

RECENT DEVELOPMENTS IN INDIANA TORT LAW

TAMMY J. MEYER*
KYLE A. LANSBERRY**

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INTRODUCTION

From October 1997 to October 1998, federal and state appellate courts of Indiana were presented with novel and complex issues in the area of Indiana tort law. They were called upon to decide issues of first impression in the State of Indiana, as well as to re-examine long-standing judicial precedent. Their decisions in this area reflect both the dynamic nature of tort law in general, and the broad range of areas in which it affects our society as a whole.

I. NEGLIGENCE

A. *Defining the Scope of the Duty Owed*

1. *Abrogation of the Latent/Patent Distinction as the Basis for*

* Lewis & Wagner, Indianapolis. B.S., *summa cum laude*, 1986, Indiana Wesleyan University; J.D., *summa cum laude*, 1989, Indiana University School of Law—Indianapolis.

** Lewis & Wagner, Indianapolis. B.S., *cum laude*, 1995, Ball State University; J.D., 1998, Indiana University School of Law—Indianapolis.

Determination of a Legal Duty to Inspect.—In *McGlothlin v. M & U Trucking, Inc.*,¹ the Indiana Supreme Court was called upon “to address the continued viability of the latent/patent distinction”² as a factor in determining the existence of a duty on the part of a supplier of a chattel to be used by another. Specifically, the court addressed the following issue: “When a defective chattel causes personal injury, should the legal duty owed by a supplier of the chattel rest upon whether the defect is considered ‘latent’ rather than ‘patent’?”³

This lawsuit arose from an accident that occurred in 1990. The plaintiff was injured during the course of his employment when the landing gear of a semi-trailer into which he was loading televisions collapsed. He sustained serious injuries and sued the owner, lessor and transporter of the trailer, alleging that each of the defendants “‘negligently owned, operated and maintained’ the trailer,”⁴ and that their breach of duty caused his injuries. Specifically, the plaintiff claimed that the defendants’ repair and inspection procedures for latent defects were inadequate and that this inadequacy contributed to the collapse of the trailer’s landing gear.⁵

The trial court “entered summary judgment against the plaintiff, concluding, *inter alia*, that ‘Indiana law did not impose a duty on [the defendants] to discover latent defects.’”⁶ On appeal, the Indiana Court of Appeals affirmed the trial court’s judgment because it too found that no duty existed as a matter of law.⁷ Recognizing that “‘no Indiana court ha[d] addressed directly the question of a supplier’s liability for injury caused by a latent defect in a chattel furnished for the use of another,’” the appellate court concluded that the defendants “‘did not owe [the plaintiff] a duty to detect a latent defect in the landing gear.’”⁸

Shortly after it issued the *McGlothlin* opinion, the court of appeals again faced this issue in *Bloemker v. Detroit Diesel Corp.*⁹ The *Bloemker* court was critical of the rationale employed in *McGlothlin*, stating that:

Defining the duty owed in terms of the nature of the defect overlooks the distinction between the existence of a duty and the breach of that duty. The duty would appear to be one of inspection in the first instance because there is no way of knowing the nature of the defect as latent or patent without inspection.¹⁰

According to the *Bloemker* court,

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1. 688 N.E.2d 1243 (Ind. 1997).
 2. *Id.* at 1244.
 3. *Id.* at 1243-44.
 4. *Id.* at 1244.
 5. *See id.*
 6. *Id.*
 7. *Id.*
 8. *Id.* (quoting *McGlothlin v. M & U Trucking, Inc.*, 649 N.E.2d 135, 139-40 (Ind. Ct. App. 1995)).
 9. 655 N.E.2d 117 (Ind. Ct. App. 1995).
 10. *Id.* at 123.

[T]he nature of the defect becomes relevant only when determining whether the duty to inspect was breached. Breach of the duty would arise where a supplier of a chattel fails, upon reasonable inspection, to discover a patent defect. Where a latent defect exists, there would be no breach for failing to discover [it], so long as a reasonable inspection was performed.¹¹

However, although the *Bloemker* court disagreed with *McGlothlin*'s latent/patent distinction, it acknowledged the existence of controlling Indiana Supreme Court precedent consistent with *McGlothlin*;¹² precedent that held that "[t]he duty to inspect arises from knowledge of possible defects or their reasonable probability."¹³

The Indiana Supreme Court granted transfer in *McGlothlin* to address the concerns expressed by the *Bloemker* court and to resolve the inconsistencies between the supreme court's broad evaluation of duty as expressed in its recent opinions, and its previous precedent, which narrowly determined duty based solely upon a supplier's knowledge of potential defects.¹⁴

Relying upon the considerations reflected in the Restatement (Second) of Torts¹⁵ and Indiana jurisprudence regarding the determination of whether a duty exists, the Indiana Supreme Court agreed with the concerns expressed by *Bloemker* and overruled its previous precedent.¹⁶ The court found the employment of the latent/patent distinction to be an unsatisfactory basis for deciding the existence of a legal duty to inspect.¹⁷ It held that while the inquiry into the reasonable discoverability of a defect may be proper in evaluating whether a supplier has breached the duty of reasonable care, it is improper in determining whether such duty exists.¹⁸ To determine whether a duty to inspect exists, the court suggested that Indiana courts should instead focus on those factors explored in typical negligence cases, including: the relationship of the parties, the reasonable foreseeability of harm to the person injured, and public policy concerns.¹⁹

2. *Mental Capacity as a Factor in the Determination of Duty.*—In *Creasy v. Rusk*,²⁰ the Indiana Court of Appeals was faced with the novel issue of whether a person's mental capacity must be factored into the determination of whether a legal duty exists. Specifically, the court was called upon to decide whether "a

11. *Id.*

12. *Id.*

13. *Evansville Legion Home Ass'n v. White*, 154 N.E.2d 109, 111 (Ind. 1958), *overruled* by *McGlothlin v. M & U Trucking, Inc.*, 688 N.E.2d 1243 (Ind. 1997).

14. *McGlothlin*, 688 N.E.2d at 1245.

15. RESTATEMENT (SECOND) OF TORTS §§ 388, 392 (1965).

16. *McGlothlin*, 688 N.E.2d at 1245.

17. *Id.*

18. *Id.*

19. *Id.*

20. 696 N.E.2d 442 (Ind. Ct. App. 1998).

person institutionalized with a mental disability owes a duty to his caregiver to refrain from conduct that results in injury to the caregiver."²¹

The parties in *Creasy* argued for and against adopting a general rule, used in several other jurisdictions, that mentally disabled individuals are liable for their tortious activities without regard to the individual's mental capacity to control or to understand the consequences of their actions.²² The same rule is firmly embodied in the Restatement (Second) of Torts, which provides: "Unless the actor is a child, his insanity or other mental deficiency does not relieve the actor from liability for conduct which does not conform to the standard of a reasonable man under like circumstances."²³

The Indiana Court of Appeals likened this issue to that involving the mental capacity of a child. With regard to children, Indiana courts have generally established the following three tiered analysis, which holds a child to the exercise of care proportionate to the child's capacity:

- (1) children under the age of 7 years are conclusively presumed to be incapable of being contributorily negligent;
- (2) between the ages of 7 and 14 years of age, a rebuttable presumption exists that a child may be guilty of contributory negligence;
- (3) children over the age of 14, absent special circumstances, are chargeable with exercising the standard of care of an adult.²⁴

In *Creasy*, the Indiana Court of Appeals determined that Indiana has likewise indicated a willingness to factor in an adult's mental capacity when determining whether to hold an adult person responsible for negligence. Consequently, it held that a person's mental capacity, "whether that person is a child or an adult, must be factored into the determination of whether a legal duty exists."²⁵

However, the court cautiously noted that:

the determination of whether such a duty exists is most frequently accomplished by balancing the following three factors set forth by the Indiana Supreme Court [in] *Webb v. Jarvis*:^[26] (1) the relationship between the parties; (2) the reasonable foreseeability of harm to the person injured; and (3) public policy concerns.²⁷

Such factors are typically balanced by the court, as a matter of law, rather than left for a jury to decide. Thus, the court suggested that "genuine issues of

21. *Id.* at 444.

22. *Id.*

23. RESTATEMENT (SECOND) OF TORTS § 283B (1964).

24. *Creasy*, 696 N.E.2d at 445 (citing *Bailey v. Martz*, 488 N.E.2d 716, 721 (Ind. Ct. App. 1986); *Smith v. Diamond*, 421 N.E.2d 1172, 1177-79 (Ind. Ct. App. 1981)).

25. *Id.* at 446.

26. 575 N.E.2d 992, 995 (Ind. 1991).

27. *Creasy*, 696 N.E.2d at 446.

material fact may be frequently interwoven with the relationship and foreseeability factors, making the existence of a duty a mixed question of law and fact, ultimately to be decided by the finder of fact."²⁸

In determining whether a relationship exists between two parties upon which a legal duty may be based, the *Creasy* court noted that "there must be some knowledge on the part of the purported tortfeasor that his or her conduct may draw him or her into a legal relationship with another."²⁹ The court found that "[i]n the absence of extenuating circumstances, the relationship between a patient in a health care facility and the caregivers working in the facility is sufficient upon which to base a legal duty."³⁰

However, the court established that extenuating circumstances that may alter the relationship between parties include the patient's mental capacity, and that such a relationship may "vary according to the nature and extent of the individual's mental capacity to control his actions and understand the consequences thereof."³¹ Thus, the court found that the greater the degree of the individual's impairment, the less weight will typically be given to the relationship factor in determining a legal duty.³²

The court also noted that the foreseeability factor is typically analyzed by considering broadly the type of plaintiff and harm involved, without regard to the facts of the actual occurrence.³³ The type of plaintiff involved in this case was a caregiver of patients with Alzheimer's disease. Because such patients often exhibit signs of violence and combativeness, the court found it was foreseeable that when an Alzheimer's patient becomes combative in the presence of his caregiver, the caregiver will be injured. Accordingly, the court concluded that "the foreseeability factor weighs in favor of imposing a duty."³⁴

Finally, the court in *Creasy* was faced with the issue of the public policy concerns involved in imposing a duty upon those with a diminished mental capacity—a source of passionate debate throughout the United States.³⁵ The court recognized the pros and cons of imposing a duty on institutionalized mentally disabled individuals; factors that have been litigated in jurisdictions across the country.³⁶ However, like the relationship factor, the court concluded that the public policy implications of imposing a duty on an institutionalized mentally disabled patient are dependent upon the degree of the person's incapacity.³⁷ Thus, the court suggested that the greater the individual's degree of impairment, the more public policy concerns weigh against imposing a duty

28. *Id.*

29. *Id.* (citing *T.S.B. by Dant v. Clinard*, 553 N.E.2d 1253 (Ind. Ct. App. 1990)).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* (citing *Goldsberry v. Grubbs*, 672 N.E.2d 475, 479 (Ind. Ct. App. 1996)).

