

RECENT DEVELOPMENTS IN INDIANA TORT LAW

JANA K. STRAIN*
CAROL A. NEMETH**

This Article discusses significant developments in tort law in Indiana during the survey period. In light of the breadth of the subject area, this Article is neither comprehensive nor exhaustive. This Article does not attempt to address in detail all of the cases applying tort law in Indiana during the survey period, but attempts to address selected cases in which the courts have interpreted the law or clarified existing law.

I. NEGLIGENCE

There were a number of significant developments in the area of negligence law during the survey period. Among other things, the courts held that, where duties of care have already been defined by Indiana law, it is unnecessary to perform an analysis of the reasonableness of a party's conduct under *Webb v. Jarvis*¹ or to consider what a similarly situated person might do under the circumstances.

A. Duty of Care

1. *Seventeen-year-old Child Must Exercise Reasonable and Ordinary Care of an Adult.*—In *Penn Harris Madison School Corp. v. Howard*,² a seventeen-year-old high school student fell from a zip-line he had constructed for a school production and brought suit against the school for the significant injuries he suffered. A jury awarded the student \$200,000 in damages. On appeal, the school challenged the jury instruction which instructed that the student “was bound to exercise in regard to his own contributory negligence . . . *reasonable care [that] a person of like age, intelligence, and experience would ordinarily exercise under like or similar circumstances.*”³ The student argued that a different standard of care applies to contributory negligence than to comparative fault. The court of appeals reversed and remanded for a new trial, explaining that this instruction misstated the standard under Indiana law:

Indeed, Indiana Pattern Jury Instruction No. 5.25 states in relevant part that “[a] child over the age of fourteen (14) [absent special circumstances] must exercise the reasonable and ordinary care of an adult.” In this case, [the student] was seventeen years old at the time he was injured Thus, he was charged with exercising the standard of

* Member, Price Waicukauski & Riley, LLC; B.A., 1986, Indiana State University; M.S., 1990, Butler University; J.D., 1997, Indiana University School of Law—Indianapolis.

** Member, Price Waicukauski & Riley, LLC.; B.A., 1991, Indiana University—Bloomington; J.D., 1994, Indiana University School of Law—Bloomington.

1. 575 N.E.2d 992 (Ind. 1991).

2. 832 N.E.2d 1013 (Ind. Ct. App.), *trans. granted*, 841 N.E.2d 188 (Ind. 2005).

3. *Id.* at 1016 (emphasis added).

care of an adult absent special circumstances.⁴

However, the Indiana Supreme Court granted transfer on November 1, 2005, but has not yet decided the case. Its decision could clarify or modify the law regarding the standard of care applicable to children.

2. *Duty of One Contractor to Another Contractor's Employees.*—In *Horine v. Homes by Dave Thompson, LLC*,⁵ an employee of one subcontractor on a residential construction project was injured when he fell from a roof after stepping on loose roofing materials installed by another subcontractor on the project. He filed suit against both subcontractors for his injuries.⁶ The trial court granted the roofer's summary judgment motion on the question of the employee's negligence.⁷ On appeal, the employee argued that the roofer had a duty to "reasonably foreseeable persons who would be working on the roof" to assure that the roofing materials were installed properly.⁸ The Indiana Court of Appeals agreed, quoting *Guy's Concrete, Inc. v. Crawford*:⁹

[I]n general, a contractor has a duty to use ordinary care both in its work and in the course of performance of the work. Where an independent contractor is in control of the construction or premises and the independent contractor's negligence results in injury to another person on the premises, the independent contractor may be held liable under Indiana law.¹⁰

In a footnote, the court explained that "it is unnecessary for us to perform the *Webb* analysis because our supreme court and this court have already held that contractors performing work owe a duty to third persons rightfully on the construction premises."¹¹

3. *Governmental Duty and Increased Risk Due to Failure to Warn.*—In *City of Muncie ex rel. Muncie Fire Department v. Weidner*,¹² parents filed suit for the failure of the fire department to protect their child from a downed, live power line which caused the child's electrocution in an adjacent backyard one day after the fire department had responded to a complaint and reported the downed wire to the electric company.¹³ The City of Muncie sought summary judgment on a number of grounds and, on appeal, argued it was entitled to summary judgment

4. *Id.*

5. 834 N.E.2d 680 (Ind. Ct. App. 2005).

6. *Id.* at 682.

7. *Id.*

8. *Id.* at 684.

9. 793 N.E.2d 288 (Ind. Ct. App. 2003).

10. *Horine*, 834 N.E.2d at 684 (internal citation omitted) (quoting *Guy's Concrete*, 793 N.E.2d at 295).

11. *Id.* at 684 n.3 (quoting *Guy's Concrete*, 793 N.E.2d at 294 n.4 (citing *Webb v. Jarvis*, 575 N.E.2d 992, 995 (Ind. 1991))).

12. 831 N.E.2d 206 (Ind. Ct. App.), *reh'g denied* (2005), and *trans. denied* (Ind. 2006).

13. *Id.* at 209.

because (1) it owed no duty to protect the child from power lines controlled by the electric company; and (2) it was entitled to immunity either under the common law or under the Emergency Management and Disaster Law.¹⁴

After reciting the burden on a claim of negligence, the court noted “[a] governmental unit is bound by the same duty of care as a non-governmental unit except where the duty alleged to have been breached is so closely akin to one of the limited exceptions (prevent crime, appoint competent officials, or make correct judicial decisions).”¹⁵ The plaintiffs conceded that the fire department owed only the duty it assumed by responding to the neighbor’s call; therefore, the court noted that the fire department’s liability would hinge on the duty it assumed.¹⁶ Although noting that section 324A of the Restatement (Second) of Torts¹⁷ “parallels Indiana’s doctrine of assumed duty”¹⁸ and that the questions whether and to what extent a party owes a duty are for the factfinder, the court explained it may decide the issue as a matter of law if the record contains insufficient evidence to establish a duty.¹⁹ Rejecting the plaintiffs’ argument that there was an increased risk because the fire department did not warn the child, the court explained that the standard “is not whether the risk of harm would have *decreased* had the fire department acted with reasonable care. Rather, it is whether the fire department’s failure to exercise reasonable care *increased* the risk of such harm.”²⁰ Finding no evidence in the record that the child actually relied on the fire department’s actions, the court found, as a matter of law, that there was insufficient evidence to establish a duty.²¹ In a footnote, the court clarified that it did not intend to suggest that it was necessary to have evidence that the fire department spoke directly to the child before a duty could be found, only that the lack of evidence of any reliance precluded a finding of assumed

14. *Id.* at 211 (citing IND. CODE § 10-14-3 (2005)).

15. *Id.* at 212.

16. *Id.*

17. THE RESTATEMENT (SECOND) TORTS § 324A (1965) provides:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

- (a) his failure to exercise reasonable care increases the risk of harm, or
- (b) he has undertaken to perform a duty owed by the other to the third person, or
- (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

See *Weidner*, 831 N.E.2d at 212.

18. *Weidner*, 831 N.E.2d at 212.

19. *Id.* (citing *Bldg. Materials Mfg. Corp. v. T & B Structural Sys., Inc.*, 804 N.E.2d 277, 282 (Ind. Ct. App. 2004)).

20. *Id.* at 213.

21. *Id.*

duty.²²

4. *Statutory Duty Owed by Roller Skating Rink Operators.*—The court construed the statutory duty of roller skating rink operators under a section of the Indiana Code in *St. Margaret Mercy Healthcare Centers, Inc. v. Poland*,²³ in which a skater was injured when she fell while skating. The skater alleged that the rink was negligent in permitting skaters to be “out of control [with] nobody seem[ing] to be supervising them.”²⁴ The jury found in favor of the skater and, on appeal, the rink asserted error in the trial court’s use of Pattern Jury Instruction No. 5.41²⁵ on incurred risk, which it contended was a misstatement of the law since Indiana Code section 34-31-6-3²⁶ presumes an assumption of the risk in the skating context.²⁷

Construing the statute, the court noted that “[d]ue to the nature of roller skating, the Indiana Legislature imposed specific duties and responsibilities upon roller skating rink operators . . . [and] also imposed certain duties upon roller skaters.”²⁸ Moreover, the legislature said that, “if a roller skating rink operator is in compliance with the specified duties and responsibilities outlined in Section 1, then pursuant to Indiana Code § 34-31-6-4²⁹ . . . the operator is entitled to a

22. *Id.* at 213 n.5.

23. 828 N.E.2d 396 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 184 (Ind. 2005).

24. *Id.* at 399.

25. The jury was instructed that the “[p]laintiff incurs the risk of injury if she actually knew of a specific danger, understood the risk involved, and voluntarily exposed herself to that danger.” *Id.* at 402.

26. The statute provides:

(a) Roller skaters are considered to:

1. have knowledge of; and
2. assume; the risks of roller skating.

(b) For purposes of this chapter, risks of roller skating include the following:

1. Injuries that result from collisions or incidental contact with other roller skaters or other individuals who are properly on the skating surface.
2. Injuries that result from falls caused by loss of balance.
3. Injuries that involve objects or artificial structures that:
 - A. are properly within the intended path of travel of the roller skater; and
 - B. are not otherwise attributable to an operator’s breach of the operator’s duties under section 1 [IC 34-31-6-1] of this chapter.

IND. CODE § 34-31-6-3 (2005).

27. *St. Margaret*, 828 N.E.2d at 400.

28. *Id.* at 402.

29. The statute provides:

- (a) Except as provided in subsection (b) and notwithstanding IC 34-51-2-6 concerning comparative fault, the assumption of risk under section 3 of this chapter is a complete defense to an action against an operator by a roller skater for injuries and property damage resulting from the assumed risks.
- (b) The following applies if an operator has violated any one (1) of the operator’s

complete defense against liability from roller skaters who experience falls due to collisions and incidental contact.”³⁰ The jury heard conflicting evidence, but the court concluded that once the jury reached the verdict that the rink failed to exercise reasonable care in supervising skaters on the floor, it “was compelled to proceed to I.C. § 34-51-2-6 for a comparative fault analysis regarding damages, if any.”³¹ As the evidence was sufficiently probative to support the jury’s finding, the trial court did not abuse its discretion in giving the instruction on incurred risk.³²

After reciting the standards for statutory interpretation and reiterating the legislature’s statements as to the specific duties and responsibilities of skating rink operators, the court concluded that it was well within the province of the jury to determine what percentage fault, if any, should be apportioned among the parties.³³ Although the evidence was conflicting, the rink provided no authority to suggest that the jury was required to apportion *some* fault to the plaintiff under the comparative fault analysis, and the jury’s verdict apportioning zero fault to the plaintiff was supported by the evidence and the law.³⁴

B. Intervening Cause

1. *Foreseeability and Intervening Cause.*—In *Mayfield v. The Levy Co.*,³⁵ a steel company employee who worked as a switchman on a train brought suit against an independent contractor for injuries suffered when he fell into a trench filled with scalding water. The trench was used to cool slag, a byproduct of steelmaking. The plaintiff, riding on the train, observed a truck trying to beat the train to a crossing. Fearing a collision, the plaintiff stepped off the train, landing on a large piece of slag, which caused him to fall into the trench that the independent contractor controlled and used to cool the slag.³⁶ The plaintiff suffered severe burns.

The trial court granted summary judgment in favor of the independent contractor, finding (1) that the contractor did not have control over the premises and therefore had no legal duty to the employee, (2) the independent contractor did not have superior knowledge with regard to dangers on the premises, and (3)

duties or responsibilities under section 1 [IC 34-31-6-1] of this chapter:

1. The complete defense against an action against an operator under subsection (a) does not apply.
2. The provisions of IC 34-51-2-6 [comparative fault] apply.

