

RECENT DEVELOPMENTS IN INDIANA TORT LAW

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INTRODUCTION

This survey Article covers the ever-changing developments in tort law in Indiana from October 1996 to October 1997. Judicial decisions have clarified existing law, recognized several new causes of action, and expanded and restricted tort law in the state of Indiana.

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I. INTENTIONAL TORTS

A. *False Imprisonment*

Haltom v. Bruner & Meis, Inc.,¹ clarified the standard to be applied for determining probable cause under Indiana's Shoplifting Detention Statute.² Haltom, a suspected shoplifter, brought an action against the defendant's store for, among other torts, false arrest and imprisonment. A customer purchased merchandise from the store and then misplaced his package. The customer reported his package stolen to the store. The following day, Haltom presented the package to the store and requested a refund. Store employees identified the merchandise as that which had been reported stolen and detained Haltom until police arrived. He was arrested and taken into custody. Charges were filed against him but were ultimately dismissed.³

The jury was instructed as to the language of the Shoplifting Detention Statute and that if the defendant acted in compliance and with probable cause, then such was a complete defense to Haltom's claims for false arrest and imprisonment. The jury returned a verdict for the store and Haltom appealed.⁴ Haltom argued that the store lacked probable cause to believe that he stole the merchandise and that the jury was improperly instructed on the applicability of the statute because the property he attempted to return was not "unpurchased merchandise taken from the store. . . ."⁵

The court of appeals affirmed the jury verdict in favor of the store,⁶ holding that the statute did not require that the merchandise be that of the merchant. Rather, a detention can occur when the store has probable cause to believe that any theft has occurred.⁷ Once the store has made the decision to detain, it has certain enumerated powers which it "may" exercise, including determining whether the suspect has unpurchased merchandise taken from the store.⁸ The

1. 680 N.E.2d 6 (Ind. Ct. App. 1997).

2. IND. CODE § 35-33-6-1 to -5 (1993).

3. *Haltom*, 680 N.E.2d at 8.

4. *Id.*

5. *Id.* Section 35-33-6-2 provides in relevant part:

(a) An owner or agent of a store who has probable cause to believe that a theft has occurred or is occurring on or about the store and who has probable cause to believe that a specific person has committed or is committing the theft may:

(1) detain the person...

....

(3) determine whether the person has in his possession unpurchased merchandise taken from the store

IND. CODE § 35-33-6-2 (1993).

6. *Haltom*, 680 N.E.2d at 9.

7. *Id.*

8. *Id.*

court went on to conclude that the store acted properly because it had probable cause to detain Haltom, noting that probable cause under the Shoplifting Detention Statute must meet the same requirements as probable cause for a police officer.⁹

B. Abuse of Process

The Indiana Court of Appeals in *Reichhart v. City of New Haven*,¹⁰ addressed whether the existence of ulterior motive alone would sustain an action for abuse of process. The court concluded that the prevailing view in Indiana, and that which the court adopted, is that an abuse of process claim requires proof of two elements—improper process and improper motive.¹¹ The court noted that the first inquiry is whether the defendant employed improper “process.”¹² It is not until *after* that issue has been resolved unfavorably to the defendant that further inquiry into the defendant’s motives is to be made.¹³ Thus, the court concluded that because the defendant’s actions were procedurally and substantively proper (i.e., no improper process), the defendant’s motives were irrelevant.¹⁴

C. Intentional Trespass

The intent necessary for intentional trespass was clarified in *Martin v. Amoco Oil Co.*¹⁵ Noting that Indiana case law did not do much to clarify what intent was necessary for intentional trespass, the court looked to a 1985 Washington Supreme Court decision which defined the requisite intent.¹⁶ In *Bradley v. American Smelting & Refining Co.*,¹⁷ the court found that “intent” meant that the

actor desires to cause consequences of his act, or . . . believes that the consequences are substantially certain to result from it . . . , [i]ntent is not, however limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.¹⁸

Martin adopted the definition of intent espoused in *Bradley*.¹⁹ The court in *Martin* found that the defendant’s intent to refine oil was insufficient to support

9. *Id.*

10. 674 N.E.2d 27 (Ind. Ct. App. 1996).

11. *Id.* at 30.

12. *Id.* The court also clarified what was meant by the term, “process,” holding that the definition is expansive and includes actions undertaken in pursuing a legal claim. *Id.*

13. *Id.*

14. *Id.* at 31.

15. 679 N.E.2d 139 (Ind. Ct. App. 1997).

16. *Id.* at 147.

17. 709 P.2d 782 (Wash. 1985).

18. *Id.* at 785 (citing RESTATEMENT (SECOND) OF TORTS § 8A (1965)).

19. *Martin*, 679 N.E.2d at 147.

a claim of intentional trespass when oil migrated underground to the plaintiffs' property.²⁰ Rather, the court found that the defendant must have intentionally committed an act that it knew or was substantially certain would result in the migration of oil onto the plaintiffs' property to fulfill the intent element of intentional trespass.²¹

D. Defamation

1. *Actual Malice*.—In *Journal-Gazette Co. v. Bandido's, Inc.*,²² the Indiana Court of Appeals addressed what provides a sufficient basis for finding actual malice in a defamation case involving public officials and figures. In *Bandido's*, the operator of a restaurant brought a defamation suit against a newspaper based on a headline for an article which described the closing of the restaurant by the health board. After the first inspection, the health board noted numerous violations including the presence of flies, roaches and rodents. On a second inspection, there was no evidence of insects or rodents but several health code violations had not been remedied. The restaurant was subsequently closed. The newspaper obtained the inspection reports and ran a front page story concerning the problems. The headline read "Health board shuts doors of Bandido's—Investigators find rats, bugs at northside eatery."²³

The controversy concerned the word "rats." The word had been included in the headline by a copy editor who thought that the word "rodents" in the health board's report suggested "rats." The word "rats" did not appear in the article. The newspaper's policy, however, was that words appearing in the headline should be included in the article. In fact, the copy editor who wrote the headline had previously received poor evaluations for inaccurate headlines. Experts at trial agreed that the headline was inappropriate.²⁴ The jury returned a verdict in favor of the restaurant for \$985,000 and the newspaper appealed.²⁵

The only issue addressed by the court of appeals was whether the evidence was sufficient to demonstrate clear and convincing evidence that the newspaper published the headline with actual malice. The court of appeals found the evidence insufficient.²⁶

The court noted that "[a] defamatory falsehood is made with 'actual malice' when it is published 'with knowledge that it was false or with reckless disregard

20. *Id.*

21. *Id.*

22. 672 N.E.2d 969 (Ind. Ct. App. 1996).

23. *Id.* at 971.

24. *Id.*

25. *Id.* at 972.

26. *Id.* at 975. Interestingly, the case had previously been before the court of appeals after the trial court granted summary judgment in favor of the newspaper. At that time, the court found that there remained a factual dispute on the issue of actual malice. It appears that, after having heard the plaintiff's evidence, the trial court should have granted judgment on the evidence in favor of the defendant.

of whether it was false or not.”²⁷ To prove reckless disregard, there must be evidence that the defendant had serious doubt as to the truth of the publication.²⁸ However, “[e]vidence of an extreme departure from professional journalistic standards, without more, cannot provide a sufficient basis for finding actual malice.”²⁹

The court concluded that even though the newspaper may have been extremely careless, there was not sufficient clear and convincing evidence that the newspaper had knowledge that the headline was false or that the newspaper had serious doubts as to the truth of the headline.³⁰ Although the court noted that the evidence may demonstrate an extreme departure from professional standards, that was not sufficient to establish actual malice; extremely careless errors do not constitute actual malice.³¹

2. *Defamation Per Se and Per Quod*.—Although not deciding any issues of first impression, the district court in *Moore v. University of Notre Dame*,³² provided a good discussion of Indiana law on the issues of defamation per se and per quod and what damages must be proven.³³

II. PARENTS’ LIABILITY FOR ACTS OF CHILD

In *Shepard v. Porter*,³⁴ the court again emphasized that under Indiana law, in order for a parent to be liable for negligent supervision, the parent must know or should know of the child’s propensity to engage in *the particular act or course of conduct* leading to the plaintiff’s injury.³⁵ Knowledge of a child’s *general disposition* alone is insufficient.³⁶ In *Porter*, knowledge by the parents that their boys had mischievous, reckless, heedless or vicious and malicious dispositions and reputations was insufficient to support a claim for negligent supervision.³⁷ The act in which the children engaged was setting fires, but there was no evidence that the parents were aware of their children having such a propensity.³⁸

27. *Id.* at 972 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964)).

28. *Id.*

29. *Id.* (citing *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 665 (1989)).

30. *Id.* at 975.

31. *Id.*

32. 968 F. Supp. 1330 (N.D. Ind. 1997).

33. *See also* *Owens v. Schoenberger*, 681 N.E.2d 760 (Ind. Ct. App. 1997).

34. 679 N.E.2d 1383 (Ind. Ct. App. 1997).

35. *Id.* at 1389 (citing *Wells v. Hickman*, 675 N.E.2d 172, 178 (Ind. Ct. App. 1995)) (emphasis added).

36. *Id.* (emphasis added).

37. *Id.* at 1390.

38. *Id.* at 1389-90.

III. WRONGFUL DEATH

In *Wolf v. Boren*,³⁹ the court briefly addressed the issue of dependency of a parent and adult siblings upon a deceased adult child under Indiana's Wrongful Death Statute.⁴⁰ On November 23, 1993, the day of his birthday and just shortly before Thanksgiving, a well-known and respected Indianapolis lawyer, Robert Wolf, was killed in an automobile accident by William Boren, a drunk driver. Robert had no children and had never been married. He shared with his family (his parents and siblings) the fruits of his many years of hard work as an outstanding trial lawyer—a beautiful vacation home on Lake Monroe. After his untimely and tragic death, his family brought a wrongful death suit against Boren seeking funeral and burial and legal expenses.⁴¹ His family also claimed that they were unable to financially maintain the vacation home without the support of Robert.⁴²

Boren claimed that Robert's parents and siblings were not dependent next of kin under Indiana's Wrongful Death Statute and the trial court agreed.⁴³ The court of appeals affirmed the trial court's ruling.⁴⁴ The court of appeals found that although Robert's family was dependent upon him to provide his vacation home as a family retreat, mere gifts, donations or acts of generosity alone are not sufficient to establish dependency on the part of the recipient.⁴⁵ Apparently the court concluded that because the vacation home was not "needed" by the family and therefore was not a "necessity," their action must fail.⁴⁶ Taken one step further, had Robert not been so fortunate to have such a lovely vacation home which he graciously chose to share, but instead found other ways to assist his family, such as providing for other needs, the conclusion may have been different.⁴⁷

IV. LIABILITY OF RELIGIOUS ORGANIZATIONS

The Indiana Court of Appeals in *Konkle v. Henson*⁴⁸ addressed several significant issues relating to religious organizations. In *Konkle*, the victim of sexual molestation brought suit against her minister, church and church associations. The plaintiff had been sexually molested by her minister since she was seven. She began experiencing emotional problems and entered counseling

39. 685 N.E.2d 86 (Ind. Ct. App. 1997).

40. *Id.* at 87.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 88.

45. *Id.* at 87.

46. *Id.*

47. The author wishes to dedicate this survey article to Robert Wolf and his family. Robert was an outstanding trial lawyer and a dear friend whose generosity was remarkable. He was taken from us too soon and is very much missed.

