

# RECENT DEVELOPMENTS IN INDIANA TORT LAW

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## TABLE OF CONTENTS

Introduction .....	1546
I. Negligence .....	1546
A. <i>Landowners' Potential Responsibility for Third-Party         Criminal Attacks</i> .....	1546
B. <i>Premises Liability and the Issue of Duty</i> .....	1552
1. Duty to Trespassers—Willful and Wanton Standard .....	1552
2. Independent Contractors .....	1554
3. Golf Course Liability .....	1560
4. <i>Control of Premises</i> .....	1561
C. <i>Recreational Use Statute</i> .....	1563
D. <i>Comparative Fault Act</i> .....	1566
E. <i>Tortious Conduct of Unincorporated Associations</i> .....	1569
II. Negligent Infliction of Emotional Distress .....	1571
III. Indiana's Shoplifting Detention Statute .....	1575
IV. Wrongful Death and Survival Actions .....	1575
A. <i>Child Wrongful Death Statute</i> .....	1576
1. Measuring Period for Calculating Loss of Child's Love and Companionship .....	1576
2. Common Law Claims for Loss of Services and Punitive Damages .....	1577
B. <i>Adult Wrongful Death Statute</i> .....	1579
1. Determination of Beneficiary Status .....	1579
2. Intervening Cause of Death .....	1580
3. Waiver of Rights to Recovery .....	1581
4. Evidence of Personal Maintenance Expenses .....	1582
C. <i>Survival Statute and Punitive Damages</i> .....	1584
V. Medical Malpractice .....	1586
A. <i>Scope of the Medical Malpractice Act</i> .....	1586
B. <i>Statute of Limitations</i> .....	1592
VI. Defamation .....	1595
VII. Governmental Immunity and Tort Claims Act .....	1601
VIII. Fraud .....	1606

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## INTRODUCTION

From October 1998 to October 1999, Indiana state and federal courts rendered a number of significant decisions in the dynamic realm of tort law. Significant consideration was given to areas of premises liability, medical malpractice, and wrongful death. These decisions have clarified existing rules of law, recognized new theories, and expanded the scope of existing tort law in Indiana.

## I. NEGLIGENCE

*A. Landowners' Potential Responsibility for Third-Party Criminal Attacks*

During the course of this survey period, Indiana courts rendered numerous decisions interpreting a landowner's potential responsibility for third-party criminal attacks upon invitees. In three early decisions, the Indiana Court of Appeals was faced with the issue of whether a landowner could be held responsible for an invitee's injuries that resulted from a criminal act of a third-party on its premises.<sup>1</sup> The court consistently found that there is generally no duty on the part of a business owner to protect its patrons against the criminal acts of third persons unless the particular facts make it reasonably foreseeable that the criminal act will occur.<sup>2</sup> Thus, a duty to anticipate and take steps to protect against criminal acts of a third-party arises only when the particular circumstances render it reasonably foreseeable that a criminal act is likely to occur. The Indiana Court of Appeals also addressed the issue of the gratuitous assumption of a duty to protect invitees from criminal acts of third parties. Specifically, the court noted that liability may be imposed upon a landlord who voluntarily undertakes or assumes a duty to protect an invitee from the criminal acts of a third-party.<sup>3</sup>

The Indiana Supreme Court recognized that it had not recently addressed the issue of whether, and to what extent, landowners owe any duty to protect their invitees from the criminal acts of third-parties and expressed concern for disagreements in the court of appeals regarding this area of tort law.<sup>4</sup> The supreme court stated that issues concerning a landowner's potential responsibility for third-party criminal attacks upon invitees have been the subject of substantial

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1. See *American Legion Pioneer Post No. 340 v. Christon*, 712 N.E.2d 532 (Ind. Ct. App. 1999); *Basicker v. Denny's, Inc.*, 704 N.E.2d 1077 (Ind. Ct. App. 1999); *Vertucci v. NHP Management Co.*, 701 N.E.2d 604 (Ind. Ct. App. 1998).

2. See *American Legion*, 712 N.E.2d at 534 (citing *Welch v. Railroad Crossing, Inc.*, 488 N.E.2d 383, 388 (Ind. Ct. App. 1986)); *Basicker*, 704 N.E.2d at 1080 (citing *Fast Eddie's v. Hall*, 688 N.E.2d 1270, 1272-73 (Ind. Ct. App. 1997)); *Vertucci*, 701 N.E.2d at 607 (citing *Center Management Corp. v. Bowman*, 526 N.E.2d 228, 230 (Ind. Ct. App. 1998)).

3. See *American Legion*, 712 N.E.2d at 535; *Vertucci*, 701 N.E.2d at 607.

4. See *Delta Tau Delta v. Johnson*, 712 N.E.2d 968, 971 (Ind. 1999).

debate among the courts and legal scholars in the past decade.<sup>5</sup> The court recognized that the majority of courts that have addressed this issue agree that while landowners are not to be made the insurers of their invitees' safety, they do have a duty to take reasonable precautions to protect their invitees from foreseeable criminal attacks.<sup>6</sup> The court also noted that Indiana courts have not held otherwise.<sup>7</sup> However, it recognized that courts employ different approaches to determine whether a criminal act was foreseeable such that a landowner owed a duty to take reasonable care to protect an invitee from the criminal act.<sup>8</sup>

On July 12, 1999, the Indiana Supreme Court issued three opinions concerning a landowner's duty to protect invitees against criminal attacks by third parties. The cases of *Delta Tau Delta v. Johnson*,<sup>9</sup> *Vernon v. Kroger*,<sup>10</sup> and *L.W. v. Western Golf Assoc.*,<sup>11</sup> discussed more fully below, adopt and apply the "totality of the circumstances" test to determine whether a duty exists in any given case.

In the lead case of *Delta Tau Delta*, the plaintiff, an undergraduate student at Indiana University, was sexually assaulted in the Delta Tau Delta fraternity house where she had attended a party. She initiated a civil action against the perpetrator and the fraternity organization, claiming that the fraternity breached its duty of care to provide reasonable protection, security and supervision at the party.<sup>12</sup> The fraternity moved for summary judgment on the issue of duty, arguing that it owed no duty to protect the plaintiff from the foreseeable acts of a third party. The trial court denied the fraternity's motion. On appeal, the Indiana Court of Appeals reversed, holding that the fraternity owed no duty to the plaintiff as a matter of law.<sup>13</sup> The Indiana Supreme Court granted transfer to address the question of whether, and to what extent, landowners owe a duty to protect their invitees from the criminal acts of third parties.<sup>14</sup>

The supreme court analyzed four basic tests employed by various courts to determine foreseeability in this context: (1) the specific harm test; (2) the prior similar incidents test; (3) the totality of the circumstances test; and (4) the balancing test. After considering all four tests, the court adopted the totality of the circumstances test.<sup>15</sup> The court noted that "[a] substantial factor in the

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5. See *id.* (citing *McClung v. Delta Square Ltd. Partnership*, 937 S.W.2d 891, 897 (Tenn. 1996) (noting that the debate caused the court to reconsider its law in this area)).

6. See *id.*

7. See *id.* (citing *McClung*, 937 S.W.2d at 898-99); *Kinsey v. Bray*, 596 N.E.2d 938 (Ind. Ct. App. 1992).

8. See *Delta Tau Delta*, 712 N.E.2d at 971.

9. 712 N.E.2d 968 (Ind. 1999).

10. 712 N.E.2d 976 (Ind. 1999).

11. 712 N.E.2d 983 (Ind. 1999).

12. See *Delta Tau Delta*, 712 N.E.2d at 971.

13. See *Motz v. Johnson*, 651 N.E.2d 1164 (Ind. Ct. App. 1995), *rev'd*, *Delta Tau Delta*, 712 N.E.2d at 968.

14. See *Delta Tau Delta*, 712 N.E.2d at 970.

15. See *id.* at 971-73.

determination of duty is the number, nature and location of prior similar incidents, but the lack of prior similar incidents will not preclude a claim where the landowner knew or should have known that the criminal act was foreseeable."<sup>16</sup> The court concluded by explicitly stating that Indiana courts confronted with the issue of whether a landowner has a duty to take reasonable care to protect an invitee from the criminal acts of a third party should apply the totality of the circumstances test to determine whether the crime was foreseeable.<sup>17</sup>

Applying this newly announced test to the facts, the court concluded that the fraternity owed the plaintiff a duty of care.<sup>18</sup> Within two years of the incident, two similar prior incidents took place. In addition, in the month prior to the sexual assault at issue, the fraternity had been provided with information concerning rape and sexual assault on college campuses, including statistics as to the number of college women raped, the association of drug and alcohol with rape, the incidence of gang rape involving fraternities, and recent legal action taken against fraternities at seven universities.<sup>19</sup> The court held that "to hold that a sexual assault in this situation was not foreseeable, as a matter of law, would ignore the facts and allow [the fraternity] to flaunt the warning signs at the risk of all its guests."<sup>20</sup> Consequently, the fraternity was held to owe a duty to take reasonable care to protect the plaintiff from a foreseeable sexual assault. The court suggested that only "exceptional" cases will warrant imposing this duty upon a landowner in a social host situation to take reasonable care to protect an invitee from the criminal acts of another.<sup>21</sup>

In *Vernon v. Kroger*,<sup>22</sup> the Indiana Supreme Court again answered the question of whether a landowner owes an invitee a duty to take reasonable care to protect against a third party criminal attack by asking whether the totality of the circumstances demonstrates that the criminal act was reasonably foreseeable.<sup>23</sup> In *Vernon*, the plaintiff, a customer of Kroger, was assaulted and beaten in the parking lot by two men who had shoplifted in the store. The trial court granted summary judgment for Kroger, finding that it owed no duty to the plaintiff to protect against third-party criminal attacks. The court of appeals affirmed the ruling, and the supreme court granted transfer.<sup>24</sup>

The supreme court reversed the lower courts' rulings, holding that it was reasonably foreseeable to Kroger that a customer who got in the way of a fleeing

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16. *Id.* at 973.

17. *See id.* The supreme court noted in passing that this is not the sole means by which a plaintiff may establish that a landowner owed the plaintiff a duty; a landowner may also voluntarily or contractually assume a duty to protect a plaintiff from criminal acts. *See id.*

18. *See id.*

19. *See id.* at 973-74.

20. *Id.* at 974.

21. *Id.*

22. 712 N.E.2d 976 (Ind. 1999).

23. *See id.* at 979 (citing *Delta Tau Delta*, 712 N.E.2d at 973).