IND. CODE § 34-31-6-4 (2005).

30. *St. Margaret*, 828 N.E.2d at 402-03.

31. *Id.* at 405.

32. *Id.*

33. *Id.* at 406-07.

34. *Id.* at 408.

35. 833 N.E.2d 501 (Ind. Ct. App. 2005).

36. *Id.* at 507.

there was no evidence establishing that the injury was foreseeable.³⁷ On appeal, the court focused solely on the question of proximate cause.³⁸ Although it was foreseeable that the independent contractor's "failure to remove the slag from the ground or its failure to drain the water might cause injuries to a person walking near the sump pump area," the court held it was not foreseeable that the failure to "maintain that area would cause injuries to an individual riding a train."³⁹ Therefore, "[i]t was not [the independent contractor's] negligent conduct . . . , but rather, the negligent, reckless, or intentional conduct of the . . . truck driver that caused [the] accident. The truck driver's actions constitute an intervening cause superseding any liability on the part of [the independent contractor]."⁴⁰ As a result, the independent contractor's conduct was not the proximate cause of the injuries.⁴¹

C. Comparative Fault

1. *Additur and the Impact of Comparative Fault on Derivative Claims.*—In *Hockema v. J.S.*,⁴² the court addressed a matter of first impression: whether parents can recover medical expenses on a derivative claim if the underlying claim is barred because the child's fault is greater than fifty percent. A child ran into the road and collided with a car driven by a seventeen-year-old driver.⁴³ The jury found the driver only 33.25% at fault, the child 66.75% at fault, and awarded the child zero damages.⁴⁴ The parents filed a motion to correct error seeking additur or a new trial, "claim[ing] that the jury erred by not awarding [them] damages for a percentage of the stipulated medical expenses."⁴⁵ After a hearing, the trial court entered judgment in favor of the parents for 33.25% of the stipulated amount of medical expenses.⁴⁶

The court of appeals noted that, although the trial court has broad discretion on a motion to correct error, the remedy of additur or remittitur under Trial Rule 59(J)(5)⁴⁷ "is only available when the evidence is insufficient to support the

37. *Id.* at 504.

38. *Id.* 505 n.4 ("Because we conclude that the undisputed material facts establish that [the independent contractor's] alleged negligence was not the proximate cause of [the employee's] injuries, we do not address [the] argument that [it] owed him a duty and breached that duty as a matter of law. . . . If we were to address [that] argument, we would likely conclude that . . . [it] is a question that must be resolved by the trier-of-fact.").

39. *Id.* at 507.

40. *Id.*

41. *Id.*

42. 832 N.E.2d 537 (Ind. Ct. App.), *reh'g denied* (2005), and *trans. denied* (Ind. 2006).

43. *Id.* at 538.

44. *Id.*

45. *Id.* at 540.

46. *Id.*

47. IND. TRIAL R. 59(J)(5) provides:

The court, if it determines that prejudicial or harmful error has been committed, shall

verdict as a matter of law.”⁴⁸ The Indiana Comparative Fault Act, a “modified fifty percent” comparative fault law, states that “if a claimant is deemed to be more than fifty percent at fault, then the claimant is barred from recovery.”⁴⁹ Thus, additur was inappropriate.⁵⁰ The parents’ duty to pay medical expenses is not a direct injury to the parents but one arising out of the parents’ duty to provide medical care for their child.⁵¹

If the child was not a minor, the medical expenses would be his own, and the parents would not be obligated to pay them. The right of the parents to recover the child’s medical expenses, hence, rests upon the child’s right to recover and therefore may be appropriately categorized as a derivative right.⁵²

Thus, although the parent has a cause of action to recover medical expenses, the right is derivative and “may be barred [if] the child’s comparative negligence . . . exceeds the negligence of the tortfeasor.”⁵³

2. *When Comparative Fault Is a Frivolous Defense.*—In *Stoller v. Totton*,⁵⁴ the driver of a semi tractor-trailer that struck an automobile when it moved into the automobile’s lane asserted the affirmative defense of comparative fault.⁵⁵ During the discovery process, the driver of the semi admitted the auto was in the lane when he entered it with his semi, but denied requests for admission saying that he was negligent in his operation of the semi.⁵⁶ Further, in response to interrogatories, the semi driver asserted that he did not see anyone in the lane when he moved into it⁵⁷ and, in his deposition, the semi driver testified that he did not know of anything the auto driver had done to cause the accident.⁵⁸ Despite repeated requests to withdraw the defense and the plaintiff’s warning that she would seek sanctions if he failed to do so, the case was tried to a jury.

take such action as will cure the error, including without limitation the following with respect to all or some of the parties and all or some of the errors:

...

(5) In the case of excessive or inadequate damages, enter final judgment on the evidence for the amount of the proper damages, grant a new trial, or grant a new trial subject to additur or remittitur[.]

See *Hockema*, 832 N.E.2d at 541.

48. *Hockema*, 832 N.E.2d at 541 (citing *Childress v. Buckler*, 779 N.E.2d 546, 550 (Ind. Ct. App. 2002)).

49. *Id.* at 542 (citing IND. CODE §§ 34-51-2-6, 34-51-2-7, 34-51-2-14 (2005)).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 543.

54. 833 N.E.2d 53 (Ind. Ct. App.), *trans. denied* (Ind. 2005).

55. *Id.* at 54.

56. *Id.*

57. *Id.* at 55.

58. *Id.*

After three witnesses had testified, the semi driver admitted that he was liable and withdrew his defense.⁵⁹ After entering judgment on the jury verdict, the trial court granted the auto driver's motion for costs and attorney's fees, finding that the semi driver's defense was frivolous and in bad faith.⁶⁰ The semi driver appealed.

Quoting *Grubnich v. Renner*,⁶¹ the court explained:

A defense is "frivolous" (a) if it is made primarily to harass or maliciously injure another, (b) if counsel is unable to make a good faith and rational argument on the merits of the action, or (c) if counsel is unable to support the action by a good faith and rational argument for extension, modification, or reversal of existing law. A defense is "unreasonable" if, based upon the totality of the circumstances, including the law and facts known at the time, no reasonable attorney would consider the defense justified or worthy of litigation. A defense is "groundless" if no facts exist which support the defense relied upon and supported by the losing party.⁶²

The court noted specifically the many occasions when the driver had the opportunity to review the facts, the admission of facts that were contrary to his comparative fault defense theory, and his "repeated[] refus[al] to settle the issue of liability while continuing to advance a theory that he had no evidence to support."⁶³ Stressing that the holding should be limited to the facts and expressing concerns that the holding may have detrimental effects on settlement negotiations if expanded, the court clarified:

Where it is clear that liability lies with one party, we encourage settlement of that issue without fear of the imposition of sanctions. It is only in the clearest of cases where an affirmative defense is frivolous, unreasonable, or groundless, yet is maintained until liability is admitted during the trial that costs and attorney's fees will be appropriate sanctions.⁶⁴

Although the court focused on the impact of its holding on settlement, the language of its holding may actually serve the opposite purpose. As written, the court suggests it is the admission of liability during trial that is the trigger for the bad faith finding rather than the absence of evidence in support of the defense. Framed this way, the holding discourages the admission of liability and may cause a defendant to choose silence on the issue, forcing a jury verdict, in order to avoid the risk of a bad faith finding even when the evidence clearly would support only one outcome.

59. *Id.*

60. *Id.*

61. 746 N.E.2d 111 (Ind. Ct. App. 2001).

62. *Stoller*, 833 N.E.2d at 55 (quoting *Grubnich*, 746 N.E.2d at 119).

63. *Id.* at 56.

64. *Id.*

3. *Is Mitigation of Damages Evidence of Comparative Fault?*—In *Kocher v. Getz*,⁶⁵ the Indiana Supreme Court revisited an issue previously decided in *Deible v. Poole*,⁶⁶ which was expressly adopted by the supreme court,⁶⁷ but the holding of which the court of appeals refused to follow in *Kocher*.⁶⁸ At the jury trial in *Kocher*, the defendant claimed that “the plaintiff failed to mitigate her damages [because] she made insufficient efforts to find replacement part-time employment . . . after the accident.”⁶⁹

The court explained that the Comparative Fault Act (the “Act”) provides, in part, that the term fault “also includes unreasonable assumption of risk not constituting an enforceable express consent, incurred risk, and *unreasonable failure to avoid an injury or to mitigate damages*.”⁷⁰ Explaining *Deible*, which addressed this portion of the Act, the court noted that “the obligation of a plaintiff to mitigate damages customarily refers to the expectation that a person injured should act to minimize damages after an injury-producing incident.”⁷¹ This is different from the allocation of fault under the Act, as the “[f]ailure to minimize damages does not bar the remedy, but goes only to the amount of damages recoverable.”⁷² Thus, the trial court’s refusal of the defendant’s proffered jury instruction was consistent with the court’s adoption of *Deible* and should have been affirmed by the court of appeals. Agreeing with Judge Vaidik’s dissent in *Kocher*, the court explained:

In cases arising under the Act, a defense of mitigation of damages based on a plaintiff’s acts or omissions occurring *after* an accident or initial injury is not properly included in the determination and allocation of “fault” under the Act. The phrase “unreasonable failure to avoid an injury or to mitigate damages” included in the definition of “fault” under Indiana Code § 34-6-2-45(b) applies only to a plaintiff’s conduct *before* an accident or initial injury. An example of such unreasonable failure to avoid an injury or to mitigate damages would be a claimant’s conduct in failing to exercise reasonable care in using appropriate safety devices, e.g., wearing safety goggles while operating machinery that presents a substantial risk of eye damage.⁷³

The practitioner may want to review the case for style. In footnote three, the court explained that it wrote the opinion as an experiment, following the style

65. 824 N.E.2d 671 (Ind. 2005).

66. *Deible v. Poole*, 691 N.E.2d 1313 (Ind. Ct. App.), *aff’d*, 702 N.E.2d 1076 (Ind. 1998).

67. 702 N.E.2d 1076 (Ind. 1998).

68. *Kocher*, 824 N.E.2d at 674.

69. *Id.* at 673.

70. *Id.* (quoting IND. CODE § 34-6-2-45(b) (2005) (emphasis added by the court)).

71. *Id.* at 674.

72. *Id.* (quoting *Deible v. Poole*, 691 N.E.2d 1313, 1316 (Ind. Ct. App.), *aff’d*, 702 N.E.2d 1076 (Ind. 1998)).

73. *Id.* at 674-75 (internal citations omitted).

recommendations of Bryan Garner in *The Winning Brief*.⁷⁴ Noting that the style did not meet with universal approval,⁷⁵ the court asked for comments from the public, the bench and the bar.

4. *Supervising Parent as Nonparty*.—In *Witte v. Mundy ex rel. Mundy*,⁷⁶ the Indiana Supreme Court addressed a question of law for which there was no prior clear precedent. In *Witte*, a five-year-old child was struck by a car driven by a minor, and the child's mother filed suit, both as her child's next friend and on her own behalf.⁷⁷ Among other things, the driver asserted the mother's negligent supervision as an affirmative defense. Just two days before trial, the mother was permitted to dismiss without prejudice her individual claim. The child sought to preclude evidence of her mother's negligent supervision. In response, the driver, who had resisted the dismissal, sought leave to amend her answer to name the mother as a nonparty. The trial court granted the child's motion in limine regarding her mother's negligent supervision and denied the driver's motion to add the mother as a non-party.⁷⁸

At trial, over the child's objection, the trial court permitted the defendant to question the mother about her supervision of the child and to question the child about her bicycle safety training. The jury returned a defense verdict, and the child filed a motion to correct error, alleging that permitting the driver to solicit information regarding negligent supervision violated the court's prior order. The trial court granted the motion to correct error, and the driver appealed.⁷⁹ The court of appeals affirmed the grant of a new trial on grounds that the trial court should have allowed the defendant to name the mother as a nonparty.