48. 672 N.E.2d 450 (Ind. Ct. App. 1996).

which continued for seven or eight years. However, the plaintiff never told her counselor about the molestation and when the plaintiff was fifteen or sixteen, she realized that her minister's behavior was wrong. A year later she realized that she could control some of the minister's behavior and his touchings thereafter were limited. When the plaintiff was seventeen or eighteen, she and her mother discussed the possibility of filing criminal charges but decided against it. The last touching occurred late 1990 when the plaintiff was twenty. The plaintiff filed her complaint in 1992 (four years after she reached majority but less than two years after the final touching). The plaintiff alleged claims of negligent hiring, supervision, retention and respondent superior liability.⁴⁹

The defendants filed motions for summary judgment. The trial court held that the First Amendment barred judicial intervention in ecclesiastical affairs and granted defendant's motion. However, recognizing that the issue of intervention was an issue of first impression in Indiana, the trial court also ruled on additional grounds for summary judgment which might be relevant if the appellate court ruled that judicial intervention was proper. The trial court addressed four additional issues. First, the court granted summary judgment to defendants based on respondeat superior because the minister's acts were outside the scope of his employment. Second, summary judgment was denied as to the local church on the issue of claims by a member of an unincorporated association. Third, summary judgment was denied to the defendants as to the issues of negligence. And fourth, the court found that the statute of limitations barred recovery against defendants except for acts committed after August 1990.⁵⁰ The trial court granted summary judgment for the defendants and the plaintiff appealed.⁵¹

The Indiana Court of Appeals held that the First Amendment did not bar the plaintiff's claims.⁵² However, the court also held that the minister was not acting within the scope of his employment, thus barring the plaintiff's claim under the respondent superior doctrine.⁵³ The court went on to rule that the limitations period began to run each time the minister touched the plaintiff, thereby barring part of her claims.⁵⁴ The court also held that the question of whether the plaintiff was a member of the church was a question of fact precluding summary judgment.⁵⁵ Finally, the court held that the plaintiff failed to establish that the associations knew about the minister's misconduct, thus precluding her negligent hiring and retention claims.⁵⁶

The first issue (of first impression) addressed by the Indiana Court of Appeals was whether the First Amendment precluded review of the church's activities. Noting that while the freedom to believe is absolute, the court

49. *Id.* at 453. The plaintiff's claims against the minister were not part of the appeal.

50. *Id.*

51. *Id.* at 454.

52. *Id.* at 456.

53. *Id.* at 457.

54. *Id.* at 459.

55. *Id.*

56. *Id.* at 461.

emphasized that the freedom to act is subject to regulation.⁵⁷ Excessive entanglement occurs when courts begin to review and interpret a church's constitution, laws and regulations.⁵⁸ Therefore, the court reviewed each of the plaintiff's claims in light of the First Amendment.

As to the plaintiff's claim for negligent hiring and retention, the court noted that the test is whether the employer exercised reasonable care.⁵⁹ The issue facing the court was whether or not the First Amendment precluded review of the church's operational activities when they endanger public safety. Noting that courts in other jurisdictions are divided on the issue, the court found that in the present case, the plaintiff's claims did not require any inquiry into religious doctrine or practice.⁶⁰ The court was simply applying secular standards to secular conduct.⁶¹ The court found that the same was true with respect to the plaintiff's claim for respondeat superior,⁶² as all the court was required to do was apply traditional tort law to the plaintiff's claims. Thus, the court of appeals found that the trial court erred in ruling that the First Amendment precluded the plaintiff's claims.⁶³

The court went on to address the substance of the plaintiff's claims, the first of which was the plaintiff's claim of respondeat superior liability. After reviewing Indiana law on the issue, the court found that the minister's acts of molestation were not authorized by the church.⁶⁴ The fact that they took place in the church was not enough to create liability, nor was the minister engaging in authorized acts or serving the interests of his employer at the time of the molestation. Therefore, the court held that summary judgment was proper because the minister was not acting within the scope and course of his employment.⁶⁵

The only remaining claims of the plaintiff's were claims for negligent hiring, supervision and retention. The court first addressed whether the plaintiff's claims were barred by the applicable two year statute of limitations. The issue was the starting of the statute of limitations. The plaintiff argued that a continuing wrong took place and the statute did not begin to run until the final act occurred. The defendants argued that each act was a separate tort invoking the statute of limitations for each occurrence.⁶⁶

57. *Id.* at 454.

58. *Id.*

59. *Id.* at 455.

60. *Id.*

61. *Id.* at 455-56.

62. *Id.* at 456.

63. *Id.*

64. *Id.* at 457.

65. *Id.* Although the court noted that an employer can be vicariously liable for the criminal acts of its employees, given the cases cited by the court and the decision in *Konkle*, it is hard to imagine the court applying the doctrine of respondeat superior in such cases, as the courts seem to find every opportunity to refrain from doing so. *Id.*

66. The plaintiff was under 18 when many of the acts occurred so she had two years from

The court rejected the plaintiff's argument, finding that the plaintiff knew the molestation was occurring and that it was wrong when she was fifteen or sixteen. She had "discovered" the tort and the statute of limitations began to run. Thus, the court found that all claims relating to acts prior to two years after the plaintiff reached majority were barred by the statute of limitation.⁶⁷ At this point, the plaintiff's only remaining claims were for negligent hiring, supervision and retention with respect to acts occurring after October 2, 1990.

The court next addressed whether the plaintiff's remaining claims were barred, as she was alleged to be a member of the unincorporated association which she was suing. Noting that the court was only concerned with the plaintiff's membership status after October 2, 1990, the court found that questions of fact remained as to whether the plaintiff was a member at that time and precluded summary judgment.⁶⁸

Finally, the court ruled against the plaintiff as to her claims for negligent hiring, supervision and retention against the International Church because there was no evidence to support the plaintiff's claims.⁶⁹ However, questions of fact remained as to whether the local and district churches had knowledge, or should have had knowledge, of the minister's actions.

Konkle provides guidance on how the court of appeals intends to resolve the ever increasing number of sexual abuse cases against religious organizations. The court of appeals does not consider molestation acts as continuing, or acts of this nature by a minister to be within the scope of employment. Moreover, if the plaintiff is a member of the church at the time, the plaintiff is without remedy. However, the court implied that the time may be appropriate to reverse the *Calvary Baptist* rule precluding members of unincorporated associations from suing their associations for intentional torts.

V. PROFESSIONAL NEGLIGENCE

During the survey period the court of appeals addressed several significant issues relating to professional negligence claims against healthcare providers.

A. *Constitutionality of Indiana's Medical Malpractice Statute of Limitations*

In *Martin v. Richey, Jr.*,⁷⁰ the court of appeals held that Indiana's occurrence based medical malpractice statute of limitations violates the equal privileges and immunities clauses of the State Constitution and the open courts provision.⁷¹

age 18 to bring her claims (unless there was a continuing wrong). However, the plaintiff did not bring suit until four years after she turned 18.

67. *Konkle*, 672 N.E.2d at 459.

68. The court noted that the *Calvary Baptist* rule precluding members of unincorporated associations from suing the association was harsh, particularly for intentional torts. *Id.* at 459. However, the court stated that intentional torts were not before the court. *Id.* at 460 n.13.

69. *Id.* at 460.

70. 674 N.E.2d 1015 (Ind. Ct. App. 1997).

71. *Id.* at 1029.

After a critical analysis of Indiana's medical malpractice statute of limitations,⁷² the privileges and immunities clause of the Indiana Constitution,⁷³ and the open courts provision of the Indiana Constitution,⁷⁴ the court, in one of the most followed tort cases of the year, found that the occurrence based statute was unconstitutional.⁷⁵

In analyzing the equal privileges argument, the court found that medical malpractice victims were treated differently from other tort victims because the former were governed by an occurrence based statute of limitations while the later were governed by a discovery based statute of limitations.⁷⁶ The court then applied the two part *Collins* test which examines whether: (1) the disparate treatment is reasonably related to inherent characteristics which distinguish the unequally treated classes and (2) whether the preferential treatment is uniformly applicable and equally available to all persons similarly situated.⁷⁷ The court found that the first prong was met because the disparate treatment was justified by reasonable basis for the classification; the classification is reasonably related to the goal of maintaining sufficient medical treatment and controlling malpractice insurance costs. Thus, the disparate treatment was not unreasonable under the first prong.⁷⁸ However, the second prong of the *Collins* test was not met because the plaintiffs claiming medical negligence, whose statute of limitations expired before they were aware of the malpractice, are treated unequally.⁷⁹ The court also found that the statute violated the open court's provision of the Indiana Constitution. Choosing not to "sleepwalk through the law,"⁸⁰ and sidestepping the doctrine of stare decisis, the court found the statute unconstitutional.⁸¹

The court of appeals followed *Martin*, in a brief opinion, *Harris v. Raymond*.⁸² However, a month later, and just seven months after the *Martin* decision, an opposite conclusion was reached by the court in *Johnson v. Gupta*.⁸³

72. IND. CODE § 27-12-7-1(b) (1993).

73. IND. CONST. art. I, § 23.

74. *Id.* § 11.

75. *Martin*, 674 N.E.2d at 1029.

76. *Id.* at 1022.

77. *Id.* at 1019-21 (citing *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994)).

78. *Id.*

79. *Id.* at 1022-23.

80. *Id.* at 1025 (quoting *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 364 (1990)).

81. *Id.* at 1027.

82. 680 N.E.2d 551 (Ind. Ct. App. 1997).

83. 682 N.E.2d 827 (Ind. Ct. App. 1997).

After *Martin*, *Harris*, and *Johnson* the following scoreboard existed:

Holding Indiana's Medical
Malpractice Statute of
Limitations Unconstitutional

Judge Riley⁸⁴
Judge Chezem⁸⁶
Judge Barteau⁸⁸
Judge Friedlander⁹⁰
Judge Rucker⁹¹

Holdings Indiana's Medical
Malpractice Statute of Limitations
Constitutional

Judge Darden⁸⁵
Judge Staton⁸⁷
Judge Garrard⁸⁹

The split in decisions by the court of appeals (although not equally by the judges) leaves Indiana law uncertain on this issue. However, the issue is presently pending before the Indiana Supreme Court.

B. Wrongful Birth

In *Bader v. Johnson*,⁹² the Indiana Court of Appeals addressed for the first time a claim for wrongful birth. The plaintiff gave birth to a child with congenital hydrocephalus and severe mental and motor retardation. The child died four months later. Prior to becoming pregnant, the plaintiff had sought genetic counseling from Dr. Bader because her first child had congenital disabilities, although testing had shown the pregnancy was normal. During genetic counseling with Dr. Bader, the plaintiff conceived and an amniocentesis at 19½ weeks revealed no abnormalities. An ultrasound, however, showed the baby to be larger than expected with an unusually shaped head. Although Dr. Bader requested follow up testing, due to an office error, the plaintiff was not examined and the initial ultrasound was not forwarded to the plaintiffs' treating physician. The treating physician's ultrasound at thirty-three weeks showed hydrocephalus and it was too late then to terminate the pregnancy. The baby was born, but died shortly thereafter. If the plaintiff had been made aware of the problems in time, she would have terminated the pregnancy.