24. *See id.* at 978-79.

shoplifter might be harmed.<sup>25</sup> The court noted that shoplifting was not an unusual occurrence at the Kroger store and that it was enough of a problem that Kroger employed off-duty police officers to patrol the store and deter shoplifters.<sup>26</sup> Criminal activity often occurred in the parking lot, calls to the police for what the court considered "crimes of violence" occurred approximately once every other month, and calls to the police for battery and shoplifting occurred almost once a week.<sup>27</sup> Under these facts, the court held that it was error to find Kroger owed no duty to the plaintiff and reversed the grant of summary judgment in favor of the defendant.<sup>28</sup>

In *L.W. v. Western Golf Assoc.*,<sup>29</sup> the Indiana Supreme Court, applying the totality of the circumstances test, held that the defendant did not owe a duty to the plaintiff to protect her against a sexual assault. Plaintiff was a sophomore and Evans Scholar at Purdue University. While visiting a bar with some friends one evening, she became intoxicated. A fellow freshman Evans Scholar student and Evans Scholar house resident helped the plaintiff to her room.<sup>30</sup> He later returned to the plaintiff's room after she had passed out and raped her while she lay unconscious. Plaintiff brought a negligence action against the scholarship foundation and the housing sponsor, alleging that they had a duty to provide for a safe living environment. Defendants filed a Motion for Summary Judgment on the issue of duty and the trial court granted the motion.<sup>31</sup>

On transfer, the Indiana Supreme Court held that the record provided sufficient evidence to find that defendants did not owe the plaintiff a duty to protect her from the criminal attack.<sup>32</sup> The court reasoned that while co-ed living at the Evans Scholar house was not always pleasant for women, there was no evidence of any prior violent acts or sexual assaults at the house.<sup>33</sup> Although there was evidence of deplorable childish pranks and sexually-charged comments, the court found the evidence insufficient to find that the rape in question was reasonably foreseeable.<sup>34</sup>

Several months after this trio of cases, the supreme court once again visited the issue of a landowner's duty to protect invitees against criminal attacks by third-parties. In *Ellis v. Luxbury Hotels, Inc.*,<sup>35</sup> the plaintiff brought a negligence action against a hotel seeking damages for personal injuries he sustained while he was visiting a guest at the hotel. The trial court granted the hotel's motion for

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25. *See id.* at 980.

26. *See id.*

27. *Id.*

28. *See id.*

29. 712 N.E.2d 983 (Ind. 1999).

30. *See id.* at 984.

31. *See id.*

32. *See id.* at 985.

33. *See id.*

34. *See id.*

35. 716 N.E.2d 359 (Ind. 1999).

summary judgment and the court of appeals affirmed.<sup>36</sup>

On transfer, the Indiana Supreme Court held that the hotel owed the plaintiff no duty to protect him from the unforeseeable criminal attack.<sup>37</sup> The court noted that although there was little dispute that a hotel guest is at least the equivalent of a business invitee and, as such, is entitled to a duty of reasonable care for the guest's safety, this case is unique in that it involved an injury to the guest of a guest.<sup>38</sup> Although the supreme court was unable to find Indiana cases concerning the duty owed by a hotel to the guest of a guest, it reasoned by analogy from cases finding that a landlord owes his tenant's social guests the same duty as the landlord owes his tenants.<sup>39</sup>

Accordingly, the court looked to the totality of the circumstances and found insufficient evidence to hold that the hotel owed the plaintiff a duty to protect him from this unforeseeable criminal attack.<sup>40</sup> Specifically, it found no evidence of any prior incidents or other circumstances that would have alerted the hotel to the resulting criminal act.<sup>41</sup> The court concluded that, to rule in the plaintiff's favor, it would have to hold that a landowner/invitor has an absolute duty to take reasonable care for the protection of its guests—in effect to be an insurer of the guests' safety.<sup>42</sup> This, the court was unwilling to do.

In dissent, Justice Boehm noted that he did not believe that summary judgment was appropriate on the basis that the hotel owed the plaintiff no duty. Rather, in Justice Boehm's view, every operator of a hotel has a duty to its guests (and its guests' guests) to take reasonable steps to preserve their safety against foreseeable harm.<sup>43</sup> Specifically, Justice Boehm found that hotel guests should be able to rely on their host taking reasonable precautions for their protection.<sup>44</sup> In a concurring opinion, Justice Dickson agreed with Justice Boehm that every hotel operator owes a duty to its guests (and its guests' guests) to take reasonable steps to preserve the safety against foreseeable harm.<sup>45</sup> He also agreed that the issue of whether it is unreasonable to give out a guest's room number is not subject to blanket resolution, but rather is an issue of fact for trial.<sup>46</sup> However, Justice Dickson noted these principles, in his view, were not contrary to the court's opinion.<sup>47</sup>

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36. See *Ellis v Luxbury Hotels, Inc.*, 666 N.E.2d 1262 (Ind. Ct. App. 1996), *aff'd*, 716 N.E.2d at 359.

37. See *Ellis*, 716 N.E.2d at 360.

38. See *id.* (citing *Rocoff v. Lancella*, 251 N.E.2d 582, 585 (Ind. App. 1969)).

39. See *id.* (citing *Dickison v. Hargitt*, 611 N.E.2d 691, 694 (Ind. Ct. App. 1993)).

40. See *id.* at 361.

41. See *id.*

42. See *id.*

43. See *id.* at 362 (Boehm, J., dissenting).

44. See *id.* (Boehm, J., dissenting).

45. See *id.* (Dickson, J., concurring).

46. See *id.*

47. See *id.*

In *Schrieber v. Walker*,<sup>48</sup> the United States District Court for the Northern District of Indiana, relying on the Indiana Supreme Court's decision in *Delta Tau Delta*, held that a hotel/condominium complex owed no duty to a guest to protect him from alleged criminal acts of another guest and that the hotel neither gratuitously nor voluntarily assumed a duty of care to protect its guests from criminal acts.<sup>49</sup>

In *Schrieber*, both the plaintiff and the perpetrator were graduates of Culver Military Academy and returned to their alma mater for graduation weekend. Both individuals stayed at the defendant's hotel/condominium complex that hired additional security for graduation weekends to protect its property and patrol the premises.<sup>50</sup> Following several drinks, the perpetrator punched the plaintiff and severely injured him. Plaintiff subsequently brought an action against the defendant hotel/condominium complex alleging negligence in failing to protect him from the perpetrator's alleged intentional criminal act.<sup>51</sup> The hotel moved for summary judgment on the basis that it owed no duty to protect the plaintiff from the alleged criminal act.<sup>52</sup>

The federal district court applied the "totality of the circumstances" test in determining whether the criminal act was reasonably foreseeable.<sup>53</sup> Although the court recognized that much drinking went on during graduation week, it found that the record contained no evidence of prior violent acts or crimes of violence during graduation week and that nothing in the record approached the indicia of foreseeability found in *Delta Tau Delta*.<sup>54</sup> Thus, it held that Indiana law created no duty on the hotel's part to take reasonable care to protect the plaintiff from the assailant's alleged criminal act.<sup>55</sup>

The plaintiff next contended that the hotel undertook actions that raised the inference that it assumed the duty to protect its guests against criminal acts of third parties.<sup>56</sup> The district court recognized that, under Indiana law, a party may gratuitously or voluntarily assume a duty of care.<sup>57</sup> However, it agreed with the Indiana Court of Appeals' decision in *American Legion Pioneer Post No. 340 v. Christon* that nothing in the record suggests that the hotel, through affirmative conduct or agreement, gratuitously undertook a duty to protect the plaintiff from the unforeseeable alleged criminal act of the assailant.<sup>58</sup>

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48. 79 F. Supp.2d 965 (N.D. Ind. 1999).

49. *See id.* at 968.

50. *See id.* at 966.

51. *See id.*

52. *See id.* at 965.

53. *Id.* at 966 (citing *Delta Tau Delta v. Johnson*, 712 N.E.2d 968, 973 (Ind. 1999)).

54. *See id.* at 967 (citing *Delta Tau Delta*, 712 N.E.2d at 973-74).

55. *See id.* at 968.

56. *See id.* at 968-69.

57. *See id.* at 969 (citing *Delta Tau Delta*, 712 N.E.2d at 975; (citing *Plan-Tec., Inc. v. Wiggins*, 443 N.E.2d 1212, 1219 (Ind. Ct. App. 1983))).

58. *See Schrieber*, 79 F. Supp.2d at 969-70 (citing *American Legion Pioneer Post No. 340 v. Christon*, 712 N.E.2d 532, 535 (Ind. Ct. App.), *trans. denied*, 726 N.E.2d 308 (Ind. 1999)).

The Indiana Court of Appeals later applied the totality of the circumstances test enunciated by the Indiana Supreme Court to a case where a spectator at a university football game was injured. In *Hayden v. University of Notre Dame*,<sup>59</sup> a spectator at a Notre Dame football game sued the university for negligence after she was injured by enthusiastic fellow spectators who lunged for a kicked football not caught by a goalpost net.<sup>60</sup> Notre Dame moved for summary judgment, arguing that it did not have a legal duty to protect the spectator from the intentional criminal acts of an unknown third person. The trial court granted Notre Dame's motion, and the plaintiff appealed.<sup>61</sup> For purposes of appeal, the court of appeals assumed that the unknown third party's actions in lunging for the football and knocking the plaintiff down constituted a criminal act; although, it did not explain the rationale for this conclusion.<sup>62</sup>

Relying on the recent Indiana Supreme Court precedent, the court of appeals found that the totality of the circumstances established that Notre Dame should have foreseen that injury would likely result from the actions of a third party in lunging for the football after it landed in the seating area. As a result, it concluded that Notre Dame owed the spectator a duty to protect her from such injury and reversed the trial court's ruling.<sup>63</sup> The court reasoned that there was evidence in the record that there were many prior incidents of people being jostled or injured by efforts of fans to retrieve a ball.<sup>64</sup>

The Indiana Supreme Court's adoption of the "totality of the circumstances" test clarified divergent Indiana law governing a landowner's duty to protect invitees against criminal attacks by third parties. Nonetheless, cases in this section of the tort law will continue to be hotly contested given the unique factual circumstances of each case.

### *B. Premises Liability and the Issue of Duty*

1. *Duty to Trespassers—Willful and Wanton Standard.*—In *Taylor v. Duke*,<sup>65</sup> the Indiana Court of Appeals interpreted the duty of care owed to a trespasser. The plaintiff, a homeless person, was walking behind a store on his way to a bridge under which he usually slept. When it began to rain, he sought shelter under a trailer parked against the backdoor of the store. He was aware that trailers are often attached to tractors and are frequently removed from loading dock areas.<sup>66</sup> Later that evening, an over-the-road truck driver arrived at the store and proceeded to attach her tractor to the empty trailer. Prior to hooking up the

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59. 716 N.E.2d 603 (Ind. Ct. App. 1999), *trans. denied*, No. 71A03-9812-CV-519, 2000 Ind. LEXIS 358 (Ind. Apr. 19, 2000).

60. *See id.* at 604.

61. *See id.*

62. *See id.* at 607 n.1.

63. *See id.* at 606.

64. *See id.*

65. 713 N.E.2d 877 (Ind. Ct. App. 1999).