On transfer, the supreme court agreed with the court of appeals that the mother was a proper non-party.⁸⁰ Although a child under seven is considered to be of such tender years that she is incapable of judgment or discretion and therefore not capable of negligence, "[i]t is another thing to conclude that an adult's negligent supervision cannot be a contributing cause to the child's injury relieving a third party of some or all liability."⁸¹

[U]ntil 1995, a "non-party" was defined as "a person who is, or may be liable to the claimant in part or in whole for the damages claimed but who has not been joined in the action as a defendant by the claimant." Under that definition, it would not have been proper to [name the mother] a nonparty because, as [the child's] mother, she would not be liable [for her child's] injuries. However, the definition of nonparty was amended in 1995 to define a nonparty as "a person who caused or

74. *Id.* at 673 n.3 (citing BRYAN GARNER, *THE WINNING BRIEF* 139-47 (2d ed. 2004)).

75. *Id.* (citing Richard A. Posner, *Against Footnotes*, 38 *COURT REV.* 24 (Summer 2001)).

76. 820 N.E.2d 128 (Ind. 2005).

77. *Id.* at 131.

78. *Id.*

79. *Id.*

80. *Id.* at 133.

81. *Id.*

contributed to cause the alleged injury, death, or damage to property but who has not been joined in the action as a defendant.” This provision was presumably [changed] to permit employers of injured workers to be named as nonparties even though under workers compensation law they have no tort liability to a worker injured by accident on the job.⁸²

As the court observed, the whole purpose of the comparative fault statute is to make a tortfeasor liable to an injured person in proportion to the tortfeasor’s fault.⁸³ Thus, even though the mother would have been immune from suit by her child, the defendant should have been allowed to name her as a nonparty so that the jury could have determined whether any fault on the part of the mother contributed to causing the accident.⁸⁴ Although it was error to refuse to add the mother as a nonparty and to instruct the jury on comparative fault, the error was not grounds for a new trial because it was invited by the child.⁸⁵ Under the doctrine of invited error, which is grounded in estoppel, “a party may not take advantage of an error that she commits, invites, or which is the natural consequence of her own neglect or misconduct.”⁸⁶ Finally, while the grant of a new trial is reversed only for an abuse of discretion, “an error of law is an abuse of discretion.”⁸⁷ Here, the trial court erred on a point of law, even though there was no clear precedent, and as a result, it abused its discretion.⁸⁸

5. *Immunity Under the Guest Statute.*—In *KLLM, Inc. v. Legg*,⁸⁹ the Indiana Court of Appeals considered two significant issues under the Indiana Guest Statute for which there was no direct Indiana precedent: first, when a rider’s status is determined for purposes of the guest statute, and, second, the definition of “in or upon” under the statute.⁹⁰ The Indiana Guest Statute is in derogation of

82. *Id.* (internal citations omitted) (quoting IND. CODE §§ 34-4-33-2(a) (1995); 34-6-2-88 (2004)).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 134 (internal quotation marks omitted) (citation omitted).

87. *Id.* (internal quotation marks omitted).

88. *Id.*

89. 826 N.E.2d 136 (Ind. Ct. App.), *trans. denied* (Ind. 2005).

90. *Id.* at 141-44. The court cites Indiana Code section 34-30-11-1, the Indiana Guest Statute, which provides:

The owner, operator, or person responsible for the operation of a motor vehicle is not liable for loss or damage arising from injuries to or the death of:

- (1) the person’s parent;
- (2) the person’s spouse;
- (3) the person’s child or stepchild;
- (4) the person’s brother;
- (5) the person’s sister; or
- (6) a hitchhiker;

resulting from the operation of the motor vehicle while the parent, spouse, child or

the common law and must be strictly construed, which the court explained “involves a close, conservative adherence to the literal or textual interpretation.”⁹¹ After discussing the history of the Indiana Guest Statute, the court of appeals rejected the personal representative’s argument that the hitchhiker, picked up by a truck driver in Tennessee, ceased being a hitchhiker in Louisville, Kentucky, when the driver offered to let him continue to ride with him to Indiana after the hitchhiker was unable to connect with his girlfriend in Louisville. The statute provides that a hitchhiker is “a passenger who has solicited a ride in violation of [Indiana Code section 9-21-17-16],”⁹² which prohibits a person from standing in the road “for the purpose of soliciting a ride . . . unless the person . . . is faced with an emergency on the roadway.”⁹³ Finding no Indiana law on the subject, the court considered cases from the Missouri Supreme Court⁹⁴ and the Washington Supreme Court⁹⁵ and concluded that the decedent was a hitchhiker at the beginning of the journey and, “[b]ecause there was no interruption in their journey,” his status did not change.⁹⁶

As to the second question, whether the hitchhiker was “in or upon” the vehicle at the time of his injuries,⁹⁷ the court again found no controlling Indiana law. Analogizing from an insurance case construing the term, however, the court agreed with the interpretation given to “upon” in that case and concluded that a person “is not required to be physically inside the vehicle at the time” of the accident, but may be “‘upon’ a motor vehicle if a sufficient relationship exists between that person and the vehicle” at the time of the accident.⁹⁸ In this case, the hitchhiker left the vehicle only temporarily to assist the driver in backing the vehicle into a parking space. The undisputed evidence indicated that both intended he would re-enter the vehicle and continue the journey. In contrast, the actions of the child in *C.M.L. ex rel. Brabant v. Republic Services*,⁹⁹ were not in

stepchild, brother, sister, or hitchhiker was being transported without payment in or upon the motor vehicle unless the injuries or death are caused by the wanton or willful misconduct of the operator, owner, or person responsible for the operation of the motor vehicle.

IND. CODE § 34-30-11-1 (2005).

91. *KLLM*, 826 N.E.2d at 140 (citing *C.M.L. ex rel. Brabant v. Republic Servs., Inc.*, 800 N.E.2d 200, 208-09 (Ind. Ct. App. 2003)).

92. *Id.* at 141 (quoting IND. CODE § 34-6-2-57 (2005)).

93. *Id.*

94. *Lines v. Teachenor*, 273 S.W.2d 300, 303 (Mo. 1954) (“The general rule is that the status of a rider is determined at the outset of the trip.”).

95. *Bateman v. Ursich*, 220 P.2d 314, 315 (Wash. 1950) (“[T]he nature of the relationship between the operator . . . and a rider therein is to be determined as of the time of the beginning of the transportation.”).

96. *KLLM*, 826 N.E.2d at 142.

97. *Id.* at 143.

98. *Id.* at 144.

99. 800 N.E.2d 200 (Ind. Ct. App. 2003). The court of appeals held that the guest statute did not bar a child’s negligence action against his stepfather and his stepfather’s employer because the

“furtherance of his and his stepfather’s journey.”¹⁰⁰ Accordingly, the hitchhiker was “in or upon” the vehicle at the time of his injury, and his claim was barred by the Guest Statute.¹⁰¹

II. WRONGFUL DEATH¹⁰²

In *Horn v. Hendrickson*,¹⁰³ the court of appeals followed the Indiana Supreme Court’s holding in *Bolin v. Wingert*,¹⁰⁴ that “only children born alive fall under Indiana’s Child Wrongful Death Statute.”¹⁰⁵ Horn was six months pregnant and her unborn fetus died as a result of an automobile collision. She sued the defendant driver for the wrongful death of her fetus, and the driver moved to dismiss for failure to state a claim. Although the defendant conceded that the six-month-old fetus was viable, she argued that under *Bolin*, there is no wrongful death claim for the death of an unborn child.¹⁰⁶

In affirming the dismissal of the claim, the court was bound to apply the controlling precedent of *Bolin*, although it recognized an important factual distinction between *Bolin* and this case: Horn’s unborn child was viable, while *Bolin* involved an eight to ten-week-old fetus.¹⁰⁷ However, the court reasoned that the Indiana Supreme Court’s holding in *Bolin* “categorically precludes all parents from bringing a wrongful death claim for the death of a viable or non-viable fetus.”¹⁰⁸

As a matter of first impression, the court found that the *Bolin* opinion, as applied to the facts of *Horn*, renders the child wrongful death statute unconstitutional under the Equal Privileges and Immunities Clause of Article I, Section 23 of the Indiana Constitution.¹⁰⁹ The court concluded that “there are no inherent differences between parents of a child born alive and parents of a viable fetus.”¹¹⁰ Nevertheless, the court affirmed the dismissal because it did not “hold that the statute is unconstitutional on its face but that it is unconstitutional as interpreted by our supreme court.”¹¹¹ As such, the court could not attempt to

boy was not “in or upon” the garbage truck driven by his stepfather when he was struck. *Id.* at 209. The boy had exited the vehicle to urinate. *Id.*

100. *KLLM*, 826 N.E.2d at 144.

101. *Id.*

102. For discussion of cases involving the wrongful death statutes and the Medical Malpractice Act, see *infra* Part VI.F.

103. 824 N.E.2d 690 (Ind. Ct. App. 2005).

104. 764 N.E.2d 201 (Ind. 2002).

105. *Horn*, 824 N.E.2d at 693, 703.

106. *Id.*

107. *See id.* at 694.

108. *Id.*

109. *Id.* at 701.

110. *Id.*

111. *Id.* at 703.

overrule *Bolin* indirectly on constitutional grounds.¹¹²

The court of appeals strongly suggested that the supreme court reconsider its holding in *Bolin*.¹¹³ However, it does not appear that Horn petitioned for transfer to the supreme court, so it will be interesting to see if the supreme court revisits the issue if given the opportunity in the future.

III. INTENTIONAL TORTS

A. *Malicious Prosecution*

As a matter of first impression, the court of appeals held that a claim for malicious prosecution may be based on a counterclaim.¹¹⁴ In this case, an attorney sued his client to recover his fees, and the client asserted a counterclaim for legal malpractice. The attorney then brought a claim for malicious prosecution of the legal malpractice claim. After analyzing cases from other jurisdictions, the court concluded that the “filing of a counterclaim constitutes an initiation of a proceeding” and, therefore, may support a claim for malicious prosecution.¹¹⁵

The court also held that a malicious prosecution claim is not collaterally estopped by the denial of a motion for sanctions under Rule 11 or Indiana Code section 34-52-1-1.¹¹⁶ In the underlying case, the attorney won summary judgment both on his claim for unpaid fees and the malpractice claim. The attorney also sought attorney fees for “obdurate behavior” under Indiana Code section 34-52-1-1 and Indiana Trial Rule 11, but his request was denied. In rejecting the client’s argument that the attorney was collaterally estopped from bringing the malicious prosecution action, the court explained that the elements which must be shown to obtain statutory attorney fees under Indiana Code section 34-52-1-1 are not identical to the elements that must be shown to establish malicious prosecution.¹¹⁷

B. *Spoliation of Evidence*

1. *First Party Intentional Spoliation of Evidence*.—Answering a certified question from the United States District Court for the Southern District of Indiana, in *Gribben v. Wal-Mart Stores, Inc.*,¹¹⁸ the Indiana Supreme Court concluded that Indiana law does not recognize a claim for “first-party” negligent or intentional spoliation of evidence.¹¹⁹ After considering the various approaches

112. *Id.*

113. *Id.* at 695-96, 701.

