s department to inform the Brueggers of their potential rights of recovery under the CVRA.⁴⁹ The requirement to inform did not arise until the enactment of the CVRA.”⁵⁰ The implication, at least, was that the proper inquiry under the facts was whether the legislature intended to impose civil tort liability upon a law enforcement agency for failing to inform crime victims of their rights under CVRA—that is, whether the legislature implicitly meant to create a statutory cause of action. But, in answering this question in the negative, the court did not identify any specific factors to guide its analysis. Perhaps more troubling is that the Brueggers’ claim was, according to the court, a claim for “negligence,” a term which at least suggests the assertion of a common law cause of action in the mold of *Lorshbough* and, more importantly, *Cracraft* and its progeny. Yet the *Bruegger* court’s assertion, without further analysis, that “no common law duty” existed on the part of the sheriff’s department to inform the Brueggers about the existence of the CVRA seemed to ignore *Cracraft*, where the court created a multi-factor analysis, one part of which serves to determine whether or not a statute gives rise to such a common law duty.⁵¹

46. *Lorshbough v. Twp. of Buzzle*, 258 N.W.2d 96, 103 (Minn. 1977).

47. *Bruegger*, 497 N.W.2d at 261-62.

48. *Id.* at 262.

49. *Id.*

50. *Id.*

51. This distinction between a common law cause of action based on a statutory duty and a purely statutory cause of action is more than just a matter of semantics. A common law negligence action based on a statutory duty remains a common law cause of action, with all of its attendant common law elements and common law defenses. In contrast, the elements of a statutory cause of action, whether express or implied, flow from the statute and its interpretation and may

The confusion reflected in *Bruegger* regarding the distinction between the public duty rule and implied statutory causes of action set the stage for the supreme court's 1996 holding in *Hoppe v. Kandiyohi County* that failure to comply with the Vulnerable Adults Reporting Act (VARA) did not give rise to tort liability⁵²—a holding subsequently reversed in *Radke*.⁵³ Because of the importance of *Hoppe* to understanding the *Radke* decision, the next section of this Article examines *Hoppe* in depth.

III. HOPPE V. KANDIYOHI COUNTY

A. Statutory Background

The statute at issue in *Hoppe* was VARA, which in 1994 mandated that particular individuals were required to report suspected neglect or abuse of vulnerable adults, and listed the duties of the local welfare agency upon receipt of a report.⁵⁴ At that time, VARA provided that a person who failed to make a required report was guilty of a misdemeanor and that a person who negligently or intentionally failed to make a required report would be liable for damages resulting from that failure.⁵⁵ The statute stated that a person who made a voluntary or mandatory report or participated in an investigation would be immune from any civil or criminal liability if that person acted in good faith.⁵⁶

The statute also imposed obligations on certain governmental actors to “immediately” take certain measures in response to

thus be significantly different from analogous common law causes of action. To return to a prior example, a MERA cause of action has elements quite different from a trespass cause of action, even though both may peacefully co-exist in the same lawsuit. *See, e.g.,* Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, Inc., 624 N.W.2d 796, 804-06 (Minn. Ct. App. 2001) (identifying elements of common law trespass and the distinct elements of a statutory MERA claim); *see also* RESTATEMENT (THIRD) OF TORTS § 14 cmt. b (2005) (“[L]arge numbers of statutes, in declaring conduct unlawful and creating a public-law penalty, are silent as to private liability in the event of a statutory violation. In a suit brought by the victim of such a violation, the court, relying on ordinary principles of legislative interpretation, may in appropriate cases infer from the statute a cause of action for damages against the violator.”).

52. 543 N.W.2d 635, 638 (Minn. 1996).

53. *See infra* Part IV.

54. MINN. STAT. § 626.557, subds. 3, 10 (1994).

55. *Id.* subd. 7.

56. *Id.* subd. 5.

reports of abuse.⁵⁷ Subdivision 10 of the statute provided that upon receipt of a report, the “local welfare agency shall immediately investigate and offer emergency and continuing protective social services.”⁵⁸ Subdivision 11a similarly provided that “upon receipt” of an abuse report from a social service agency, “the prosecuting authority shall immediately investigate, prosecute when warranted, and transmit its findings and disposition to the referring agency.”⁵⁹ These requirements to take “immediate” action—and the alleged failure of officials in Kandiyohi County to do so—were at the center of the *Hoppe* case.