66. *See id.* at 879.

empty trailer, the driver checked under it for bottles, blocks and other debris. Finding nothing, she backed her tractor up to the empty trailer, connected the two, and drove the unit away from the loading dock.<sup>67</sup> When the driver subsequently exited the tractor, she discovered that she had run over the sleeping plaintiff.<sup>68</sup>

Plaintiff filed a negligence action against the driver and the store, and the defendants moved for summary judgment. The trial court entered summary judgment in favor of the defendants, holding as a matter of law that the plaintiff was a trespasser on the premises where the incident occurred, that defendants owed the plaintiff only a duty to avoid willfully and wantonly injuring him, and that there was no evidence to support an inference that defendants willfully or wantonly injured the plaintiff.<sup>69</sup>

On appeal, the court noted that the status of a person entering the land of another determines the duty that the landowner or occupier owes to him, but that the driver was neither an owner nor occupier of the property.<sup>70</sup> However, the court found that “[o]ne who does an act or carries on an activity upon land on behalf of the possessor is subject to the same liability, and enjoys the same freedom from liability for physical harm caused thereby to others upon and outside the land as though he was the possessor of the land.”<sup>71</sup> Because it determined that the defendant driver had a written agreement for carrier services with the store, was clearly acting by the direction, consent and authority of the store, and was acting on behalf of the store, the court found that she was subject to the same liability, or freedom from liability, for physical harm caused to others upon the land as the store.<sup>72</sup>

Plaintiff argued that he was an invitee on the store’s premises and that defendants therefore owed him a duty of reasonable care for his protection. The appellate court disagreed, finding that the plaintiff entered the store’s premises for his own convenience, not for the purpose for which the premises are held open to the public.<sup>73</sup> Further, it found that he entered the premises without the store’s permission or sufferance.<sup>74</sup> Accordingly, the court determined that the plaintiff was a trespasser to whom defendants owed a duty only to refrain from willfully or wantonly injuring.<sup>75</sup>

The court of appeals acknowledged that wanton and willful conduct consists of either: (1) an intentional act done with reckless disregard of the natural and probable consequences of injury to a known person under the circumstances

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67. *See id.*

68. *See id.*

69. *See id.*

70. *See id.* at 880 (citing *Frye v. Trustees of the Rumbletown Free Methodist Church*, 657 N.E.2d 745 (Ind. Ct. App. 1995)).

71. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 383 (1965)).

72. *See id.* at 881.

73. *See id.*

74. *See id.*

75. *See id.*

known to the actor at the time; or (2) an omission or failure to act when the actor has actual knowledge of the natural and probable consequence of injury and has opportunity to avoid that risk.<sup>76</sup> This conduct is comprised of two elements: (1) the defendant's knowledge of an impending danger or consciousness of misconduct calculated to result in probable injury; and (2) the defendant's conduct must have exhibited an indifference to the consequences of the act.<sup>77</sup> The court further acknowledged that willful or wanton misconduct is "so grossly deviant from everyday standards that the licensee or trespasser cannot be expected to anticipate it."<sup>78</sup>

Applying this law to the facts, the court of appeals found that none of the designated evidence raised a genuine issue or inference that defendants acted willfully or wantonly.<sup>79</sup> Specifically, the plaintiff designated no evidence that defendants had knowledge of an impending danger or consciousness of misconduct calculated to result in probable injury, or that their conduct exhibited an indifference to the consequences of the act.<sup>80</sup> Further, the plaintiff designated no evidence that defendants' conduct was so grossly deviate from everyday standards that the plaintiff could not have been expected to anticipate it. Rather, the designated evidence revealed that the plaintiff was aware that trailers were often attached to tractors and removed from loading dock areas. Accordingly, the court of appeals affirmed the trial court's entry of summary judgment in favor of the defendants.<sup>81</sup>

2. *Independent Contractors*.—During the course of this survey period, the Indiana Court of Appeals handed down several decisions interpreting the liability of an independent contractor following the acceptance of its work by a contractor. In *Jacques v. Allied Building Services of Indiana, Inc.*,<sup>82</sup> Allied had contracted with a store owner to provide floor maintenance. Plaintiff slipped and fell in the interior lobby of the store after making several purchases. The store's co-manager inspected the area where the plaintiff fell and determined that it was clean and dry.<sup>83</sup> However, he detected a slick spot with his foot which he believed may have had "slick wax."<sup>84</sup> On these facts, the plaintiff brought suit against Allied claiming that it was liable for injuries sustained in her fall. Allied moved for summary judgment, claiming that it owed no duty to the plaintiff as a matter of law because the store had accepted its work. The trial court agreed and granted Allied's motion for summary judgment, and the plaintiff appealed

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76. See *id.* at 882 (citing *Witham v. Norfolk & Western Ry. Co.*, 561 N.E.2d 484, 486 (Ind. 1990); *Nesvig v. Town of Porter*, 668 N.E.2d 1276, 1283 (Ind. Ct. App. 1996)).

77. See *id.*

78. *Id.* (citing *Harper v. Kamp Schaefer*, 549 N.E.2d 1067, 1070 (Ind. Ct. App. 1990)).

79. See *id.*

80. See *id.*

81. See *id.*

82. 717 N.E.2d 606 (Ind. Ct. App. 1999).

83. See *id.* at 607.

84. *Id.*

the decision.<sup>85</sup>

On appeal, Allied argued that it owed no duty to the plaintiff because its work had been accepted by the store. The court noted that, generally, contractors do not owe a duty of care to third parties after the owner has accepted the work.<sup>86</sup> Thus, evidence of an independent contractor's mere negligence is typically insufficient to impose liability against the contractor after acceptance of the work by the general contractor or owner.<sup>87</sup>

Plaintiff argued that a material issue of fact existed as to whether the store accepted Allied's work. In analyzing this issue, the Indiana Court of Appeals looked to the Indiana Supreme Court's decision in *Blake v. Calumet Construction Corp.*, which established a test for determining whether acceptance of an independent contractor's work has taken place by focusing on whether the owner was better able to prevent injury to third parties at the time the harm occurred.<sup>88</sup> Factors in 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.<sup>89</sup> The court determined that Allied never had physical control of the store's premises, but continued to assert the control that it did have—responsibility for maintenance of the sales floor—and never relinquished that responsibility to the store.<sup>90</sup> The work was not completed because it was provided under an agreement to perform regularly scheduled cleaning and on-demand service. Therefore, the court concluded that the store never expressly communicated an acceptance to Allied.<sup>91</sup>

In response, Allied argued that this case is analogous to the case of *Lynn v. Hart*.<sup>92</sup> The court of appeals noted that, in *Lynn*, the quality of the contractor's work and the condition of the premises were easily ascertainable. This, in addition to evidence that the owner did examine the parking lot, permitted the reasonable inference that the owner had accepted the work.<sup>93</sup> In this case, however, a visual inspection of the floor would not have revealed its condition. Further, there was no evidence that any particularized inspection of the floor was done beyond the general manager's "walk through" inspection of the store as a whole. Thus, the court found that acceptance of Allied's work was not the only

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85. See *id.* at 607-08.

86. See *id.* (citing *Blake v. Calumet Constr. Corp.*, 674 N.E.2d 167, 170 (Ind. 1996)); *Hill v. Rieth-Riley Constr. Co.*, 670 N.E.2d 940, 944 (Ind. Ct. App. 1996); *Lynn v. Hart*, 565 N.E.2d 1162, 1163 (Ind. Ct. App. 1991).

87. See *Jacques*, 717 N.E.2d at 609 (citing *Snider v. Bob Heinlin Concrete Constr. Co.*, 506 N.E.2d 77, 82 (Ind. Ct. App. 1987)).

88. See *Blake*, 674 N.E.2d at 171.

89. See *Jacques*, 717 N.E.2d at 609 (citing *Blake*, 674 N.E.2d at 171).

90. See *id.*

91. See *id.*

92. 565 N.E.2d 1162 (Ind. Ct. App. 1991).

93. See *id.* at 1164.

reasonable inference that could be drawn from the facts.<sup>94</sup> Accordingly, it reversed the trial court's entry of summary judgment in favor of Allied.<sup>95</sup>

In *Ross v. State*,<sup>96</sup> the Indiana Court of Appeals likewise interpreted exceptions to the general rule in Indiana that an independent contractor does not owe a duty of care to third parties after the owner has accepted the contractor's work.<sup>97</sup> In *Ross*, a contractor contracted within the Indiana Department of Transportation ("INDOT") to provide labor and materials to perform road resurfacing.<sup>98</sup> Approximately five months after INDOT accepted the contractor's work, the plaintiff encountered a left curve containing a dip or low spot which forced his vehicle to cross the center line of the road and strike a mud bank. The plaintiff filed a complaint against the contractor and INDOT, and the trial court subsequently entered summary judgment in favor of the defendants.<sup>99</sup>

On appeal, the plaintiff contended that the trial court erred in granting summary judgment because there were genuine issues of material fact relating to whether the contractor was immune from liability, even after its work was accepted by INDOT.<sup>100</sup> The court of appeals began its discussion by noting that an exception to the general rule of independent contractor non-liability imposes liability on the contractor after the acceptance of the work where the contractor turns over the work "in a condition that was dangerously defective, inherently dangerous, or imminently dangerous such that it created a risk of imminent personal injury."<sup>101</sup> However, any such liability established under this exception is limited where the contractor has merely followed plans provided by the contractee/owner. This limitation has been stated as follows: "[T]he contractor is not liable if he has merely carried out the plans, specifications, and directions given him, since in that case the responsibility is assumed by the employer, at least when the plans are not so obviously dangerous that no reasonable contractor would follow them."<sup>102</sup> Thus, where a contractor is not following their own plans for the work, but those provided by the contractee, liability is imposed only where the plans are so obviously defective that no reasonable contractor would follow them.<sup>103</sup>

In response, the plaintiff asserted that the designated evidence created a genuine issue of fact as to whether the contractor's failure to correct the adverse superelevation in the road left the work in an imminently dangerous condition such that it created a risk of imminent personal injury. The appellate court

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94. See *Jacques*, 717 N.E.2d at 610.

95. See *id.*

96. 704 N.E.2d 141 (Ind. Ct. App. 1998).

97. See *Blake v. Calumet Constr. Corp.*, 674 N.E.2d 167, 170 (Ind. 1996).

98. See *Ross*, 704 N.E.2d at 143.

99. See *id.*

100. See *id.* at 143-44.

101. *Id.* at 144 (citing *Blake*, 674 N.E.2d at 172-73).

102. *Id.* at 144-45 (citations omitted).