114. *Crosson v. Berry*, 829 N.E.2d 184 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 186 (Ind. 2005).

115. *Id.* at 191.

116. *Id.* at 193-94, 196.

117. *Id.* at 193-94.

118. 824 N.E.2d 349 (Ind. 2005).

119. *Id.* at 355.

taken in other states, the court concluded:

Notwithstanding the important considerations favoring the recognition of an independent tort of spoliation by parties to litigation, we are persuaded that these are minimized by existing remedies and outweighed by the attendant disadvantages. We thus determine the common law of Indiana to be that, if an alleged tortfeasor negligently or intentionally destroys or discards evidence that is relevant to a tort action, the plaintiff in the tort action does not have an additional independent cognizable claim against the tortfeasor for spoliation of evidence under Indiana law.

It may well be that the fairness and integrity of outcome and the deterrence of evidence destruction may require an additional tort remedy when evidence is destroyed or impaired by persons that are not parties to litigation and thus not subject to existing remedies and deterrence. But the certified questions are directed only to first-party spoliation, and we therefore decline to address the issue with respect to third-party spoliation.¹²⁰

2. *Third Party Spoliation*.—The Indiana Court of Appeals held, in *Glotzbach v. Froman*,¹²¹ that the exclusivity provisions of the Worker's Compensation Act did not preclude a third party spoliation claim because the spoliation claim is not a "personal injury" claim within the scope of the Act.¹²² The supreme court granted transfer on November 9, 2005.¹²³ The reader should be aware of the transfer and watch for further developments.

C. Fraud

1. *Constructive Fraud Based on Promise of Future Conduct*.—In *Siegel v. Williams*,¹²⁴ the court addressed the issue of constructive fraud based on a promise of future conduct in a case involving an attorney's representations to his former clients that fraudulently induced them to settle their legal malpractice claim. The clients filed a malpractice claim against their lawyer and the lawyer told his former clients' new lawyer that he would settle the claim for \$25,000 because that was all he had and if the former clients were awarded a judgment over \$25,000, he would file for bankruptcy.¹²⁵ When the clients later discovered that this was untrue, they filed an action against their attorney for fraudulent inducement to settle and were awarded a judgment of \$100,000.¹²⁶

120. *Id.*

121. 827 N.E.2d 105 (Ind. Ct. App.), *reh'g denied, trans. granted and opinion vacated*, 841 N.E.2d 189 (Ind. 2005).

122. *Id.* at 111.

123. 841 N.E.2d 189 (Ind. 2005).

124. 818 N.E.2d 510 (Ind. Ct. App. 2004).

125. *Id.* at 512.

126. *Id.* at 513.

In affirming the judgment against the attorney, the court first held that there was actual fraud based on the attorney's misrepresentation that he only had a present ability to pay a judgment of \$25,000.¹²⁷ The court also found that the lawyer's false threat to file bankruptcy if there was a judgment over \$25,000 supported a claim for constructive fraud.¹²⁸ Although a promise about future conduct will not support a claim for actual fraud, it may form the basis for constructive fraud if the promise induces someone "to place himself in a worse position than he would have been in . . . and if the party making the promise derives a benefit."¹²⁹ The elements of constructive fraud were satisfied here. Because the defendant was also an attorney of record in the malpractice case, the clients' new lawyers had "a right to rely upon any material misrepresentations that may have been made by opposing counsel . . . as a matter of law."¹³⁰ In addition, the clients' reliance benefited their lawyer because he was able to settle the malpractice claim for less than it was worth and it placed the clients in a worse position than they would have been otherwise. In the fraud action, an expert testified that the clients' underlying negligence claim against Wishard Memorial Hospital was worth between \$100,000 and \$150,000. However, the clients settled that case because their lawyer failed to file a notice of tort claim against the hospital as required under the Indiana Tort Claims Act.¹³¹

IV. EMOTIONAL DISTRESS

A. *Death of a Fetus*

In *Ryan v. Brown*,¹³² the mother developed severe blood pressure problems in the thirty-fourth week of pregnancy which ultimately resulted in the fetus's death *in utero*. The parents filed suit under the Medical Malpractice Act, alleging the wrongful death of the baby, along with claims for negligent infliction of emotional distress.¹³³ The court of appeals affirmed the trial court's determination that the parents were barred by the Child Wrongful Death Statute from seeking recovery for the fetus's death under the Medical Malpractice Act.¹³⁴

127. *Id.* at 514.

128. *Id.* at 516.

129. *Id.* at 515.

130. *Id.* (quoting *Fire Ins. Exch. v. Bell*, 643 N.E.2d 310, 313 (Ind. 1994)).

131. *Id.* at 512-13. Note that client Marjorie Williams was not a patient at the hospital when she was stuck by a hypodermic needle hidden in the bed of her daughter who had been diagnosed with AIDS. Since she was not a patient of the hospital, her negligence claim against the hospital lay outside the purview of the Medical Malpractice Act. See *Peters v. Cummins Mental Health, Inc.*, 790 N.E.2d 572, 577 (Ind. Ct. App. 2003). Accordingly, the tort claim notice was still required. See *Jeffries v. Clark Mem'l Hosp.*, 832 N.E.2d 571, 573 (Ind. Ct. App. 2005), discussed in *infra* Part VI.H.

132. 827 N.E.2d 112 (Ind. Ct. App. 2005).

133. *Id.* at 116.

134. *Id.* at 117-18.

Rejecting the doctor's argument that the parents could not maintain emotional distress claims once the wrongful death claim was dismissed, the court concluded that the mother had suffered the necessary impact under *Shuamber v. Henderson*¹³⁵ because of the impact the miscarriage had on her physical condition.¹³⁶ Thus, the mother was entitled to pursue her claims and could recover "all emotional damages that she suffered that are directly related to her miscarriage."¹³⁷ The court reached a similar conclusion as to the father's claim. Even though the father did not directly witness his son's death and only learned of it from the doctor, he had to tell his wife of the death. Moreover, he was present when the doctor unsuccessfully attempted to induce labor, rode with his wife in the ambulance as she was transferred to another hospital, was present when the baby was finally delivered, and held his dead son after the delivery.¹³⁸ These facts were sufficient to support a claim under the bystander rule.¹³⁹

B. The Impact Rule and Prior Relationship

In *Helsel v. Hoosier Insurance Co.*,¹⁴⁰ the court of appeals considered an issue of first impression, whether the lack of a prior relationship precluded recovery for negligent infliction of emotional distress. The plaintiff was traveling by motor vehicle when another vehicle crossed the centerline in front of and collided with his vehicle.¹⁴¹ The plaintiff observed the head of the passenger in the other vehicle coming toward his window, but lost sight of him when his airbag deployed. After the impact, the plaintiff noticed that no one in the other vehicle was moving and assumed the passenger had died. This information was confirmed by a paramedic in the ambulance.¹⁴² He later learned that the driver of the other vehicle had also died. The plaintiff did not know either the passenger or the driver. When he filed suit for his injuries, he alleged, among other claims that he suffered psychological injuries as a result of witnessing the other people's deaths.¹⁴³

Although finding no Indiana case "in which a plaintiff obtained recovery when the victim was not at least an acquaintance," the court concluded "there is no relationship requirement contained in the direct impact test," which requires only "an emotional trauma which is serious in nature and of a kind and extent normally expected to occur in a reasonable person."¹⁴⁴ Because the plaintiff was directly involved in the impact and may proceed under the direct impact test, his

135. 579 N.E.2d 452 (Ind. 1991).

136. *Ryan*, 827 N.E.2d at 119-21.

137. *Id.* at 121.

138. *Id.* at 122-23.

139. *Id.* at 124.

140. 827 N.E.2d 155 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 181 (Ind. 2005).

141. *Id.* at 156.

142. *Id.*

143. *Id.*

144. *Id.* at 157 (quoting *Shuamber v. Henderson*, 579 N.E.2d 452, 456 (Ind. 1991)).

lack of prior relationship was no bar to recovery.¹⁴⁵ Moreover, even though the plaintiff did not directly see the other persons' deaths, the evidence regarding what he saw immediately before his airbag deployed was sufficient to survive summary judgment.¹⁴⁶

C. *The Impact Rule and Property Damage*

In *Ketchmark v. Northern Indiana Public Service Co.*,¹⁴⁷ the court of appeals refused to extend negligent infliction of emotional distress to cover claims for property damage where "there was no impact to the plaintiffs' persons, the plaintiffs were not the bystanders of an accident with impact on [another person], and . . . there was no threat of injury to either of the plaintiffs' persons."¹⁴⁸ The plaintiffs filed claims for emotional distress when their home of forty-five years exploded due to a natural gas leak related to work being done by the gas company on the plaintiffs' gas lines and gas meter.¹⁴⁹ Fortunately, the plaintiffs had left the house shortly before the explosion and learned of it only upon returning home after dinner.¹⁵⁰

Judge Crone dissented, noting that the "'impact rule' is a legal fiction that was created to protect juries from the difficult task of evaluating claims in which the alleged damages might be fraudulent, i.e., emotional trauma."¹⁵¹ After explaining the history of the rule, Judge Crone noted that Indiana courts have undercut the rule significantly and urged that:

the time has come to clear the decks of the so-called "impact rule" and to allow the tort of negligent infliction of emotional distress to stand on its own inherent elements. If we trust jurors to determine whether a criminal defendant should live or die, then we should consider them capable of deciding whether a claimant's serious emotional trauma is both legitimate and reasonable, without imposing any artificial impediment to recovery.¹⁵²

V. LEGAL MALPRACTICE

In *Price v. Freeland*,¹⁵³ the court of appeals reversed the trial court's denial of the defendant's motion for summary judgment on both proximate cause and damages.¹⁵⁴ The bankruptcy trustee for Consolidated Industries hired lawyer

145. *Id.*

146. *Id.*

147. 818 N.E.2d 522 (Ind. Ct. App. 2004).

148. *Id.* at 523.

149. *Id.* at 522-23.

150. *Id.* at 523.

151. *Id.* at 526 (Crone, J., dissenting).

152. *Id.* at 526-27.

153. 832 N.E.2d 1036 (Ind. Ct. App. 2005).

154. *Id.* at 1044.

Gary Price to bring a declaratory judgment action against its insurers to establish coverage as to class action claims allegedly arising from defective furnaces manufactured by Consolidated. At the direction of the bankruptcy judge, Price entered into a stipulation with the insurers as to what constituted an “occurrence” under the policy.¹⁵⁵ Daniel Freeland, as bankruptcy trustee of the Estate of Consolidated, subsequently sued Price and his firm alleging that in stipulating as to the meaning of “occurrence,” Price had committed malpractice.

Freeland filed an affidavit in opposition to Price’s motion for summary judgment. The court found the affidavit to be improper with respect to Freeland’s assertion that the stipulation “is not an accurate statement of the law.”¹⁵⁶ The court explained that such an assertion is a legal conclusion, which is inadmissible under Indiana Evidence Rule 704(b).¹⁵⁷ The court found that there was no genuine issue of material fact as to proximate cause because the stipulation as to the meaning of occurrence under the policy was not binding on the bankruptcy court.¹⁵⁸ In fact, the stipulation was a nullity because “‘questions of law are beyond the power of agreement by the attorneys or parties.’”¹⁵⁹ As such, it could not be the proximate cause of any harm to Freeland.