B. The Facts and the Claims

The *Hoppe* case involved a claim of financial exploitation of an older adult. Georgia Hoppe, who was more than ninety years old at the time the case arose, had appointed Paul Bengston as her attorney-in-fact to help her manage her financial affairs.⁶⁰ Bengston was an employee of Green Lake State Bank, where Hoppe had an account.⁶¹ From June 1989 to November 1990, Bengston wrote numerous checks on Hoppe’s account, including checks payable to Bengston.⁶² Bengston subsequently admitted to forging Hoppe’s signature.⁶³

In March 1990, another bank employee, Allen Struck, spoke with Hoppe about the activity on her account.⁶⁴ According to Struck, Hoppe seemed to have complete trust in Bengston.⁶⁵ Struck then took his concerns to Sondra Anderson at Kandiyohi County Family Services, who in turn contacted the Kandiyohi Sheriff’s Department and the County Attorney and completed a Vulnerable Adult Complaint.⁶⁶

At the County Attorney’s suggestion, it was decided that a mental health worker would meet with Hoppe and evaluate whether she understood what Bengston was doing with her

57. *Id.* subds. 4, 4a.

58. *Id.* subd. 10(a).

59. *Id.* subd. 11a.

60. Stipulation of Facts at 1-2, *Hoppe v. Kandiyohi County*, No. C6-93-1215 (Dist. Ct. Kandiyohi County 1994).

61. *Id.* at 1.

62. *Id.* at 2.

63. *Id.*

64. *Id.* at 3.

65. *Id.*

66. *Id.* at 3-4.

money.⁶⁷ After the evaluation, either the county social services workers or the County Attorney were to advise the sheriff's office as to whether further investigation by law enforcement was warranted.⁶⁸ Despite this plan, the county took no further action for more than six months.⁶⁹ In that time, nineteen checks payable to Bengston and allegedly signed by Hoppe were drawn on Hoppe's account at Green Lake State Bank, for a total of \$54,500.⁷⁰

On October 10, 1990, Struck contacted Anderson again and told her that Bengston had taken substantial amounts of Hoppe's money, had cashed in some of her bonds, and was giving money to his children and taking trips to Las Vegas.⁷¹ After relaying some of this information to the sheriff's department, Kandiyohi County Family Services sent two employees to interview Hoppe on October 19, 1990.⁷² Hoppe appeared confused about dates and names and about her financial situation.⁷³ She also told the Family Services workers that she was being abused by staff at the nursing home and that she wished she would die.⁷⁴

The following day, one of the Family Services workers who interviewed Hoppe met with the County Attorney, who agreed to help the Family Services agency commence guardianship proceedings.⁷⁵ About five weeks later, a Vulnerable Adult Maltreatment Report was prepared by Family Services, and a special guardian was appointed on November 30, 1990.⁷⁶ That action terminated Bengston's power-of-attorney.⁷⁷ In the meantime, however, eight more checks payable to Bengston and totaling \$17,200 had been drawn on Hoppe's account from October 22 to November 28, 1990.⁷⁸

67. *Id.* at 4.

68. *Id.*

69. *Id.* at 4-5.

70. *Id.* at 5-8. The stipulation also notes the existence of two other checks payable to Bengston, totaling \$10,000, pre-dating the March 20, 1990 conference. *Id.* at 3, 5.

71. *Id.* at 7-8.

72. *Id.* at 8-9.

73. *Id.* at 9-11.

74. *Id.*

75. *Id.* at 11.

76. *Id.* at 13.

77. *Id.* at 1.

78. *Id.* at 11-13.

C. *The Lawsuit and the District Court's Decision*

After settling a claim against the Green Lake State Bank for negligence and breach of fiduciary duty, Hoppe sued Kandiyohi County for failing to take immediate steps to protect Hoppe from financial exploitation after the March 1990 report made by bank employee Struck, and for subsequent delays in investigating the case.⁷⁹ Hoppe and the county both moved for summary judgment.⁸⁰

The district court modeled its analysis largely on the supreme court's discussion in *Bruegger*. The district court first noted that the provisions of VARA requiring the County Attorney to immediately investigate vulnerable adult abuse reports did not create a private cause of action against the county.⁸¹ The court then cited *Bruegger* as standing for the proposition that "[a] statute does not create a private cause of action if, absent the statute, the county would not be subject to suit in common law negligence."⁸² The district court thus appears to have read *Bruegger* as completely precluding the possibility that a statute might imply a cause of action.⁸³ Citing *Lorshbough*, the court stated that it would have reached a different conclusion if the county had been "subject to suit in common law negligence absent the statute," but noted that no common law duty existed requiring the County Attorney to immediately investigate financial exploitation.⁸⁴ The court therefore found that the county was entitled to judgment as a matter of law.⁸⁵

D. *The Decision of the Court of Appeals*

Shortly after appealing the district court's order, Hoppe died.⁸⁶ In the Statement of the Case to the court of appeals, Hoppe's personal representative and former guardian characterized her

79. Hoppe v. Kandiyohi County, No. C6-93-1215, slip op. at 4 (Minn. Dist. Ct. Kandiyohi County 1994). The County, in turn, named the bank and Bengston as third-party defendants. *Id.* Their role in the proceedings is not further discussed here.