103. See *id.* at 145 (citing *Davis v. Henderlong Lumber Co.*, 221 F. Supp. 129, 134 (N.D. Ind. 1963) (applying Indiana law)).

disagreed, finding that the work performed by the contractor did not create the defect in the curve.<sup>104</sup> The defect in the road existed prior to the contractor beginning its work, and the contractor merely added a layer of material to the existing road.<sup>105</sup> As a result, the court found that nothing in the contractor's work directly created the alleged dangerous condition.<sup>106</sup> In addition, the court found that even if the contractor's correction of the adverse superelevation was to be considered part of its "work," it concluded that, as a matter of law, it was not imminently dangerous.<sup>107</sup> It noted that in the context of independent contractor liability, a danger is imminent where it is likely to cause injury, rather than creating the mere possibility of injury.<sup>108</sup> Further, an instrumentality may be imminently dangerous where it is of "such a nature that danger in its use is imminent, that is, its use for the purpose for which it is intended is fraught with immediate peril, [and] carries the threat of serious immediate danger."<sup>109</sup> Although the court acknowledged that the plaintiff designated an affidavit of a civil engineer who concluded that the curve contained an adverse superelevation that made the design speed of the curve less than the posted speed limit, this affidavit did not support the conclusion that the curve was *imminently dangerous*.<sup>110</sup> Likewise, the court found that because the curve is not always dangerous and poses a problem only to some types of vehicles that navigate the curve in a particular manner, the defect in the curve was not "imminently dangerous."<sup>111</sup>

The court further concluded that the contractor had no liability because it merely followed INDOT's plans.<sup>112</sup> Plaintiffs responded that the designated evidence created a genuine issue of material fact as to whether INDOT's plans for the resurfacing project were so obviously defective and dangerous that no reasonable contractor would follow them. The court acknowledged that plans that fail to correct a dangerous defect obvious to the contractor may possibly fall within this exception to the rule on contractor liability.<sup>113</sup> However, it noted that it was clear from the designated evidence that the contractor was reasonable in relying upon INDOT's engineers to correctly calculate and post the correct speed limit for the curve.<sup>114</sup> Therefore, the court concluded that even if the designated

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104. *See id.*

105. *See id.*

106. *See id.*

107. *Id.*

108. *See id.* (citing *Snider v. Bob Heinlin Concrete Constr. Co.*, 506 N.E.2d 77, 82 (Ind. Ct. App. 1987)).

109. *Id.* (citing *National Steel Erection v. Hinkle*, 541 N.E.2d 288, 293 (Ind. Ct. App. 1989)).

110. *See id.*

111. *Id.* at 146; *see also Blake v. Calumet Constr. Corp.*, 674 N.E.2d 167, 173 (Ind. 1996); *Hill v. Rieth-Riley*, 670 N.E.2d 940, 945 (Ind. Ct. App. 1996).

112. *See Ross*, 704 N.E.2d at 147.

113. *See id.*

114. *See id.* (citing *National*, 541 N.E.2d at 294 which held that a contractor was justified in relying upon the experience and skill of the architect and supervising engineer in the installation

evidence indicated that the contractor should have been aware that the posted speed limit was too high for the curve, it would be reasonable for it to rely upon INDOT's protected decision not to change the speed limit.<sup>115</sup>

Both the Indiana Supreme Court and the court of appeals also rendered decisions concerning the general rule of a principal's nonliability for the negligence of an independent contractor during this survey period. In *Carie v. PSI Energy, Inc.*,<sup>116</sup> a contractor's employees sued PSI for injuries sustained during the use of a non-self-supporting fixture to remove an exhaust cover during maintenance work on a generating station.<sup>117</sup> PSI moved for summary judgment, which the trial court granted, based on the general rule that a person who hires an independent contractor is not liable for the independent contractor's negligence. Applying an exception to the general rule of non-liability, the Indiana Court of Appeals reversed, with Judge Friedlander dissenting.<sup>118</sup> PSI, in its petition to transfer, presented one dispositive issue: whether the "due precaution" exception to the general rule of non-liability applies to this case.<sup>119</sup>

The supreme court began its discussion by noting the longstanding general rule that a principal is not liable for the negligence of an independent contractor.<sup>120</sup> Indiana courts, however, have recognized the following five exceptions to the general rule: (1) where the contract requires the performance of intrinsically dangerous work; (2) where the principal is, by law or contract, charged with performing the specific duties; (3) where the act will create a nuisance; (4) where the act to be performed will probably cause injury to others unless due precaution is taken; and (5) where the act to be performed is illegal.<sup>121</sup> These exceptions reflect the notion that, in certain circumstances, "the employer is in the best position to identify, minimize, and administer the risks involved in the contractor's activities."<sup>122</sup>

The supreme court agreed with the court of appeals that the due precaution exception makes an employer "liable" for the negligence of an independent contractor where the act to be performed will probably cause injuries to others unless due precaution is taken.<sup>123</sup> In *Bagley*, the supreme court explained the exception as follows:

The essence of this exception is the foreseeability of the peculiar risk involved in the work and of the need for special precautions. The

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of a fume hood in a chemical laboratory).

115. *See id.* at 148.

116. 715 N.E.2d 853 (Ind. 1999).

117. *See id.* at 854-55.

118. *See id.* at 856 (citing *Carie v. PSI Energy, Inc.*, 694 N.E.2d 729, 737-38 (Ind. Ct. App. 1998), *aff'd in part and vacated in part*, 715 N.E.2d at 853).

119. *Id.* at 855.

120. *See id.* (citing *Bagley v. Insight Communications Co.*, 658 N.E.2d 584, 586 (Ind. 1995)).

121. *See id.*

122. *Id.* (citing 7 AM. JUR. 3D *Proof of Facts* § 1, at 483 (1990)).

123. *Id.* at 856 (citing *Carie*, 694 N.E.2d at 735).

exception applies where, at the time of the making of the contract, a principal should have foreseen that the performance of the work or the conditions under which it was to be performed would, absent precautionary measures, probably cause injury.

Application of this fourth exception to the plaintiff's claim thus requires an examination of whether, at the time [a party] was employed as an independent contractor, there existed a peculiar risk which was reasonably foreseeable and which recognizably called for precautionary measures.<sup>124</sup>

With these standards in mind, and the relevant facts undisputed, the supreme court found that the inquiry becomes whether, as a matter of law, PSI should have foreseen that the performance of maintenance work on the exhausters would probably result in this type of incident unless due precaution was taken.<sup>125</sup> This determination hinged on the degree of factual specificity which the law should require the employer to foresee. The court of appeals majority decided that the due precaution exception applied because PSI should have foreseen the general risk which caused the plaintiff's injuries.<sup>126</sup> In dissent, Judge Friedlander asserted that the exception should apply only if there were some relatively more peculiar or special foreseeable risk.<sup>127</sup> The supreme court agreed with Judge Friedlander that "the danger that the contractee must foresee in order to fit within the fourth exception must be substantially similar to the accident that produced the complained-of injury."<sup>128</sup> Based on the designated evidence, the supreme court was satisfied that PSI could not have foreseen the sequence of events leading to the plaintiff's injuries, and as such held that the due precaution exception did not apply.<sup>129</sup>

In a similar decision, *Ryobi Die Casting v. Montgomery*,<sup>130</sup> the Indiana Court of Appeals found that the focus of the fourth exception to the general rule of non-liability for the torts of independent contractors is on the act to be performed, not the skill level of the contractor.<sup>131</sup> Thus, the court held that, in applying this exception, it would not consider the level of skill or experience of the independent contractor, only the risk involved in the performance of the work.<sup>132</sup>

In *McDaniel v. Business Investment Group, Ltd.*,<sup>133</sup> the Indiana Court of

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124. *Carie*, 715 N.E.2d at 856.

125. *See id.* at 857.

126. *See Carie*, 694 N.E.2d at 736-37.

127. *See id.* at 737 (Friedlander, J., dissenting).

128. *Carie*, 715 N.E.2d at 857 (quoting *Carie*, 694 N.E.2d at 737 (Friedlander, J., dissenting)).

129. *See id.* at 858.

130. 705 N.E.2d 227 (Ind. Ct. App.), *trans. denied*, 726 N.E.2d 298 (Ind. 1999) (mem.).

131. *See id.* at 229.

132. *See id.* at 230.

133. 709 N.E.2d 17 (Ind. Ct. App.), *trans. denied*, 726 N.E.2d 298 (Ind. 1999) (mem.).

Appeals interpreted the “peculiar risk” language of the due precaution exception to the general rule of non-liability for the torts of independent contractors. The court held that although “peculiar risk” has not been defined previously, the phrase refers to the risk of a particularized harm specific to the work being performed or the conditions under which it is performed.<sup>134</sup> Accordingly, the court found that the fourth exception to the general rule applies only when the risk involved is something more than the routine and predictable hazards generally associated with a given occupation.<sup>135</sup> Rather, it must be a risk unique to the circumstances of a given job. In addition, the actual injury sustained must result from the particularized harm identified by the risk.<sup>136</sup>

In *McDaniel*, an employee of a water and sewer contractor was killed after a cave-in occurred while he was performing trenching work as part of the repair of an underground sewer line. The estate’s administrator sued the plumbing contractor which had an oral agreement with the water and sewer contractor for performance of the underground work.<sup>137</sup> Applying the aforementioned standard, the Indiana Court of Appeals found that a cave-in does not represent a peculiar risk of trenching.<sup>138</sup> Relevant statistics demonstrate that cave-ins are a routine and predictable hazard of trenching, and there was no evidence that the decedent’s job involved a risk of cave-in that was somehow unique or distinguishable from the general risk of cave-ins associated with trenching.<sup>139</sup> Because the due precaution exception only contemplates that independent contractors will be held responsible for anticipating and guarding against unique or distinguishable dangers, the court of appeals affirmed the trial court’s grant of summary judgment in favor of the defendant.<sup>140</sup>

3. *Golf Course Liability*.—In *Lincke v. Long Beach Country Club*,<sup>141</sup> a golfer standing in the rough was injured by a ball hit by a golfer playing on an adjacent hole. The injured golfer sued the country club for failure to maintain its golf course in a reasonably safe condition. The club moved for summary judgment, arguing that it took remedial measures to address safety concerns about the two holes.<sup>142</sup> Specifically, the club designated evidence that it had hired a golf course architect to suggest corrections for a drainage problem and that the architect’s recommendations had been implemented. Based on this evidence, the club claimed that it had no reason to know or suspect that any dangerous condition remained.<sup>143</sup>

Although the Indiana Court of Appeals acknowledged both the scarcity of

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134. *Id.* at 22.

135. *See id.*

136. *See id.* (citing *Red Roof Inns, Inc. v. Purvis*, 691 N.E.2d 1341 (Ind. Ct. App. 1998)).

137. *See id.* at 20.

138. *See id.*

139. *See id.*

140. *See id.* at 22.

141. 702 N.E.2d 738 (Ind. Ct. App. 1998), *trans. denied*, 714 N.E.2d 117 (Ind. 1999).

142. *See id.* at 739.