Finally, the court found there was no evidence of damage to Freeland.¹⁶⁰ The parties reached a settlement in the declaratory judgment action, and Consolidated did not have to pay anything to individual claimants.¹⁶¹

VI. MEDICAL MALPRACTICE

A. *Physician Duty to Warn*

In *Cox. v. Paul*,¹⁶² the Indiana Supreme Court held “that a health care provider who receives notice of possible dangerous side effects of a treatment is not strictly liable for failure to warn a patient who [previously] received the treatment from the provider.”¹⁶³ However, the provider “may be held liable for failure to make reasonable efforts to warn the patient.”¹⁶⁴

Cox, a former patient, filed suit against an oral surgeon alleging that he breached a duty to warn of a government recall of a type of dental implant that the surgeon had used on the patient in 1984. In late 1989, the patient began to experience various symptoms, including vertigo, neck pain, headaches, fatigue, and insomnia. The symptoms progressed but her family doctor could not identify

155. *Id.* at 1038-39.

156. *Id.* at 1042.

157. *Id.*

158. *Id.* at 1043.

159. *Id.* (quoting *Yelton v. Plantz*, 77 N.E.2d 895, 899 (Ind. 1948)).

160. *Id.* at 1043-44.

161. *Id.*

162. 828 N.E.2d 907 (Ind. 2005).

163. *Id.* at 909.

164. *Id.*

their cause. In September 1991, the surgeon received an announcement from the FDA of a recall of Vitek implants.¹⁶⁵ In early 1992, the surgeon instructed his staff to search patient files to identify any patients who had received the implants. For an unknown reason, his staff conducted a second search in 1994. However, Cox was not identified and notified of the recall until 1996. A subsequent MRI revealed that Cox's implants were extensively damaged.¹⁶⁶

The court held that Cox "raised an inference that [the surgeon] was negligent by showing that he did not notify [her] until several years after he received the [recall] notice."¹⁶⁷ Therefore, under the doctrine of *res ipsa loquitur*, once Cox showed that she was not notified of the recall, the burden shifted to the surgeon "to explain what steps he took to notify [her] or why no steps were taken."¹⁶⁸ The surgeon testified that he did not know why Cox was not identified until 1996 and hypothesized that her file might not have been in the office at the time his staff searched for patients with the implant (explaining that he had separated his practice from another doctor in 1989). The court then concluded that the surgeon failed to meet his burden and that Cox was entitled to partial summary judgment as a matter of law.¹⁶⁹

B. *Res Ipsa Loquitur*

In *Balfour v. Kimberly Home Health Care, Inc.*,¹⁷⁰ the court of appeals addressed the doctrine of *res ipsa loquitur*, noting that the doctrine is "especially applicable in cases where . . . a health care provider leaves a foreign object in a patient's body."¹⁷¹ The defendant health care company provided post-operative abdominal wound care for Balfour after liposuction. Balfour alleged that a nurse left a piece of 4x4 gauze in her wound.¹⁷²

In holding that the trial court erred in entering summary judgment for the home health care company, the court found that there was a genuine issue of material fact as to whether the company was negligent in failing to remove the gauze.¹⁷³ Although Balfour could not prove the exact date of negligence, the evidence showed that the gauze was placed in the wound at some point between March 12 and 16, 1999, and was present on March 16, when the defendant was "the only health care provider in charge of [Balfour's] wound care" and the defendant's nurse changed the dressing.¹⁷⁴ Thus, the nurse had "exclusive control of the injuring instrumentality at that time and it was [her] responsibility

165. *Id.* at 909-10.

166. *Id.* at 910.

167. *Id.* at 912.

168. *Id.*

169. *Id.* at 913-14.

170. 830 N.E.2d 145 (Ind. Ct. App. 2005).

171. *Id.* at 149.

172. *Id.* at 147.

173. *Id.* at 147-48.

174. *Id.* at 149.

to exercise reasonable care in removing all 4x4's from the wound."¹⁷⁵ The court found that the inference of negligence created by the *res ipsa loquitur* doctrine was sufficient to defeat a summary judgment motion, even though the defendant presented some evidence tending to establish the lack of negligence.¹⁷⁶

In another medical malpractice case, *Ross v. Olson*,¹⁷⁷ the plaintiff was not entitled to a *res ipsa loquitur* instruction where he alleged that during his bilateral knee replacement surgery a surgical chisel partially severed his artery.¹⁷⁸ The court of appeals explained that the doctrine of *res ipsa loquitur* was "designed to create an evidentiary presumption of negligence from circumstantial evidence," but here, "there was direct evidence of causation."¹⁷⁹ Expert witnesses who testified agreed that the chisel severed his artery, although they disagreed concerning the exercise of due care.¹⁸⁰

C. Statute of Limitations in Class Actions

In *Ling v. Webb*,¹⁸¹ the court of appeals held that the filing of a proposed medical malpractice class action complaint with the medical review board does not toll the two-year statute of limitations under the "Class Action Tolling Rule."¹⁸² Under that rule, "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action."¹⁸³ Citing Indiana Trial Rule 3, which states that a "civil action is commenced by filing with the court a complaint or such equivalent . . . document," the court concluded that the filing of a proposed class action complaint with the medical review board does not commence an action for purpose of the Class Action Tolling Rule.¹⁸⁴

The court noted that its holding was consistent with provisions of the Medical Malpractice Act, including Indiana Code section 34-18-8-7, which permits claimants to simultaneously file a proposed complaint with the Department of Insurance and a complaint in the trial court, as long as the court complaint does not contain information identifying the defendants.¹⁸⁵

175. *Id.* at 149-50.

176. *Id.* at 150.

177. 825 N.E.2d 890 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 181 (Ind. 2005).

178. *Id.* at 893-94.

179. *Id.* at 894.

180. *Id.*

181. 834 N.E.2d 1137 (Ind. Ct. App. 2005).

182. *Id.* at 1145.

183. *Id.* at 1141 (quoting *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974) (emphasis added by court)).

184. *Id.* at 1142 (quoting IND. TRIAL R. 3 (emphasis added by court)).

185. *Id.* at 1143-44; IND. CODE § 34-18-8-7 (2005).

D. Increased Risk of Harm/Loss of Chance

In *Sawlani v. Mills*,¹⁸⁶ the court of appeals addressed the issue of the proper jury instruction on damages in a case involving a radiologist's failure to diagnose breast cancer from a mammogram where the plaintiff had not yet sustained any physical harm as a result of the radiologist's alleged negligence. Mills had a mammogram in September 1997, which was interpreted by Dr. Sawlani.¹⁸⁷ She had another mammogram twenty months later and was diagnosed with breast cancer. She then underwent a lumpectomy, radiation, and chemotherapy.¹⁸⁸

The court observed that in *Alexander v. Scheid*,¹⁸⁹ the Indiana Supreme Court has adopted the "loss of chance" doctrine for cases such as this where the injury resulting from the negligence has not yet "come to its full potential."¹⁹⁰ The court distinguished this type of case from situations, such as that addressed by the Indiana Supreme Court in *Mayhue v. Sparkman*¹⁹¹ where a physician is negligent and the patient dies, but the patient's illness already results in a probability of dying that is greater than fifty percent.¹⁹²

In rejecting the physician's proposed jury instruction, the court explained that, as indicated by the supreme court in *Scheid*, damages in a loss of chance case are not the same as damages in a case governed by Section 323 of the Restatement.¹⁹³ Damages for loss of chance are "based upon 'the reduction of the patient's expectancy from her pre-negligence expectancy' and the jury must 'attach a monetary amount' to the patient's loss of life expectancy."¹⁹⁴ The court then concluded that "the trial court's damages instruction, while not as complete as it should be, was not an erroneous statement of the law."¹⁹⁵

E. Informed Consent

In *Mullins v. Parkview Hospital, Inc.*,¹⁹⁶ a patient stated a claim for battery where she did not consent to a medical student's presence in the operating room or the student's performance of a medical procedure.¹⁹⁷ Although the patient Mullins made it very clear that she did not even want students in the operating

186. 830 N.E.2d 932 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 188 (Ind. 2005).

187. *Id.* at 935.

188. *Id.* at 935-36.

189. 726 N.E.2d 272 (Ind. 2000).

190. *Sawlani*, 830 N.E.2d at 939 (citing *Scheid*, 726 N.E.2d at 273).

191. 653 N.E.2d 1384 (Ind. 1995) (adopting RESTATEMENT (SECOND) OF TORTS § 323 (1965)).

192. *Sawlani*, 830 N.E.2d at 939.

193. *Id.* at 947 (explaining that damages under the Restatement "are determined by subtracting the decedent's postnegligence chance of survival from the prenegligence chance of survival" and multiplying the total damages by the percent of chance lost).

194. *Id.* (quoting *Scheid*, 726 N.E.2d at 282).

195. *Id.* at 948.

196. 830 N.E.2d 45 (Ind. Ct. App. 2005), *reh'g denied* (2006).

197. *Id.* at 51-52.

room, her anesthesiologist and surgeon¹⁹⁸ allowed a student to perform an intubation on Mullins prior to a hysterectomy. In performing the procedure, the student lacerated Mullins's esophagus and Mullins had to undergo a subsequent procedure to repair the damage.¹⁹⁹

In concluding that Mullins stated a claim for battery, the court distinguished a line of cases which held that claims "based on the doctrine of informed consent sound in negligence" and not battery.²⁰⁰ Here, it was not simply a matter of whether Mullins gave informed consent but whether she had consented at all to the procedure performed by the student.²⁰¹

As to Mullins's negligence claims, the court held that whether the hospital complied with the standard of care in allowing the student to perform the procedure was not within the common knowledge of laypersons.²⁰² Accordingly, expert testimony was required regarding the issue of informed consent.²⁰³

F. Medical Malpractice Act Does Not Provide Independent Cause of Action for Damages for Wrongful Death

The supreme court, in *Chamberlain v. Walpole*,²⁰⁴ addressed the question of whether non-pecuniary damages could be recovered under the Medical Malpractice Act where such damages would not otherwise be available under the Wrongful Death Act.²⁰⁵ It concluded that they may not because the Act does not create new substantive rights or new causes of action.²⁰⁶

Walpole's father died following surgery for a hernia repair, and Walpole brought a malpractice action against the doctors seeking damages for loss of the love, care, affection, and services of his father.²⁰⁷ Walpole conceded that, as a non-dependent adult, he could not recover such damages under the Wrongful Death Act, but argued that the Medical Malpractice Act should be interpreted to create such a remedy independent of the Wrongful Death Act.²⁰⁸ Walpole argued that he fit within the Act's definition of "patient" because he was his father's

198. In a footnote, the court of appeals expressed concern that the same law firm represented both the anesthesiologist and the surgeon, noting the potential for a conflict of interest. *Id.* at 50 n.1.

199. *Id.* at 50-51.

200. *Id.* at 53-54 (citing *Bowman v. Beghin*, 713 N.E.2d 913, 916 (Ind. Ct. App. 1999) but distinguishing the *Mullins* case based on *Cacdac v. West*, 705 N.E.2d 506, 511-12 (Ind. Ct. App. 1999)).

201. *Id.* at 54.

202. *Id.* at 57.

203. *Id.* at 58.

204. 822 N.E.2d 959 (Ind. 2005).

205. *Id.* at 960-61.

206. *Id.* at 963.

207. *Id.* at 960-61.