The plaintiff brought suit for wrongful birth seeking damages for (1) lost opportunity to terminate the pregnancy and having to proceed through labor and delivery, (2) emotional pain of knowing that the baby suffered the defects and had little chance to survive, (3) care and treatment for the child, (4) medical expenses, (5) lost personal time and income, and (6) emotional pain of watching

84. Author of *Martin*.

85. Dissent in *Martin*.

86. Concurred in *Martin*.

87. Author of *Johnson*.

88. Author in *Harris* and concurred in *Johnson*.

89. Concurred in *Johnson*.

90. Concurred in *Harris*.

91. Concurred in *Harris*.

92. 675 N.E.2d 1119 (Ind. Ct. App. 1997).

their baby suffer and die.⁹³ Dr. Bader moved for summary judgment arguing that Indiana does not recognize a claim for wrongful birth.⁹⁴ The trial court denied the motion.⁹⁵ The court of appeals affirmed, recognizing for the first time in Indiana a claim for damages for wrongful birth.⁹⁶

The court began its analysis by defining “wrongful birth” as “claims brought by parents of a child born with birth defects alleging that due to negligent medical advice or testing they were precluded from an informed decision about whether to conceive a potentially handicapped child, or, in the event of a pregnancy, to terminate it.”⁹⁷ If the plaintiff seeks damages on behalf of the child, it is one for “wrongful life,” which Indiana has rejected.⁹⁸ A third theory, “wrongful conception or pregnancy,” the court noted, referred to a claim for damages sustained by parents of an unexpected child alleging that conception resulted from negligent sterilization procedures or a defective contraceptive product.⁹⁹ Indiana recognizes this type of claim.¹⁰⁰

The court then looked to other jurisdictions for guidance, noting that thirty-one states and the District of Columbia have addressed the issue. Twenty-two states and the District of Columbia have recognized the claim by judicial decision,¹⁰¹ two states have recognized the claim which was subsequently barred by statute,¹⁰² and two have barred the claim by judicial decision.¹⁰³ Thus, a majority of courts have recognized the claim. The Indiana Court of Appeals followed suit.

In recognizing a claim for wrongful birth, the court distinguished claims for wrongful life which Indiana has continued to reject.¹⁰⁴ The court noted that in a wrongful life claim, the tort system must put a value on a life with defects as opposed to no life at all.¹⁰⁵ However, in a wrongful birth claim, the injury is to the parents and the damages flowing from that injury are incurred by them, not the child; such damages include emotional, physical and financial harm. The judges, however, could not agree upon whether or not emotional damages were recoverable by the parents—that issue, it appears, may need to be resolved by the Indiana Supreme Court.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 1127.

97. *Id.* at 1122.

98. *Id.* (citing *Cowe v. Forum Group, Inc.*, 575 N.E.2d 630, 633 (Ind. 1991)).

99. *Id.*

100. *Id.* (citing *Garrison v. Foy*, 486 N.E.2d 5 (Ind. Ct. App. 1985)).

101. *Id.*

102. *Id.* at 1123.

103. *Id.*

104. *Id.*

105. *Id.*

C. *Compensability of Damages*

In *Rimert v. Mortell*,¹⁰⁶ the court of appeals was called upon to determine (1) whether Indiana Code section 27-12-15-3(5) of Indiana's Medical Malpractice Act precludes Indiana's Patient's Compensation Fund (PCF) from inquiring into the extent of liability of a health care provider after the health care provider has settled; (2) whether a plaintiff who has been imprisoned for life upon a criminal conviction may recover from a tortfeasor damages for "loss of enjoyment of life" associated with his imprisonment; (3) whether legal fees incurred to defend a plaintiff's underlying criminal charges are compensable damages under Indiana law; and, (4) whether a plaintiff can recover damages from a tortfeasor for emotional distress that the plaintiff allegedly suffered from imprisonment.¹⁰⁷

In June of 1990, Gary Rimert was diagnosed as psychotic by Dr. Judy Anderson. On June 14, 1990, he was examined by Dr. Desai and later that day admitted into Lafayette Home Hospital where he was treated by Dr. Desai for nearly a month. Dr. Desai released Gary into the custody of his parents on July 11, 1990.

On July 13, 1990, Elizabeth Rimert, Gary's mother, allowed Gary to use the family car under the condition that he take his prescribed medication and return home for dinner. Instead of returning home, Gary left Indiana, enroute to his grandparents' home in South Carolina. Gary arrived in South Carolina the next morning and several hours after his arrival, he bludgeoned to death his grandparents and two of their neighbors with a kitchen knife. Gary was subsequently charged with four counts of murder, found guilty but mentally ill on all counts, and sentenced to life imprisonment.¹⁰⁸

Betty Rimert, as conservator of Gary Rimert, filed a proposed complaint for malpractice with the Indiana Department of Insurance against Dr. Desai, claiming that he was negligent in discharging Gary from the hospital and that his negligence was the proximate cause of the four murders and Gary's subsequent imprisonment. Dr. Desai's insurance carrier settled Betty's claim for \$100,000, the maximum recovery permitted under the Act.¹⁰⁹ Next, Betty petitioned the PCF for excess damages, seeking recovery for Gary's loss of enjoyment of life due to his imprisonment, for his legal defense fees, and for his emotional distress.¹¹⁰ Following a bench trial, the court denied Betty's petition and held that the damages sought were not compensable under Indiana law.¹¹¹ The court also held that Dr. Desai's release of Gary was not the proximate cause of the murders or of Gary's imprisonment.¹¹² Betty appealed the trial court's decision.

The court of appeals first addressed Betty's argument that the trial court

106. 680 N.E.2d 867 (Ind. Ct. App. 1997).

107. *Id.* at 869.

108. *Id.*

109. *Id.*

110. *Id.* at 870.

111. *Id.*

112. *Id.*

erred by revisiting liability. In support of her argument, Betty cited section 27-12-15-3 of the Indiana Code.¹¹³

The commissioner argued that settlement of liability is merely an admission of a negligent act and not an admission of proximate causation of all damages alleged.¹¹⁴ The commissioner further argued that under Betty's scheme, health care providers and their insurance carriers could bind the PCF to the payment of damages by deciding to settle.¹¹⁵ Thus, the PCF would be obligated to pay excess damages in cases involving damages that should not have been awarded in the first place.¹¹⁶

The court of appeals noted that the commissioner's position was appealing,

113. Section 27-12-15-3 provides in pertinent part:

If a health care provider or its insurer has agreed to *settle its liability on a claim* by payment of its policy limits of one hundred thousand dollars (\$100,000), and the claimant is demanding an amount in excess of that amount, the following procedure must be followed:

(1) A petition shall be filed by the claimant . . . :

(B) Demanding payment of damages from the patient's compensation fund.

. . . .

(4) The judge of the court in which the petition is filed shall set the petition for approval or, if objections have been filed, for hearing, as soon as practicable

(5) . . . If the commissioner, the health care provider, the insurer of the health care provider, and the claimant cannot agree on the amount, if any, to be paid out of the patient's compensation fund, the court shall, after hearing any relevant evidence on the issue of claimant's damage submitted by any of the parties described in this section, determine the amount of claimant's damages, if any, in excess of the one hundred thousand dollars (\$100,000) already paid by the insurer of the health care provider. The court shall determine the amount for which the fund is liable and make a finding and judgment accordingly. *In approving a settlement or determining the amount, if any, to be paid from the patient's compensation fund, the court shall consider the liability of the health care provider as admitted and established.*

IND. CODE § 27-12-15-3 (1993) (emphasis added).

114. *Rimert*, 680 N.E.2d at 870-71.

115. *Id.* at 871. The commissioner argued that the health care providers and insurance carriers' decisions to settle are often unrelated to the strength of the plaintiff's case.

116. *Id.*

however, the issue had previously been decided against the commissioner in *Dillon v. Glover*.¹¹⁷ In *Glover*, the court held that once the provider's liability upon the claim has been settled, the statute prohibits litigation of a health provider's liability.¹¹⁸ Thus, the issue of proximate causation is foreclosed.

The appellate court held that although the trial court erroneously determined that Dr. Desai did not proximately cause the damages sought by Betty, its dispositive holding was that the damages Betty sought to recover were non-compensable.¹¹⁹ The court concluded that such a determination is within the authority of the trial court and the trial court may, in a case such as this, inquire into the compensable nature of injuries.¹²⁰

Next, the court addressed whether the trial court was correct in determining that the damages requested by Betty were not compensable under Indiana law.¹²¹ The court stated that it is general public policy that "a person cannot maintain an action if, in order to establish his cause of action, he must rely, in whole or in part, on an illegal or immoral act or transaction to which he is a party . . . [or] . . . on a violation by himself of the criminal or penal laws. . . ."¹²² The court reasoned that this prohibition against actions based in whole or in part upon one's own criminal conduct is grounded upon the sound public policy that convicted criminals should not be permitted to impose or shift liability for the consequences of their own anti-social conduct.¹²³ The court acknowledged that Indiana has not expressly adopted this public policy, but went on to state that it is consistent with the public policy expressed by the Indiana legislature and existing case law.¹²⁴ Thus, the court held it to be the public policy of Indiana that an individual who has been convicted of a crime should be precluded from imposing liability upon others, through a civil action, for the results of his or her own criminal conduct.¹²⁵ "Consequently, a person may not maintain an action if, in order to establish the cause of action, he or she must rely, in whole or in part, upon an illegal act or transaction to which he or she is a party or upon a violation by him or herself of the criminal laws."¹²⁶

117. 597 N.E.2d 971 (Ind. Ct. App. 1992).

118. *Id.* at 973.

119. *Rimert*, 680 N.E.2d at 871.

120. *Id.* (citing *J.L. v. Mortell*, 633 N.E.2d 300 (Ind. Ct. App. 1994)).

121. The court noted that "upon judicial review, a trial court's judgment may be affirmed upon grounds different from those reflected in the trial court's decision." *Id.*; see *Kimberlin v. DeLong*, 637 N.E.2d 121 (Ind. 1994). Thus, a trial court may get it right, but for the wrong reason. *Rimert*, 680 N.E.2d at 871.

122. *Rimert*, 680 N.E.2d at 871-72 (quoting 1A C.J.S. *Actions* § 29 (1985)).

123. *Id.* at 873.

124. *Id.* (citing to IND. CODE § 29-1-2-12.1 (1993) (statute that prohibits beneficiary of life insurance policy who is convicted of murdering the policy holder to recover policy proceeds); *lemma v. Adventure RV Rentals, Inc.*, 632 N.E.2d 1178 (Ind. Ct. App. 1994) (one who commits arson to gain insurance proceeds is barred from recovery)).

125. *Id.* at 874.

126. *Id.*

In enacting the new public policy, the court noted an important limitation to the public policy bar. As it is written, the policy applies to cases where the plaintiff is responsible for her criminal act. A problem arises when it is unclear whether or not the plaintiff is legally responsible for the act. The court held that to prohibit the imposition of liability onto the culpable party when a plaintiff is not responsible for the act or acts in question is unjust.¹²⁷ Thus, the public policy bar adopted in *Rimert* does not operate to the extent that the individual is not responsible for the criminal act in question.

The court concluded that the public policy bar of *Rimert* applied because Gary was found to be *criminally responsible* for the murders by a South Carolina jury.¹²⁸ Thus, he should not be allowed to recover damages from the PCF.