143. *See id.*

Indiana law in claims against golf courses and the references in the parties' supporting briefs to decisions by other jurisdictions, the court chose to rest its decision on the Indiana Supreme Court decision in *Douglass v. Irvin*.<sup>144</sup> In *Douglass*, the supreme court held that a

landowner is liable for harm caused to an invitee by a condition on the land only if the landowner (1) knows of or through the exercise of reasonable care would discover the condition and realize it involves an unreasonable risk of harm to such invitees; (2) should expect that the invitee will fail to discover or realize the danger or fail to protect against it; and (3) fails to exercise reasonable care in protecting the invitee against the danger.<sup>145</sup>

Thus, the "determination of whether a landowner breached its duty of care to an invitee centers on an objective evaluation of the landowner's knowledge."<sup>146</sup> After reviewing the designated evidence, the court determined that although there were general statements of criticism concerning the configuration of the holes, there was no express statement that the holes were dangerous.<sup>147</sup> Moreover, there was no designated evidence that critical sentiments about the configuration of the holes had been expressed to the club or any recommendations made to the club about possible changes. Accordingly, the Indiana Court of Appeals determined that the plaintiff's response to the club's motion for summary judgment failed to meet his burden of setting forth specifically designated facts regarding a breach of duty by the club.<sup>148</sup>

4. *Control of Premises*.—In *Helton v. Harbrecht*,<sup>149</sup> a property owner's mother sustained injuries while visiting the construction site of her son's future home. Prior to the date of the injury, the plaintiff's son contracted with defendant for the construction of the home. At the time of the injury, the house was in the latter stages of the framing process and the defendant's employees had temporarily moved to another job site.<sup>150</sup> The plaintiff went to the construction site to show friends the frame of the home, and attempted to climb a ladder in place in the interior of the house leading to the second level. On her descent, the plaintiff fell off the ladder and sustained injury.<sup>151</sup>

Plaintiff alleged that defendant was in control of the construction site on the date of her injuries and that defendant's negligence caused her injuries. Specifically, she argued that defendant was negligent in failing to properly secure

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144. 549 N.E.2d 368 (Ind. 1990).

145. *Lincke*, 702 N.E.2d at 740 (citing *Douglass*, 549 N.E.2d at 370).

146. *Id.*

147. *See id.*

148. *See id.*

149. 701 N.E.2d 1265 (Ind. Ct. App. 1998), *trans. denied*, 714 N.E.2d 171 (Ind. 1999) (mem.).

150. *See id.* at 1266.

151. *See id.*

the work site by leaving the ladder at the site.<sup>152</sup> Defendant moved for summary judgment on the grounds that it was not in control of the premises at the time of the plaintiff's fall and therefore owed her no duty.<sup>153</sup>

In opposing summary judgment, the plaintiff relied on a recent Indiana Court of Appeals decision that found that a factual issue existed regarding control of a partially constructed home. In *Carroll v. Jagoe Homes, Inc.*,<sup>154</sup> a child was injured when he fell through insulation in a house under construction. The child and his mother brought suit against the property owners and contractor, and the property owners moved for summary judgment arguing that they had nothing to do with the construction of the home and therefore owed no duty to those coming into the property.<sup>155</sup> On appeal, the court relied on the Indiana Supreme Court decision in *Risk v. Schilling*.<sup>156</sup> In that case, the court held that "[o]nly a party who exerts control over the premises owes a duty to persons coming onto the premises."<sup>157</sup> Turning to the case before it, the court of appeals in *Helton* found that it was undisputed that defendant acted as the general contractor for the job, and as such, performed many roles and undertook many responsibilities.<sup>158</sup> However, it further found that no employees of defendant were physically at the job site on the date of the accident and had been away from the job site for approximately one month. Moreover, it found that at the time of the accident the owner of the property, the plaintiff's son, was completing electrical work in the house.<sup>159</sup> Although the court found conflicting facts regarding the ownership of the ladder, it held that the evidence was undisputed as to defendant's exercise of control over the premises at the time of the accident.<sup>160</sup> Specifically, it held that the plaintiff's son, the homeowner, was in control of the construction site when his mother asked for permission to come on the site and when she fell.<sup>161</sup> Accordingly, the court held that defendant did not exert control over the premises at the time of the plaintiff's injury and therefore owed no duty to her.<sup>162</sup>

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152. *See id.* at 1267.

153. *See id.*

154. 677 N.E.2d 612 (Ind. Ct. App.), *trans. denied*, 690 N.E.2d 1181 (Ind. 1997).

155. *See id.*

156. 569 N.E.2d 646 (Ind. 1991).

157. *Helton*, 701 N.E.2d at 1267-68 (quoting *Risk*, 569 N.E.2d at 648).

158. *See id.* at 1268.

159. *See id.*

160. *See id.*

161. *See id.* at 1266.

162. *See id.* (citing *Risk*, 569 N.E.2d at 648) (only a party who asserts control over the premises owes a duty to persons coming onto the premises).

### C. Recreational Use Statute

In *Civils v. Stucker*,<sup>163</sup> a child, through his parents, brought a personal injury action against a landowner, seeking recovery for injuries he sustained while riding on an intertube pulled by an automobile on the defendant landowner's driveway. The landowner filed a motion for summary judgment arguing that Indiana's Recreational Use Statute provided immunity and that the plaintiff incurred the risk of his injury.<sup>164</sup> The trial court found that the plaintiff was a licensee on the property, but could not conclude that Indiana's Recreational Use Statute was applicable.<sup>165</sup>

The Indiana Court of Appeals agreed with the trial court that the plaintiff was a licensee at the time of the accident.<sup>166</sup> Licensees have a license to use the land and are privileged to enter or remain on the land by virtue of the permission or sufferance of the owner or occupier.<sup>167</sup> They enter the land of another for their own convenience, curiosity or entertainment and take the premises as they find them.<sup>168</sup> The court further found that the Indiana Recreational Use Statute applies in this case to licensees and trespassers but not invitees.<sup>169</sup>

In response, the plaintiff argued on appeal that riding an intertube being pulled by an automobile is a reckless activity not covered by the Indiana Recreational Use Statute.<sup>170</sup> The land owner countered that sledding is an activity contemplated by the statute.<sup>171</sup> The court agreed with the landowner that normal sledding is an activity of the same kind or class as those specifically designated in the Recreational Use Statute.<sup>172</sup> Specifically, the court found that the "for any other purpose" language makes it clear the list of enumerated activities was not intended by the legislature to be exhaustive.<sup>173</sup>

The court of appeals did note, however, that the statute does not address the manner in which an activity is undertaken, only the type or purpose of the activity.<sup>174</sup> Nevertheless, it concluded that while the plaintiff was riding the intertube behind the automobile he was engaged in a recreational use, albeit in an arguably reckless manner.<sup>175</sup> Therefore, the defendant landowner was entitled

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163. 705 N.E.2d 524 (Ind. Ct. App. 1999).

164. *See id.* at 526.

165. *See id.*

166. *See id.* at 527.

167. *See id.* (citing *McCormick v. State*, 673 N.E.2d 829, 836 (Ind. Ct. App. 1996)).

168. *See id.*

169. *See* IND. CODE § 14-22-10-2 (1998).

170. *See id.*

171. *See id.*

172. *See Civils*, 705 N.E.2d at 527 (citing *Kelly v. Ladywood Apartments*, 622 N.E.2d 1044, 1048 (Ind. Ct. App. 1993)).

173. *See id.*

174. *See id.*

175. *See id.*

to immunity under the statute.<sup>176</sup>

The court of appeals again addressed the Indiana Recreational Use Statute in *Cunningham v. Bakker Produce, Inc.*<sup>177</sup> There, the parents of a six year old child sued the owner of a parcel of unimproved land for injuries to their child as he attempted to help other children clear a tree limb for a baseball game. The defendant property owner had hired a tree removal service to remove limbs from a tree on the unimproved property and directed them to cut the limbs and leave them where they fell.<sup>178</sup> The defendant intended to remove the tree limbs, but did not do so for approximately one week. During this time, a group of children went to the property to play baseball as they had in the past. The children discovered that one of the limbs was left on the base path that they traditionally used, and attempted to remove the limb.<sup>179</sup> As this was being attempted, the plaintiffs' son slipped and fell underneath the limb, which then fell from his brother's arms and fracturing the plaintiff's son's skull. The plaintiffs brought a personal injury action, and defendant subsequently filed a motion for summary judgment alleging that the Indiana Recreational Use Statute shielded him from liability.<sup>180</sup> The trial court granted defendant's motion on the basis that the plaintiffs' son was a licensee "at most" and that defendant was thus protected by the Recreational Use Statute. The trial court further held that the attractive nuisance exception statute did not apply to this case.<sup>181</sup>

On appeal, the plaintiffs argued that: (1) the statute does not protect landowners from suit regarding injuries caused by their own negligence, but rather protects them from the acts of third persons; (2) the children's use of defendant's field to play baseball was not an activity similar to the Statute's listed uses, and, therefore, the Recreational Use Statute did not apply; and (3) even if the Recreational Use Statute applied, there is a question of fact regarding the applicability of the attractive nuisance exception.<sup>182</sup>

With respect to whether the Recreational Use Statute excuses a landowner's own negligence, the plaintiffs pointed to the statutory language that a landowner is not liable under the Statute for "an act or failure to act of other persons using the premises," and asserted the Statute does not protect landowners from their own negligence.<sup>183</sup> The court of appeals noted that the purpose of the Recreational Use Statute is to encourage landowners to open their property to the public for recreational purposes free of charge.<sup>184</sup> It further noted that the statute does not create immunity from liability for the premises owner with regard to his

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176. *See id.*

177. 712 N.E.2d 1002 (Ind. Ct. App.), *trans. denied*, 726 N.E.2d 308 (1999) (mem.).

178. *See id.* at 1004.

179. *See id.*

180. *See id.*

181. *See id.*

182. *See id.* at 1004-05.

183. *Id.* at 1005 (quoting IND. CODE § 14-22-10-2(e) (1998)).

184. *See id.* (citing *McCormick v. State*, 673 N.E.2d 829, 833 (Ind. Ct. App. 1996)).

own actions.<sup>185</sup> However, the court found that the designated evidence compelled the conclusion that the acts of the other children, third persons in relation to the victim and the landowner, caused the injuries giving rise to the lawsuit.<sup>186</sup> Although the court stated that it did not want to minimize the very unfortunate injuries suffered by the child, it noted that it is liability precisely for these types of tragic events from which the landowner is protected under the Indiana Recreational Use Statute.<sup>187</sup> Defendant tolerated the public's use of his vacant lot, and it was this sufferance that the Recreational Use Statute was designed to encourage.<sup>188</sup>

The plaintiffs next contended that baseball is not an activity in the same category as those set forth by the Recreational Use Statute.<sup>189</sup> However, the court disagreed on the basis of the phrase "for any other purpose" found in the Recreational Use Statute following the specifically listed activities. The court applied the principle of *egusdem generis*, which maintains that "where words of specific and limited signification in a statute are followed by general words of more comprehensive import, the general word shall be construed as embracing only such persons, places, and things as are of like kind or class to those designated by the specific words, unless the contrary intention is clearly shown by the statute."<sup>190</sup> The court concluded that the principal of *egusdem generis* does not require it to split categories so finely or so arbitrarily and held that baseball falls into a category with other outdoor recreational activities such as sledding and boating and that the Recreational Use Statute applies to the case.<sup>191</sup>

Finally, the court of appeals held that the attractive nuisance doctrine was inapplicable.<sup>192</sup> The attractive nuisance doctrine recognizes that a child may be incapable of understanding and appreciating the dangers that the child may encounter on a landowner's premises.<sup>193</sup>

The doctrine applies where several elements are met: (1) the problem complained of must be maintained or permitted upon the property by the owner; (2) it must be peculiarly dangerous to children, and of such a nature that they will not comprehend the danger; (3) it must be particularly attractive to children; (4) the owner must have actual or constructive knowledge of the condition, and that children do or are likely to trespass, and to be injured; and (5) the injury must be a foreseeable result of the wrong. The doctrine is limited to cases where

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185. *See id.*

186. *See id.*

187. *See id.* at 1066.