208. *Id.* at 961.

representative and child, and that he could assert a derivative claim.²⁰⁹ The Act states that a derivative claim includes “the claim of a parent or parents, guardian, trustee, child, relative, attorney, or any other representative of the patient including claims for loss of services, loss of consortium, expenses, and other similar claims.”²¹⁰ He reasoned that this language meant that he could pursue a claim for “loss of his father’s love, care and affection.”²¹¹

The supreme court rejected his argument, explaining that the Act’s

definition of a “patient” to include both the person who was injured and a person who has a derivative claim . . . does not imply that the [Act] creates a new claim . . . [but] merely requires that claims for medical malpractice that are otherwise recognized under tort law and applicable statutes be pursued through the procedures of the [Act].²¹²

The court also noted that the Act was designed to limit, not expand liability for medical malpractice.²¹³

Consistent with this reasoning, the court stated in *Chamberlain* that it agreed with the reasoning of the court of appeals in *Breece v. Lugo*,²¹⁴ and it was denying transfer in that case, which held that the Medical Malpractice Act does create a claim for death of a fetus. Similarly, in *Ryan v. Brown*,²¹⁵ the court of appeals held that the Medical Malpractice Act does not create a remedy separate from the Indiana Wrongful Death of a Child Statute for the wrongful death of a viable fetus.²¹⁶ As the court observed, the Indiana Supreme Court previously held, in *Bolin v. Wingert*,²¹⁷ that “only children who are born alive can bring a claim under Indiana’s Child Wrongful Death Statute.”²¹⁸ Therefore, the Ryans could not bring a claim under the Wrongful Death Statute because their son was not born alive.²¹⁹ Furthermore, the court held that, pursuant to *Chamberlain*, because the Ryans could not bring a claim for their son’s death under the Child Wrongful Death Statute, they were also barred from bringing a claim for wrongful death under the Medical Malpractice Act.²²⁰

209. *Id.*

210. *Id.* (citing IND. CODE § 34-18-2-22 (2005)).

211. *Id.* at 961-62.

212. *Id.* at 963.

213. *Id.*

214. 800 N.E.2d 224 (Ind. Ct. App. 2003).

215. 827 N.E.2d 112 (Ind. Ct. App. 2005); *see supra* Part II.D.

216. *Ryan*, 827 N.E.2d at 117-18.

217. 764 N.E.2d 201 (Ind. 2002).

218. *Ryan*, 827 N.E.2d at 117 (citing *Bolin*, 764 N.E.2d at 207).

219. *Id.*

220. *Id.* at 117-18.

G. Tort Claims Act Inapplicable

In *Jeffries v. Clark Memorial Hospital*,²²¹ the Indiana Court of Appeals clarified that a medical malpractice claim against a governmental entity, such as the defendant county hospital, is governed exclusively by the Medical Malpractice Act.²²² As such, the plaintiff was not required to comply with the notice provisions of the Indiana Tort Claims Act.²²³ The trial court had dismissed the plaintiff's complaint after determining that the Tort Claims Act applied because the "[h]ospital is a political subdivision, but not a political subdivision of the state."²²⁴ The court rejected the trial court's finding that a "political subdivision" and a "political subdivision of the state" had distinct meanings, and found that there was "no differentiation between" the two terms.²²⁵

H. Periodic Payments Agreement

The court of appeals addressed an issue of first impression regarding a periodic payments agreement in *Patient's Compensation Fund v. Hicklin*.²²⁶ Under the version of the Act applicable at the time, a health care provider was liable for up to \$100,000 per occurrence, and this liability could be discharged by either paying the claimant the full \$100,000 or by purchasing a periodic payments agreement through a third party at a total cost of more than \$75,000.²²⁷ Welborn Baptist Hospital had an agreement to make an immediate payment of \$75,000 to the patient's estate plus a future payment of \$1 directly to the estate one week later. The estate then sought excess damages from the Patient's Compensation Fund.²²⁸

In reversing the trial court's denial of the Fund's motion to dismiss, the court observed that "the 'cost of the periodic payments agreement' is defined as 'the amount expended by the health care provider . . . at the time the periodic payments agreement is made, to obtain the commitment from a third party to make available money for use as future payment.'"²²⁹ The court concluded that the hospital's own two payments did not meet these requirements because there was no periodic payments agreement purchased from a third party.²³⁰ As the court described,

it is . . . clear that Section 4(b) permits health care providers and their

221. 832 N.E.2d 571 (Ind. Ct. App. 2005).

222. *Id.* at 573.

223. *Id.* (citing IND. CODE § 34-13-3-8 (2005)).

224. *Id.*

225. *Id.* at 573-74.

226. 823 N.E.2d 705 (Ind. Ct. App. 2005).

227. *Id.* at 707-08 (citing IND. CODE § 34-18-14-2 to -4 (2005) (formerly IND. CODE § 27-12-14-2 to -4 *repealed* by P.L. 1-1998, sec. 221)).

228. *Id.* at 708.

229. *Id.* (quoting IND. CODE § 34-18-14-1).

230. *Id.* at 708-09.

insurers to save thousands of dollars by purchasing periodic payments agreements in lieu of lump-sum payments, [but] nothing in the rationale and policy underlying the Act indicates that the legislature intended that a health care provider could satisfy its obligation under the statute by making two direct payments to the claimant totaling \$75,001.²³¹

I. Contributory Negligence of Patient

In *Sawlani v. Mills*,²³² the court also addressed whether the patient's failure to obtain a second mammogram within one year after her initial mammogram, as advised by the defendant radiologist, was evidence of contributory negligence.²³³ In affirming the trial court's grant of judgment on the evidence, the court explained that the doctor's alleged negligence was complete at the time of the mammogram in September 1997, and Mills's alleged contributory negligence did not occur until September 1998 when she failed to have a second mammogram.²³⁴ Because the patient's negligence was "wholly subsequent" to the alleged malpractice, contributory negligence was inapplicable.²³⁵ However, the court noted that an instruction on mitigation of damages was appropriate.²³⁶

J. No Cause of Action Under Statute Imposing Duty of Hospital Peer Review

*Longa v. Vicory*²³⁷ was yet another case arising out of the tragic deaths at the Vermillion County Hospital from 1993 to 1995, in which patients were murdered by nurse Orville Lynn Majors. The families of patients who were murdered filed proposed complaints "alleging in part that certain members of the hospital's medical staff had committed medical malpractice [by] failing to provide proper peer review" under Indiana Code section 16-21-2-7.²³⁸

Although the plaintiff conceded that there was no private right of action under the statute,²³⁹ he argued that the doctors nevertheless had a "non-delegable duty to provide peer review."²⁴⁰ In rejecting the plaintiff's argument, the court observed that "Indiana Code section 16-21-2-7 makes the medical staff

231. *Id.* at 710.

232. 830 N.E.2d 932 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 188 (Ind. 2005); *see supra* Part VI.D.

233. *Id.* at 941-43.

234. *Id.* at 943.

235. *Id.* (citing *Harris v. Cacadac*, 512 N.E.2d 1138, 1140 (Ind. Ct. App. 1987)).

236. *Id.*

237. 829 N.E.2d 546 (Ind. Ct. App. 2005).

238. *Id.* at 547. This case was before the court on interlocutory appeal of a certified question from the Vermillion Circuit Court. *Id.* at 546.

239. *See Roberts v. Sankey*, 813 N.E.2d 1195 (Ind. Ct. App. 2004), *trans. denied*, 831 N.E.2d 742 (Ind. 2005). In *Roberts*, another case arising out of the Vermillion County Hospital deaths, the court held that this statute does not create a private right of action.

240. *Longa*, 829 N.E.2d at 549.

responsible for peer review to the governing board, not to patients or the general public.”²⁴¹ The court also noted that Indiana Code section 16-21-2-8 provides peer review committee members with immunity.²⁴² The court reasoned that it would be absurd to allow suits against doctors who are not members of the peer review committee while immunizing those who are.²⁴³ In so holding, however, the court stressed the importance of peer reviews and noted that the plaintiffs were not without a remedy, but they could not hold the defendant doctors responsible for the alleged failures of the committee.²⁴⁴

VII. PREMISES LIABILITY

A. *Liability of a Principal to the Independent Contractor or Its Employees*

The Indiana Supreme Court granted transfer to consider liability of a landowner to an independent contractor or its employees in *PSI Energy, Inc. v. Roberts*,²⁴⁵ an asbestos case tried before a jury. The plaintiff’s claims centered on two theories: premises liability and principal-independent contractor vicarious liability.²⁴⁶ Under the comparative fault act, the jury allocated thirty-six percent of the fault to the employer/independent contractor.²⁴⁷

The court considered whether any of the exceptions to the general rule that a principal is not liable for the negligence of an independent contractor would apply.²⁴⁸ Indiana law recognizes five public policy-based exceptions to this general rule, and the plaintiff asserted that two applied in this case: “(1) the ‘intrinsicly dangerous’ exception—‘where the contract requires the performance of intrinsicly dangerous work,’ and (2) the ‘due precaution’ exception—‘where the act will probably cause injury to others unless due precaution is taken.’”²⁴⁹ Although acknowledging that it previously had described asbestos as “‘an inherently dangerous substance . . . a toxic foreign substance . . . an inherently dangerous product . . . and a hazardous foreign substance,’”²⁵⁰ the court rejected the plaintiff’s claim that asbestos is “inherently or intrinsicly dangerous.”²⁵¹ The court explained, “[w]e agree that working with asbestos can be perilous, but that is not enough to render it intrinsicly dangerous as that term is used to establish liability for actions of an independent

241. *Id.*

242. *Id.*; IND. CODE § 16-21-2-8 (2005).

243. *Longa*, 829 N.E.2d at 549.

244. *Id.*

245. 829 N.E.2d 943 (Ind.), *aff’d on reh’g*, 834 N.E.2d 665 (Ind. 2005).

246. *Id.* at 948.

247. *Id.* at 950.

248. *Id.*

249. *Id.*

250. *Id.* at 954 (quoting *Covalt v. Carey Canada, Inc.*, 543 N.E.2d 382 (Ind. 1989)).

251. *Id.* at 955.

contractor.”²⁵² Even though the “consequences of mesothelioma can be horrific,” the court noted that proper precautions could have minimized the harms to the plaintiff; therefore, “asbestos is not intrinsically dangerous such that anyone hiring a contractor to address it incurs strict liability for injuries sustained from exposure to it.”²⁵³ The court then rejected the plaintiff’s “due precaution” argument, concluding that, absent circumstances that create unique hazards, the responsibility of taking due precautions lies with the employer/independent contractor, not with the principal.²⁵⁴

Having rejected all of the plaintiff’s claims as to the vicarious liability of the principal for the independent contractor’s actions, the court considered the claims under premises liability theories. The court noted that landowners often hire independent contractors because they have specialized tools and skills, which the landowners are entitled to rely upon.²⁵⁵ “A principal who hires an independent contractor to address a problem on [its] premises is no different from one who engages a contractor for work elsewhere and should have no broader exposure to liability for the contractor’s acts.”²⁵⁶ The principal has no duty to, in effect, supervise the work of the independent contractor or to assure that it uses appropriate safety equipment.²⁵⁷ Therefore, “a landowner . . . has no liability to an independent contractor or the contractor’s employees for injuries sustained while addressing a condition as to which the landowner has no superior knowledge.”²⁵⁸

Justice Dickson, concurring in result and dissenting with a separate opinion joined by Justice Rucker, stated:

I respectfully contend that the Court today employs unnecessary draconian methodologies to provide protection for landowners and other entities that employ independent contractors to eliminate or ameliorate dangerous conditions. Except for genuine intrinsically dangerous activities, such interests already receive significant protection under the “due precautions” exception and Restatement § 343A(1). More significant, I submit, is the constraint intrinsic to the comparative fault allocation system itself.²⁵⁹

Noting the jury’s allocation of fault, which Justice Dickson characterized as showing “clear recognition of the significant role of the independent contractor,” he concluded, “[j]ustice is better served by trusting the sound judgment of civil juries than by erecting protective judicial doctrines.”²⁶⁰

252. *Id.*

253. *Id.*

254. *Id.* at 956.