80. *Id.* at 1.

81. *Id.* at 4-5.

82. *Id.* at 5 (citing *Bruegger v. Fairbault County Sheriff's Dep't*, 497 N.W.2d 260, 262 (Minn. 1993)).

83. *See id.*

84. *Id.* (citing *Lorshbough v. Twp. of Buzzle*, 258 N.W.2d 96 (Minn. 1977)).

85. *Id.* at 6.

86. Hoppe v. Kandiyohi County, No. C0-94-1627, 1995 WL 70167, at *2 (Minn. Ct. App. Feb. 21, 1995).

claim as a “negligence action . . . as a result of the County’s breach of its duties under the Vulnerable Adults Act and at common law.”⁸⁷

Unlike the district court’s focus on the responsibilities of the County Attorney under subdivision 11 of VARA, the court of appeals focused on the obligations of the Kandiyohi County Family Services agency under subdivision 10(c).⁸⁸ The court noted that the statute did not expressly make a county liable for failing to carry out its duties to immediately investigate and offer protective services, but ultimately found the case “similar” to *Andrade v. Ellefson*.⁸⁹ Writing on behalf of the court, Judge Amundson applied the factors promulgated in *Cracraft v. City of St. Louis Park* and found that vulnerable adults were a “‘particular protected class’ and, like children, ‘uniquely vulnerable.’”⁹⁰ Judge Amundson also noted that the facts in Hoppe’s case were even more compelling than in *Andrade*, as “the county had actual knowledge of the danger to Hoppe.”⁹¹ Based on this analysis, the court found that a special relationship existed between the county’s social service agency and Hoppe, “giving rise to a tort duty of care owed by the county to Hoppe.”⁹²

E. *The Supreme Court’s Decision*

The Minnesota Supreme Court granted review and unanimously reversed the court of appeals, reinstating summary judgment for the county.⁹³ The court distinguished *Andrade* on the basis that the statute at issue in *Andrade* had not discussed penalties or liability, while the legislature had spoken to the question of penalties imposed for failure to make a report under VARA, and had not identified consequences for failure to investigate or

87. Appellant’s Statement of the Case at 1, *Hoppe v. Kandiyohi County*, No. C0-94-1627, 1995 WL 70167 (Minn. Ct. App. Feb. 21, 1995).

88. *Hoppe*, 1995 WL 70167, at *4.

89. *Id.*

90. *Id.* at *5.

91. *Id.*

92. *Id.* In reaching this result, the court also distinguished one of its own recent cases, *Valtakis v. Putnam*, 504 N.W.2d 264 (Minn. Ct. App. 1993). *Hoppe*, 1995 WL 70167, at *5. In *Valtakis*, the court had declined to find a private cause of action under CARA—the statute that would eventually be at issue in *Radke*. 504 N.W.2d at 267. The court distinguished *Valtakis* on the grounds that the court there “did not consider *Cracraft* or *Andrade* in reaching its decision.” *Hoppe*, 1995 WL 70167, at *5.

93. *Hoppe v. Kandiyohi County*, 543 N.W.2d 635, 636 (Minn. 1996).

intervene.⁹⁴ Accordingly, the court found that the legislature had not explicitly or by implication identified a civil cause of action for alleged negligent investigation or intervention.⁹⁵ The court stated that it was relying upon *Bruegger v. Faribault County Sheriff's Department*,⁹⁶ but the court's reasoning appears to have gone further than that case. In *Bruegger*, the court rejected the Brueggers' claims because the statute at issue had not expressly or impliedly provided for a cause of action.⁹⁷ In *Hoppe*, the statute at issue did explicitly provide for a cause of action in some circumstances, but was silent regarding others.⁹⁸ Thus one possible reading of *Bruegger* and *Hoppe* is that *Bruegger* was governed by the rule that "statutes are presumed not to alter or modify the common law unless they expressly so provide,"⁹⁹ while in *Hoppe* the court found that by imposing penalties for some behaviors but not for the specific wrongs alleged in that case, the legislature *did* modify the common law (albeit by omission) and that precluded liability for those specific wrongs.¹⁰⁰