188. *See id.* at 1005 (citing *McCormick*, 673 N.E.2d at 833).

189. *See id.* at 1003.

190. *Id.* at 1002 (citing *Drake by Drake v. Mitchell Community Schs.*, 649 N.E.2d 1027, 1029 (Ind. 1995)).

191. *See id.*

192. *See id.* at 1007.

193. *See id.* at 1006 (citing *Carroll by Carroll*, 677 N.E.2d at 617).

the danger is latent, [and] does not apply to conditions, natural or artificial, which are common to nature.<sup>194</sup>

In *Cunningham*, the condition at issue was limbs lying in a field. The court found that it did not matter whether the limbs fell or were cut down because the attractive nuisance doctrine did not apply to either natural or artificial conditions found in nature.<sup>195</sup> Because a limb on the ground is a condition commonly found in nature, the court held that the attractive nuisance doctrine did not apply.<sup>196</sup>

#### D. Comparative Fault Act

In *Tate v. Cambridge Commons Apartment*,<sup>197</sup> a delivery person who was injured when he slipped and fell on an ice covered walkway while delivering drywall to an apartment complex, sued the owner of the complex for negligence. The plaintiff had gone to the apartment complex following a large ice storm and noticed that the sidewalks were all clear with the exception of an ice-covered sidewalk leading to the laundry room.<sup>198</sup> Plaintiff was given a key to the laundry room by the apartment's maintenance supervisor, who considered the ice to be dangerous that day but did not personally salt the sidewalk and did not advise the plaintiff of alternate routes. After obtaining the key, the plaintiff successfully carried one sheet of drywall over the slick ice-covered sidewalk.<sup>199</sup> Plaintiff perceived the slickness of the sidewalk on his first trip; however, he proceeded to return to his truck and obtain another sheet of drywall. As he was walking on the sidewalk a second time he slipped and fell and was injured.<sup>200</sup>

The apartment complex moved for summary judgment arguing that it did not breach any duty owed to the plaintiff because it was not required to protect an invitee from dangers of which he was fully aware, yet consciously disregarded. The trial court entered summary judgment in favor of the defendant, and the plaintiff appealed.<sup>201</sup>

Plaintiff initially argued that sections 343 and 343(A) of the Restatement (Second) of Torts, which sets forth the duty of care a possessor of land owes to an invitee, has been superseded by the enactment of the Comparative Fault Act.<sup>202</sup> Specifically, he asserted that these sections of the Restatement are akin to defenses such as contributory negligence and incurred risk, which are contrary to the Comparative Fault Act.<sup>203</sup> The court of appeals found that while it had not directly confronted this issue, the persistent application of sections 343 and

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194. *Id.* at 1006-07.

195. *See id.* (citing *Kelly*, 622 N.E.2d at 1048-49).

196. *See id.*

197. 712 N.E.2d 525 (Ind. Ct. App. 1999), *trans. denied*, 726 N.E.2d 310 (1999) (mem.).

198. *See id.* at 526.

199. *See id.*

200. *See id.*

201. *See id.*

202. *See id.* at 527.

203. *See id.*

343(A) in premises liability cases since Indiana's enactment of the Comparative Fault Act implicitly recognized the continued viability of these sections as part of common law.<sup>204</sup> Moreover, the court found that the plaintiff's argument failed to recognize that where there is no breach of duty, there is no liability and, therefore, there is no fault to be compared.<sup>205</sup> The court noted that sections 343 and 343(A) are used to analyze whether a landowner's duty to keep his property in a reasonably safe condition for invitees has been breached and concluded that the issue of whether a duty has been breached is a prerequisite to liability, regardless of the availability of defenses, and must necessarily be determined before one can reach the issue of comparative fault.<sup>206</sup> Thus, the court explicitly held that sections 343 and 343(A) have survived Indiana's adoption of the Comparative Fault Act.<sup>207</sup>

Plaintiff alternatively argued that even if sections 343 and 343(A) apply, a question of fact remained as to whether defendant breached the duty it owed him as an invitee. Essentially, the plaintiff contended that defendant should have reasonably expected that he would have proceeded to encounter the known danger, the ice covered sidewalk, without taking any precautions because he had a job to do. The court of appeals disagreed, noting that actions may be involuntary when "there is no reasonable opportunity to escape from [the danger] or where the exposure is the result of influence, circumstances or surroundings which are a real inducement to continue despite the danger."<sup>208</sup> Applying this law to the facts in issue, the court stated that while it recognized that sometimes the argument that "I have a job to do" is persuasive, the plaintiff did not encounter the type of "strong, external compelling circumstances" necessary for recovery under this theory of liability.<sup>209</sup> Specifically, the designated evidence did not reveal any sort of ultimatum given to the plaintiff by defendant that he deliver the drywall immediately or lose his job or evidence that the plaintiff unsuccessfully complained about the conditions or that this was the only path he could have taken to the laundry room.<sup>210</sup>

In *Hopper v. Carey*,<sup>211</sup> the Indiana Court of Appeals was presented with the issue of whether the seatbelt defense is admissible to demonstrate fault under the common law defense of contributory negligence or the Indiana Comparative Fault Act.<sup>212</sup> The plaintiffs were the driver and passengers of a fire truck which overturned after it left the road. Contrary to the department's rules, none of the occupants were wearing seatbelts at the time of the accident. The plaintiffs filed

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204. *See id.* (citations omitted).

205. *See id.*

206. *See id.*

207. *See id.* at 528 (citing *Douglass v. Irvin*, 549 N.E.2d 368, 370 (Ind. 1990)) (explaining the difference between this inquiry and that involved in establishing the defense of incurred risk).

208. *Id.* (citing *Ooms v. USX Corp.*, 661 N.E.2d 1250 (Ind. Ct. App. 1996)).

209. *Id.* (quoting *Ooms*, 661 N.E.2d at 1255).

210. *See id.* at 528-29.

211. 716 N.E.2d 566 (Ind. Ct. App. 1999).

212. *See id.* at 569.

a complaint seeking damages for personal injuries.<sup>213</sup> Defendant subsequently filed a motion in limine requesting an order that "evidence of [plaintiffs'] failure to wear seat belts is admissible to demonstrate 'fault' on the part of the plaintiff."<sup>214</sup> Following a hearing, the trial court granted the motion, holding that evidence of the plaintiffs' failure to use a seatbelt is admissible to determine fault.<sup>215</sup>

On appeal, the court noted that the validity of the seatbelt defense has been hotly contested in courts across the country.<sup>216</sup> The court then went through a lengthy summary of the history of the seatbelt defense in Indiana, focusing on the Indiana Supreme Court decision in *State v. Ingram*,<sup>217</sup> where the court disallowed evidence of seatbelt non-use. In response, defendants argued that *Ingram* only addressed mitigation of damages, whereas this case involved fault for pre-tort conduct.<sup>218</sup> Defendant also noted that since the decision in *Ingram*, the Indiana Legislature has enacted statutes requiring the use of seatbelts.<sup>219</sup>

With respect to the admissibility of the seatbelt defense under contributory negligence, defendants urged that they were not offering the seatbelt offense as evidence of the plaintiff's failure to mitigate his damages as were the defendants in *Ingram*; rather, they argued that the evidence should be admitted to demonstrate the negligence of the plaintiff.<sup>220</sup> They further argued that the plaintiff had a common law duty to use reasonable care to avoid injury to himself. However, while the court of appeals agreed with this principle of tort law, it noted the difference between a plaintiff's duty to avoid injuring himself and a plaintiff's duty to anticipate the negligence of another.<sup>221</sup> "Under the common law, a plaintiff ordinarily does not have a duty to anticipate the negligence of another."<sup>222</sup> The court explained that the "policy rationale behind this principle is well-reasoned: if plaintiffs were required to anticipate the negligence of others, our jurisprudence would shift the duty of taking care from the careless to the careful."<sup>223</sup> Applying common law principles to the present case, the court concluded that the plaintiff was not under a duty to anticipate the alleged negligence of the defendants, and believed this conclusion to be consistent with the supreme court's decision in *Ingram*.<sup>224</sup> Although the court noted that *Ingram* dealt specifically with mitigation of damages, *Ingram* also

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213. *See id.*

214. *Id.*

215. *See id.* at 569-70.

216. *See id.* at 570.

217. 427 N.E.2d 444 (Ind. 1981).

218. *See Hopper*, 716 N.E.2d at 572.

219. *See id.* at 573.

220. *See id.*

221. *See id.*

222. *Id.* (citing *Haugh v. Jones & Laughlin Steel Corp.*, 949 F.2d 914, 920-21 (7th Cir. 1991)).

223. *Id.*

224. *See id.*

noted that absent a clear legislative mandate creating a duty to wear a seatbelt, no such duty would be judicially created.<sup>225</sup> The court of appeals found that the supreme court's decision in this vein clearly expanded the scope of the decision beyond just mitigation of damages to prohibit the creation of a duty of automobile occupants to wear a seatbelt.<sup>226</sup> Thus, it held that allowing evidence of a plaintiff's failure to wear a seatbelt to establish contributory negligence would do just that.<sup>227</sup>

In response, the defendants argued that the statutory mandate mentioned in *Ingram* now exists. In 1985, the legislature enacted a mandatory passenger restraint law and created a statutory duty for occupants of certain vehicles to wear seatbelts.<sup>228</sup> The court of appeals noted that it was presented with an interesting dilemma. The legislature has spoken on a passenger's duty to wear a seatbelt, however, that duty cannot be used to demonstrate fault and does not apply to plaintiffs.<sup>229</sup> Specifically, the court found that, based on the language of *Ingram*, it must conclude that the Indiana Legislature has not altered the common law.<sup>230</sup> The court reasoned that supreme court procedure mandated that there is no duty to wear a seatbelt absent a clear mandate from the legislature, and that the legislature enactments since *Ingram* are anything but clear.<sup>231</sup> Accordingly, the court of appeals found the state of the law with regard to the seatbelt defense today as the supreme court found it in *Ingram*: "there is no duty, common law or otherwise, for an occupant of a truck to wear his seatbelt."<sup>232</sup>

#### *E. Tortious Conduct of Unincorporated Associations*

In *Hanson v. Saint Lukes United Methodist Church*,<sup>233</sup> the plaintiff, a church member, slipped and fell on an accumulation of snow and ice in the parking lot of a church following a social gathering she had attended at the church. Plaintiff subsequently filed suit against the church and its trustees for her personal injuries, alleging negligence for failure to maintain the parking lot, failure to inspect the parking lot for dangerous conditions, failure to remove the snow and ice from the parking lot, and failure to warn her of the dangerous conditions.<sup>234</sup> The trial court granted summary judgment in favor of all defendants, applying the

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225. *See id.*

226. *See id.* at 575.