255. *Id.* at 961.

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.* at 968 (Dickson, J., dissenting).

260. *Id.*

B. Duty to Protect from Third Party Criminal Acts

The court addressed the scope of a premises owner's duty in several cases during the survey period. In *Lane v. St. Joseph's Regional Medical Center*,²⁶¹ the court of appeals found that there is a duty to maintain protection for patients in a hospital emergency room from harm by third parties.²⁶² The plaintiff was sitting in the waiting area when a teenage boy entered the hospital with his mother.²⁶³ With no warning or provocation, the teenager suddenly began attacking the plaintiff. The court noted that the hospital emergency room has a much higher potential for violence than other areas because "[v]iolent and intoxicated individuals, those involved in crimes, and people injured in domestic disputes are routinely brought to the emergency room for treatment."²⁶⁴ However, the court affirmed summary judgment for the hospital on grounds that any breach of this duty was not the proximate cause of the plaintiff's injuries based on the lack of foreseeability of the violence.²⁶⁵ The court held that, just as the plaintiff had no reason to foresee this attack, neither did the hospital, and therefore it was entitled to judgment as a matter of law.²⁶⁶

Judge Vaidick concurred in part and dissented in part, disagreeing with the court's conclusion as to foreseeability.²⁶⁷ Noting that the issue of proximate cause is generally a question of fact for the jury, Judge Vaidick also noted that although the plaintiff was surprised by the violence, this does not necessarily mean that "a trained security officer stationed in or near the emergency room would [not] have been able to prevent the attack by picking up on warning signs" that a lay bystander might have missed.²⁶⁸

In *Dennis v. Greyhound Lines, Inc.*,²⁶⁹ the court of appeals found that genuine issues of material fact precluded summary judgment when a bus passenger was attacked in the restroom of the bus terminal.²⁷⁰ The court noted that this case "exposes the distinct difference in Indiana's summary judgment procedure and the federal procedure."²⁷¹ Under the Indiana standard, "the party moving for summary judgment has the burden of establishing no genuine issue of material fact exists . . . [and] only when it has met this burden does the burden shift to the nonmovant to establish that a genuine issue does exist."²⁷² Unlike under the

261. 817 N.E.2d 266 (Ind. Ct. App. 2004).

262. *Id.* at 273.

263. *Id.* at 268.

264. *Id.* at 273.

265. *Id.* at 273-74.

266. *Id.* at 274.

267. *Id.* at 274-75 (Vaidick, J., concurring and dissenting).

268. *Id.* at 275.

269. 831 N.E.2d 171 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 188 (Ind. 2005).

270. *Id.* at 175.

271. *Id.* at 173.

272. *Id.*

federal rule, “[m]erely alleging that the plaintiff has failed to produce evidence on each element [of his claim] is insufficient to entitle the defendant to summary judgment.”²⁷³ Noting that Greyhound designated evidence relevant to the issue of whether it breached its duty, the court concluded that the evidence fell short of establishing, as a matter of law, that it actually met its duty.²⁷⁴ The court also stated that Greyhound would have been entitled to summary judgment under the federal rules, as the plaintiff had designated little evidence substantiating his claim that Greyhound breached its duty of care.²⁷⁵

In *Zambrana v. Armenta*,²⁷⁶ a bar patron brought suit after he was shot in a gunfight between a bar employee and another patron. Addressing the bar owner’s duty, the court noted that the Indiana Supreme Court no longer requires application of the “totality of the circumstances” test to determine duty, but now requires only an inquiry into the issue of foreseeability, since the duty to business invitees is well-settled.²⁷⁷ Landowners must “take reasonable precautions to protect their business invitees from foreseeable criminal attacks.”²⁷⁸ Because the bar was located in East Chicago, in an area “where gang activity and crime were prevalent,” it was foreseeable that weapons brought onto the premises might lead to escalating confrontations.²⁷⁹ In fact, the bar attempted to keep weapons out by frisking male patrons. The guns at issue in this case were in the hands of the bouncer and a patron who obtained the gun from a female patron who was not searched on entry.²⁸⁰ Under these circumstances, the evidence supported a finding of foreseeability, and therefore liability.²⁸¹

VIII. TORTS ACTIONS AGAINST GOVERNMENT

A. *Immunity Under the Indiana Tort Claims Act*

1. *Law Enforcement Immunity.*—

a. *Collision caused during pursuit of suspect.*—The Indiana Court of Appeals issued conflicting opinions regarding whether police operating a vehicle in pursuit of a suspect are immune under the law enforcement immunity provision of the Indiana Tort Claims Act.²⁸² Under Indiana Code section 34-13-3-3, a governmental entity or employee is not liable for a loss resulting from “[t]he adoption and enforcement of or failure to adopt or enforce a law (including rules and regulations), unless the act of enforcement constitutes false arrest or

273. *Id.* (quoting *Jarboe v. Landmark Cmty. Newspapers*, 644 N.E.2d 118, 123 (Ind. 1994)).

274. *Id.* at 174.

275. *Id.* at 175.

276. 819 N.E.2d 881 (Ind. Ct. App.), *reh’g denied, and trans. denied* (Ind. 2005).

277. *Id.* at 886-87 (citing *Paragon Family Rest. v. Bartolini*, 799 N.E.2d 1048 (Ind. 2003)).

278. *Id.* at 887.

279. *Id.* at 888.

280. *Id.* at 885.

281. *Id.* at 888.

282. IND. CODE §§ 34-13-3-1 to -25 (2005).

false imprisonment.”²⁸³

In *Chenoweth v. Estate of Wilson*,²⁸⁴ the court of appeals held that the police department was immune from liability to the estate of a driver killed in a collision with a police officer that occurred while the officer was pursuing a suspected drunk driver.²⁸⁵ The court reasoned that “‘enforcement of the law’ as that phrase is used to evoke the application of immunity under the Act ‘means compelling or attempting to compel the obedience of another to laws.’”²⁸⁶ The court found that the officer was attempting to enforce the law while he pursued the suspect and was entitled to immunity as a matter of law.²⁸⁷

On the other hand, in *East Chicago Police Department v. Bynum*,²⁸⁸ the court affirmed the trial court’s denial of summary judgment for a police department under similar facts.²⁸⁹ The plaintiffs contended that Indiana Code section 34-13-3-3(8) did not grant immunity for the police officers’ alleged breach of their statutory duty of reasonable care under various motor vehicle safety statutes, including Indiana Code section 9-21-1-8.

Although acknowledging that the officers’ “act of pursuing gang members and a warrant violator would constitute enforcement of a law as contemplated by [Indiana Code section] 34-13-3-3(8),” the court concluded that “the legislature did not intend to abolish the duty of authorized emergency vehicle drivers to drive with due regard for the safety of all persons.”²⁹⁰

283. *Id.* § 34-13-3-3(A)(8).

284. 827 N.E.2d 44 (Ind. Ct. App. 2005).

285. *Id.* at 48.

286. *Id.* (quoting *St. Joseph County Police Dep’t v. Shumaker*, 812 N.E.2d 1143, 1150 (Ind. Ct. App. 2004), *trans. denied*, 831 N.E.2d 737 (Ind. 2005)).

287. *Id.*

288. 826 N.E.2d 22 (Ind. Ct. App. 2005).

289. *Id.* at 30.

290. *Id.* IND. CODE § 9-21-1-8 (2005) provides:

- a) This section applies to the person who drives an authorized emergency vehicle when:
 - (1) responding to an emergency call;
 - (2) in the pursuit of an actual or suspected violator of the law; or
 - (3) responding to, but not upon returning from, a fire alarm.
- (b) The person who drives an authorized emergency vehicle may do the following:
 - (1) Park or stand, notwithstanding other provisions of this article.
 - (2) Proceed past a red or stop signal or stop sign, but only after slowing down as necessary for safe operation.
 - (3) Exceed the maximum speed limits if the person who drives the vehicle does not endanger life or property.
 - (4) Disregard regulations governing direction of movement or turning in specified directions.
- (c) This section applies to an authorized emergency vehicle only when the vehicle is using audible or visual signals as required by law. An authorized emergency vehicle operated as a police vehicle is not required to be equipped with or display

In *Patrick v. Miresso*,²⁹¹ relied on heavily by the court in *Bynum*, the court concluded that to the extent there is an irreconcilable conflict between Indiana Code section 34-13-3-3(8) (providing immunity) and section 9-21-1-8 (regarding liability of drivers of emergency vehicles), section 9-21-1-8 prevails.²⁹² In so holding, the court noted that section 9-21-1-8 was enacted first and is more specific. The court presumed that the legislature was aware of that section in enacting section 34-13-3-3(8). The court also reasoned that “repeal by implication” is disfavored and that the court must strictly construe the Indiana Tort Claims Act. Accordingly, the court concluded that “the legislature did not intend to abolish the longstanding duty of emergency vehicle drivers to ‘drive with due regard for the safety of all persons’” as required under section 9-21-1-8(d)(1).²⁹³ Note that the *Patrick* case is currently before the Indiana Supreme Court on a petition to transfer.²⁹⁴

b. Failure to prevent suicide.—The city was entitled to immunity for a police officer’s failure to prevent a suicide in *Savieo v. City of New Haven*.²⁹⁵ Police responded to a family member’s call regarding a threat by Jon Savieo to shoot himself.²⁹⁶ Police officers and Savieo’s son then searched his home, but did not search his person or the chair in which he was sitting. Savieo told them he had sold the gun and made the suicide threat to get attention. One of the responding officers, who was also a friend of Savieo, dismissed the other officers and then asked Savieo to join him on the front porch to discuss matters. Savieo then shot himself.²⁹⁷

The court of appeals held that the city was immune from liability under the law enforcement immunity provision of the Indiana Tort Claims Act.²⁹⁸ The court rejected the plaintiff’s argument that law enforcement immunity did not apply because suicide is not a criminal act.²⁹⁹ As the trial court found, the police officer could have detained Savieo pursuant to Indiana Code section 12-26-4-1, which allows a police officer to detain a person if the officer has reasonable grounds to believe that the person is mentally ill, dangerous, or in immediate

red and blue lights visible from in front of the vehicle.

(d) This section does not do the following:

(1) Relieve the person who drives an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons.

(2) Protect the person who drives an authorized emergency vehicle from the consequences of the person’s reckless disregard for the safety of others.

291. 821 N.E.2d 856 (Ind. Ct. App.), *trans. granted*, 831 N.E.2d 747 (Ind. 2005).

292. *Id.* at 867-68.

293. *Id.*

294. *See* 831 N.E.2d 747 (Ind. 2005).

295. 824 N.E.2d 1272, 1275-76 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 178 (Ind. 2005).

296. *Id.* at 1273.

297. *Id.*

298. *Id.* at 1275-76 (citing IND. CODE § 34-13-3-3(8) (2005)).