F. Summary

After these cases it was unclear when (or whether) the *Cracraft* factors were to be applied to tort claims based upon statutory duties. In *Bruegger*, the supreme court seemingly ignored *Cracraft* and *Andrade*, discussing the older *Lorshbough v. Township of Buzzle* case instead. The court did discuss *Andrade* in *Hoppe*, but seemed to limit its application to circumstances where the legislature had been completely silent regarding liability. Additionally, the court of appeals and supreme court appeared to part ways on the proper analysis to be applied when determining whether a statute

94. *Id.* at 638.

95. *Id.* The court did not discuss whether the *Cracraft* factors could still show that a "special relationship" existed between the county and Hoppe. In this respect, the court's decision resembles the reasoning in *Valtakis*, which the court of appeals distinguished (and perhaps implicitly criticized) in its own review of Hoppe's claim. *See Hoppe*, 1995 WL 70167, at *5.

96. *Hoppe*, 543 N.W.2d at 638.

97. *Id.*

98. *Id.* ("Here, unlike in *Andrade*, the legislature has spoken to the question of penalties of liability to be imposed with regard to the Vulnerable Adults Reporting Act and has not explicitly or by implication identified a civil cause of action for alleged negligent investigation or intervention.")

99. *Bruegger v. Faribault County Sheriff's Dept.*, 497 N.W.2d 260, 262 (quoting *Agassiz v. Magnusson*, 272 Minn. 156, 166, 136 N.W.2d 861, 868 (1965)).

100. *See Hoppe*, 543 N.W.2d at 638.

implicitly creates a cause of action. The court of appeals adopted a three-factor test for this issue, while the supreme court's analysis remained more nebulous.

The approaches taken by the court of appeals and supreme court to the question of how statutory duties factor into tort claims thus reflected something of a jumble of two, and possibly three, legal doctrines—the common law public duty rule, the implied statutory cause of action analysis, and the question of whether the legislature has modified the common law. This was the state of the law when the *Radke* case arose.

IV. THE *RADKE* CASE

A. *Statutory Background*

The *Radke* case involved CARA, one of a set of reporting acts relating specifically to protecting children who may be neglected or abused.¹⁰¹ The legislature stated that

the public policy of this state is to protect children whose health or welfare may be jeopardized through physical abuse, neglect, or sexual abuse [I]t is the intent of the legislature . . . to strengthen the family and make the home, school, and community safe for children by promoting responsible child care in all settings; and to provide, when necessary, a safe temporary or permanent home environment for physically or sexually abused or neglected children.¹⁰²

CARA specifies the persons who are required to report suspected child abuse, the methods of making reports, the agencies responsible for assessing or investigating reports of maltreatment, and the duties of those agencies upon receipt of a report.¹⁰³ Like VARA, CARA imposes obligations to take certain measures in response to reports of abuse.¹⁰⁴ Likewise, CARA lists criminal penalties for failure to report, and provides immunity from civil or

101. MINN. STAT. § 626.556 (2004). In addition to CARA and VARA, other reporting acts deal with health professionals' reports of suspicious wounds and reports of crimes motivated by bias. *See id.* §§ 626.52, 626.5531 (mandating health care professionals' reports of suspicious wounds and peace officers' reports of crimes motivated by bias, respectively).

102. *Id.* § 626.556, subd. 1.

103. *See id.* subds. 2, 3-3c, 7, 10.

104. *Id.* subd. 10.

criminal liability for persons acting in good faith and assisting in the assessment, but offers no immunity if the person fails to make a required report or is the abuser.¹⁰⁵ The statute now provides that if a person makes a report and prevails in a civil action because that person was granted immunity, that person can get attorney fees.¹⁰⁶ As a result, one could argue that the revised statute seems to contemplate a civil cause of action for a failure to report.¹⁰⁷ Arguably, if a statutory civil cause of action can be implied for a failure to report, one can also be implied for a failure to investigate or intervene.¹⁰⁸ However, as is discussed further below, in *Radke* the Minnesota Supreme Court did not reach the issue of whether a statutory cause of action is available and instead focused on the common law arguments.¹⁰⁹

B. *Facts and Procedural History*

In January 2003, Matthew Radke brought a common law negligence action against Freeborn County and two of its social workers, alleging that their failure to act in good faith and with due care in following the investigatory procedures of CARA resulted in the wrongful death of his and Peggy Radke's son Makaio.¹¹⁰ From

105. *Id.* subds. 4-5.