34. *Id.*

35. *Id.*

36. *Id.* at 447.

37. *Id.*

upon the individual.³⁸

Concluding that genuine issues of material fact existed in this case concerning the degree of the defendant's impairment and, accordingly, the existence of a legal duty, the court found that summary judgment was precluded.³⁹ The court suggested, however, that the degree of a patient's impairment may be established by the affidavit of an expert who is qualified to testify to the extent of an individual's dementia and its effect on his ability to control his actions or understand the consequences thereof.⁴⁰

3. *Duty of Care of Children Between the Ages of Seven and Fourteen.*—In *Maynard v. Indiana Harbor Belt Railroad*,⁴¹ the District Court for the Northern District of Indiana decided an issue of substantive Indiana law that has produced conflicting appellate court decisions. Specifically, the court decided "whether Indiana has a presumption as to a child's capacity to exercise care and discretion."⁴²

The case involved a thirteen-year-old boy who was injured while climbing between railroad cars owned by the defendant. The defendant moved for summary judgment on the basis that the child was a trespasser and that, under Indiana law, it did not breach the duty of care owed to a trespasser.⁴³ The court found that the child was indeed a trespasser on the property at the time of his injury, and that if he were an adult the railroad company would "owe him no duty except to refrain from wilfully or intentionally injuring him after discovering his presence."⁴⁴ Because the plaintiffs claimed only negligence, and provided no evidence of intent to harm the child, the court found that, under the general rule, the claim would be dismissed.⁴⁵

However, because the plaintiff was only thirteen years old at the time of the accident, the court determined that he may fall under the exception to the general rule that a railroad company does not have a duty to anticipate a trespasser and may assume that there are no trespassers on its property.⁴⁶ This exception was first enunciated in *Cleveland C., C. & St. L. Railway v. Means*,⁴⁷ where the Indiana Court of Appeals held:

Where the person on the track is a child non sui juris of whose presence the railroad company has knowledge, actual or constructive . . . the company must operate its cars on such tracks with reference to the probable presence of such child and use some care to avoid injuring it;

38. *Id.* at 447-48.

39. *Id.* at 448.

40. *Id.*

41. 997 F. Supp. 1128 (N.D. Ind. 1998).

42. *Id.* at 1132.

43. *See id.* at 1128.

44. *Id.* at 1132.

45. *Id.*

46. *Id.* at 1131-32 (citing *Freitag v. Chicago Junction Ry.*, 89 N.E. 501 (Ind. App. 1909)).

47. 104 N.E. 785 (Ind. App. 1914).

otherwise no additional care is imposed on the company over that which it owes the adult trespasser on its tracks.⁴⁸

The *Maynard* court defined the term “non sui juris” as “lacking legal capacity to act for oneself, as in the case of a minor or mentally incompetent person.”⁴⁹ It further found that where a child is sui juris, it is held to be capable of exercising some care and discretion, but it is not necessarily held to the same degree of care required of a person of mature years.⁵⁰ Thus, the district court was forced to look to Indiana law to determine the status of the presumption as to a child’s capacity.⁵¹

The plaintiffs argued that children between the ages of seven and fourteen are presumed to be non sui juris, or incapable of exercising some care and discretion. The defendant countered that these children are presumed to be sui juris, or capable of exercising some care and discretion.⁵² Both parties cited valid Indiana case law in support of their respective positions, and the court found that whether Indiana has a presumption as to a child’s capacity to exercise care and discretion is unclear.⁵³ Specifically, the court noted that no Indiana Supreme Court case is directly on point regarding this issue, and that Indiana’s intermediate courts have taken contrasting positions.⁵⁴

For example, the Fourth District of the Indiana Court of Appeals has made the conclusory statement that for children between the ages of seven and fourteen “a rebuttable presumption exists that they *may be guilty* of negligence.”⁵⁵ However, the Second and Third Districts of the Indiana Court of Appeals have stated that children between the ages of seven and fourteen are rebuttably presumed *incapable* of negligence.⁵⁶ Thus, because the appellate court decisions conflict on this issue, the *Maynard* court looked to the language of the cases and the laws of other states for guidance.⁵⁷

Based upon its analysis of this law, the District Court for the Northern District of Indiana concluded that it believed that the Indiana Supreme Court would not find that children between the ages of seven and fourteen are rebuttably presumed to be capable of exercising some discretion and care.⁵⁸ The court was less certain as to whether the Indiana Supreme Court would rebuttably presume that children between the ages of seven and fourteen are incapable of

48. *Id.* at 792.

49. *Maynard*, 997 F. Supp. at 1132 (citing BLACK’S LAW DICTIONARY 1058 (6th ed. 1990)).

50. *Id.* (citing *Cole v. Searfoss*, 97 N.E. 345, 348 (Ind. App. 1912)).

51. *Id.*

52. *See id.*

53. *See id.*

54. *Id.* at 1133-34 (citations omitted).

55. *Bailey v. Martz*, 488 N.E.2d 716, 721 (Ind. Ct. App. 1986) (emphasis added).

56. *Brockmeyer v. Fort Wayne Pub. Transp.*, 614 N.E.2d 605, 607 (Ind. Ct. App. 1993); *Baller by Baller v. Corle*, 490 N.E.2d 382, 385 (Ind. Ct. App. 1986).

57. *Maynard*, 997 F. Supp. at 1134.

58. *Id.* at 1134-35.

exercising discretion and care, or would reject any presumption.⁵⁹ However, the court held that because the question of a particular child's ability to appreciate the danger is generally a question of fact for the jury, it would not grant the defendant's motion for summary judgment even if the Indiana Supreme Court found that there was no presumption.⁶⁰

4. *Duties of Suppliers and Transporters of Natural Gas.*—In *Downs v. Panhandle Eastern Pipeline Co.*,⁶¹ plaintiffs were customers of a local gas utility company whose house exploded following a natural gas leak from the utility's pipe. They sued the utility, the supplier of the natural gas, and the transporter of the gas for negligence and negligent entrustment. Specifically, the plaintiffs argued that the supplier, Vesta, and the transporter, Panhandle, were negligent in supplying and transporting the gas.⁶² Both defendants moved for summary judgment, claiming that their respective liability ended once the gas was delivered to the utility and that they had no duty to investigate the condition of the service lines.⁶³

At the outset, the Indiana Court of Appeals noted that natural gas is, as a matter of law, a dangerous substance.⁶⁴ However, it further noted that the utility of natural gas is derived from the very qualities that make it dangerous.⁶⁵ Thus, to succeed in her negligence claim, the court noted that the plaintiff must demonstrate that the defendants owed her a legal duty.⁶⁶

Relying on the appellate court's decision in *City of Indianapolis v. Bates*,⁶⁷ the plaintiff argued that a gas provider is liable for damages caused by the failure of equipment installed and under the control of another party when the provider knows or has reason to know that injury may result from its continued provision of gas.⁶⁸ In *Bates*, the defendant gas company had entered the premises and examined and tested all appliances, gas pipes and tubing in the home prior to an explosion. The court held that the gas company had assumed such duties and thereby become responsible for its negligence.⁶⁹ However, the court of appeals in *Downs* agreed with the defendants that the plaintiff had misconstrued the holding in *Bates*, finding that "Indiana courts, heretofore, have not determined whether a gas supplier or gas transporter has a duty to a customer of a local gas company to insure that the distribution system of the local gas company is safely

59. *Id.* at 1135.

60. *Id.* at 1135-36.

61. 694 N.E.2d 1198 (Ind. Ct. App. 1998).

62. *See id.* at 1201.

63. *See id.*

64. *Id.* at 1202 (citing *South Eastern Ind. Natural Gas Co., v. Ingram*, 617 N.E.2d 943, 952 (Ind. Ct. App. 1993)).

65. *Id.*

66. *Id.*

67. 205 N.E.2d 839 (Ind. App. 1965).

68. *See Downs*, 694 N.E.2d at 1202, 1203.

69. *Bates*, 205 N.E.2d at 847.

maintained and operated.”⁷⁰

In deciding whether to impose a common law duty upon the defendants, the court determined that it must employ the balancing test enumerated by the Indiana Supreme Court in *Webb v. Jarvis*.⁷¹ Thus, the *Downs* court weighed the following factors: the relationship between the parties, the reasonable foreseeability of harm to the person injured, and public policy concerns. The court first considered the nature of the relationship, the defendant’s knowledge, and the circumstances surrounding the relationship in order to determine whether a relationship exists.⁷² Analogizing the determination of duty to that owed by a supplier of electricity, the court held that because the defendants had neither ownership nor control of the defective pipe from which the gas escaped or any other part of the utility’s system, there was no relationship between the defendants and the plaintiff that would impose a duty upon the defendants to insure that the utility’s distribution system was safe.⁷³

The *Downs* court next addressed the factor of foreseeability. In reviewing this factor, it focused on whether the person actually harmed was a foreseeable victim and whether the type of harm actually inflicted was reasonably foreseeable.⁷⁴ The court found that the plaintiff’s arguments centered around the assertion that the defendants, because of an alleged lack of sophistication of the small utility and its gas distribution system, should have known that the utility’s system was unsafe.⁷⁵ The court disagreed with the plaintiff’s arguments, noting that the designated facts did not support an inference that the plaintiffs or other gas customers inevitably were exposed to the danger of explosion.⁷⁶ Moreover, even if the court were to determine the defendants had constructive knowledge of the deficiencies of the utility’s system, because of the distant relationship between the defendants and the plaintiff, such constructive knowledge alone would not be enough to impose a duty.⁷⁷

This determination was supported by established precedent in which the court noted that where ownership or control of utility lines is absent, actual knowledge of the circumstances that created an imminent danger to the injured party is required before liability attaches.⁷⁸ Relying on this precedent, the court concluded that the defendants would be required to have actual knowledge of an unsafe condition before they would have a duty to take action.⁷⁹

In response, the plaintiff argued that the defendants had a duty to inquire

70. *Downs*, 694 N.E.2d at 1203.

71. *Id.* (citing *Webb v. Jarvis*, 575 N.E.2d 687, 688 (Ind. Ct. App. 1991)).

72. *Id.*

73. *Id.* at 1204 (citing *Northern Ind. Pub. Serv. Co. (“NIPSCO”) v. East Chicago Sanitary Dist.*, 590 N.E.2d 1067 (Ind. Ct. App. 1992)).

74. *Id.* (citing *Webb*, 575 N.E.2d at 997).

75. *Id.*

76. *Id.* at 1205.

77. *Id.*

78. *Id.* (citing *NIPSCO*, 590 N.E.2d at 1073).