227. *See id.*

228. *See* IND. CODE § 9-19-10-2 (1998) (requiring that each front seat occupant of a passenger motor vehicle that is equipped with a safety belt meeting the standards stated in the Federal Motor Vehicle Safety Standard Number 208 shall have a safety belt properly fastened about the occupant's body at all times when the vehicle is in forward motion).

229. *See id.*

230. *See Hopper*, 716 N.E.2d at 574.

231. *See id.* at 574-75 (citing *State v. Ingram*, 427 N.E.2d 444, 448 (Ind. 1981)).

232. *Id.*

233. 704 N.E.2d 1020 (Ind. 1998).

234. *See id.* at 1021.

common law rule that a member of an unincorporated association cannot sue the association for the negligence of another member. On appeal, the court of appeals reversed the summary judgment as to the church, and affirmed the summary judgment for the trustees.<sup>235</sup> In ruling that the plaintiff could maintain a personal injury lawsuit against the church, the court applied an exception to the common law rule which the supreme court had never formally adopted.<sup>236</sup> On transfer, the Indiana Supreme Court chose to accept the invitations of the court of appeals and revisit its previous ruling in *Calvary Baptist Church v. Joseph*.<sup>237</sup>

In *Calvary*, the Indiana Supreme Court held that, as a general rule, a member of an unincorporated association may not sue the association for injuries suffered as a result of the tortious acts of the association or its members.<sup>238</sup> This rule rests upon the doctrine of imputed liability, which states that an association's membership is engaged in a joint enterprise, and the negligence of each member and the prosecution of that enterprise is imputable to each and every other member so that the member who has suffered damages through the tortious conduct of another member of the association may not recover from the association for such damage.<sup>239</sup> The supreme court noted that the requirement that the members of an unincorporated association be engaged in a joint enterprise does not mean, however, that at the time of the injuries, the members must be engaged in some specific "group activity."<sup>240</sup> Rather, this requirement is generally satisfied in the church congregation setting because the congregation's members are thought to be engaged in the joint enterprise of worship and/or maintaining a premises for worshipping.<sup>241</sup> Applying the common law rule to the facts in *Calvary*, the Indiana Supreme Court held that a church member who had been injured when he fell off a ladder while repairing the church's roof could not sue the church.<sup>242</sup>

The *Hanson* court analyzed decisions of other jurisdictions that examined the erosion of the common law rule and noted that one vestige of the common law rule survives—our "obedience to an ancient precept automatically impeding the negligence of an unincorporated association to an injured member."<sup>243</sup> However, it perceived no compelling reason for retaining this remnant of the original common law rules, and held that members should be allowed to bring tort actions against the unincorporated associations of which they are part, thus overruling

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235. See *Hanson v. St. Lukes United Methodist Church*, 682 N.E.2d 1314 (Ind. Ct. App. 1997), *aff'd*, 704 N.E.2d 1020 (Ind. 1998).

236. See *Hanson*, 704 N.E.2d at 1021.

237. 522 N.E.2d 371 (Ind. 1988).

238. See *id.* at 374.

239. See *id.* at 374-75; see also 65A C.J.S. *Negligence* § 158 (1966).

240. *Hanson*, 704 N.E.2d at 1022 (citing *Biereichel v. Smith*, 693 N.E.2d 634, 637 (Ind. Ct. App.), *vacated*, 704 N.E.2d 456 (Ind. 1998)).

241. See *id.* at 1020.

242. See *Calvary*, 522 N.E.2d at 372.

243. *Hanson*, 704 N.E.2d at 1025.

*Calvary*.<sup>244</sup> In addition, the court noted that it believed this change in the common law may also be justified by Indiana's shift from a system of contributory negligence to one of comparative fault.<sup>245</sup> It reasoned that under a system of contributory negligence, the common law doctrine of imputed negligence necessarily barred these types of suits, assuming no exceptions apply.<sup>246</sup> However, under a comparative fault system, the relevant issue is not whether the injured party is a member of the association, but rather whether his or her own degree of actual causative negligence, if any, is greater or lesser than that of which he or she complains.<sup>247</sup>

In conclusion, *Hanson* abolished the ancient precept which precluded members of unincorporated associations from suing their associations for tortious conduct, holding that such suits shall now be allowed, subject to the applicable principles of comparative fault and the limitations imposed by the Indiana Rules of Trial Procedure.<sup>248</sup>

## II. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

For nearly one hundred years, Indiana adhered to the "impact rule" with regard to the recovery of damages for negligent infliction of emotional distress. This rule required that the mental distress be accompanied by, and result from, a physical injury caused by an impact to the person seeking recovery. Just nine years ago, the Indiana Supreme Court specifically declined to abolish the impact rule in a case involving emotional trauma suffered by a mother who witnessed her son die as a result of an automobile accident in which she was involved.<sup>249</sup> Instead of abolishing the impact rule, the court modified the rule as follows:

When . . . a plaintiff sustains a direct impact by the negligence of another and, by virtue of that direct involvement sustains an emotional trauma which is serious in nature and of a kind and extent normally expected to occur in a reasonable person, we hold that such a plaintiff is entitled to maintain an action to recover for that emotional trauma without regard to whether the emotional trauma arises out of or accompanies any physical injury to the plaintiff.<sup>250</sup>

Thus, while physical injury is no longer required, the plaintiffs seeking recovery for negligently caused emotional distress must still sustain a *direct physical impact* by the negligence of the defendant.<sup>251</sup>

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244. *See id.*

245. *See id.*

246. *See id.* at 1026.

247. *See id.*

248. *See id.*

249. *See Shuamber v. Henderson*, 579 N.E.2d 452, 456 (Ind. 1991)

250. *Id.*

251. *See id.*; *see also Miller v. May*, 656 N.E.2d 1198, 1200 (Ind. Ct. App. 1995) ("[T]he modified impact rule maintains the requirement that the plaintiff demonstrate that he suffered a

Post-*Shuamber* decisions have clearly and consistently applied this rule of law to restrict emotional distress claims where there is an insufficient nexus between the defendant's conduct and the plaintiff's alleged injury.<sup>252</sup>

The Indiana Court of Appeals handed down another opinion this year following the line of cases restricting recovery on a claim for emotional distress. In *Groves v. Taylor*,<sup>253</sup> the court held that an eight year old child who witnessed an accident involving her younger brother's death suffered no direct physical impact and could not recover for emotional distress under Indiana law. In *Groves*, eight year old Mary Beth walked her six year old brother down the driveway to check the mailbox across the road. As Mary Beth turned to walk back toward the house, her brother proceeded to cross the road and was hit by a car. Mary Beth heard, but did not see, the impact. The car was driven by a State Trooper. Mary Beth brought a claim against the State for emotional distress. The State was granted summary judgment. Mary Beth appealed, arguing that her proximity and relationship to her brother caused her to be directly involved in the accident.<sup>254</sup> Mary Beth urged the court of appeals to modify Indiana law to permit her recovery. The court held that it was not the province of the court of appeals to render that decision and invited the supreme court to do so.<sup>255</sup>

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direct physical impact.”).

252. *Compare* *Dollar Inn, Inc. v. Slone*, 695 N.E.2d 185 (Ind. Ct. App. 1998) (finding a direct impact where the plaintiff was stabbed by a needle and brought a claim for the fear of AIDS and mental distress suffered as a result of the needle stab); *J.L. v. Mortell*, 633 N.E.2d 300 (Ind. Ct. App. 1994) (holding that a physical therapy patient could maintain an action for the negligent infliction of emotional distress where her therapist performed inappropriate and unfounded vaginal massages on her because the massages constituted a direct impact); *and* *Bader v. Johnson*, 675 N.E.2d 1119 (Ind. Ct. App. 1997) (finding a direct physical impact where the plaintiff experienced a continued pregnancy and delivered a child with severe congenital defects after the defendant-physician negligently failed to disclose the results of pre-natal testing), *with* *Gorman v. I&M Electric Co., Inc.*, 641 N.E.2d 1288 (Ind. Ct. App. 1994) (holding that the plaintiff failed to show a direct physical impact where she mistakenly concluded that her five-year-old son remained in her burning home and watched as her husband re-entered the home in search of the child); *Comfax v. North American Van Lines*, 587 N.E.2d 118, 127 (Ind. Ct. App. 1992) (holding that the plaintiff failed to show a direct impact where he merely “saw” his business decline as a result of the defendant's negligence); *and* *Etienne v. Caputi*, 679 N.E.2d 922 (Ind. Ct. App. 1997) (finding no direct physical impact where defendant-physician misdiagnosed the plaintiff's breast cancer by incorrectly reading a mammogram because the plaintiff was not physically touched by the physician and did not witness a loved one's death).

253. 711 N.E.2d 861 (Ind. Ct. App. 1999).

254. *See id.* at 864.

255. *See id.* Judge Kirsch dissented, noting that severe, debilitating and foreseeable emotional effects can result from traumatic events without physical impact and that this case presented an opportunity to take another step towards expanding the impact rule. *See id.* at 864 (Kirsch, J., dissenting), *rev'd*, 729 N.E.2d 569 (Ind. 2000). The court's reasoning will be discussed in next year's Survey Issue.

In *Ross v. Cheema*,<sup>256</sup> and *Conder v. Wood*,<sup>257</sup> the supreme court decided to accept such an invitation. In *Ross*, the defendant, deliveryman Cheema, was attempting to deliver a certified termination letter to the plaintiff, Ross, at her home. Ross was inside her home, sitting in a recliner recovering from surgery. Cheema (1) pounded on Ross' door; (2) opened Ross' screen door; and, (3) twisted and shook the door knob on Ross' inner door.<sup>258</sup> Ross testified that she was frightened that an intruder was trying to gain entry into her home. She placed a steak knife in her pants and went to the door. She was presented with a clipboard and asked to "sign here." Cheema never touched Ross, no instrumentality of his ever came into physical contact with Ross, and he never entered Ross' house.<sup>259</sup> Based upon Cheema's argument that Ross sustained no direct physical impact as required under Indiana law to recover for the negligent infliction of emotional distress, the trial court entered summary judgment in favor of Cheema.<sup>260</sup>

The Indiana Court of Appeals held that Ross satisfied Indiana's modified impact rule announced in *Shuamber* requiring that a party claiming negligent infliction of emotional distress sustain a direct physical impact in relation to the defendant's negligence before being entitled to recover for her alleged emotional damages.<sup>261</sup> The court reasoned that being inside one's home that sustains a physical impact (i.e., pounding on the door) is similar to being inside a car which sustains a physical impact (i.e., the facts of *Shuamber*).<sup>262</sup>

Apparently finding that the Indiana Court of Appeals opinion in *Ross* represented an unwarranted departure from the modified impact rule, the Indiana Supreme Court granted transfer, vacated the court of appeals' opinion, and affirmed the judgment of the trial court.<sup>263</sup> The court found that the touching of a building in which a plaintiff is situated does not constitute a direct physical impact.<sup>264</sup> While the defendant deliveryman pounded on Ross' door, opened the screen door, and shook the door knob on Ross' inner door, the deliveryman never touched Ross, no instrumentality of his ever came into physical contact with Ross, and he never entered Ross' house. Moreover, the deliveryman said nothing to Ross other than to request that she sign for a letter.<sup>265</sup> He did not step into Ross' house, he did not threaten Ross, he did not have a weapon, and he did not touch Ross. Put simply, Ross was neither directly nor physically impacted in any

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256. 716 N.E.2d 435 (Ind. 1999).