VI. LIABILITY OF INDEPENDENT CONTRACTORS

Within six months time both the Indiana Supreme Court and the Seventh Circuit Court of Appeals upheld the exception to Indiana's acceptance rule, more commonly referred to as the "humanitarian exception."¹²⁹ Indiana's acceptance rule was adopted to relieve contractors of liability after their work has been accepted and completed.¹³⁰ Thus, under Indiana law, contractors do not owe a duty of care to third parties for construction flaws after the owner has accepted the work. An exception to the rule exists where the work is deemed dangerously defective, inherently dangerous, or imminently dangerous such that it poses a risk of imminent personal injury to third parties.¹³¹

In *Blake v. Calumet Construction Corp.*,¹³² Blake, an employee of Morrison, a contractor on a construction site, was injured after he tripped and fell approximately four feet to the concrete floor. Calumet was another contractor on site hired to construct the loading dock, including guard rails, adjacent to a maintenance building. Morrison and Calumet were working under the direction of United Engineers, a project manager coordinating the work of all contractors. Blake left the maintenance building through a door to the unlit loading dock area. Not familiar with the loading dock, Blake tripped and fell and sustained a fractured hip and other injuries. Soon thereafter, he brought an action against Calumet for injuries sustained, alleging that Calumet's negligence in failing to install guard rails caused his injuries.

Calumet moved for summary judgment, arguing that it owed no duty of care

127. *Id.* at 874-75.

128. *Id.* at 876.

129. *See Blake v. Calumet Constr. Corp.*, 674 N.E.2d 167 (Ind. 1996); *Bush v. Seco Elec. Co.*, 118 F.3d 519 (7th Cir. 1997).

130. *Daugherty v. Herzog*, 44 N.E. 457 (Ind. 1896), is the seminal Indiana case holding that a contractor's duty of care to third parties is extinguished upon acceptance of the work. *Blake*, 674 N.E.2d at 170.

131. *Blake*, 674 N.E.2d at 172-73 (citing *Citizen's Gas & Coke Util. v. American Econ. Ins. Co.*, 486 N.E.2d 998 (Ind. 1985)).

132. *Id.* at 167.

to Blake on the night of the injury.¹³³ In support, Calumet argued that its work on the loading dock had been accepted as a matter of law by the owner (I/N Tek) because Calumet's billing records indicated that I/N Tek had paid for the loading dock in full two months before Blake's fall. Calumet also argued that it had relinquished physical control of the loading dock area before November 3, 1989, indicating an acceptance of its work by I/N Tek. Notwithstanding acceptance of its work, Calumet argued that the guard rails were installed before November 3, 1989, but had been removed by a third party. The trial court granted Calumet's motion for summary judgment and, on appeal, the court of appeals affirmed.¹³⁴ Blake appealed and the supreme court reversed and remanded the case.

The supreme court initially addressed the issue of duty at common law,¹³⁵ stating that the imposition of a duty is covered by a line of decisions dealing specifically with contractors' liability to third parties for construction flaws.¹³⁶ The court stated that "under this line of authority duty in this case turns on two factual issues: did the owner accept the loading dock before the accident occurred and, if so, did the loading dock nonetheless present a risk of imminent personal injury as to that time?"¹³⁷

The supreme court revisited the seminal case of a contractor's duty of care to third parties, *Daugherty v. Herzog*,¹³⁸ stating that in the present case there were conflicting factual signs as to whether I/N Tek or United had interposed itself, in the manner contemplated by *Daugherty*, to break the casual connection between Calumet and Blake so as to relieve Calumet of its duty of care.¹³⁹

The court held that the "fact of payment alone cannot support summary judgment because payment could have occurred for a number of reasons, including mindless processing of submitted paperwork."¹⁴⁰ The court also held that there was nothing in the record to support Calumet's claim that United or I/N Tek had asserted physical control over the loading dock.¹⁴¹

The supreme court went on to address the remaining question of whether or not the loading dock was "imminently dangerous" as a matter of law. The court

133. *Id.* at 169.

134. *Id.*; see *Blake v. Calumet Constr. Corp.*, 648 N.E.2d 1250, 1253 (Ind. Ct. App. 1995).

135. *Blake*, 674 N.E.2d at 170. In deciding whether to impose a duty at common law, the court usually considers three factors: (1) the relationship between the parties; (2) the foreseeability of the harm; and (3) public policy concerns. *Id.* (citing *Webb v. Jarvis*, 575 N.E.2d 992, 995 (Ind. 1991)).

136. *Id.*

137. *Id.*

138. 44 N.E. 457 (Ind. 1896).

139. *Blake*, 674 N.E.2d at 171. In *Daugherty*, the court held that the factors informing the acceptance inquiry include whether (1) the owner or its agent reasserted physical control over the premises or instrumentality; (2) the work was actually completed; (3) the owner expressly communicated an acceptance or release of liability; or (4) the owner's actions permit a reasonable inference that the work was accepted. *Id.* (citing *Daugherty*, 44 N.E. at 457).

140. *Id.*

141. *Id.* at 172.

held that the lack of a safety device on a darkened construction site is enough to present a jury question on whether or not the loading dock was imminently dangerous.¹⁴² The court, using the definition of “imminently dangerous” as defined in *Black’s Law Dictionary*,¹⁴³ stated that a jury could find that the loading dock, without guard rails, on the night of Blake’s fall was reasonably certain to place life or limb in peril. Thus, assuming arguendo that the jury finds I/N Tek accepted Calumet’s work before Blake’s fall on November 3, 1989, Calumet may not be absolved from liability because the humanitarian exception may apply if the jury finds that the lack of guard rails on the loading dock presented an *imminent risk* of personal injury to third parties.¹⁴⁴

One month after the court’s decision in *Blake*, the Seventh Circuit Court of Appeals heard oral argument on this issue in *Bush v. Seco Electric Company*.¹⁴⁵ The court rendered its decision five months later. *Bush*, a temporary employee at Rumpke Recycling, was injured by a conveyor and sued Seco for negligence in the installation of the conveyor’s wiring. Seco had wired the conveyor almost four weeks before the plaintiff’s accident. Delivery trucks would drop cans into a pit and the conveyor would pick them up and deposit them in a hopper. Whenever the conveyor failed, someone had to go into the pit, pick up the cans, dump them in garbage bags, and haul the bins out. There was a safety protocol in place at the time of *Bush*’s accident.

On the day of *Bush*’s accident, the conveyor failed and she was chosen to clean the pit. She claims that she was not aware of the safety protocol and did not shut the conveyor off. The safety guard to the conveyor was not in place (the safety guard made it impossible to feed cans into the conveyor) and the conveyor snagged *Bush*’s clothes. As a result, *Bush* lost her arm.

Unlike the acceptance argument in *Blake*, it was not in dispute that Rumpke had accepted Seco’s wiring job. The conveyor had been operating for four weeks when *Bush* was injured. Also, there was no dispute that Rumpke had control of the conveyor. However, *Bush* argued that her case fit into a narrow “humanitarian exception,” thereby defeating the longstanding acceptance rule.¹⁴⁶ She argued that absence of an emergency stop button in the pit created a risk of imminent personal injury.¹⁴⁷ Seco moved for summary judgment and the District Court granted its motion, holding that Seco did not owe *Bush* a duty of care.¹⁴⁸

While *Bush* was awaiting oral argument, the Indiana Supreme Court recast

142. *Id.* at 173.

143. Work is “imminently dangerous” if it “is reasonably certain to place life or limb in peril.” BLACK’S LAW DICTIONARY 750 (6th ed. 1990).

144. Plaintiffs must do more than simply plead “dangerously defective,” “inherently dangerous” or “imminently dangerous” to avoid summary judgment. Some evidence must be presented tending to show the work or instrumentality presented an imminent risk of personal injury to third parties.

145. 118 F.3d 519 (7th Cir. 1997).

146. *Id.* at 521.

147. *Id.*

148. *Id.*

the acceptance rule in *Blake v. Calumet Construction Corp.*¹⁴⁹ Although the court in *Blake* used terms like “expectable,” “reasonable,” and “foreseeable,” words that are foreign to the privity analysis of the acceptance rule, as well as visited the idea of rejecting the acceptance rule in favor of a “Palsgraf like foreseeability standard,”¹⁵⁰ the court did not set aside the acceptance rule.

The Seventh Circuit found that the humanitarian exception was widened by *Blake* enough and reshaped the acceptance rule.¹⁵¹ The court relied upon language from *Blake* which states, “[w]here a contractor hands over work ‘in a defective or dangerous state’ ‘important considerations of deterrence and prevention militate in favor of imposing an ongoing duty of care.’”¹⁵² The court went on to state that “the spirit of *Palsgraf* is evident in *Blake*’s elaboration of the humanitarian exception.”¹⁵³ The court relied upon the definitions of “dangerously defective” and “imminently dangerous” that the Indiana Supreme Court adopted in *Blake* in reaching its decision. The Seventh Circuit held that “Seco’s wiring would be ‘dangerously defective’ if the work is turned over in a condition that has a propensity for causing physical harm to foreseeable third parties using it in reasonably expectable ways.”¹⁵⁴ The court also held that Seco’s “work might be ‘imminently dangerous’ if it is reasonably certain to place life or limb in peril.”¹⁵⁵ The Seventh Circuit also stated that, because *Bush* was decided under pre-*Blake* law and that *Blake* has shifted the acceptance rule enough “to make extrapolating from the district court’s decision little more than divination,”¹⁵⁶ the district court must take a second look. The court held that a reasonable jury could conclude that the absence of an emergency stop button in the pit was reasonably certain to place life or limb in peril.¹⁵⁷

Based upon the decisions in *Blake* and *Bush*, it appears that the long standing acceptance rule survives despite the supreme court’s references to applying a Palsgraf foreseeability standard in view of the rule. However, in what form does it apply? The Indiana Supreme Court in *Blake* applied the acceptance rule as it was stated in *Daugherty*, but similar to other decisions, did not elaborate on the underlying rationale for terminating the contractor’s duty of care upon acceptance.

The Seventh Circuit has interpreted the Indiana Supreme Court’s decision in *Blake* as an expansion of the humanitarian exception to the acceptance rule.¹⁵⁸ However, such an interpretation appears misplaced as *Blake* does not expand the humanitarian exception.

149. 674 N.E.2d 167 (Ind. 1996).

150. *Id.* at 170 n.1.

151. *Bush*, 118 F.3d at 522.

152. *Id.* at 521 (citing *Blake*, 674 N.E.2d at 173).

153. *Id.*

154. *Id.* (citing *Blake*, 674 N.E.2d at 173 n.6).

155. *Id.* (citing *Blake*, 674 N.E.2d at 173 n.8).

156. *Id.* at 522.

157. *Id.*

158. *Id.* at 521.

VII. GOVERNMENTAL ENTITIES AND IMMUNITY

A. *Existence of Public/Private Duty*

In *Willis v. Warren Township Fire Department*,¹⁵⁹ the Indiana Court of Appeals was called upon to determine if a governmental entity, the Warren Township Fire Department, owed a private duty to homeowners. The Willises filed a complaint for damages against the fire department, alleging that the department "negligently failed to completely extinguish the fire and the fire rekindled damaging the [Willises] home and personal property."¹⁶⁰ The department responded to a reported gasoline fire in the Willises' garage at approximately 4:03 p.m. and upon arrival extinguished what they observed to be a localized fire in one-half of the garage. The firefighters left the garage approximately one hour after their arrival. The fire department was again called to respond to a second fire at the Willises' home at approximately 8:15 p.m. later that evening. Upon arrival, the firefighters extinguished the fire and left the scene at 10:58 p.m.

In response to the Willises' complaint, the department raised as an affirmative defense that it was immune from liability under section 34-4-16.5-3 of the Indiana Code.¹⁶¹ The Willises filed a motion for summary judgment on the issue of the fire department's immunity. The trial court held that the department was immune from liability.¹⁶² The Indiana Court of Appeals reversed on the basis that the department's decision to leave the Willises' home was an operational function which did not fall within the scope of statutory immunity.¹⁶³ Upon remand to the trial court, the department filed a motion for summary judgment, alleging that it owed no private duty to the Willises.¹⁶⁴ The court granted summary judgment in favor of the fire department.¹⁶⁵ The Willises appealed.