79. *Id.* at 1205.

about or investigate the safety of the utility's distribution system.⁸⁰ However, because the defendants did not own or control the distribution system, the court concluded they had no duty to inspect it.⁸¹

The court finally considered whether there is a public policy reason for imposing a duty of care upon the suppliers and transporters of gas to ensure that utilities to which they supply gas follow the legal requirements for the operation of such a utility and otherwise exercise reasonable care to protect their customers and others.⁸² The court noted that while

there is a strong argument that liability should be imposed on anyone that has within their means to inspect, supervise and oversee the distribution of gas to the public, there is little to be gained by imposing such a duty on one who has no control of or access to the distribution system. The cost of imposing such a duty would exceed the benefit to be gained by requiring the supplier and transporter to obtain access and exercise control in addition to that already in the hands of the utility.⁸³

After balancing each of the *Webb* factors, the court concluded "that the [defendants] owed no common law duty to the [plaintiffs]."⁸⁴ Likewise, it concluded that the defendants assumed no duty to the plaintiff.⁸⁵

B. Proximate Cause—Basis for Summary Judgment

Proximate cause is rarely a sufficient basis for the entry of summary judgment in a negligence case. However, when an unforeseeable intervening act breaks the line of causation that led to a plaintiff's injury, summary judgment is generally warranted. During the course of this survey period, the Indiana Court of Appeals had an opportunity to examine the type of factual scenario that might warrant the entry of summary judgment based upon the element of proximate cause.

In *Straley v. Kimberly*,⁸⁶ a local natural gas distribution company employee brought negligence and negligent entrustment actions against various defendants for injuries sustained from an explosion that occurred while he was attempting to repair a gas main that was ruptured by a subcontractor digging a water line trench with a backhoe.⁸⁷ The subcontractor immediately phoned the home construction contractor, informed him of the damaged line and asked him to call the gas company. The contractor then notified the gas company to alert them of the ruptured line. In response, the gas company dispatched a repair crew,

80. *See id.*

81. *Id.* (citing *NIPSCO*, 590 N.E.2d at 1073).

82. *Id.* at 1205-06.

83. *Id.* at 1206.

84. *Id.*

85. *Id.* at 1206-07.

86. 687 N.E.2d 360 (Ind. Ct. App. 1997).

87. *Id.* at 362-63.

including the plaintiff, to the site. More than an hour after the gas crew assumed control of the repairs the gas ignited, causing the plaintiff's injuries.⁸⁸

The plaintiff's complaint alleged that each of the defendants negligently contributed to the severance of the underground gas line, and that several of the defendants negligently entrusted the water line trench excavation subcontractor to lay the water line.⁸⁹ In response, each of the defendants moved for summary judgment, contending that they did not owe the plaintiff a duty of care and that their respective acts were not the proximate cause of the plaintiff's injuries.⁹⁰ The trial court granted the defendants' motions for summary judgment, concluding that, as a matter of law, none of the alleged negligent acts were the proximate cause of the plaintiff's injuries.⁹¹

On appeal, the plaintiff contended that a question of fact existed regarding whether the defendants' acts were the proximate cause of the plaintiff's injuries. Specifically, he argued that the injuries were the foreseeable consequence of the defendants' negligent acts.⁹² The defendants countered that although they may have initially caused the gas leak, the gas company's actions in repairing the gas main, including its failure to turn off the gas, were intervening superseding causes of the plaintiff's injuries; therefore, they argued they were not liable as a matter of law.⁹³

Initially, the Indiana Court of Appeals noted that in determining whether an act is the proximate cause of another's injury, it considers whether the injury was a natural and probable consequence of the negligent act, which, in light of the attending circumstances, could have been reasonably foreseen or anticipated.⁹⁴ Thus, to be considered a proximate cause, the negligent act must have set in motion a chain of circumstances that in natural and continuous sequence lead to the resulting injury.⁹⁵ However, the court further noted that the intervention of an independent, superseding negligent act will relieve the original negligent actor of legal liability if that act could not have been reasonably foreseen.⁹⁶

Applying the law to the facts of this case, the *Straley* court found that although the defendants contributed to the severance of the gas main, they merely started a chain of events that eventually led to the plaintiff's injuries.⁹⁷ The defendants immediately contacted the gas company to inform it of the leak. The gas company took several unforeseeable steps that broke the chain of causation. Specifically, the court found that the gas company's failure to turn off the gas

88. *See id.* at 363.

89. *See id.*

90. *See id.*

91. *See id.*

92. *See id.* at 364.

93. *See id.*

94. *Id.* (citing *Goldsberry v. Grubbs*, 672 N.E.2d 475, 477 (Ind. Ct. App. 1996)).

95. *Id.* (citing *City of Portage v. Lindbloom*, 655 N.E.2d 84, 86 (Ind. Ct. App. 1986)).

96. *Id.* (citing *Lutheran Hosp. of Ind. 126, Inc. v. Blaser*, 634 N.E.2d 864, 871 (Ind. Ct. App. 1994)).

97. *Id.* at 364-65.

was an unforeseeable intervening act that broke the line of causation.⁹⁸ Therefore, because it concluded that assigning legal liability to the defendants would be inconsistent with the policy underlying proximate cause, the court held, as a matter of law, that the defendants were not the proximate cause of the plaintiff's injuries.⁹⁹

II. THE PUBLIC USE EXCEPTION TO LANDLORD NONLIABILITY

As a general rule in the State of Indiana, in the absence of statute, covenant, fraud or concealment, a landlord who gives a tenant full control and possession of leased property will not be liable for personal injuries sustained by the tenant or other persons lawfully upon the premises.¹⁰⁰ Once possession and control of property have been surrendered, a landlord generally does not owe a duty to protect tenants from defective conditions.¹⁰¹

However, Indiana courts have recognized a "public use exception" to the general rule of landlord non-liability. This exception provides:

"Where premises are leased for public or semi-public purposes, and at [the] time of lease, conditions exist which render premises unsafe for purposes intended, or constitute a nuisance, and landlord knows or by exercise of reasonable care ought to know of conditions, and a third person suffers injury on account thereof, landlord is liable, because [the] third person is there at invitation of landlord, as well as of tenant."¹⁰²

Thus, for the public use exception to apply, a plaintiff must demonstrate that he or she was a third person who was injured because of the existing condition.¹⁰³

In *Smith v. Standard Life Insurance Co.*,¹⁰⁴ the Indiana Court of Appeals was faced with the following issue of first impression: Whether an employee of a tenant qualifies as a "third person" under the public use exception to the general rule of non-liability for landlords.¹⁰⁵ In *Smith*, the plaintiff, an employee of Hook's Drugs, was injured when she slipped and fell on an icy sidewalk outside of a Hook's store. She filed suit against Standard Life, the owner and lessor of the premises, alleging that the defendant had breached its duty of reasonable care when it knew or should have known at the time of the lease that a dangerous condition existed on the premises, specifically that a drain spout directed water onto the sidewalk in a concentrated area, causing ice to form. The plaintiff also alleged that Standard Life was negligent because it failed to remove

98. *Id.* at 365.

99. *Id.*

100. *See* *Rogers v. Grunden*, 589 N.E.2d 248, 254 (Ind. Ct. App. 1992).

101. *See id.*

102. *Walker v. Ellis*, 129 N.E.2d 65, 73 (Ind. App. 1955) (quoting *Fraser v. Kruger*, 298 F. Supp. 693, 696-97 (8th Cir. 1924)).

103. *See id.*

104. 687 N.E.2d 214 (Ind. Ct. App. 1997).

105. *Id.* at 216.

accumulations of snow and ice from the sidewalk.¹⁰⁶

Standard Life had relinquished complete possession and control of the premises to Hook's, which accepted the premises in its condition at the time of the lease and agreed to keep the premises in good condition and repair. In fact, Hook's employees were responsible for snow and ice removal from the sidewalk directly in front of Hook's.¹⁰⁷

In response to the defendant's motion for summary judgment, the plaintiff asserted that summary judgment should be precluded because the "public use exception" to the general rule of landlord non-liability applied and created a duty owed by the defendant to the plaintiff. Specifically, the plaintiff argued that she qualified as a "third person" protected by the public use exception because her injury occurred on the sidewalk outside of the area occupied by Hook's, rather than inside the store.¹⁰⁸ The defendant countered that the plaintiff was injured during the course of her employment and did not qualify as a third person under the exception.¹⁰⁹

The Indiana Court of Appeals agreed with the defendant and affirmed the trial court's entry of summary judgment.¹¹⁰ Adopting the Restatement (Second) of Torts' definition of who qualifies as a "third person" under the public use exception, the court held, as a matter of first impression, that "third persons" include:

[A]ll persons other than the possessor of the land, or his servants acting within the scope of their employment. It includes such servants when they are acting outside of the scope of their employment, as well as other invitees or licensees upon the premises, and also trespassers on the land, and even persons outside of the land whose acts endanger the safety of the visitor.¹¹¹

The court concluded that the plaintiff, a Hook's employee, failed to meet the "third person" requirement of the public use exception and that the exception, therefore, did not apply.¹¹²

III. COMPARATIVE FAULT

In *Edwards v. Sisler*,¹¹³ the Indiana Court of Appeals was faced with the issue of whether Indiana's Comparative Fault Act¹¹⁴ abrogated the common law rule that a tort-feasor may not rely on a physician's negligent treatment of a victim's

106. *See id.*

107. *See id.* at 217.

108. *See id.* at 217-18.

109. *See id.* at 218.

110. *Id.*

111. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 344 cmt. b (1965)).

112. *Id.*

113. 691 N.E.2d 1252 (Ind. Ct. App. 1998).

114. IND. CODE §§ 34-51-2-1 to -19 (1998) (formerly IND. CODE §§ 34-4-33-1 to -12 (1993)).

injuries to avoid or reduce the tortfeasor's liability.¹¹⁵ The plaintiff was injured in an automobile accident, and filed suit against the driver of the other car and his employer. After deposing the plaintiff, the defendants' counsel learned that the physician who treated the plaintiff for the injuries she sustained in the collision had performed a surgical procedure on the wrong leg.¹¹⁶ The defendants then moved to amend their answer to include a claim that the plaintiff's damages were caused in full or in part by a nonparty pursuant to section 34-4-33-10(a) of the Indiana Code, within the Comparative Fault Act.¹¹⁷

The plaintiff objected to this amendment and urged the trial court to determine that the Indiana Court of Appeals' reasoning in *Whitaker v. Kruse*¹¹⁸ survived the adoption of Indiana's Comparative Fault Act. In *Whitaker*, the court held clearly erroneous a jury instruction that stated, in essence, that a plaintiff could not recover for injuries if the evidence indicated that her physicians had misdiagnosed and/or mistreated her injuries.¹¹⁹ The *Whitaker* court further adopted the general rule of the Restatement (Second) of Torts, which provides:

If the negligent actor is liable for another's bodily injury, he is also subject to liability for any additional bodily harm resulting from normal efforts of third persons in rendering aid which the other's injury reasonably requires, irrespective of whether such acts are done in a proper or a negligent manner.¹²⁰

However, the *Edwards* trial court disagreed with the plaintiff's argument, and allowed the defendants' proposed amendment.¹²¹

On interlocutory appeal, the plaintiff urged the appellate court to determine that the *Whitaker* decision survived adoption of the Comparative Fault Act. In addition, the plaintiff relied upon *Holden v. Balko*,¹²² a federal decision construing Indiana law. Addressing precisely the question at issue in *Edwards*, the District Court for the Southern District of Indiana in *Holden* found that a defendant could not name a health care provider as a nonparty to whom fault could be attributed.¹²³ *Holden* determined that Indiana's Comparative Fault Act did not supplant the long-standing rule in Indiana that an original tortfeasor is responsible for the subsequent negligence of a health care provider who treats the plaintiff's injuries.¹²⁴

In response, the defendant argued that the *Holden* rule was necessarily changed by Indiana's adoption of comparative fault in tort claims, which allows

115. *Edwards*, 691 N.E.2d at 1254.