106. *Id.* subd. 4(d). This provision did not exist when the Minnesota Court of Appeals, applying the framework in *Bruegger*, held that no common law duty to report existed before the statute was enacted, that the only issue was whether the legislature intended there to be a cause of action, and that the legislature did not expressly or impliedly create a cause of action for a failure to make a required report under CARA. *Valtakis v. Putnam*, 504 N.W.2d 264, 266-67 (Minn. Ct. App. 1993).

107. The Minnesota Court of Appeals rejected this argument in *Kuelbs v. Williams*, 609 N.W.2d 10, 15 (Minn. Ct. App. 2000). The supreme court denied review of that case, in which Kuelbs argued that a police officer made a report of child abuse in bad faith. *Id.* at 13. It is conceivable that public policy concerns may preclude a cause of action in the type of situation involved in *Kuelbs*, as opposed when someone fails to make a required report of abuse.

108. In *Valtakis*, the court stated that the legislature did not intend to create a civil remedy for a failure to report because it expressly imposed a criminal penalty and made no mention of a civil remedy. 504 N.W.2d at 266. Because CARA includes no proscribed criminal penalties for a failure to investigate, it seems that the reasoning in *Valtakis* does not necessarily preclude an implied statutory civil cause of action for a failure to investigate or intervene.

109. The court did not discuss statutory causes of action, but hinted that one may be implied by CARA's grant of immunity. *Radke v. County of Freeborn*, 694 N.W.2d 788, 796 n.3 (Minn. 2005).

110. Radke specifically alleged that the County failed to exercise its duties under Minnesota Statute section 626.556, subdivisions 10(a) and 10(h)-(j).

February 2001 through April 2001, when Makaio was about seventeen to nineteen months old, Peggy Radke's housemate, Paul Gutierrez, physically and sexually abused Makaio, eventually killing him.¹¹¹

In February 2001, Makaio became the subject of investigation by the Freeborn County Human Services Department after a physician or nurse observed bruises and lesions and made a report.¹¹² Tammy Ressler, a social worker, visited the home in early March and was told that Makaio had fallen down.¹¹³ Neither Ressler nor the County investigated the situation further.¹¹⁴ In late March, Matthew Radke took Makaio to the police, who photographed Makaio, and to an urgent care center.¹¹⁵ A physician at the urgent care center examined Makaio's multiple bruises, multiple abrasions, and a burn, and reported the suspected abuse to the Human Services Department.¹¹⁶ Four days later, Ressler visited the home and interviewed Peggy Radke and Gutierrez, who provided an explanation for the marks.¹¹⁷ Ressler sent Matthew Radke a letter stating that the bruise on Makaio's foot had not been intentionally inflicted and that child protection services were not necessary.¹¹⁸ About two weeks later, in early April, Matthew Radke and Makaio's guardian ad litem separately contacted the police about bruises on Makaio's face and about their concerns that Makaio was being abused.¹¹⁹ Social worker Lisa Frank went to the home about seven to ten days later.¹²⁰ Frank, aware of the prior abuse allegations, observed fresh bruises on Makaio's face, rib cage, and backbone, and saw a foot injury, but took no immediate

Complaint at ¶ 29, *Radke v. County of Freeborn*, No. C6-02-1692 (Minn. Dist. Ct. Freeborn County 2003).

111. In *State v. Gutierrez*, 667 N.W.2d 426, 439 (Minn. 2003), the supreme court affirmed Gutierrez's conviction of first-degree murder while committing or attempting to commit criminal sexual conduct in the first or second degree, first-degree murder while committing child abuse, and second-degree felony murder while committing or attempting to commit assault in the first degree.

112. Complaint, *supra* note 110, at 3; Joint and Separate Answer of Defendants County of Freeborn, Lisa Frank and Tammy Ressler at 2, *Radke v. County of Freeborn*, No. C6-02-1692 (Minn. Dist. Ct. Freeborn County 2003).

113. Complaint, *supra* note 110, at 3.

114. *See id.*

115. *Id.* at 3-4.

116. *Id.* at 4; Answer, *supra* note 112, at 3.