159. 672 N.E.2d 484 (Ind. Ct. App. 1996).

160. *Id.* at 485.

161. *Id.*

162. *Id.* at 486. The trial court concluded that the fire department was immune from liability pursuant to section 34-4-16.5-3 of the Indiana Code which provides as follows:

A governmental entity or an employee acting within the scope of his employment is not liable if a loss results from: . . .

(6) the performance of a discretionary function; . . .

(11) failure to make an inspection, or making an inadequate or negligent inspection, of any property, other than the property of a governmental entity, to determine whether the property complied with or violates any law or contains a hazard to health or safety[.]

IND. CODE § 34-4-16.5-3(6), (11) (Supp. 1997).

163. *Willis*, 672 N.E.2d at 486.

164. *Id.*

165. *Id.*

The court of appeals first addressed the issue of the existence of a private duty. The court noted that the existence of a duty is normally a question of law for the court.¹⁶⁶ The court noted the three factors that must be balanced in determining whether a duty exists: (1) the relationship between the parties; (2) the reasonable foreseeability of harm to the person injured; and (3) public policy concerns.¹⁶⁷ However, to recover against a governmental entity for negligence, plaintiffs must show more than a duty owed to the public as a whole; they must show that the relationship between the parties is one that gives rise to a specific or private duty owed to the plaintiffs.¹⁶⁸

The firefighters designated evidence to establish that they followed the normal procedure for extinguishing a fire and the Willises designated evidence which showed that Mrs. Willis was concerned that the fire was not completely extinguished and that the firefighters did not share her concern. The court of appeals held that there was no evidence present to show that a specific or private duty was created between the fire department and the Willises.¹⁶⁹ The court stated that for a private duty to exist, the Willises must show that the firefighters duty is "in no way different from its duty to any other citizen."¹⁷⁰ There was no evidence in this case to establish such a duty.¹⁷¹ In fact, the court of appeals made reference to its holding in *City of Hammond v. Cataldi* that a fire department's "attempt to extinguish [a] fire [is] made in response to its general duty to protect the safety and welfare of the public."¹⁷² Thus, the Indiana Court of Appeals held that the trial court was correct as a matter of law in granting summary judgment for the department.¹⁷³

Judge Staton concurred with Judge Chezem but issued a separate opinion. In his opinion, he highlighted the limited nature of the public/private duty analysis contained in *Mullin v. Municipal City of South Bend*.¹⁷⁴ Judge Staton laid out the three part test that the Indiana Supreme Court adopted in *Mullin* as the test to determine whether a governmental agency owes a private duty to a particular plaintiff. In *Mullin*, the court held that a private duty will be imposed on the government only where each of three elements are present: (1) an explicit assurance by the municipality, through promises or actions, that it would act on behalf of the injured party; (2) knowledge on the part of the municipality that inaction could lead to harm; and (3) justifiable and detrimental reliance by the injured party on the municipality's affirmative undertaking.¹⁷⁵ The court

166. *Id.* (quoting *Mullin v. Municipal City of South Bend*, 639 N.E.2d 278, 283 (Ind. 1994)).

167. *Id.* (citing *Webb v. Jarvis*, 575 N.E.2d 992, 995 (Ind. 1991)).

168. *Id.* (citing *Greathouse v. Armstrong*, 616 N.E.2d 364, 368 (Ind. 1993)).

169. *Id.* at 487.

170. *Id.* at 486 (quoting *City of Hammond v. Cataldi*, 449 N.E.2d 1184, 1188 (Ind. Ct. App. 1983)).

171. *Id.* at 487.

172. *Id.* at 486 (quoting *Cataldi*, 449 N.E.2d at 1188).

173. *Id.*

174. 639 N.E.2d 278 (Ind. 1994).

175. *Willis*, 672 N.E.2d at 487 (citing *Mullin*, 639 N.E.2d at 284).

explained further that “the relationship between the governmental entity and the injured person must be such that the governmental entity has induced the injured person justifiably to rely on its taking action for the benefit of that particular person to his detriment.”¹⁷⁶ Thus, application of the public/private duty analysis of *Mullin* is limited to situations involving the government’s failure to act.¹⁷⁷

Judge Staton held that *Mullin* was inapplicable to the present case because the Willises did not allege that they suffered an injury due to inaction by the department.¹⁷⁸ Judge Staton further held that *Mullin* applies only to the separate question of what duty a governmental agency might have to dispatch emergency services to the scene of a calamity and not to whether or not the department had a duty to extinguish the fire in a non-negligent manner as was the question in *Willis*.¹⁷⁹

Almost one month after the *Willis* case, the court of appeals once again addressed whether or not a private duty existed between a governmental entity and a particular entity. In *Benthal v. City of Evansville*,¹⁸⁰ the court revisited the three part test of *Mullin* and clarified when it is to be applied. The court held that *Mullin* applies only in those situations where the “governmental entity is aware of the plight of a particular individual and leads that person to believe that governmental rescue services will be used, and the individual detrimentally relies on that promise.”¹⁸¹

In *Benthal*, the wife of the decedent brought an action against the city of Evansville and Vanderburgh County for wrongful death, alleging that the police department and sheriff department negligently responded to the automobile accident which resulted in the death of her husband. On October 26, 1992, the decedent left his home enroute to his parents’ home in Vanderburgh County. Early the next morning, October 27, 1992, the sheriff’s department arrived at the scene of an accident on Hillsdale Road near the decedent’s parents’ home. The decedent’s car was found overturned in a field approximately 17 feet east of Old State Road, near the intersection of Hillsdale Road and Old State Road. After an hour long search, the sheriff’s deputies had not located the decedent or any other person at the scene. The sheriff did not resume the search the following day.

On October 28, 1992, the decedent’s wife reported to the Evansville City Police Department that her husband and his car were missing. She provided the police with a description of her husband and the car, and advised them that her husband’s last whereabouts was at or near his parents’ home. Neither the police nor the sheriff’s department informed the plaintiff of the accident on Hillsdale Road. Almost one month after the accident, two pedestrians found the decedent’s body located about seventeen feet east of Old State Road and approximately 100 feet east of the accident scene. Thereafter, the plaintiff

176. *Id.* at 488 (citing *Mullin*, 639 N.E.2d at 284).

177. *See Henshilwood v. Hendricks County*, 653 N.E.2d 1062, 1067 (Ind. Ct. App. 1995).

178. *Willis*, 672 N.E.2d at 488.

179. *Id.*

180. 674 N.E.2d 580 (Ind. Ct. App. 1996).

181. *Id.* at 584.

searched her husband's car, which was still being stored at a towing company, and found a "dog tag" key chain still in the ignition which provided the decedent's name and address.

First, the court addressed whether or not the county owed a duty to the decedent to investigate the scene of the accident to find any possible victims. The plaintiff argued that had the sheriff's deputies conducted a thorough search, they could have located the decedent, provided medical care, and possibly saved his life.¹⁸² The plaintiff also raised a question of whether the sheriff's actions in removing the car and failing to contact either the owner of the car or decedent's wife prevented others from coming to his aid.¹⁸³

The court concluded that the plaintiff failed to show the existence of a private duty as required by the *Mullin* test.¹⁸⁴ In reaching this conclusion, the court stated that "[t]he mere existence of rescue services does not, standing alone, impose upon the governmental entity a duty to use them for the benefit of [a] particular individual."¹⁸⁵ The court went on to state that "the governmental entity must know that an identified person is in need of assistance and must make an assurance, either directly or indirectly, to that identified person that a specific manner of assistance will be rendered," before a private duty can arise.¹⁸⁶ In this case, the police department did not make any representation to the decedent or anyone acting on his behalf. The court also noted that an injured person must have some knowledge of the government's assurance to render assistance before a private duty is found.¹⁸⁷ The court reasoned that although the decedent may have assumed that upon discovering his damaged car someone would come to his aid, that alone is insufficient to establish a duty because the decedent did not have either direct contact with the police or knowledge that the police had made an explicit assurance to provide rescue services.¹⁸⁸ The court concluded that without an explicit assurance from the county, there can be no reliance.¹⁸⁹

Next the court addressed the plaintiff's claim that the police department created a duty once the sheriff's deputies began their investigation.¹⁹⁰ The court did not agree. In reaching its decision, the court recognized the distinction between non-feasance and mis-feasance under Indiana law and stated that "an affirmative act by the governmental entity does not, in and of itself, establish a private duty. There must be some causal link between the affirmative act and the victim's peril."¹⁹¹ Applying this reasoning, the court found that a causal link did

182. *Id.* at 583.

183. *Id.*

184. *Id.* at 584.

185. *Id.* (citing *Mullin*, 639 N.E.2d at 284).

186. *Id.*

187. *Id.* (citing *City of Rome v. Jordan*, 426 S.E.2d 861 (1993)).

188. *Id.*

189. *Id.*

190. *Id.* at 584 n.2.

191. *Id.* at 585 (citing *Henshilwood v. Hendricks County*, 653 N.E.2d 1062, 1064-65, 1068 (Ind. Ct. App. 1996)).

not exist.¹⁹² The court held that the decedent's perilous situation resulted from his car accident and that the plaintiff failed to show that any affirmative act of negligence by the county to the decedent's peril.¹⁹³

B. Interpretation of Indiana Code § 34-4-1-16.5-3(4)

In a case of first impression, the Indiana Court of Appeals decided a case in which section 34-4-16.5-3(4) of the Indiana Code was interpreted.¹⁹⁴

In *City of Peru v. Brooks*,¹⁹⁵ a bicycle rider brought an action against the city and the city's park department to recover damages for injuries he suffered when he drove off the end of an incomplete bridge over a creek in the city park. Peru answered the plaintiff's complaint, raising the affirmative defense of immunity under the Indiana Tort Claims Act.¹⁹⁶ Peru subsequently filed a motion for summary judgment which was later denied.¹⁹⁷ Thereafter, the trial court certified the order for interlocutory appeal.¹⁹⁸

For the first time, the court was faced with interpreting section 34-4-16.5-3(4) of the Indiana Code to determine whether or not the city was immune from liability. In doing so, the court relied upon the dictionary to ascertain the plain and ordinary meaning of the undefined term in the statute: "unpaved."¹⁹⁹

In June 1993, the Peru Park Maintenance Department sponsored a volunteer day at Maconaquah Park in Peru, Indiana. Volunteers from Peru and the county helped to clean up the park. During cleanup, a group of volunteers gathered heavy wood planks from a wooded area and constructed a bridge across a creek located forty or fifty feet from the wooded area. The volunteers did not complete the bridge and, although the bridge had a dirt ramp leading up to it on one end, the other end had a drop off of approximately two feet. On August 29, 1993, Brooks and his wife were riding their bikes in the park. Brooks rode his bike down the dirt path and onto the bridge and when he reached the far end of the bridge, the front tire of his bike went over the edge of the drop off, causing him to flip over his handlebars. Brooks landed on his head, neck and shoulders and suffered a broken neck.

Peru argued that the trial court erred in denying its motion for summary judgment because the city is immune from liability pursuant to section 34-4-16.5-

192. *Id.*

193. *Id.*

194. Section 34-4-16.5-3 states in part: "A governmental entity or an employee acting within the scope of his employment is not liable if a loss results from: . . . (4) the condition of an unpaved road, trail, or footpath, the purpose of which is to provide access to a recreation or scenic area." IND. CODE § 34-4-16.5-3((4)) (1993 & Supp. 1997).