116. *See id.* at 1253.

117. *See id.*

118. 495 N.E.2d 223 (Ind. Ct. App. 1986).

119. *Id.* at 227.

120. *Id.* at 225 (citing RESTATEMENT (SECOND) OF TORTS § 457 (1965)).

121. *Edwards*, 691 N.E.2d at 1253.

122. 949 F. Supp. 704 (S.D. Ind. 1996).

123. *Id.* at 714.

124. *Id.* at 710-14.

a defendant to assert an affirmative defense “that the damages of the claimant were caused in full or in part by a nonparty.”¹²⁵ Essential to the defendant’s argument was the assertion that the Comparative Fault Act seeks to attribute fault proportionally to those actors who contributed to the damages.¹²⁶ The *Edwards* court, however, disagreed with the defendant’s interpretation.¹²⁷

The *Edwards* court found it significant that the overriding reason for adoption of the Comparative Fault Act was to “ameliorate the harshness of the former rule of contributory negligence which would not allow a slightly blameworthy plaintiff any recovery.”¹²⁸ Moreover, it found the reasoning of *Holden* instructive. As noted in *Holden* and adopted by the Indiana Court of Appeals, “it is not intended that the [Comparative Fault A]ct will foster additional lawsuits.”¹²⁹

Thus, the court found that “while a plaintiff may choose to sue a negligent caregiver, the plaintiff should not be required to do so, nor should the decision be one made by the defendant,”¹³⁰ because “[a] stranger to the physician-patient relationship should not have a stake in scouring an injured party’s medical records searching for some act of malpractice or negligence in order to extricate himself from all or some portion of the damages to the injured party.”¹³¹ Accordingly, the appellate court reversed the decision of the trial court to allow the amendment to add the non-party defense.¹³²

IV. STATUTE OF LIMITATIONS AND THEORY OF RECOVERY

Statutes of limitations are favored by courts and litigants because they afford security against stale claims and promote the peace and welfare of society.¹³³ “They are enacted upon the presumption that one having a well-founded claim will not delay in enforcing it.”¹³⁴ Thus, our courts have consistently held that the defense of a statute of limitations is important to the efficient administration of justice.

By statute, claims for personal injuries must be brought within two years of accrual or they are deemed time-barred.¹³⁵ In a recent case, *Schuman v.*

125. *Edwards*, 691 N.E.2d at 1254 (quoting IND. CODE § 34-4-33-2 (1993)).

126. *See id.*

127. *Id.* at 1255.

128. *Id.* *See also* Indianapolis Power v. Snodgrass, 578 N.E.2d 669, 672 (Ind. 1991).

129. *Edwards*, 691 N.E.2d at 1255 (citing *Holden*, 949 F. Supp. at 712).

130. *Id.* (citing *Holden*, 949 F. Supp. at 712).

131. *Id.* (citing *Holden*, 949 F. Supp. at 711-12).

132. *Id.*

133. *See* A.M. v. Roman Catholic Church, 669 N.E.2d 1034, 1037 (Ind. Ct. App. 1996) (citing *Shideler v. Dwyer*, 417 N.E.2d 281, 283 (Ind. 1981)).

134. *Id.* (citing *Shideler*, 417 N.E.2d at 283).

135. Indiana Code section 34-11-2-4 (1998), formerly Indiana Code section 34-1-2-2 (1993), provides, in relevant part: “An action for: (1) injury to person . . . must be commenced within two (2) years after the cause of action accrues.” IND. CODE § 34-11-2-4 (1998).

Kobets,¹³⁶ the Indiana Court of Appeals sent a clear message that the theory of recovery advanced in a complaint will not control for purposes of determining the appropriate statute of limitations. Rather, courts must look to the nature or substance of the cause of action to make this determination.¹³⁷

In *Schuman*, the plaintiff brought suit against her landlord in 1996 under a theory of breach of implied warranty of habitability to recover damages for personal injuries.¹³⁸ The plaintiff contracted histoplasmosis, a fungal infection, in 1990 from exposure to pigeon droppings in the window casing and wall of her apartment. She had complained to her landlord on numerous occasions that repairs were necessary to keep the pigeons out. However, despite repeated assurances to do so, the landlord neglected to make the needed repairs.¹³⁹

The defendant in *Schuman* moved for judgment on the pleadings, arguing that the plaintiff's claim, though brought under the theory of breach of implied warranty of habitability, was subject to the two-year statute of limitations for personal injuries under section 34-1-2-2 of the Indiana Code.¹⁴⁰ The trial court agreed, and granted the motion.¹⁴¹ On appeal, the plaintiff argued that the six-year statute of limitations found in Indiana Code section 34-1-2-1¹⁴² applied to her case because her theory of recovery was based on a breach of the oral lease contract and/or breach of an implied warranty of habitability, which also arose out of the oral contract.¹⁴³

However, the appellate court disagreed.¹⁴⁴ The *Schuman* court noted that the general rule is that the nature or substance of the cause of action determines the applicable statute of limitations.¹⁴⁵ "For purposes of determining the appropriate statute of limitations, the substance of a cause of action is ascertained by an inquiry into the nature of the alleged harm and not by reference to the theories

136. 698 N.E.2d 375 (Ind. Ct. App. 1998).

137. *See id.* at 378.

138. *Id.* at 377.

139. *See id.*

140. IND. CODE § 34-1-2-1 (1993) (recodified at IND. CODE § 34-11-2-4 (1998), without substantive changes).

141. *See Schuman*, 698 N.E.2d at 377.

142. IND. CODE § 34-1-2-1 (1993) (recodified at IND. CODE § 34-11-2-4 (1998) without substantive changes). That section provided:

The following actions must be commenced within six (6) years after the cause of action accrues. (1) Actions on accounts and contracts in writing. (2) Actions for use, rents, and profits of real property. (3) Actions for injuries to property other than personal property, damages for detention of personal property and for recovering possession of personal property. (4) Actions for relief against frauds.

Id.

143. *See Schuman*, 698 N.E.2d at 378.

144. *Id.* at 378-79.

145. *Id.* at 378 (citing *INB National Bank v. Morgan Elec. Serv., Inc.*, 608 N.E.2d 702, 706 (Ind. Ct. App. 1993)).

of recovery advanced in the complaint.”¹⁴⁶ Accordingly, the court held that “the nature of the harm suffered by the plaintiff was clearly injury to her person”¹⁴⁷ and that the trial court therefore correctly determined that the two-year statute of limitations applied.

V. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

A. *Indiana's Modified Impact Rule*

During the course of this survey period, the Indiana Court of Appeals rendered several decisions interpreting the “direct impact” requirement necessary to recover for claims of negligent infliction of emotional distress under Indiana’s modified impact rule. Generally, the tort of negligent infliction of emotional distress depends upon judicial interpretation of whether the plaintiff sustains a direct impact. To fully comprehend the nature of this requirement of the modified impact rule, it is necessary to begin with an analysis of its origin.

Under Indiana’s traditional impact rule, damages for mental distress could only be recovered when the distress was accompanied by and resulted from a physical injury caused by a direct impact to the plaintiff.¹⁴⁸ This rule provided that the only emotional trauma compensable under a negligence theory was that arising out of a plaintiff’s own injuries.¹⁴⁹ Thus, to recover under the rule, the plaintiff was required to prove that the mental injury was the natural and direct result of the physical injury.¹⁵⁰

In 1991, the Indiana Supreme Court, in *Shuamber v. Henderson*,¹⁵¹ modified this traditional impact rule in actions for mental or emotional distress. In *Shuamber*, a drunk driver collided with an automobile, carrying a mother and her two children. As a result of the accident, one of the children was killed.¹⁵² The mother and daughter filed suit against the defendant driver, seeking damages for the emotional distress they suffered from watching the child die. The Indiana Supreme Court noted that the plaintiffs were clearly precluded from recovering damages for their mental injuries under Indiana’s traditional impact rule.¹⁵³ However, the court modified the traditional impact rule and allowed the plaintiffs to recover.¹⁵⁴

In *Shuamber*, the Indiana Supreme Court removed as a requirement to sustain an action for negligent infliction of emotional distress, contemporaneous physical injury accompanying the impact, and announced the following modification to

146. *Id.* (citing *Whitehouse v. Quinn*, 477 N.E.2d 270, 274 (Ind. 1985)).

147. *Id.*

148. *See Shuamber v. Henderson*, 579 N.E.2d 452, 454 (Ind. 1991).

149. *See id.* (citing *Boston v. Chesapeake & O. Ry.*, 61 N.E.2d 326, 327 (Ind. 1945)).

150. *See id.*

151. 579 N.E.2d 452, 456 (Ind. 1991).

152. *See id.* at 453.

153. *Id.* at 455.

154. *Id.* at 454-56.

the traditional impact rule:

When as here, a plaintiff sustains a *direct impact* by the negligence of another and, by virtue of that direct involvement sustains an emotional trauma which is serious in nature and of a kind and extent normally expected to occur in a reasonable person, we hold that such a plaintiff is entitled to maintain an action to recover for that emotional trauma without regard to whether the emotional trauma arises out of or accompanies any physical injury to the plaintiff.¹⁵⁵

In its reexamination of the impact rule, the court reviewed and rejected the traditional reasons for requiring a physical injury to a plaintiff before recovery was allowed: "(1) fear that a flood of litigation will result if claims of this nature are allowed; (2) concern that fraudulent claims will be made (and rewarded); and (3) difficulties in proving a causal connection between the negligent conduct and the emotional distress."¹⁵⁶ The court noted that the presence of physical injury does not make mental damages less speculative and that the presence or absence of mental damage is properly judged by the jury.¹⁵⁷

B. Judicial Determination of Direct Impact

Since *Shuamber*, the Indiana Court of Appeals has stated that the modified impact rule "maintains the requirement that [the plaintiff] demonstrate that she suffered a direct physical impact."¹⁵⁸ In the past year, the appellate court was faced with several significant cases in which the court determined whether the factual circumstances gave rise to a "physical impact" necessary to maintain a cause of action for negligent infliction of emotional distress.