117. Complaint, *supra* note 110, at 4; Answer, *supra* note 112, at 3.

118. Complaint, *supra* note 110, at 4-5; Answer, *supra* note 112, at 3.

119. Complaint, *supra* note 110, at 5.

120. Complaint, *supra* note 110, at 5-6; Answer, *supra* note 112, at 3-4.

precautions.¹²¹ Makaio died that same night when left in Gutierrez's care, after suffering numerous bruises, abrasions, and fractures.¹²²

Freeborn County, Frank, and Ressler's Answer denied that the County's agents were aware of any physical abuse.¹²³ In their Answer, these defendants argued that the report received in late February was anonymous, and did not contain all of the details of the physician's observations.¹²⁴ The Answer denied that the defendants had all the information about the late March medical exam¹²⁵ and asserted that Ressler did not observe symptoms of neglect or abuse in her late March 2001 visit to the home.¹²⁶ Frank contended that she had no reason to remove the child from the home, but that she had determined that further investigation was warranted.¹²⁷

The Answer also stated that the three defendants "acted in good faith and with due care," that they "followed the procedures in Minnesota statutes," that any negligence on their part was not the proximate cause of injury to Makaio, and that Gutierrez's behavior was a superseding and intervening act.¹²⁸ The defendants asserted that

- the complaint failed to state a claim upon which relief could be granted;¹²⁹
- the cause of action alleged by Radke "comes from public duty," and that the defendants owed the plaintiff no duty;¹³⁰ and
- the defendants were entitled to statutory immunity under provisions including CARA, statutory discretionary immunity, official immunity, and other common law and statutory immunities.¹³¹

The defendants moved to dismiss the complaint for failure to state a claim for which relief could be granted,¹³² and the district

121. Complaint, *supra* note 110, at 5-6; Answer, *supra* note 112, at 3-4.

122. Complaint, *supra* note 110, at 6-7; Answer, *supra* note 112, at 4.

123. Answer, *supra* note 112, at 3-4.

124. *Id.* at 2.

125. *Id.* at 3.

126. *Id.*

127. *Id.* at 3-4.

128. *Id.* at 4-5.

129. *Id.* at 5.

130. *Id.*

131. *Id.* at 5-6.

132. Defendants' Motion to Dismiss, Radke v. County of Freeborn, No. C6-02-

court granted the motion.¹³³

Radke appealed, arguing that the defendants had assumed a duty to act with reasonable care and that this special duty gave rise to the wrongful death negligence claim.¹³⁴ In March 2004, the Minnesota Court of Appeals affirmed, concluding that CARA does not contain a legislatively-established cause of action.¹³⁵ The court found that CARA is comparable to VARA and determined that the Minnesota Supreme Court's reasoning from *Hoppe*, in which the supreme court held that the legislature did not identify a cause of action under VARA for alleged negligent investigation or intervention, should apply.¹³⁶ Thus, although Radke brought a common law claim, it appears that by relying on *Hoppe* the court affirmed on the basis that no express or implied statutory cause of action was available.

When affirming, the Minnesota Court of Appeals noted that Radke's complaint was not specifically based on the defendants' failure to follow CARA.¹³⁷ Without explicitly saying so, the court seemed to recognize that Radke was attempting to bring a common law claim, as he did not allege a statutory cause of action when he argued on appeal that the defendants owed Makaio a special duty. The court admitted the law was not "clear cut"¹³⁸ and that it was sympathetic toward Radke, but nevertheless was "reluctant to supply what the legislature appeared to intentionally omit."¹³⁹

While the court of appeals discussed *Cracraft* and *Andrade*, it did not rely on those cases or synthesize them with *Hoppe*; it simply held there was no legislatively established cause of action for the reasons discussed in *Hoppe*.¹⁴⁰ This reliance on *Hoppe* seems consistent with the interpretation discussed above—that the legislature's deliberate omission of a cause of action modified the common law in a way that precluded liability for the specific wrongs

1692 (Minn. Dist. Ct. Freeborn County 2003). The defendants moved to dismiss pursuant to Minnesota Rules of Civil Procedure 12.02(b) and 12.03. *Id.*

133. Order of June 2, 2003, *Radke v. County of Freeborn*, No. C6-02-1692 (Minn. Dist. Ct. Freeborn County 2003) (dismissing the case with prejudice on the merits).

134. *Radke v. County of Freeborn*, 676 N.W.2d 295, 298 (Minn. Ct. App. 2004).

135. *Id.* at 301.

136. *Id.* at 300.

137. *Id.* at 298.

138. *Id.* at 300.

139. *Id.* at 298-300.