195. 676 N.E.2d 393 (Ind. Ct. App. 1997).

196. *Id.* at 394.

197. *Id.*

198. *Id.*

199. *Id.* at 395 (citing *State Bd. of Accounts v. Indiana Univ. Found.*, 647 N.E.2d 342, 347 (Ind. Ct. App. 1995)).

3(4) of the Indiana Code. Peru urged the court to apply California and Illinois law in interpreting the code section because there was no Indiana case law applying this specific provision. However, the court held that there was no need to apply California and Illinois law because, on its face, the statute is clear and unambiguous and when a statute is clear and unambiguous on its face, the court may not interpret it but instead must hold the statute to its clear and plain meaning.²⁰⁰ The court will use the common and ordinary meaning of the words contained in the statute.²⁰¹

In deciding the case, the court of appeals recited the plain, common sense meaning of the code section as follows:

The plain, common sense meaning of the statute is that while a governmental entity is immune from liability when a loss results from the natural condition of a road, trail, or footpath, the entity will not be immune where a loss results from improvements the entity has made to such road, trail, or footpath.²⁰²

Because “unpaved” was not defined in the statute, the court of appeals adopted the definition of “pave” as listed in the dictionary which states “[t]o cover with any hard, smooth surface that will bear travel.”²⁰³ The Brookses, in their appellee brief, adopted the definition of “pave” as listed in another dictionary: “to lay or to cover with material (as stone or concrete) that forms a firm level surface for travel.”²⁰⁴ Despite Peru’s argument that the bridge was unpaved because it was not covered with stone or concrete, the court of appeals applied its definition of “pave” and held that the wooden planks were utilized to form a hard, smooth surface covering the creek so that persons could travel across the creek; therefore, the bridge constituted a paved surface and was not within the scope of the statute.²⁰⁵ Thus, the trial court’s denial of Peru’s motion for summary judgment was affirmed.²⁰⁶

C. Interpretation of Indiana Code § 34-4-16.5-3(9)

One month after its decision in *Shand Mining, Inc. v. Clay County Board of Commissioners*,²⁰⁷ the Indiana Court of Appeals was called upon to once again address whether a governmental entity which contracts with another to perform a traditional government function could avoid liability under section 34-4-16.5-3(9) of the Indiana Code for damage based on the contract. This section provides

200. *Id.* at 394 (citing *Hendricks County Bd. of Zoning Appeals v. Barlow*, 656 N.E.2d 481 (Ind. Ct. App. 1995)).

201. *Id.* at 395.

202. *Id.*

203. *Id.* (quoting *AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE* 962 (1981)).

204. *Id.* (quoting *WEBSTER’S NEW COLLEGIATE DICTIONARY* 841 (1981)).

205. *Id.*

206. *Id.*

207. 671 N.E.2d 477 (Ind. Ct. App. 1997).

that a governmental entity is immune from liability for damages which result from the acts or omissions of anyone other than the governmental entity.²⁰⁸

In *City of Vincennes v. Reuhl*, Reuhl brought an action against the city of Vincennes, EMC (the independent contractor with whom the city had an agreement to operate and maintain its wastewater facility), and Rogers Construction (a paving contractor with whom the city contracted to resurface various streets within the city) for damages and injuries that she suffered when she stepped into a hole next to a sewer grate in Vincennes, Indiana. In her complaint, Reuhl claimed that the defendants negligently dug the hole, failed to repair the hole, and failed to warn her of the hole.²⁰⁹ EMC filed a cross claim against Vincennes, alleging that EMC was entitled to indemnity pursuant to their agreement with Vincennes for damages resulting from the city's negligence.²¹⁰ Thereafter, Vincennes filed a motion for summary judgment on Reuhl's complaint and EMC's cross claim. The trial court denied Vincennes' motion²¹¹ and the city petitioned the trial court to certify for interlocutory appeal of the denial of its motion.

The city argued that it was entitled to governmental immunity because the damage to Reuhl was caused by the acts or omissions of EMC and Rogers, relying upon section 34-4-16.5-3(9) of the Indiana Code. The Indiana Court of Appeals correctly followed its holding in *Shand Mining* and found that Vincennes was not immune from liability.²¹² The court applied the exception to the general rule that "a principal who delegates a duty to an independent contractor is not liable for the negligence of that independent contractor in performing the duty"²¹³ in deciding that Vincennes could not absolve itself from liability on the basis of its delegation. In applying the exception, the court held that where the principal is by law or contract charged with performing specific duties, those duties are considered non-delegable.²¹⁴ In Indiana, governmental entities are charged with specific obligations with respect to public travel.²¹⁵ Just as the county was charged by law to maintain public travel in *Shand Mining*, Vincennes was also charged by law to maintain public travel. The court held that although Vincennes properly exercised its discretion to delegate its duty to maintain the sewers and streets, it was not entitled to immunity.²¹⁶

Next, the court of appeals addressed EMC's cross claim for indemnity. Vincennes argued that pursuant to Indiana's Comparative Fault Act (CFA) it

208. IND. CODE § 34-4-16.5-3(9) (1993 & Supp. 1997).

209. *Id.* at 497.

210. *Id.*

211. *Id.*

212. *Id.* at 498.

213. *Shand Mining*, 671 N.E.2d at 481.

214. *Id.*

215. *Reuhl*, 672 N.E.2d at 497 (citing *City of Indianapolis v. Cauley*, 73 N.E. 691, 693-94 (1905)).

216. *Id.* at 497-98.

would not owe indemnification to EMC.²¹⁷ Under the CFA, a jury is charged with allocating 100% of the fault among all culpable parties and non-parties.²¹⁸ Tort claims against governmental entities do not fall within the purview of the CFA; however, a jury is still permitted to consider governmental entities' negligence in its allocation of fault. Thus, under the CFA, EMC's potential liability is limited to its own portion of fault as it cannot be held liable for Vincennes' negligence.²¹⁹ Therefore, the court held that the hold harmless agreement between Vincennes and EMC was unnecessary and the trial court erred in denying Vincennes' motion for summary judgment on EMC's cross claim for indemnity.²²⁰

D. Indiana's "Planning-Operational Test"

During the survey period, the Indiana Court of Appeals once again relied on Indiana's "planning-operational test" that the supreme court adopted in *Peavler v. Board of Commissioners*²²¹ in holding that a city was immune from liability.

In *Lee v. State*,²²² Elizabeth Lee, mother of Michaelynn Lee, an automobile passenger who died in an accident after the driver of the vehicle failed to successfully negotiate a series of curves on State Road 7 in Wirt, Indiana, brought a wrongful death action against the Indiana and the Indiana Department of Transportation (INDOT). Lee averred in her complaint that INDOT was negligent for improperly designing and constructing State Road 7, failing to properly warn motorists of the unreasonably dangerous nature of State Road 7, failing to maintain State Road 7 so as to prevent injury to motorists, and failing to eliminate the known dangerous condition of State Road 7. The State and INDOT moved for summary judgment, arguing that it was immune from liability pursuant to the doctrine of discretionary function immunity. The trial court granted summary judgment for the State and INDOT and the plaintiff appealed.²²³ The court of appeals affirmed the trial court's holding that INDOT's improvement of curves was in the planning phase at the time of the accident such that the State and INDOT were entitled to governmental immunity under the Tort Claims Act for a discretionary decision to correct curves in conjunction with the replacement of the bridge.²²⁴

The evidence presented at the trial court revealed that the incident occurred in the early morning hours of July 2, 1992 in Wirt, Indiana on northbound State Road 7 near the intersection of County Road 480 North. The driver of the

217. *Id.*

218. *Id.* (citing IND. CODE § 34-4-33-5 (1993 & Supp. 1997)).

219. The court stated that if Vincennes had been determined to be immune from liability, summary judgment on EMC's cross claim for indemnity would not have been appropriate. *Id.*

220. *Id.*

221. 528 N.E.2d 40 (Ind. 1988).

222. 682 N.E.2d 576 (Ind. Ct. App. 1997).

223. *Id.* at 577.

224. *Id.*

vehicle failed to successfully negotiate a series of curves located at the Wirt bridge and the vehicle left the roadway, struck a bridge railing, went over an embankment and struck a utility pole.

In reaching its decision, the court of appeals relied on the Indiana Tort Claims Act which provides as follows: "(a) Governmental entity or an employee acting within the scope of the employee's employment is not liable if a loss results from: . . . (6) the performance of a discretionary function . . ." ²²⁵ This section was first construed by the Indiana Supreme Court in *Peavler*.²²⁶ *Peavler* adopted the "planning operational test" and held that a governmental entity will not be held liable for negligence arising from decisions which are made at a planning level as opposed to an operational level.²²⁷

The court of appeals characterized *Lee* as a case of omission and stated that "[w]hen considering cases of omission 'a conscious balancing may be demonstrated by evidence showing that a governmental entity considered improvements of the general type alleged in the plaintiff's complaint.'" ²²⁸ According to INDOT's records, the area of the Wirt curves was inspected as early as 1983 when initial data was gathered for the preparation of environmental reports and a determination of project scope concerning the replacement of the bridge located approximately .04 of a mile from the curves. Also, 1984 records reveal that INDOT investigated the Wirt curves for possible replacement. In early 1985, INDOT decided that the bridge and the Wirt Curve Project should be incorporated into one large project, and in May of 1985 the Wirt Curve Project was approved. After several years of revised engineering reports, surveys, and public hearings, the Federal Highway Administration approved the project on August 8, 1992. The contract for the project was awarded in October of 1992 and completed in February of 1994. The decedent's accident occurred on July 2, 1992.²²⁹

Despite the plaintiff's argument that at the time of the accident the project had moved beyond the planning phase, the court held that the operational phase did not begin until after the contract was set for bidding on October 16, 1992.²³⁰ In reaching its decision, the court of appeals relied on the policy underlying government immunity.²³¹ The court held that the Wirt Curve Project, in conjunction with the replacement of the bridge, represented the type of discretionary function that the legislature intended to protect and thus the Indiana Department of Transportation should be shielded from liability.²³²

225. *Id.* at 578 (quoting IND. CODE § 34-4-16.5-3(6) (Supp. 1997)).

226. 528 N.E.2d at 40.

227. *Id.* at 48.

228. *Lee*, 682 N.E.2d at 578 (quoting *Voit v. Allen County*, 634 N.E.2d 767, 770 (Ind. Ct. App. 1994)).

229. *Id.* at 579.

230. *Id.*

231. *Id.*

232. The policy underlying governmental immunity is based on the concept of separation of powers between the coordinate branches of government and the notion that we should prevent tort

VIII. COMPARATIVE FAULT

A. *Strict Liability in Wild Animal Cases*

In a case of first impression, the Indiana Court of Appeals in *Irvine v. Rare Feline Breeding Center, Inc.*²³³ addressed the issue of whether strict liability is the law to be applied in wild animal cases. Generally, the possessor of a wild animal is subject to strict liability for harm done by that animal, but incurred risk and other exceptions or defenses may apply.²³⁴

In *Irvine*, the plaintiff filed a complaint against Schaffer, owner of Rare Feline Breeding Center, Inc., for injuries that he sustained when a male tiger kept on defendant's property attacked him. The plaintiff's complaint contained four counts: negligence, strict liability, nuisance, and punitives. The plaintiff filed a motion for partial summary judgment on the basis that incurred risk and assumption of risk are not valid defenses to a strict liability wild animal claim, that assumption of risk is not available in a non-contract case, and that the defense of open and obvious is not available in an animal liability case.²³⁵ The trial court denied the plaintiff's motion for summary judgment on the strict liability count and issue of assumption of risk and granted summary judgment on the issue of open and obvious.²³⁶ The plaintiff's petition to certify three issues for interlocutory appeal were granted by the trial court.²³⁷

The court first addressed whether strict liability is the common law rule for wild animal cases in Indiana. The court held that although the basic rule has been frequently stated in various cases, there are no Indiana cases where the rule has been specifically applied to true wild animal case.²³⁸ Even in the absence of cases that have applied strict liability to wild animal cases, the court held that "we have little difficulty concluding that Indiana's common law recognized the strict liability rule for wild animal cases. . . ." ²³⁹

Next, the court of appeals concluded that Indiana's Comparative Fault Act

actions from becoming a vehicle for judicial review of government policy based decisions. *Id.* (citing *Peavler*, 528 N.E.2d at 44).