In *Conder v. Wood*,¹⁵⁹ a pedestrian was attempting to cross a street with a companion when the companion was struck and fatally injured by a truck that was negotiating a turn. The plaintiff had seen that the truck was not going to stop and jumped out of its path. She attempted to pull her companion back; however, before she had time to react, the front wheel of the truck struck her companion and knocked her violently to the ground.¹⁶⁰ The truck continued to roll directly next to where the plaintiff was standing and in the direct path of her fallen companion. Afraid that the truck would run her over, the plaintiff began pounding on the panels of the truck trailer to get the driver's attention. The truck came to a stop just before the rear tire ran over her companion's head; nevertheless, the companion died at the scene.¹⁶¹

155. *Id.* at 456 (emphasis added).

156. *Id.* at 454. See also *Ross v. Cheema*, 696 N.E.2d 437, 439 (Ind. Ct. App. 1998).

157. *Shuamber*, 579 N.E.2d at 454.

158. *Etienne v. Caputi*, 679 N.E.2d 922, 926 (Ind. Ct. App. 1997) (quoting *Gorman v. I & M Electric Co.*, 641 N.E.2d 1288, 1290 (Ind. Ct. App. 1994)).

159. 691 N.E.2d 490 (Ind. Ct. App. 1998).

160. See *id.* at 491.

161. See *id.*

As a result of the incident, the plaintiff sustained bruises on her arm, emotional and psychological trauma, stress-related headaches, insomnia and personality changes.¹⁶² The plaintiff subsequently filed suit against the truck driver and the trucking company, seeking recovery for her emotional injuries under a theory of negligent infliction of emotional distress.¹⁶³ The defendants filed a motion for summary judgment, arguing that any recovery sought by the plaintiff for emotional distress or psychological damage was precluded under Indiana law.¹⁶⁴ The trial court issued an order denying summary judgment.¹⁶⁵

On appeal, the defendants argued that the modified impact rule announced in *Shuamber v. Henderson*¹⁶⁶ precluded the plaintiff from recovering damages.¹⁶⁷ Interpreting the Indiana Supreme Court's *Shuamber* decision, the Indiana Court of Appeals remarked that it must determine whether the plaintiff suffered a direct physical impact by the negligence of the defendant truck driver.¹⁶⁸ The *Conder* court found that the only physical impact between the plaintiff and the truck driven by the defendant was initiated through the plaintiff's own actions, and not directly through the truck driver's negligence.¹⁶⁹ Thus, the court held that while it was clear that the plaintiff was involved in the incident that resulted in her companion's death, she did not suffer a "direct physical impact by the negligence of another" necessary for the application of the modified impact rule."¹⁷⁰

In *Holloway v. Bob Evans Farms, Inc.*,¹⁷¹ the court of appeals was asked to determine whether the consumption of food that had been cooked with a worm constituted a direct physical impact under the modified impact rule. The plaintiff had consumed approximately one-half of her meal when she discovered that a worm had been cooked with her food.¹⁷² As a result, she experienced vomiting and diarrhea. She also had nightmares about discovering the worm in her food, experienced weight loss and visited both a doctor and a psychologist.¹⁷³

The plaintiff brought suit against the defendant restaurant seeking recovery for her mental and emotional injuries under a theory of negligence. The defendant moved for summary judgment, which the trial court granted.¹⁷⁴ On appeal, the plaintiff claimed that she was entitled to pursue recovery for her

162. *See id.*

163. *See id.* at 492.

164. *See id.*

165. *See id.*

166. 579 N.E.2d 452 (Ind. 1991).

167. *Conder*, 691 N.E.2d at 492.

168. *Id.* at 493.

169. *Id.*

170. *Id.*

171. 695 N.E.2d 991, 996 (Ind. Ct. App. 1998).

172. *See id.* at 993.

173. *See id.*

174. *See id.*

emotional damages under Indiana's "modified impact rule."¹⁷⁵ In response, the defendant argued that the emotional distress claim must fail because there was no evidence she suffered a direct physical impact required to recover damages for negligent infliction of emotional distress.¹⁷⁶ The plaintiff argued that eating a portion of food that had been cooked with a worm constituted a direct physical impact under the modified impact rule, and the court agreed.¹⁷⁷

The *Holloway* court found that although the worm was not submitted as evidence or made part of the record, the parties did not dispute that a worm had been cooked and served with the plaintiff's meal.¹⁷⁸ The court noted that had the plaintiff discovered the worm before she began eating, there would have been no direct impact under the modified impact rule.¹⁷⁹ However, it concluded that because she had consumed over one-half of the dinner before she observed the worm fall from her fork, and thus ingested food in which the worm had been cooked, she sustained a direct impact as required by Indiana's modified impact rule.¹⁸⁰

One day after the court of appeals' decision in *Holloway*, the appellate court rendered another decision on whether certain factual circumstances gave rise to a "physical impact" necessary to maintain an action for negligent infliction of emotional distress. In *Dollar Inn, Inc. v. Slone*,¹⁸¹ a guest sued a hotel in which she had stayed for negligent infliction of emotional distress associated with her fear of contracting AIDS after she was stabbed in the thumb by a hypodermic needle concealed in the center tube of a toilet paper roll. Following the stabbing, a member of the hotel's staff informed the plaintiff that the needle was probably from an intravenous drug user on the hotel staff.¹⁸² Because she feared possible exposure to disease from the needle, the plaintiff went to the hospital for blood tests. There she was informed by her examining physician that she would need to be tested regularly for AIDS for up to ten years.¹⁸³

When the plaintiff returned home, she was visibly upset, crying, shaking and pale. As a result of her fear of contracting AIDS, she began having problems sleeping, became severely withdrawn, and her relationship with her daughters deteriorated.¹⁸⁴ She took precautions to prevent the possible exposure of her daughters to the disease, such as wearing two pairs of food handler's gloves while cooking and washing her laundry separately. During the two years following the incident she was tested for AIDS every six months, and for the following three years she was tested annually. Fortunately, the plaintiff did not

175. *See id.* at 996.

176. *See id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. 695 N.E.2d 185 (Ind. Ct. App. 1998).

182. *See id.* at 186.

183. *See id.* at 190.

184. *See id.* at 186-87.

test positive for the virus.¹⁸⁵

The plaintiff filed a complaint against the hotel for the mental suffering associated with the needle stab. Seven years later, her suit finally went to trial and the jury returned a verdict in her favor.¹⁸⁶ On appeal, the defendant contended that the trial court erred by denying its motion for judgment on the evidence, arguing that the plaintiff was required to prove that she was actually exposed to AIDS to recover.¹⁸⁷ The plaintiff countered that actual exposure is not required under Indiana law and that there was sufficient evidence to support the jury's verdict.¹⁸⁸

The Indiana Court of Appeals noted that to succeed on her claim, the plaintiff "was required to show that she sustained a direct impact as a result of [the defendant's] negligence and as a result of this direct impact suffered an emotional trauma 'which is serious in nature and of a kind and extent normally expected to occur in a reasonable person . . .'"¹⁸⁹ However, it held that the plaintiff was able to prove an impact other than actual exposure because the needle stab to her thumb was a direct impact, thus satisfying the requirements established by the Indiana Supreme Court in *Shuamber*.¹⁹⁰

The defendant also claimed that the needle stab was so insignificant that it could not be considered a direct impact.¹⁹¹ The plaintiff responded that an impact "need not be of a substantial and permanent nature to satisfy the requirement of a direct impact."¹⁹² Relying upon its own precedent, the court found that "[t]here is no requirement that the injury be severe to support the parasitic mental anguish claim."¹⁹³ Because the direct impact need not be substantial or permanent in nature, the court held that the needle stab, a physical injury that broke the skin of the plaintiff's thumb, was evidence of a direct impact and satisfied the requirements of the modified impact rule.¹⁹⁴

Less than three weeks following the *Slone* decision, the court of appeals rendered what may have been its most delicate interpretation of the physical impact requirement. In *Ross v. Cheema*,¹⁹⁵ a homeowner sued a deliveryman and his employer for negligent infliction of emotion distress arising out of an incident in which the deliveryman repeatedly and loudly pounded on the homeowner's door and broke her door knob in an attempt to delivery a letter. On the date of the incident, the plaintiff was in her living room when the doorbell rang. "Before she could answer the door there was a 'tremendous pounding' on the door. She

185. *See id.* at 187.

186. *See id.*

187. *See id.* at 188.

188. *See id.*

189. *Id.* (quoting *Shuamber v. Henderson*, 579 N.E.2d 452, 456 (Ind. 1991)).

190. *Id.* at 189.

191. *See id.*

192. *Id.*

193. *Id.* (quoting *Kroger Co. v. Beck*, 375 N.E.2d 640, 643 n.1 (Ind. App. 1978)).

194. *Id.*

195. 696 N.E.2d 437 (Ind. Ct. App. 1998).

heard the locked screen door pop open, then the door knob on the inner door began to twist back and forth,"¹⁹⁶ followed by more pounding. The plaintiff then

went to a window and saw a car which she did not recognize. Fearful of an intruder, [she] placed a steak knife in her pants for protection before returning to the door. [The plaintiff] opened the front door and a man reached in and put a clipboard in front of her face and told her to sign.¹⁹⁷

The plaintiff signed the document, but noticed that her screen door lock was broken and the main door knob was hanging by two screws.

As a result of this incident, the plaintiff filed suit claiming that she suffered mental injury that required medical treatment.¹⁹⁸ The defendant moved for summary judgment claiming that the Indiana impact rule barred her recovery, and the trial court agreed.¹⁹⁹

On appeal, the plaintiff contended that she should be allowed to maintain her action for negligent infliction of emotional distress without regard to whether the emotional trauma was accompanied by any physical injury, because the emotional distress was a "foreseeable consequence" of the defendant's actions.²⁰⁰ In response, the defendant contended that the plaintiff did not meet the requirements of the modified impact rule under *Shuamber v. Henderson*²⁰¹ and that the plaintiff's alleged distress was not reasonable and consequently did not satisfy the reasonableness test in *Shuamber* either.²⁰²

After carefully analyzing the language of *Shuamber*, the *Ross* court noted that *Shuamber* requires a "direct impact" and a "direct involvement," and that the plaintiff satisfied both conditions.²⁰³ Reasoning that the plaintiff was in her home sitting in her living room when the defendant broke her screen door and began pounding on the main door and twisting the handle vigorously, the court saw no meaningful distinction between a violent impact with an automobile in which one is riding and one with a home in which one is sitting.²⁰⁴ In both instances, the court held that resulting emotional trauma should be readily foreseen.²⁰⁵

In addition to the "direct impact" and "direct involvement" requirements, the *Ross* court also found that *Shuamber* imposes a "reasonableness" requirement.²⁰⁶ The defendant contended that the plaintiff could not satisfy this requirement because it was unreasonable for the plaintiff to suffer emotional trauma based on

196. *Id.* at 438.