140. *Id.*

alleged in this case. This reading is also consistent with the Minnesota Court of Appeals' brief mention of the *Valtakis* case,¹⁴¹ where the same court held that no statutory civil cause of action was available for failure to make a required report of child abuse because the legislature failed to provide a civil remedy when it outlined criminal penalties for that behavior.¹⁴²

Radke appealed to the Minnesota Supreme Court, raising the legal issue of whether a cause of action existed for the wrongful death of a child caused by the negligence of a county and two social workers who assumed a special duty to the child.¹⁴³

C. *The Arguments Raised by the Parties*

In their briefs to the Minnesota Supreme Court, appellant Radke primarily relied on *Cracraft* and *Andrade*, while respondents Freeborn County and the social workers generally argued that *Hoppe* controlled.¹⁴⁴ Neither party focused on the distinction between statutory and common law causes of action, or the circumstances under which a statute would be regarded as having modified the common law (which, as we have seen, seemed to factor into the supreme court's *Hoppe* decision).

Radke argued that the court of appeals misapplied the third *Cracraft* factor and failed to apply the other factors when it found that there was no language in CARA that explicitly or impliedly permitted a civil cause of action.¹⁴⁵ He then contended that the third *Cracraft* factor alone was sufficient to allow a cause of action because Makaio was within the class of persons that the statute was designed to protect, and the other factors were "helpful."¹⁴⁶ In his brief, Radke asserted that the county had actual knowledge of the abuse, that there were insufficient facts in the record to determine whether Radke had reasonably relied on the actions of the county, and that the county increased the harm to Makaio by failing to remove him from the home, particularly on the day of his death.¹⁴⁷ Radke argued that *Hoppe* was distinguishable because that case

141. *Id.* at 298.

142. *Valtakis v. Putnam*, 504 N.W.2d 264, 266 (Minn. Ct. App. 1993).

143. Brief of Petitioner-Appellant at v, *Radke v. County of Freeborn*, 694 N.W.2d 788 (Minn. 2005) (No. A03-797).

144. *Id.* at 9-16, 20-31; Brief of Respondent-Appellee at 8-13, 16-22, *Radke v. County of Freeborn*, 694 N.W.2d 788 (Minn. 2005) (No. A03-797).

145. Brief of Petitioner-Appellant, *supra* note 143, at 10.

146. *Id.* at 11-14.

147. *Id.* at 21-28.

involved the county's failure to initiate an investigation, while this case involved the county's negligence while conducting an investigation.¹⁴⁸ Because this case involved a negligent investigation, Radke asserted, the county had assumed a duty of care and breached that duty.¹⁴⁹ Finally, Radke distinguished CARA from VARA and argued that *Hoppe* did not apply to this case because there were greater public policy concerns due to children being more vulnerable than adults.¹⁵⁰

The county argued that CARA is almost identical to VARA, and contended that, as a result, *Hoppe* dictated that no cause of action was available under CARA.¹⁵¹ The county further argued that because no cause of action is available under CARA, no other theory of liability—such as a special duty under *Cracraft* or *Andrade*, or an assumed duty—was available.¹⁵² Thus, in essence, the county argued that the absence of a *statutory* cause of action precluded any *common law* claim.

D. *The Minnesota Supreme Court's Decision*

In its decision, the Minnesota Supreme Court first discussed the principle from *Andrade* that a person generally only has a common law duty to prevent a third person from harming another if there is some sort of special relationship, noted that it applied this principle to government torts in *Cracraft* when it stated that a governmental unit can only be found liable if the governmental unit owed “the plaintiff a duty different than that owed to the general public,” and then reiterated that *Cracraft* set out the test for determining whether a special duty exists.¹⁵³ The court explained that the existence of a statute such as CARA cannot alone create a special duty because there must be additional indicia that the governmental unit undertook the responsibility of protecting a particular class of persons “from the risks associated with a particular harm.”¹⁵⁴ It then described the four *Cracraft* factors, reiterating that they are not exhaustive and that there is no bright

148. *Id.* at 19.

149. *Id.* at 29-32.

150. *Id.* at 32-36.

151. Brief of Respondent-Appellee, *supra* note 144, at 7-8.

152. *Id.* at 11-14.