233. 685 N.E.2d 120 (Ind. Ct. App. 1997).

234. *Id.* at 121.

235. *Id.* at 122.

236. *Id.* at 123.

237. The trial court granted the plaintiff's petition to certify the following issues: (1) whether incurred risk or other defenses are available in a strict liability case; (2) whether *Irvine* was an invitee as a matter of law; and (3) whether the defense of assumption of risk is available in a non-contractual case. *Id.*

238. *Id.* The court cited *Holt v. Myers*, 93 N.E. 31 (1910) (mentioning wild animal strict liability rule in case which dealt with vicious dog); *Gordan v. Kaufman*, 89 N.E. 898 (1909); and *Bostock-Ferari Amusement Co. v. Brocksmith*, 73 N.E. 281 (1904) (setting out wild animal rule and its rationale, but not applying it because bear's inherent dangerousness was not cause of harm).

239. *Irvine*, 685 N.E.2d at 123.

does not change the common law rule of strict liability in wild animal cases.²⁴⁰ The court noted that the legislature did not intend, by the enactment of a statute, to make changes in the common law beyond what it declares, either in express terms or by unmistakable implication.²⁴¹

Strict liability is not included in the definition of fault as defined in the current form of the Act. Thus, the court held that construing the Act narrowly, it does not explicitly apply to strict liability.²⁴²

The plaintiff argued that no exceptions to strict liability in wild animal cases have ever been applied in Indiana. The court agreed with the plaintiff's contention and stated that in the absence of cases, it must examine the reason behind the strict liability wild animal rule and consult other sources.²⁴³ First, the court recognized that it had previously set out the rationale for imposing strict liability against owners for injuries caused by a naturally ferocious or dangerous animal.²⁴⁴ Strict liability is appropriately placed:

Upon those who, even with proper care, expose the community to the risk of a very dangerous thing . . . the kind of 'dangerous animal' that will subject the keeper to strict liability The possessor of a wild animal is strictly liable for physical harm done to the person of another . . . if that harm results from a dangerous propensity that is characteristic of wild animals of that class. Thus, strict liability has been imposed on keepers of lions and tigers, bears, elephants, wolves, monkeys, and other similar animals.²⁴⁵

The court noted Judge Posner's rationale for the wild animal strict liability rule as set out in *G. J. Leasing Co. v. Union Electric Co.*²⁴⁶ in the following hypothetical:

Keeping a tiger in one's backyard would be an example of an abnormally hazardous activity. The hazard is such, relative to the value of the activity, that we desire not just that the owner take all due care that the tiger not escape, but that he consider seriously the possibility of getting rid of the tiger altogether, and we give him an incentive to consider this course of action by declining to make the exercise of due care a defense to a suit based on an injury caused by the tiger—in order words, by

240. *Id.* at 124.

241. *Id.* at 123 (citing *Rocca v. Southern Hills Counseling Ctr., Inc.*, 671 N.E.2d 913, 920 (Ind. Ct. App. 1996)).

242. *Id.* (citing BLACK'S LAW DICTIONARY 991 (6th ed. 1990)).

243. *Id.*

244. *Id.* (citing *Hardin v. Christy*, 462 N.E.2d 256, 259, 262 (Ind. Ct. App. 1984) (citing W. PROSSER, LAW OF TORTS (4th ed. 1971)).

245. *Id.* (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 76, at 541-42 (5th ed. 1984)).

246. 54 F.3d 379 (7th Cir. 1995).

making him strictly liable for any such injury.²⁴⁷

The court analyzed the rationale for applying the rule and next looked at whether any exceptions or defenses to the rule were appropriate. In doing so, the court turned to section 507 of the *Restatement (Second) of Torts*.²⁴⁸ Section 510(a) provides: "The possessor of a wild animal . . . is subject to strict liability for the resulting harm, although it would not have occurred but for the unexpected . . . innocent, negligent or reckless conduct of a third person."²⁴⁹ Section 513 provides: "The possessor of a wild animal . . . who keeps in upon land in his possession, is subject to strict liability to persons coming upon the land in the exercise of a privilege whether derived from his consent to their entry or otherwise." Yet, if the invitee or licensee "knows that the dangerous animal is permitted to run at large or has escaped from control they may be barred from recovery if they choose to act upon the possessor's consent or to exercise any other privilege and thus expose themselves to the risk of being harmed by the animal."²⁵⁰

Section 515(2) provides: "The plaintiff's contributory negligence in knowingly and unreasonably subjecting himself to the risk that a wild animal . . . will do harm to his person . . . is a defense to the strict liability."²⁵¹ Comment d to section 515(2) states: "This kind of contributory negligence, which consists of voluntarily and unreasonably encountering a known danger, is frequently called either contributory negligence or assumption of risk, or both."²⁵²

The court concluded that the *Restatement* clearly recognizes exceptions or defenses to wild animal strict liability and that it is "keeping with Indiana's recent policy regarding allocation of fault"²⁵³ and adopted the *Restatement's* approach in wild animal cases.²⁵⁴

247. *Irvine*, 685 N.E.2d at 124-25 (quoting *G.J. Leasing Co. v. Union Elec. Co.*, 54 F.3d at 386.

248. Section 507 provides:

(1) A possessor of a wild animal is subject to liability to another for harm done by the animal to the other, his person, land or chattels, although the possessor has exercised the utmost care to confine the animal, or otherwise prevent it from doing harm.

(2) This liability is limited to harm that results from a dangerous propensity that is characteristic of wild animals of the particular class, or of which the possessor knows or has reason to know.

RESTATEMENT (SECOND) OF TORTS § 507 (1977).

249. *Id.* § 510(a).

250. *Id.* § 513.

251. *Id.* § 515(2).

252. *Id.*

253. *Irvine*, 685 N.E.2d at 126.

254. *Id.*

B. Comparative Fault Jury Instruction

During this survey period, the court was called upon once again to address the issue of the comparative fault jury instruction. In *Lueder v. Northern Indiana Public Service Co.*,²⁵⁵ the court held that a jury instruction, stating that the worker's employer and/or co-workers had been negligent if they violated certain statutory provisions, was improper because it invited the jury to find negligence and allocate fault to the employer and co-workers as unnamed non-parties in violation of the Comparative Fault Act.²⁵⁶ Lueder was injured after the boom of his crane came in contact with an overhead electrical line at a construction site. Lueder sued NIPSCO, alleging that the electrical line was too low. A jury returned a verdict for NIPSCO, finding that NIPSCO's conduct was not a proximate cause of Lueder's injury and Lueder appealed.²⁵⁷

Lueder argued that the trial court erred in giving the jury an instruction and verdict form that improperly invited the jury to allocate fault to his employer and co-workers who were unnamed non-parties.²⁵⁸ Lueder cited *Kveton v. Siade*²⁵⁹ to support his argument. *Kveton* held that under the Comparative Fault Act (CFA), a defendant must affirmatively plead as a defense that the damages of the claimant were caused in full or in part by a non-party and if the evidence is sufficient to support this defense, the verdict form shall require a disclosure of the name of the non-party and the percentage of fault charged to the non-party.²⁶⁰ The court held that the trial court had erred in giving an instruction that invited the jury to determine the fault of an unnamed non-party because the CFA requires that fault and damages be allocated to only named non-parties.²⁶¹

In response, NIPSCO relied on the holding in *Evans v. Schenk Cattle Co.*²⁶² In *Evans*, the plaintiff was injured while operating a bulldozer for his employer on the farm of the defendant. The jury returned a verdict for the defendant and Evans appealed, challenging the refusal of an instruction that instructed the jury that they could not consider his employer to be at fault. The following instruction was in dispute: "I instruct you, members of the jury, that under the Indiana Comparative Fault law, *you may not consider Harold Wayne Evans' employer, Barney Robinson, to be at fault in this case and, therefore, you may not allow any deduction from plaintiff's recovery for any conduct of Barney Robinson.*"²⁶³ The trial court modified Evans' tendered instruction to delete the italicized text.²⁶⁴

255. 683 N.E.2d 1340 (Ind. Ct. App. 1997).

256. *Id.* at 1346.

257. *Id.* at 1342.

258. *Id.* at 1342-43.

259. 562 N.E.2d 461 (Ind. Ct. App. 1990).

260. *Id.* at 463.

261. *Lueder*, 683 N.E.2d at 1346.

262. 558 N.E.2d 892 (Ind. Ct. App. 1990).

263. *Id.* at 894 (emphasis in original).

264. *Id.*

Evans held that a defendant is permitted to present evidence of the conduct of those who are not non-parties under the statute, and the jury may consider this evidence and draw its own conclusions.²⁶⁵ Thus, it would be incorrect to instruct the jury that it could not consider the employer at fault. The court held that the trial court did not err in refusing the tendered instruction.²⁶⁶

It should be noted that the court of appeals disagreed with the *Evans* holding "insofar as it suggests that the jury can be instructed in a manner that invites them to allocate fault to an unnamed non-party."²⁶⁷ Instead, this court correctly sided with the holding in *Kveton* that the CFA prohibits instructions that invite the jury to allocate fault to unnamed non-parties.

Thus, it is improper to instruct the jury that specified conduct on the part of the employer or co-workers was negligent. . . . The conduct of the employer and co-workers is relevant only insofar as it negates elements of the plaintiff's claim; the jury should not be invited to make an affirmative finding of negligence against the employer and co-workers.²⁶⁸

The court held that the trial court erred in giving NIPSCO's tendered instruction because it "invited the jury to find negligence and thus allocate fault to Lueder's employer and co-worker in violation of the Comparative Fault Act. . . ."²⁶⁹

IX. LIABILITY OF PUBLIC UTILITIES

A. *Indiana Recreational Use Statute (IRUS)*

The Indiana Court of Appeals addressed the issue of whether Indiana's recreational use statute (IRUS)²⁷⁰ provides immunity from tort liability to a public utility in *McCormick v. State of Indiana*.²⁷¹ IRUS protects landowners in lawful possession and control of land from liability if they open their property to the public for recreational use without charging a fee. The purpose for enacting IRUS was to encourage landowners to open their property to the public for recreational purposes free of charge.²⁷² In *McCormick*, Nora McCormick, the wife of the decedent, Paul McCormick, brought a wrongful death action against defendants after her husband was killed when his boat went over the spillway of Morse Reservoir. On June 9, 1990, the decedent took a motorboat out on the reservoir when it was at flood stage. The decedent ended up near the spillway

265. *Id.*

266. *Id.*

267. *Lueder*, 683 N.E.2d at 1346.