197. *Id.*

198. *See id.*

199. *See id.*

200. *See id.*

201. 579 N.E.2d 452 (Ind. 1991).

202. *See Ross*, 696 N.E.2d at 438.

203. *Id.* at 439.

204. *Id.*

205. *Id.*

206. *Id.*

his actions.²⁰⁷ However, the court held that the reasonableness of the plaintiff's injuries was a question of fact for the jury, and that from the designated facts a jury could conclude that the plaintiff, fearful that her home was being broken into, could reasonably experience emotional trauma that the defendant should have foreseen.²⁰⁸

In conclusion, the *Ross* court found that there were genuine issues of material fact about whether the circumstances of the case constituted a direct impact within the Indiana impact rule, and whether the plaintiff's emotional trauma was the reasonable result of such impact.²⁰⁹ It held that these are both questions of fact to be determined by a jury, and not by the courts as a matter of law.²¹⁰

VI. MEDICAL MALPRACTICE

In *Auler v. Van Natta*,²¹¹ the plaintiff brought a medical malpractice action against her surgeon and the hospital in which she was treated, claiming lack of informed consent for the implantation of a saline breast implant. At the time of her surgery, the plaintiff was suffering from cancer of her left breast. She was admitted to the defendant hospital for removal of the breast and reconstructive surgery.²¹² Prior to surgery, the plaintiff informed her surgeon that she did not want a breast implant. She subsequently signed a general consent form, which provided: "The explanation of the operation or special procedure must be given to the patient by the named physician, since only he is competent to do so."²¹³ Nowhere did the document reflect that a saline breast implant was contemplated.

Following the surgical removal of her breast, the defendant doctor performed the reconstructive surgery, inserting a saline-filled breast implant. "[The plaintiff] was unaware of the implant until the next year when it was observed in a sonogram."²¹⁴ The plaintiff subsequently filed a proposed complaint with the Indiana Department of Insurance naming the hospital and surgeon as defendants. "In a unanimous decision, the Medical Review Panel concluded that the [h]ospital had complied with the appropriate standard of care. With regard to the surgeon, the panel found there was a material issue of fact, not requiring expert opinion, concerning the issue of informed consent."²¹⁵ The plaintiff then filed a medical malpractice complaint against both the hospital and surgeon. The hospital moved for summary judgment, which was granted by the trial court.²¹⁶

On appeal, the plaintiffs contended that the hospital was liable for

207. *See id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. 686 N.E.2d 172 (Ind. Ct. App. 1997).

212. *See id.* at 173.

213. *Id.*

214. *Id.*

215. *Id.*

216. *See id.*

malpractice because it failed to obtain her informed consent to the breast implant procedure.²¹⁷ She first claimed that the hospital possessed a legal duty, independent from that of the physician, to obtain her informed consent to perform the surgery.²¹⁸ As a matter of first impression, the Indiana Court of Appeals concluded that, in the absence of circumstances supporting a claim for vicarious liability or other special circumstances, a hospital has no independent duty to obtain a patient's informed consent.²¹⁹ In doing so, the court recognized that:

[O]ne purpose for securing a patient's informed consent is to protect the patient from a physician who, without a legally sufficient consent, commits a battery. If there is a failure of informed consent, no battery occurs until the surgery or other procedure is performed. However, when the physician performs the procedure in the absence of such consent, it is the physician, not the hospital, who commits the battery.²²⁰

Thus, the *Auler* court held that because the doctor was not an employee or agent of the hospital, and no other special circumstances were present, the hospital had no independent legal duty to obtain the patient's informed consent.²²¹

Alternatively, the plaintiff claimed that by providing the written consent form and obtaining her signature, the hospital had gratuitously assumed the physician's duty to obtain her legal informed consent to the surgery.²²² Recognizing that under Indiana law a party may gratuitously place himself in a position such that the law imposes a duty to perform an undertaking in a manner that will not jeopardize the safety of others,²²³ the court analyzed the written consent form signed by the plaintiff. It concluded from the language therein that the hospital's general consent form was not designed to replace the informed consent required to be given by the surgeon, and that the hospital did not undertake to perform the duty of obtaining informed consent.²²⁴ Consequently, the court held that the defendant hospital did not gratuitously assume the physician's duty to obtain informed consent.²²⁵ Absent a duty, the hospital could not be liable for malpractice. Thus, the court affirmed the trial court's entry of summary judgment in favor of the hospital.²²⁶

217. *See id.* at 174.

218. *See id.*

219. *Id.* at 175.

220. *Id.*

221. *Id.*

222. *See id.*

223. *Id.* (citing *Johnson v. Owens*, 639 N.E.2d 1016, 1019 (Ind. Ct. App. 1994)).

224. *Id.* at 176.

225. *Id.*

226. *Id.*

VII. WRONGFUL DEATH

During this survey period, the Indiana Court of Appeals decided several cases addressing who is entitled to recover under Indiana's Wrongful Death Statute.²²⁷ In *Manczunski v. Frye*,²²⁸ the Indiana Court of Appeals held that a fiancé is not entitled to recover under Indiana's Wrongful Death Statute.²²⁹ The plaintiff argued that given "the totality of the circumstances" (i.e., that the couple had lived together for two years, received a marriage license and were to be married in six days), he should be entitled to bring a wrongful death suit for the death of his fiancé. The court found that both the statute and case law precedent were clear and refused to permit the plaintiff's cause of action to proceed by granting defendant's motion for summary judgment.²³⁰

In *Estate of Miller v. City of Richmond*,²³¹ the court held that the parents of a twenty-three-year-old were not "dependent next-of-kin" within the statutory definition of Indiana's Wrongful Death Statute.²³² In *Miller*, the decedent was the son of the plaintiffs. He lived at home while he attended a vocational college full time and worked for two family businesses.²³³ The decedent and his father each owned one-half of a welding business and the decedent, his father and step-brother owned a supply business.²³⁴ The parents argued that they were dependent next-of-kin because their son partially supported them through his contributions in working for the family businesses.²³⁵

The trial court granted summary judgment to the plaintiffs on the issue of liability. However, it agreed with the defendants that the plaintiffs were not dependent next-of-kin under Indiana's Wrongful Death Statute and thus granted summary judgment to the City.²³⁶

The court, quoting *Wolf v. Boren*,²³⁷ stated that the standard for dependency within the meaning of the wrongful death statute requires proof of "a need or necessity of support on the part of the person alleged to be dependent . . . coupled with the contribution to such support by the deceased."²³⁸ The "dependency

227. IND. CODE § 34-23-1-1 (1998). The court in *Manczunski v. Frye*, 689 N.E.2d 473, 474 (Ind. Ct. App. 1997), cited Indiana Code section 34-1-1-2 (1988), which was repealed and replaced in 1998.

228. 689 N.E.2d 473 (Ind. Ct. App. 1997).

229. *Id.* at 474.

230. *Id.*

231. 691 N.E.2d 1310 (Ind. Ct. App. 1998).

232. *Id.* at 1313.

233. *See id.* at 1311.

234. *See id.*

235. *Id.* at 1312.

236. *See id.* at 1311.

237. 685 N.E.2d 86 (Ind. Ct. App. 1997). *Wolf* was discussed in last year's survey issue of the *Indiana Law Review*. Tammy J. Meyer & Mark E. Walker, *Recent Developments in Indiana Tort Law*, 31 IND. L. REV. 839, 844 (1998).

238. *Estate of Miller*, 691 N.E.2d at 1312 (quoting *Wolf*, 685 N.E.2d at 88)).

must be actual, amounting to a necessitous want on the part of the beneficiary and a recognition of that necessity by the decedent."²³⁹ There must be "an actual dependence coupled with a reasonable expectation of support or with some reasonable claim to support from the decedent."²⁴⁰

In its analysis, the court pointed to two federal district court cases that had addressed similar issues. In *Mehler v. Bennett*,²⁴¹ the court found that services rendered by the decedent to a corporation were not sufficient to constitute an actual contribution of services for the support of the beneficial claimants; rather, the court held that services inured directly to the corporation and not the parents.²⁴² The court made a similar finding in *Heinhold v. Bishop Motor Express, Inc.*²⁴³

The *Miller* court held that the provision of services, for pay, to a business entity, particularly where the decedent was an owner of the business, does not constitute support of dependency even though the party claiming dependency owns a portion of the business.²⁴⁴ The court appeared to give considerable weight to the fact that the decedent's parents were able-bodied individuals who were employed full time and whose income actually increased after their son's death.²⁴⁵ The court also noted that it was the son who appeared dependent on the parents, as they had been claiming him as a dependent upon their tax returns.²⁴⁶

Within a few weeks of the *Miller* decision, the court of appeals, in a rather unusual case of first impression, addressed the dependent next-of-kin issue in relation to dependant remote relatives when closer non-dependant relatives exist. In *Luiders v. Skaggs*,²⁴⁷ Kammerer was killed in an automobile accident. Luiders, Kammerer's second cousin, subsequently brought a wrongful death suit. The defendants moved for summary judgment, arguing that Luiders was not a dependent next-of-kin because the decedent was survived by a relative closer in consanguinity, a brother.²⁴⁸ The trial court agreed with the defendants' argument and granted summary judgment in favor of the defendants without reaching the issue of dependency based on Luiders's gainful employment.²⁴⁹

The sole issue before the court of appeals was whether Indiana's Wrongful Death Statute permits a decedent's remote dependent relative to maintain a cause of action as a dependent next-of-kin even when there are closer non-dependent relatives in existence.²⁵⁰ Acknowledging a U.S. Supreme Court case that had

239. *Id.*

240. *Id.*

241. 581 F. Supp. 645 (S.D. Ind. 1984).

242. *Id.* at 648.

243. 660 F. Supp. 382 (N.D. Ind. 1987).

244. *Estate of Miller*, 691 N.E.2d at 1313.

245. *Id.*

246. *Id.*

247. 693 N.E.2d 593 (Ind. Ct. App. 1998).

248. *See id.* at 595.