299. *Id.* at 1276.

need of treatment.³⁰⁰ The court of appeals reasoned that, although this statute does not criminalize such conduct and cannot be enforced in that sense, it grants police officers discretion to compel a person's obedience to the police power of the state, which is "the very essence of law enforcement."³⁰¹

The court also found that the City was immune under the common law, stating that "[t]o the extent that the police are expected to prevent threatened suicides in noncustodial cases, we conclude that this duty is so closely akin to the duty to prevent crime that it should be treated as fitting within that limited exception to the general rule of governmental liability."³⁰²

2. *Discretionary Function Immunity*.—In *Madden v. Indiana Department of Transportation*,³⁰³ a class action brought by train passengers who were injured in a collision with a tractor-trailer, the Indiana Court of Appeals addressed the applicability of discretionary function immunity. The collision occurred near an intersection where two sets of tracks intersect Midwest Steel Road at which the traffic control light was designed, controlled, and maintained by the Indiana Department of Transportation ("INDOT").³⁰⁴ Midwest Steel Road runs perpendicular to U.S. 12. The intersection was such that the tractor, which was pulling dual tandem-trailers, turned north onto Midwest Steel Road from U.S. 12 and when the train gates lowered, he was caught in a space between the two sets of train tracks. While the tractor was trapped, it was hit by a westbound commuter train.³⁰⁵ The plaintiffs alleged that INDOT was negligent in failing to keep northbound traffic on Midwest Steel Road clear when a train was approaching.³⁰⁶

The court of appeals reversed the trial court's grant of summary judgment to INDOT based on discretionary function immunity under Indiana Code section 34-13-3-3(7).³⁰⁷ In order to prove discretionary function immunity, INDOT had the burden "to demonstrate it had considered setting the traffic signals to account for northbound traffic."³⁰⁸ Although INDOT asserted that it could not present such evidence because it was privileged under 23 U.S.C. § 409, the court held that the privilege did not relieve INDOT of its burden of proof.³⁰⁹ As the court stated, "legislatures create evidentiary privileges to shield selected information from discovery, [but] those shields may not be wielded as swords at the will of a party."³¹⁰

300. *Id.*

301. *Id.* at 1276.

302. *Id.* at 1277-78.

303. 832 N.E.2d 1122 (Ind. Ct. App. 2005).

304. *Id.* at 1125.

305. *Id.*

306. *Id.* at 1125-26.

307. *Id.* at 1129.

308. *Id.* at 1127.

309. *Id.* at 1128.

310. *Id.*

In *Chandradat v. State*,³¹¹ a suit arising out of an accident that occurred in an interstate construction zone, the State was not entitled to discretionary function immunity under Indiana Code section 34-13-3-3(7) for its alleged negligence in the placement of traffic control signs regarding lane restrictions.³¹² An INDOT project engineer testified that the contractor was responsible for placing lane restriction signage in compliance with the standards set forth in the Indiana Manual on Uniform Traffic Control Devices for Streets and Highways, and that the contractor's work was conducted pursuant to the plans, specifications, and direction of INDOT. Additionally, the engineer testified that he did not determine where the signs would be placed, but that he implemented the plan. The court determined that the placement of signs was not part of the planning for the construction but was part of its implementation.³¹³ As such, discretionary function immunity did not apply.³¹⁴

IX. WORKERS COMPENSATION

The courts addressed several issues related to the Workers Compensation Act during the survey period. Several provided guidance of significant note.

A. *Standing to Seek an Order of Mandate*

In *State ex. rel. Steinke v. Coriden*,³¹⁵ an attorney who practices before the Worker's Compensation Board of Indiana filed a Verified Complaint for Writs of Mandate, alleging that members of the Board violated the Worker's Compensation Act. The court found the attorney lacked standing under the general rule of standing because he did not have a personal stake in the outcome of the litigation, despite his argument that he was injured because, as an attorney who practices before the Board, he lacked access to a full-time Board, as required under the statute.³¹⁶ The court similarly concluded that the attorney lacked public standing because the rights created under the Worker's Compensation Act are private, and the nexus of harm to the public is not direct enough to confer standing under a public interest exception.³¹⁷ Finally, in dicta addressing the right to seek mandamus on a more general level, the court noted that mandamus usually seeks to compel the defendant to perform a specific act, whereas in this case, the act sought to be compelled was the more general request that the Board comply with the rules pertaining to membership requirements.³¹⁸ As the Board is an administrative body under the executive branch of state government, "the task of insuring that candidates for membership . . . are eligible to serve . . .

311. 830 N.E.2d 904 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 187 (Ind. 2005).

312. *Id.* at 911.

313. *Id.*

314. *Id.*

315. 831 N.E.2d 751 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 188 (Ind. 2005).

316. *Id.* at 754.

317. *Id.* at 755-56.

318. *Id.* at 757.

properly falls upon the executive branch, not to the judiciary.”³¹⁹

B. Temporary Employee/Co-Employee

In *Jennings v. St. Vincent Hospital & Health Care Center*,³²⁰ the court considered whether the worker’s compensation system provided the exclusive remedy to a nurse employed by a temporary employment agency to work in a hospital, where she was injured. The court of appeals, calling this a “seemingly unresolvable case,” indicated it was taking the opportunity to “point out a deficiency in our current system of worker’s compensation.”³²¹ Applying the seven factor test of dual employment adopted by the supreme court in *Hale v. Kemp*,³²² the court concluded that the hospital was an employer under the Act, as was the temporary agency, so that the nurse’s exclusive remedy against both was under the Act.³²³ The court concluded by noting that:

While the worker’s compensation scheme fulfills many needs, the rates employers pay (when they are not otherwise self-insured) will be materially affected by the safety of the workplace they provide to their “employees.” Here, we have an employer without a “workplace” and one with. The one with the workplace is shielded from traditional tort liability because it qualifies as a “co-employer.” The entire scheme should be reviewed by our General Assembly in light of our ever shrinking and “flat” world.³²⁴

C. Equitable Estoppel from Asserting the Statute of Limitations

In *Binder v. Benchwarmers Sports Lounge*,³²⁵ the court considered the affect of representations related to the employment relationship on the statute of limitation defense. The plaintiff worked at various times for the defendant bar owner.³²⁶ On one occasion when he was working in the bar, the plaintiff was injured when he tried to break up a fight. The plaintiff timely filed a claim with the Indiana Worker’s Compensation Board. Nearly two years after the incident, during the course of the worker’s compensation litigation, the attorney for the bar owner informed the plaintiff’s attorney that the plaintiff was “not acting in the course and scope of his employment at the time of the injury.”³²⁷ Only after the statute of limitations had run, did the plaintiff learn that the bar owner claimed that the plaintiff was not an employee and only working security for a third party

319. *Id.* at 758.

320. 832 N.E.2d 1044 (Ind. Ct. App. 2005), *reh’g denied, and trans. denied* (Ind. 2006).

321. *Id.* at 1047.

322. 579 N.E.2d 63 (Ind. 1991).

323. *Jennings*, 832 N.E.2d at 1054.

324. *Id.* at 1055.

325. 833 N.E.2d 70 (Ind. Ct. App. 2005).

326. *Id.* at 72.

327. *Id.* at 74.

at the time of the injury.

The plaintiff promptly filed suit and the bar owner raised the statute of limitations as a defense.³²⁸ The trial court granted summary judgment on the statute of limitations defense. Although there was no dispute the claim was filed more than two years after the injury, the plaintiff contended that the defendant should be estopped from asserting the limitations defense because of its representations regarding employment before the statute ran.³²⁹

On appeal, the defendant took the position that the statement that the plaintiff was not acting within the scope of his employment reflected the position that he was not an employee. The court noted that anyone who is familiar with worker's compensation law would understand this statement "to presume, rather than to deny, employment."³³⁰ Because the bar owner's attorney regularly handled worker's compensation claims, the court concluded that she presumably knew the law and that her letter was "intentionally deceptive."³³¹ The court concluded that this was a material misrepresentation regarding whether the bar would challenge the plaintiff's status as an employee and that the plaintiff was entitled to rely upon opposing counsel's representation.³³² The court applied the doctrine of equitable estoppel and reversed summary judgment on the statute of limitations defense.³³³

The lesson to the litigator is, of course, that opposing counsel is entitled to rely upon your representations. Quoting the supreme court, the court reminded that it has declined

to require attorneys to burden unnecessarily the courts and litigation process with discovery to verify the truthfulness of material representations made by opposing counsel. The reliability of lawyers' representations is an integral component of the fair and efficient administration of justice. The law should promote lawyers' care in making statements that are accurate and trustworthy and should foster the reliance upon such statements by others.³³⁴

X. TORT PREJUDGMENT INTEREST STATUTE PREEMPTS COMMON LAW

During the survey period, the Indiana Court of Appeals twice held that the Tort Prejudgment Interest Statute³³⁵ preempts the common law right to prejudgment interest.³³⁶ Initially, in *Simon Property Group, L.P. v. Brandt*

328. *Id.* at 72.

329. *Id.* at 73.

330. *Id.* at 74.

331. *Id.* at 75.

332. *Id.* at 76.

333. *Id.*

334. *Id.* at 75 (quoting *Fire Ins. Exch. v. Bell*, 643 N.E.2d 310, 312-13 (Ind. 1994)).

335. IND. CODE §§ 34-51-4-1 to -9 (2005).

336. *Simon Prop. Group, L.P. v. Brandt Constr., Inc.*, 830 N.E.2d 981, 994 (Ind. Ct. App.

Construction, Inc., the court noted that prejudgment interest is allowable under the common law “when the damages are capable of being determined by reference to some known standard, such as fair market value.”³³⁷ Pursuant to the statute, however, a trial court may award prejudgment interest if the plaintiff makes a written offer of settlement within the time period specified by statute, for a specified amount, and according to particular payment terms.³³⁸ In determining that the statute preempts the common law, the *Simon* court stated:

In our view, in passing this statute the legislature intended to preempt common law prejudgment interest in tort cases. To hold otherwise would be to render the statute and its requirements virtually meaningless—a party who failed to fulfill the statute’s requirements could merely turn to the common law for relief. Thus, to agree with *Landlord* is, essentially, to say that notwithstanding the statutory requirement that a tort plaintiff must make a qualifying settlement offer to recover prejudgment interest, we will allow plaintiffs who fail to do so to recover anyway. Such a result would be tantamount to decimating the statute altogether, which we shall not do.³³⁹

Recently, the Indiana Supreme Court denied a petition to transfer in this case.

2005), *reh’g denied, and trans. denied* (Ind. 2006); *see also* Gregory & Appel Ins. Agency v. Philadelphia Indem. Ins. Co., 835 N.E.2d 1053, 1065 (Ind. Ct. App. 2005), *trans. denied* (Ind. 2006).

337. *Simon*, 830 N.E.2d at 993 (citing 4-D Bldgs., Inc. v. Palmore, 688 N.E.2d 918, 921 (Ind. Ct. App. 1997)).

338. *See* IND. CODE § 34-51-4-6 to -7. IND. CODE § 34-51-4-6 provides:

This chapter does not apply if:

- (1) within one (1) year after a claim is filed in the court, or any longer period determined by the court to be necessary upon a showing of good cause, the party who filed the claim fails to make a written offer of settlement to the party or parties against whom the claim is filed;
- (2) the terms of the offer fail to provide for payment of the settlement offer within sixty (60) days after the offer is accepted; or
- (3) the amount of the offer exceeds one and one-third (1 1/3) of the amount of the judgment awarded.

339. *Simon*, 830 N.E.2d at 994.