268. *Id.*

269. *Id.*

270. IND. CODE § 14-22-10-2 (Supp. 1997).

271. 673 N.E.2d 829 (Ind. Ct. App. 1996).

272. *Id.* at 833 (citing *Kelly v. Ladywood Apartments*, 622 N.E.2d 1044, 1047 (Ind. Ct. App. 1993)).

of the reservoir dam and was unable to start the motor of the boat. He subsequently jumped from the boat just as it was going over the spillway. Despite recovery attempts on June 9 and 10, the decedent's body was not recovered until June 11, 1990.

The court of appeals held that IRUS applied despite McCormick's argument to the contrary, and further concluded that it shielded IWC from liability.²⁷³ McCormick argued that IRUS did not apply because the reservoir is a "public water"²⁷⁴ and must be held open to the public because of its designation.²⁷⁵ Thus, the purpose of IRUS is not served by applying it to the reservoir. The court of appeals disagreed and held that although the reservoir is a "public water" of the State of Indiana, it is owned by IWC and is private property.²⁷⁶ Absent a law that requires IWC to hold the reservoir open to the public, the State can not compel it to do so as such an order would amount to a confiscation or taking of property.²⁷⁷ Thus, IWC is afforded the same protection as other landowners who open their property to the public for recreational use.²⁷⁸

Next, McCormick argued that IRUS should not apply in this case because the spillway was a restricted area and the purposes of IRUS is to encourage landowners to open their property to the public for recreational use.²⁷⁹ McCormick cited *Pulis v. T.H. Kinsella, Inc.*²⁸⁰ as authority analogous to the present case. In *Pulis*, a driver of an all-terrain vehicle was injured when he ran into a cable that was stretched across an entrance to a gravel pit. The court in *Pulis* held that IRUS did not apply because it was intended to apply only to property that was suitable and appropriate for recreational purposes and the gravel pit was not suitable for such use.²⁸¹ However, the court of appeals disagreed with McCormick's use of *Pulis*.

The court of appeals distinguished the facts of *Pulis* from this case by saying that in *Pulis* there were two separate areas of land, both of which were readily distinguishable from each other and easily segregable.²⁸² Thus, it was logical to not apply the recreational use statute to the land which should not be held open to the public.²⁸³ The court of appeals stated, unlike the land in *Pulis*, the spillway could not be separated from the rest of the reservoir as the reservoir is one body

273. *Id.*

274. A "public water" is defined as "every lake, river, stream, canal, ditch and body of water that is subject to the jurisdiction of the State of Indiana, or owned or controlled by a public utility. *Id.* (citing IND. CODE § 14-1-1-1 (1993)).

275. *Id.* at 834.

276. *Id.*

277. *Id.*

278. The court of appeals held that the fact that IWC is also a public utility does not make the reservoir public property. *Id.*

279. *Id.*

280. 593 N.Y.S.2d 959 (N.Y. Sup. Ct. 1993), *aff'd*, 204 A.D.2d 976 (N.Y. App. Div. 1994).

281. *McCormick*, 673 N.E.2d at 835 (citing *Pulis*, 593 N.Y.S.2 at 961).

282. *Id.*

283. *Id.*

of water and the spillway essentially is a part of it. The court held that it could not apply IRUS to the spillway alone because the only feasible alternative would be to close the reservoir.²⁸⁴

The court of appeals went on to conclude that McCormick did not produce any evidence from which one could reasonably conclude that IWC "desired, induced, encouraged or expected the decedent to enter the reservoir."²⁸⁵ The court concluded that evidence established that IWC merely gave the decedent permission to enter the reservoir and not an invitation; mere permission of IWC made the decedent a licensee and not an invitee, public or otherwise, as McCormick alleged.²⁸⁶ Thus, the court of appeals did not accept McCormick's argument that IRUS did not apply because IWC breached its duty of reasonable care to the decedent.²⁸⁷

B. Duty Owed to Motorists

In *Goldsberry v. Grubbs*,²⁸⁸ the plaintiff, Cynthia Goldsberry, brought suit against several defendants, including General Telephone Company of Indiana, Inc. (GTE) for injuries sustained when her automobile, operated by Eddie Grubbs, left the traveled portion of State Road 119 in Elkhart County, traveled down an embankment, and collided with a telephone pole. The accident rendered Goldsberry a quadriplegic and she brought suit against GTE for negligent installation and placement of the telephone pole. GTE filed a motion for summary judgment on the ground that it owed no duty to Goldsberry upon which to base a negligence action.²⁸⁹ The trial court granted GTE's motion for summary judgment and Goldsberry appealed.²⁹⁰

In reversing the award of GTE's motion for summary judgment, the court of appeals noted the inconsistent application of the *Webb* formula that was adopted by the supreme court in *Webb v. Jarvis*²⁹¹ when deciding whether a utility company owed a duty to the motoring public in cases where a vehicle leaves a traveled portion of the roadway and strikes a pole owned by a utility company.²⁹² The court identified several cases in which this issue was addressed to illustrate how the court had rendered different opinions after applying the *Webb* formula.

In *Northern Indiana Public Service Co. v. Sell*,²⁹³ the court of appeals concluded that the utility company was entitled to summary judgment because the balancing factors regarding the imposition of a duty all weighed against

284. *Id.* at 837.

285. *Id.*

286. *Id.*

287. *Id.* at 838.

288. 672 N.E.2d 475 (Ind. Ct. App. 1996).

289. *Id.* at 477.

290. *Id.*

291. 575 N.E.2d 992 (Ind. 1991).

292. *Goldsberry*, 672 N.E.2d at 478.

293. 597 N.E.2d 329 (Ind. Ct. App. 1992).

imposing such a duty.²⁹⁴ In *Sell*, a passenger in a car struck a utility pole after the driver fell asleep at the wheel, crossed the center line, and went down an embankment.²⁹⁵ However, in *State v. Cornelius*²⁹⁶ the court found that summary judgment was inappropriate because the relationship and public policy components weighed in favor of imposing a duty and questions of fact existed as to the foreseeability factor.²⁹⁷ In *Cornelius*, the plaintiff, a motorcyclist, was injured when his motorcycle was struck by a motorist which caused it to slide across the roadway and collide with a utility pole.

In *Goldsberry*, the court of appeals held that GTE had a duty to the motoring public to exercise reasonable care when placing telephone poles along highways.²⁹⁸ In reaching its decision, the court noted that *Sell* failed to distinguish between the foreseeability component of the duty analysis and the foreseeability component of proximate cause.²⁹⁹ The court reasoned that foreseeability in the context of proximate cause is based on hindsight evaluating the facts of the actual occurrence.³⁰⁰ On the other hand, the foreseeability component of duty requires a more central analysis of the broad type of plaintiff and harm involved without regard to the facts of the actual occurrence.³⁰¹ The court of appeals specifically disagreed with the analysis in *Sell* (which examined the facts of that case in detail and concluded that the foreseeability component of duty was not met) and concluded that under a general analysis appropriate to determine duty, it is foreseeable that a motorist will leave the roadway and strike a utility pole.³⁰² Thus, the foreseeability factor weighs in favor of imposing a duty.³⁰³

The court next addressed the "relationship" factor in imposing a common law duty. Once again, the court disagreed with the decision in *Sell* in its position that a relationship was "limited" to legitimate users of the highway, which did not include users riding in a car that had crossed the center line and opposing lane of traffic.³⁰⁴ In contrast, the court held that there was a relationship between *Goldsberry* and GTE sufficient to impose a duty and that the issue of whether or not the highway was being used as it was intended to be used is a more appropriate consideration under the foreseeability factor of the duty analysis.³⁰⁵

294. *Id.* at 334.

295. *Goldsberry*, 672 N.E.2d at 478 (citing *Sell*, 597 N.E.2d at 329).

296. 637 N.E.2d 195 (Ind. Ct. App. 1994).

297. *Goldsberry*, 672 N.E.2d at 478 (citing *Cornelius*, 637 N.E.2d at 201).

298. *Id.* at 481.

299. *Id.* at 479. This author agrees with Judge Friedlander's dissent which implies that the majority's analysis in applying two different standards when analyzing the foreseeability components of duty and proximate cause is misplaced. *Id.* at 481-82.

300. *Id.*

301. *Id.*

302. *Id.* at 480.

303. *Id.*

304. *Id.* (citing *Sell*, 597 N.E.2d at 332).

305. *Id.*

Finally, the court held that public policy would not be offended by requiring a telephone company to act reasonably and prudently when placing their poles.³⁰⁶ The court once again disagreed with *Sell* and reasoned that imposing a duty upon the utility company, under these circumstances, would not be tantamount to imposing absolute liability in all utilities and car/utility pole accidents in that the duty question was one of but three elements that needed to be proved before liability would be imposed under a negligence claim.³⁰⁷

Almost one year later, the court of appeals revisited this issue in *Bush v. Northern Indiana Public Serv. Co.* (NIPSCO).³⁰⁸ In *Bush*, the plaintiff, Kelley Bush was injured when a car driven by Nathan Henderson left the road and hit a utility pole located in a grassy area approximately four and one half feet from the road. At the time of the accident, Henderson was driving recklessly, approximately forty-five (45) miles an hour and had just traveled through an S-curve. Bush filed a complaint against NIPSCO, the city of Valparaiso, and Porter County. The defendants filed a motion for summary judgment and the trial court granted summary judgment in favor of the defendants. Bush appealed.

The court of appeals first addressed Bush's argument that summary judgment was inappropriate because NIPSCO owed her a duty. In line with this line of cases, the court applied the three part *Webb* formula in determining whether NIPSCO owed Bush a duty³⁰⁹ and concluded that "no relationship which would give rise to a duty exists."³¹⁰ In reaching this conclusion, the court stated that "a utility company has a relationship only with those persons using the road as it was intended to be used"³¹¹ and Henderson's speeding and driving recklessly was not normal use of the road.³¹²

The court further concluded that no duty existed because the harm suffered by Bush was not foreseeable.³¹³ The court noted that there are some circumstances when it might be reasonably foreseeable that a motorist could leave the road and collide with a utility pole, such as when a utility pole is located on a sharp curve, when several prior accidents involving the same pole have occurred, or when the pole is located on an island in the middle of a dangerous intersection.³¹⁴ The court stated that Bush presented no evidence to

306. *Id.* at 480-81.

307. *Id.* The majority opinion in this case operates so that utility companies will never be able to obtain summary judgment because the court will always impose a duty. Thus, utility companies will be forced to proceed to trial in order to prove their cases. Such a scheme flies in the face of judicial economy.

308. 685 N.E.2d 174 (Ind. Ct. App. 1997).

309. *Id.* at 177. In determining whether a common law duty exists, the court must consider three factors: (1) the relationship between the parties; (2) the reasonable foreseeability of harm to the person injured; (3) public policy concerns. *Webb*, 575 N.E.2d at 995.

310. *Bush*, 685 N.E.2d at 177.

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.* at 177-78 (citing *Cornelius*, 637 N.E.2d at 199).

show that it is foreseeable that a motorist would leave the road and strike a pole. The court took note of the exact location of the pole in reference to the street and considered several other factors before it concluded that there were no facts to indicate that the pole was placed in a dangerous location.³¹⁵

Next, the court addressed Bush's argument that the trial court erred in determining that any negligence committed by Valparaiso or Porter County was not the cause of her injuries. The court concluded that Henderson's intentional act of driving at an excessive speed and reckless was the cause of the accident, thereby superseding any liability of Valparaiso and Porter County. Thus, the trial court was justified in reaching its decision.³¹⁶

315. *Id.* at 178.

316. *Id.*