249. *See id.*

250. *Id.* at 595.

addressed the issue,²⁵¹ the court found that “the degree of kinship alone should not be the sole factor in a wrongful death action.”²⁵² Instead, “the issue of dependency should also define the right.”²⁵³ The court noted that even though the decedent had a surviving brother who was next in line under Indiana’s intestate succession statute, the case was not one of intestate succession but one of alleged dependency.²⁵⁴

The *Luiders* court reversed the trial court’s ruling and remanded the case for a determination of whether Luiders was a dependent.²⁵⁵ It noted several facts showing dependency, including the facts that the parties lived together, owned a ranch, pooled their resources, combined their incomes, paid joint debts, had a “Living Together Agreement,” held joint life insurance policies and executed a single will.²⁵⁶ The court also noted that there was evidence that Luiders had experienced financial hardship since Kammerer’s death.²⁵⁷ Of particular interest, the court found that despite the familial lineage, the parties were living together as husband and wife.²⁵⁸ The court remanded the case for a determination of whether Luiders was in fact a dependent next-of-kin based on these facts.²⁵⁹

Within a week of the *Luiders* decision, the court of appeals was once again faced with the issue of dependent next-of-kin in *Chamberlain v. Parks*.²⁶⁰ In *Chamberlain*, the decedent’s parents brought a wrongful death action against the driver of a vehicle that had struck their son’s vehicle. The defendants challenged the parents’ standing as dependent next-of-kin. The trial court granted the defendants’ motion for summary judgment, finding that the parents were not dependent next-of-kin.²⁶¹ The parents appealed and challenged the constitutionality of Indiana’s Wrongful Death Statute and the issue of their dependency, alleging that they were entitled to bring a common law wrongful death action.

As to constitutionality, the parents claimed that because both financially dependant and independent parents are emotionally dependant upon their children, there is no reasonable basis to treat dependant parents differently under Indiana’s Wrongful Death Statute.²⁶² The court noted that it must judge the constitutionality challenge to the statute based on the two-prong test set forth in

251. See *Poff v. Pennsylvania R.R.*, 327 U.S. 399 (1946).

252. *Luiders*, 693 N.E.2d at 596.

253. *Id.*

254. *Id.*

255. *Id.* at 597.

256. *Id.*

257. *Id.*

258. This appeared to be a factor in the court’s analysis although, as noted in *Manczunski v. Frye*, 689 N.E.2d 473, 474 (Ind. Ct. App. 1997), if the parties are not legally married this should not be an issue.

259. *Luiders*, 693 N.E.2d at 597.

260. 692 N.E.2d 1380 (Ind. Ct. App. 1998).

261. See *id.* at 1381-82.

262. See *id.* at 1382.

Collins v. Day,²⁶³ which provides:

First, the disparate treatment accorded by the statute must be reasonably related to inherent characteristics which rationally distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated.²⁶⁴

The *Chamberlain* court found that recoverable emotional damages under Indiana's Wrongful Death Statute derive from a dependent-caregiver relationship, not that of a parent-child. It further found that the classification scheme is based upon the party's dependency on the deceased and that the disparate treatment must be rationally related to the parent's dependency.²⁶⁵ Thus, the court held that limiting damages to those who are dependant satisfies the first prong of the *Collins* test.²⁶⁶ As to the second prong, the court held that the statute was constitutional because it applied equally to all dependent next-of-kin.²⁶⁷

The court next addressed the parents' dependency argument. The parents claimed that although their son did not provide them with financial support, they were dependent upon him for various personal services, such as groceries, house cleaning, yard work, painting and vehicle repair.²⁶⁸ The court found that although the son occasionally performed services for his parents, he did not contribute to their support in a tangible and material way; rather, his acts were ones of generosity, gifts and donations, as he lived with his parents and received free room and board, automobile insurance and the like.²⁶⁹

Finally, the court found that the parents were not entitled to bring an action at common law for wrongful death, as actions for wrongful death are purely statutory.²⁷⁰

The dependant next-of-kin issue was addressed again in *Necessary v. Inter-State Towing*.²⁷¹ In *Necessary*, Juanita was killed in an automobile accident and was survived by Scott, her adult son, and Joseph, Scott's adult son. The three had resided together and shared household expenses. Juanita made mortgage payments until 1991, and thereafter shared them with Scott.²⁷² Scott purchased a car for Juanita, and Joseph paid rent to Scott. Juanita made monthly payments

263. 644 N.E.2d 72 (Ind. 1994).

264. *Id.* at 80.

265. *Chamberlain*, 692 N.E.2d at 1382-83.

266. *Id.* at 1383.

267. *Id.*

268. *See id.* at 1383-84.

269. *Id.* at 1384. Judge Riley dissented on this issue, noting that the issue of dependency was an issue of fact in this case. *Id.* at 1385 (Riley, J., dissenting).

270. *Id.* at 1384.

271. 697 N.E.2d 73 (Ind. Ct. App. 1998).

272. *See id.* at 75.

toward food and utilities. Scott paid for lawn care.²⁷³ Juanita also provided Scott and Joseph with love, affection, guidance and services like cooking, cleaning and tailoring. Scott earned the most income and Juanita earned the least of the three. Juanita did not declare her son or grandson on her tax returns. Scott inherited a portion of Juanita's estate, but Joseph did not.²⁷⁴

The defendant filed a motion for partial summary judgment, which the trial court granted, finding that because Juanita had no dependants the recoverable damages were limited to medical, hospital, funeral and burial expenses, and the costs of administration.²⁷⁵ The estate appealed arguing that dependency damages should have been allowed.²⁷⁶

Noting that partial dependency is sufficient to establish "necessitous want," the *Necessary* court found that material questions of fact existed regarding the dependency claims that precluded the entry of summary judgment.²⁷⁷ The court distinguished *Miller*,²⁷⁸ finding that in *Miller*, the decedent made no financial contributions to his parents, made only occasional contributions of services, and was claimed as a dependent on his parents' tax returns. Further, the primary loss claimed by the parents in *Miller* was the expectation that the son would take over the family business.²⁷⁹ In *Necessary*, however, Juanita made regular, significant and continuous financial and non-financial contributions on a daily basis.²⁸⁰

Next, the court found that assuming dependency, Scott, but not Joseph, would be the sole dependent next-of-kin. The *Necessary* court held that Scott's dependency precluded Joseph from bringing his own dependency claim.²⁸¹ Noting its previous decision in *Ludier*,²⁸² the court found that two conditions must be met for recovery under Indiana's Wrongful Death Statute: dependency and heirship.²⁸³

During this survey period, the Indiana Court of Appeals went to great lengths to clarify the language of Indiana's Wrongful Death Statute. Its decisions reflect a strict interpretation of the language expressed by the legislature as to who is entitled to recover under the statute. Nevertheless, as the number of wrongful death actions brought in the State of Indiana continues to increase, our courts will no doubt face similar issues time and again.

273. *See id.*

274. *See id.*

275. *See id.*

276. *See id.*

277. *Id.* at 77-78.

278. *Estate of Miller v. City of Richmond*, 691 N.E.2d 1310 (Ind. Ct. App. 1998).

279. *Id.* at 1313.

280. *Necessary*, 697 N.E.2d at 78.

281. *Id.*

282. *Ludier v. Skaggs*, 693 N.E.2d 593 (Ind. Ct. App. 1998).

283. *Necessary*, 697 N.E.2d at 80.

VIII. GOVERNMENTAL ENTITIES AND THE INDIANA TORT CLAIMS ACT

In *Saunders v. County of Steuben*,²⁸⁴ the Indiana Supreme Court held, in a case of first impression, that a decedent's act of suicide cannot be the basis for a finding of contributory negligence or incurred risk that would bar a plaintiff's claim for wrongful death of an inmate.²⁸⁵ The court noted that a custodian has a legal duty to take reasonable steps to protect a person in custody from harm.²⁸⁶ However, the custodian is not under a duty to prevent a particular act such as suicide because the custodian is not an insurer against harm.²⁸⁷

The court found that the degree of notice that a person is a suicide risk is a critical factor in assessing the reasonableness of the steps taken.²⁸⁸ The focus is on the defendant's conduct under the circumstances, and the plaintiff's actions are only relevant insofar as they are part of those circumstances.²⁸⁹ To hold that the suicide of a plaintiff barred a claim against a governmental entity based on comparative fault or incurred risk would obviate the custodian's legal duty to protect the plaintiff from that very form of harm.²⁹⁰

Chief Justice Shepard dissented from the majority opinion, stating that the statements that a custodian does not have a duty to prevent a particular act such as suicide but does have a duty to take reasonable steps to protect life (including self-harm) are inconsistent.²⁹¹ Chief Justice Shepard noted that the majority decision, in effect, holds that while custodians have a duty to prevent self-harm, detainees have no duty at all to care for themselves.²⁹² He further noted that other non-governmental custodians like hospitals, psychiatric centers and juvenile homes, will be adversely affected and will find themselves insurers of the safety of those in their care.²⁹³ Chief Justice Shepard did not address the fact that non-governmental entities can raise the defense of comparative fault and reduce an award to a plaintiff based on the plaintiff's fault. However, in *Saunders*, this would preclude recovery by the plaintiff; the very circumstance the court appears to be trying to avoid.

In another case of first impression, the Indiana Supreme Court, in *Budden v. Board of School Commissioners of Indianapolis*,²⁹⁴ held that a tort claims "notice by a putative class representative that fairly signals an intent to assert a class claim, but does not list all potential plaintiffs, compl[ies] with the notice

284. 693 N.E.2d 16 (Ind. 1998).

285. *Id.* at 17.

286. *Id.* at 18.

287. *See id.*

288. *Id.* at 19.

289. *See id.*

290. *See id.*

291. *Id.* at 22 (Shepard, C.J., dissenting).

292. *Id.*

293. *Id.* at 23.

294. 698 N.E.2d 1157 (Ind. 1998).

requirement to preserve claims of class members²⁹⁵ who subsequently seek class certification under Trial Rule 23.

In analyzing this issue, the court first found that the plaintiffs' notice satisfied the language of the Indiana Tort Claims Act ("ITCA"),²⁹⁶ reasoning that the ITCA merely requires notice from the person making the claim and that those terms are not defined.²⁹⁷ Accordingly, the court held that there was nothing in the ITCA to suggest that "the claim" cannot be a class action or that unknown class members must be identified by name; other "persons involved" must be identified if known.²⁹⁸ The purpose of the ITCA is to provide notice to the political subdivision, not to create barriers to claims.²⁹⁹

In *Greater Hammond Community Service v. Mutka*,³⁰⁰ the Indiana Court of Appeals addressed whether a not-for-profit corporation was a governmental instrumentality entitled to the protection of the liability cap of the ITCA.

A group of Hammond residents founded and incorporated Hammond Opportunity Center, Inc. as a not-for-profit corporation. The name was later changed to Greater Hammond Community Services, Inc. ("GHCS"). GHCS entered into a contract with Lake County Equal Opportunity Council, Inc. ("LCEOC"), a community action agency under the ITCA, to provide services to low income, elderly and physically impaired Hammond residents. This included providing transportation for the elderly.³⁰¹

Mutka was a passenger on a bus driven by King, an employee of GHCS, when the bus collided with another car. As a result of the collision, Mutka was injured. LCEOC leased the bus from the Northern Indiana Regional Planning Commission ("NIRPC"). Mutka sued LCEOC, GHCS, NIRPC and King.³⁰² The parties stipulated that LCEOC and NIRPC were governed by the ITCA. The defendants filed a motion for summary judgment seeking a declaration that all defendants were governed by the ITCA and that the aggregate liability of the defendants could not exceed the liability cap of \$300,000 pursuant to the act.³⁰³ GHCS argued that it was a political subdivision or, alternatively, that it was a division of LCEOC and entitled to the protection of the liability cap.³⁰⁴ Mutka cross moved for summary judgment, arguing that the cap did not apply to GHCS because it was not a community action agency or other governmental entity. The trial court granted Mutka's motion and held that the ITCA did not apply to GHCS.³⁰⁵

295. *Id.* at 1158.