153. Radke v. County of Freeborn, 694 N.W.2d 788, 793 (Minn. 2005).

154. *Id.* (citing *Cracraft v. City of St. Louis Park*, 279 N.W.2d 801, 806 (Minn. 1979)).

line rule, but explained that it found in *Andrade* that the third factor was “so overwhelmingly dominant” that it had no difficulty finding a special relation, even though two of the four *Cracraft* factors had not been met.¹⁵⁵

The court then discussed its decision in *Hoppe* in terms that are remarkably circumspect for a case about to be overruled. The court stated that it had found in *Hoppe* that VARA could not “form the basis for a civil cause of action in negligence,”¹⁵⁶ a description which appears to be a tacit admission that *Hoppe* involved a common law cause of action rather than a statutory one. Similarly, the *Radke* court noted that *Hoppe* had distinguished *Andrade* without directly analyzing the *Cracraft* factors when it held that no cause of action was available to the guardian of a vulnerable adult because the legislature did not expressly or impliedly create a cause of action when enacting VARA.¹⁵⁷ Curiously, however, the court did not directly confront the propriety of *Hoppe*’s reliance on the implied statutory cause of action analysis in place of the common law public duty analysis.

Instead, the court explained that although *Radke* could be distinguished from *Hoppe* on the basis that VARA and CARA are only similar and not identical, its true reason for distinguishing the two was based on public policy concerns—specifically, that the concerns raised in *Radke* were similar to those raised in *Andrade*: providing a safe environment for children in a private home.¹⁵⁸ The court reiterated that whether a common law cause of action is available due to a statute’s creation of a special duty involves a case-by-case analysis of the *Cracraft* factors.¹⁵⁹

The court began with the third *Cracraft* factor and found that CARA sets forth mandatory reporting and investigatory acts that are for the protection of a particular class of persons—children who are identified as suspected victims of abuse or neglect—rather than the public in general and, as a result, held that the third *Cracraft* factor was satisfied.¹⁶⁰ The court then analyzed the other *Cracraft* factors, finding that Freeborn County had actual knowledge of the abuse; that while it could not conclusively find that *Radke*

155. *Id.* at 794 (citing *Andrade v. Ellefson*, 391 N.W.2d 836, 843 (Minn. 1986)).

156. *Id.* at 795.

157. *Id.*

158. *Id.* at 795-96.

159. *Id.* at 796.

160. *Id.* at 797.

reasonably relied on the county's representations, it was difficult to speculate what more Radke could have done about the situation; and that Radke did not establish that the county increased the risk of harm to Makaio.¹⁶¹ Despite the fact that not all factors were satisfied, the supreme court found that, like in *Andrade*, the third factor was overwhelmingly dominant and that the county owed Makaio a special duty.¹⁶² It thus held that "a cause of action can be maintained for negligence in the investigation of child abuse and neglect reports as required under CARA," and reversed and remanded the case to the district court.¹⁶³

V. CONCLUSION: LINGERING QUESTIONS

By all appearances, *Radke* fully restores *Cracraft* and the public duty rule as a legal doctrine that stands separate and distinct from the analysis used to discover implicit statutory causes of action. But for some reason, the court appears to have been reluctant to come right out and say as much. Even when ultimately overruling *Hoppe*, the court was circumspect, stating that it found it impossible to harmonize *Hoppe* with *Cracraft* and *Andrade* and that it was overruling *Hoppe* to avoid eviscerating "the legal principles regarding special duties set forth in *Cracraft* and *Andrade*."¹⁶⁴

Because the *Radke* court determined that the *Hoppe* and *Radke* cases each dealt with common law claims regarding governmental actors' duties under reporting statutes but had different outcomes, one can understand why the court felt it had to overrule *Hoppe* to achieve uniformity. Absent a more detailed explanation by the supreme court, however, it remains unclear in what ways the court believes the analysis in *Hoppe* was flawed or how to synthesize *Bruegger* with *Cracraft* and its progeny.

In this and other respects, *Radke* represents something of a missed opportunity to truly clarify this area of the law. As already noted, the court did suggest that it was restoring the principle that a common law negligence claim can be brought based on duties prescribed by statute.¹⁶⁵ But, it is still unclear what specific factors the supreme court will apply to determine whether a statute implies

161. *Id.* at 797-98.

162. *Id.* at 798.

163. *Id.* at 799. The court noted that the issue of immunity was not before it. *Id.* at 799 n.6.

164. *Id.*

165. *Id.*

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a cause of action separate and apart from any common law cause of action. And perhaps most seriously, the court did not squarely address the notion lurking behind *Bruegger* and *Hoppe*—that the legislature’s withholding of an express cause of action may be interpreted as an affirmative act intended to alter the underlying common law to preclude private common law causes of action. Future case law applying *Radke* and these other cases may bring additional clarity to these issues.