296. IND. CODE §§ 34-13-3-1 to -25 (1998).

297. *Budden*, 698 N.E.2d at 1161-62. *See also* IND. CODE § 34-13-3-10 (1998).

298. *Budden*, 698 N.E.2d at 1162.

299. *See id.* at 1163.

300. 699 N.E.2d 757, 758 (Ind. Ct. App. 1998).

301. *See id.*

302. *See id.*

303. *See id.* at 758-59.

304. *See id.* at 759.

305. *See id.*

GHCS appealed, arguing that despite the fact that it was not a community action agency as defined by Indiana Code section 12-14-23-2, as a private not-for-profit corporation providing essential government services it was an instrumentality of the state entitled to the protections of the ITCA.³⁰⁶ GHCS relied upon the Indiana Supreme Court decision in *Ayres v. Indiana Heights Volunteer Fire Department*,³⁰⁷ in support of its argument.³⁰⁸

In *Ayres*, the Indiana Supreme Court held that a volunteer fire department was entitled to the immunity afforded by the ITCA because firefighting was a service uniquely governmental and private enterprises are not in the business of fighting fires.³⁰⁹ The *Ayres* court held that the volunteer fire department was an instrumentality of the local government and protected by the ITCA.³¹⁰

In *Mutka*, the Indiana Court of Appeals distinguished *Ayres*, finding that GHCS was not a statutory creation but a private not-for-profit group of Hammond residents independent of any governmental entity.³¹¹ Additionally, unlike the volunteer fire department, GHCS did not offer a service uniquely governmental.³¹² Thus, the court affirmed the trial court's ruling that GHCS was not entitled to the statutory cap provided in the act.³¹³

However, a contrary result was reached in *LCEOC, Inc. v. Greer*,³¹⁴ where the Indiana Court of Appeals held that LCEOC was a community action agency and thus a political subdivision under the ITCA and that GHCS was also a political subdivision within the meaning of the ITCA.³¹⁵ The court found that because GHCS was a provider of services governmental in nature and because it was administered by LCEOC, it was a governmental entity entitled to the protections of the ITCA.³¹⁶

Interestingly, the *Mutka* and *Greer* decisions were rendered on the same date. The *Mutka* decision was written by Judge Darden with Judges Garrard and Staton concurring.³¹⁷ *Greer* was written by Judge Riley with Judges Bailey and Najam concurring.³¹⁸

306. *See id.* at 760.

307. 493 N.E.2d 1229 (Ind. 1986).

308. *See Mutka*, 699 N.E.2d at 760.

309. *Ayres*, 493 N.E.2d at 1235.

310. *Id.* at 1237.

311. *Mutka*, 699 N.E.2d at 760.

312. *See id.*

313. *Id.*

314. 699 N.E.2d 763 (Ind. Ct. App. 1998).

315. *Id.* at 767, 769.

316. *Id.* at 769.

317. *Mutka*, 699 N.E.2d at 758, 762.

318. *Greer*, 699 N.E.2d at 764, 769.

IX. ABUSE OF PROCESS

In *National City Bank, Indiana v. Shortridge*,³¹⁹ the Indiana Supreme Court held that attorneys representing a personal injury plaintiff could not escape a defendant's claim of abuse of process by way of summary judgment.³²⁰ The plaintiff's attorneys had filed a *lis pendens* notice against certain real estate owned by the defendants. The trial court ruled that the *lis pendens* was improper and ordered it removed.³²¹ Despite this ruling, the attorneys filed a second *lis pendens* notice, which caused the sale of the property to collapse. The Indiana Supreme Court held that issues of fact precluded summary judgment.³²²

Despite the trial court and court of appeals' findings that the attorney's actions were within a range of legitimate ends and justifiable conduct precluding the abuse of process claim, the Indiana Supreme Court held to the contrary.³²³ The court noted that because the use of *lis pendens* was so plainly wrong and because the attorneys did not have a proper justification for filing the second *lis pendens*, the inference that the attorneys may have made improper use of the legal process existed.³²⁴

National City appears to open the door (at least a crack) for claims against attorneys for abuse of process. Only as future claims are filed will the impact of the Indiana Supreme Court's decision truly come to light.

X. INVASION OF PRIVACY

The specter of AIDS entered the legal realm once again in *Doe v. Methodist Hospital*,³²⁵ where the Indiana Supreme Court declined to recognize the tort of invasion of privacy when private facts are publically disclosed, at least on the facts as presented in *Doe*. The plurality opinion addressed the issue as one of first impression in the State of Indiana.³²⁶

In *Doe*, the plaintiff, a letter carrier for the U.S. Postal Service, was rushed by ambulance from work to the hospital due to a suspected heart attack. Doe informed the paramedics that he was HIV positive.³²⁷ He had previously disclosed this to a small circle of close friends and co-workers, but not to his co-workers generally. While in the hospital, Cameron, a co-worker, checked on Doe's condition by calling his own wife who worked at the hospital. She disclosed that Doe was HIV positive and Cameron told some of Doe's co-

319. 689 N.E.2d 1248 (Ind. 1997).

320. *Id.* at 1249.

321. *See id.* at 1250.

322. *Id.* at 1253.

323. *Id.*

324. *Id.*

325. 690 N.E.2d 681, 682 (Ind. 1997).

326. The concurring opinion noted that this was not a case of first impression in Indiana. *Id.* at 694 (Dickson, Sullivan, JJ., concurring with separate opinion).

327. *Id.* at 683.

workers, including Duncan.³²⁸ Duncan told Saunders and Okes the news. Saunders was not aware of Doe's condition, but Okes, a close friend of Doe's, was aware. Doe subsequently sued Duncan for invasion of privacy.³²⁹

The trial court granted Duncan's motion for summary judgment and the court of appeals affirmed. The Indiana Supreme Court granted transfer and also affirmed.³³⁰

The supreme court went through a lengthy discussion of the genesis of the tort of invasion of privacy, initially noting that it originated from a 1890 law review article written by a Boston attorney, Samuel Warren. Apparently, the press had been covering Warren's wife's social gatherings "in highly personal and embarrassing detail."³³¹ Thereafter, a few courts rejected the new tort,³³² while at least one accepted it.³³³

The First Restatement of Torts articulates a two dimensional interest in "not having [one's] affairs known to others or [one's] likeness exhibited to the public."³³⁴ By 1960, Professor Prosser had concluded that invasion of privacy consisted of four separate and independent torts.³³⁵ The Second Restatement adopted his view and described the four injuries as follows: "(1) intrusion upon seclusion; (2) appropriation of likeness; (3) public disclosure of private facts; and (4) false-light publicity."³³⁶

The "subpart" of the tort of invasion of privacy at issue in *Doe* was the disclosure of private facts. The court noted that this cause of action was recognized in most states, but that Indiana had never directly confronted the issue.³³⁷

The court identified two main interests that the duty to refrain from publically disclosing private affairs of others would protect: reputation and mental well-being. It noted that these interests must be balanced against competing public and private interests.³³⁸ Addressing the issue of reputation, the court found that "[t]ruthful disclosures can be socially disruptive and personally dangerous."³³⁹ It further found that under defamation law in Indiana, truthful but

328. *See id.*

329. *Id.* at 683. Doe also sued the hospital and Cameron for invasion of privacy and for violating statutory duties of confidentiality. Those issues were not presented in the appeal. *Id.*

330. *Id.* at 684.

331. *Id.* (citing William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960)).

332. *See id.*; *see also* *Atkinson v. John E. Doherty & Co.*, 80 N.W. 285 (1899); *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902).

333. *See Doe*, 690 N.E.2d at 684; *see also Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (1905).

334. *Doe*, 690 N.E.2d at 684 (quoting RESTATEMENT OF TORTS § 867 (1938)).

335. *See id.* (citing Prosser, *supra* note 331, at 389).

336. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 652A (1977)).

337. *Id.* at 685.

338. *Id.* at 686.

339. *Id.*

defamatory statements have not been civilly actionable.³⁴⁰ Citing a potential conflict with the Indiana Bill of Rights (in which truth is a justification in prosecution for libel), the court found that caution should be exercised in recognizing a civil cause of action for truthful defamation.³⁴¹

The court then addressed the interest of emotional health. It initially pointed out that Indiana already provides a remedy for one injured emotionally by another through the tort of intentional infliction of emotional distress, otherwise known as "outrage."³⁴² However, under the tort of outrage, a plaintiff must prove a mental element that is not required under the public disclosure tort. The latter is a strict liability version of outrage, or "outrage lite."³⁴³

The key elements for the tort of public disclosure of private facts are: a "person (1) gives 'publicity;' (2) to a matter that (a) concerns the 'private life' of another; (b) would be 'highly offensive' to a reasonable person; and (c) is not of legitimate public concern."³⁴⁴

In *Doe*, Duncan argued that Doe's claim failed with regard to Okes because of the "private life" element, and failed with regard to Saunders because of the "publicity" element. The Indiana Supreme Court agreed on both counts.³⁴⁵ As to Okes, Doe had already told Okes of his HIV status.³⁴⁶ As to Saunders, there was no dissemination to the general public.³⁴⁷ The court held that "'publicity' requires communication of the information 'to the public at large, or to so many persons that the matter is regarded as substantially certain to become one of public knowledge.'"³⁴⁸ Communication to a single person or small group of persons is not actionable. Although not adopting a looser standard, the court noted that some courts have held that the publicity element is satisfied if the publicity is to a particular public or person who has a special relationship with the plaintiff (such as a spouse).³⁴⁹ Even under such a broad definition of publicity, the court held that, Duncan's disclosure to Saunders did not amount to publicity because there was no special relationship.³⁵⁰ There was no evidence that the disclosure to Saunders was any more damaging than to the other letter carriers Doe had told.³⁵¹ In so holding, the court concluded that the facts of *Doe* did not persuade it to endorse the subtort of disclosure.³⁵²

340. *Id.* at 687.

341. *Id.* at 691. The concurring opinion did not agree that there was any conflict. *Id.* at 695 (Dickson, Sullivan, JJ., concurring with separate opinion).

342. *Id.* at 691.

343. *Id.*

344. *Id.* at 692 (citing RESTATEMENT (SECOND) OF TORTS § 652D (1977)).

345. *Id.*

346. *See id.* at 692 n.15.

347. *See id.* at 692.

348. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977)).

349. *Id.* at 693.

350. *Id.*

351. *See id.*

352. *Id.* at 695.