257. 716 N.E.2d 432 (Ind. 1999).

258. See *Ross*, 716 N.E.2d at 436.

259. See *id.*

260. See *id.*

261. See *Ross v. Cheema*, 696 N.E.2d 437, 439 (Ind. Ct. App. 1998), *rev'd*, 716 N.E.2d 435 (Ind. 1999).

262. See *id.*

263. See *Ross*, 716 N.E.2d at 435.

264. See *id.* at 436.

265. See *id.*

way by the defendant's conduct.<sup>266</sup>

In *Conder v. Wood*,<sup>267</sup> the Indiana Supreme Court reached a contrary result on the same day. In *Conder*, a pedestrian was attempting to cross a street with a companion when the companion was struck and fatally injured by a truck which was negotiating a turn. The plaintiff had seen that the truck was not going to stop and jumped out of its path.<sup>268</sup> She attempted to pull her companion back; however, before she had time to react, the front wheel of the truck struck her companion and knocked her violently to the ground. The truck continued to roll directly next to where the plaintiff was standing and in the direct path of her fallen companion.<sup>269</sup> Afraid that the truck would run her companion over, the plaintiff began pounding on the panels of the truck trailer to get the driver's attention. The truck came to a stop just before the rear tire ran over her companion's head; nevertheless, the companion died at the scene.<sup>270</sup>

As a result of the incident, the plaintiff sustained bruises on her arm, emotional and psychological trauma, stress-related headaches, insomnia and personality changes. The plaintiff subsequently filed suit against the truck driver and the trucking company, seeking recovery for her emotional injuries under a theory of negligent infliction of emotional distress.<sup>271</sup> The defendants filed a motion for summary judgment, arguing that any recovery sought by the plaintiff for emotional distress or psychological damage was precluded under Indiana law. The trial court issued an order denying summary judgment.<sup>272</sup>

On appeal, the defendants argued that the modified impact rule announced in *Shuamber* precluded the plaintiff from recovering damages.<sup>273</sup> Relying on this Indiana Supreme Court decision, the Indiana court of appeals remarked that it must determine whether the plaintiff suffered a direct physical impact by the negligence of the defendant truck driver.<sup>274</sup> The court of appeals found that the only physical impact between the plaintiff and the truck driven by the defendant was initiated through the plaintiff's own actions, and not directly through the truck driver's negligence.<sup>275</sup> Thus, the court held that while it was clear that the plaintiff was involved in the incident which resulted in her companion's death, she did not suffer a "direct physical impact by the negligence of another" necessary for the application of the modified impact rule.<sup>276</sup>

The Indiana Supreme Court found that as long as an impact occurred from

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266. *See id.*

267. 716 N.E.2d 432 (Ind. 1999).

268. *See id.* at 433.

269. *See id.*

270. *See id.*

271. *See id.* at 434.

272. *See id.*

273. *See id.*

274. *Conder v. Wood*, 691 N.E.2d 490, 493 (Ind. Ct. App. 1998), *rev'd*, 716 N.E.2d 432 (Ind. 1999).

275. *See id.*

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

the plaintiff's direct involvement in the tortfeasor's conduct, it mattered little *how* the physical impact occurred.<sup>277</sup>

While it appears that the Indiana Supreme Court will continue to follow the modified impact rule and require some impact, the standard is relaxed somewhat so that the source of the impact may be irrelevant.

### III. INDIANA'S SHOPLIFTING DETENTION STATUTE

In *Wal-Mart Stores, Inc. v. Bathe*,<sup>278</sup> the Indiana Court of Appeals once again addressed the scope of Indiana's Shoplifting Detention Act. The opinion basically stands for the proposition that the reasonableness of a suspected shoplifter's detention may be determined as a matter of law and that if the detention is reasonable a merchant is immune from claims for negligence, defamation, and fraud.

In *Bathe*, an alarm was triggered when Wal-Mart customers attempted to leave the store. Wal-Mart employees escorted the customers back to the checkout and ascertained in a short amount of time that nothing in the shopping bags was triggering the alarm. The customer's purse was then passed through the alarm, at which time the alarm sounded.<sup>279</sup> The purse was emptied, and an empty Dristan box was located. Because the item had been purchased elsewhere, the Wal-Mart employees deactivated the plastic tag and allowed the customer to leave.<sup>280</sup>

The entire event lasted no longer than fifteen minutes, and the Indiana Court of Appeals concluded, as a matter of law, that the length of the detention was not unreasonable.<sup>281</sup> The court noted that, while the customer may have been embarrassed by the manner of the store's search, the Shoplifting Detention Act "authorizes a merchant to take steps that might inevitably result in some embarrassment to innocent customers."<sup>282</sup> On the other hand, the Act "does not immunize a merchant from liability for negligence based upon allegations that it conducted an unreasonable search."<sup>283</sup>

Of equal importance, the court extended the scope of the Act to claims of defamation and fraud. Therefore, if a merchant's actions are determined to be reasonable, the merchant is immune from claims of defamation and fraud as well as negligence.

### IV. WRONGFUL DEATH AND SURVIVAL STATUTE

During the course of this survey period, both the Indiana Supreme Court and

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277. See *Conder*, 716 N.E.2d at 435.

278. 715 N.E.2d 954 (Ind. Ct. App. 1999), *trans. denied*, No. 49A02-9812-CV-1001, 2000 Ind. LEXIS 126 (Ind. Feb. 17, 2000).

279. See *id.* at 956.

280. See *id.*

281. See *id.* at 961.

282. *Id.*

283. *Id.* at 962.

court of appeals rendered significant and controversial decisions interpreting the scope and breadth of Indiana's wrongful death and survival statutes.

### A. *Child Wrongful Death Statute*

1. *Measuring Period for Calculating Loss of Child's Love and Companionship.*—In *Robinson v. Wroblewski*,<sup>284</sup> plaintiffs brought a wrongful death action against defendant seeking recovery for the death of their son, who was killed in an automobile accident with the defendant driver. Specifically, plaintiffs sought damages for the loss of their son's love and companionship measured using the time period from his death until the death of his last surviving parent.<sup>285</sup> Defendants moved to strike from the complaint the plaintiffs' request for damages measured using this time, arguing that plaintiffs should only be entitled to recover damages measured using the time from the date of decedent's death until the date decedent would have reached the age of 23. This latter measuring period is the same as that assigned by Indiana's Wrongful Death Statute for damages for the loss of a child's services.<sup>286</sup>

The trial court concluded that the legislature intended specific and independent limitations on damages and found that the recovery for the loss of a child's love and companionship began upon the death of the child and extended until the death of the last surviving parent. The Indiana Court of Appeals affirmed the trial court's decision, holding that "Indiana's Child Wrongful Death Act permits the recovery of damages for the loss of a child's love and companionship until the death of the last surviving parent."<sup>287</sup>

On transfer, the Indiana Supreme Court engaged in a lengthy analysis of the history of the Child Wrongful Death Act. It then focused its inquiry on whether, as the bill proceeded through the legislative process, evidence existed that the Indiana General Assembly meant to change the measuring period provisions of the bill as introduced; i.e., providing a different measuring period for calculating damages for loss of a child's services than that for loss of a child's love and companionship.<sup>288</sup> Although the court acknowledged that Indiana's Child Wrongful Death Act had undergone substantial revisions, it determined from a detailed examination of the bill's legislative history and rules of statutory construction that the legislature did not intend to change this aspect of the bill as introduced.<sup>289</sup> Therefore, the court concluded that the Indiana Child Wrongful Death Act, specifically Indiana Code sections 34-23-2-1(f) and (g), permits the recovery of damages for the loss of a child's love and companionship from the

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284. 704 N.E.2d 467 (Ind. 1998).

285. *See id.* at 468.

286. *See id.* at 467-68 (citing IND. CODE §34-23-2-1(a) (1998)).

287. *Robinson v. Wroblewski*, 679 N.E.2d 1348, 1349 (Ind. Ct. App. 1997), *aff'd*, 704 N.E.2d at 467.

288. *Robinson*, 704 N.E.2d at 471-72.

289. *See id.* at 476.

death of a child until the death of a child's last surviving parent.<sup>290</sup>

In a dissenting opinion, Justice Boehm noted that the majority's careful analysis of the statute and its legislative history leads inescapably to the conclusion that the statute is internally inconsistent and that someone failed at the drafting stage to consider all of the implications in subsection (f) for other provisions of the statute.<sup>291</sup> Justice Boehm could not find anything in the statute that resolves this inconsistency or that points in the direction of resolving disputes in favor of either party. However, he stated that the internal logic of the statute seems more offended by the majority's result than by a literal reading of subsection (f) to limit all damages under "this section" to age twenty-three for students and age twenty for others.<sup>292</sup>

In Justice Boehm's opinion,

the result of the majority's view is that the legislature intended the following results: (1) economic loss and the loss of a child's services and out-of-pocket expenses for the survivor's psychiatric care are not recoverable after age twenty-three, but loss of love and affection is recoverable beyond that time; and (2) a child who is killed at age twenty-three and one day is wholly not compensable, but loss of love and affection from the death of that child's twin that occurs two days earlier is compensable for the life of the parents.<sup>293</sup>

Justice Boehm found these results sufficiently bizarre that it is unlikely that the legislature would have approved them.<sup>294</sup> He concluded by stating that the issue is purely a matter of legislative policy, and that the majority may well be correct in divining the legislature's intentions.<sup>295</sup> If so, he noted this decision will stand. If not, he noted the General Assembly can fix it.<sup>296</sup>

2. *Common Law Claims for Loss of Services and Punitive Damages.*—In *Forté v. Connerwood Healthcare, Inc.*,<sup>297</sup> a mother whose son had died while in a nursing home brought suit individually and on behalf of her son's estate alleging that the nursing home's negligence had caused her son's death. Plaintiff subsequently amended her complaint to include a claim for punitive damages, alleging that the nursing home's negligence was willful and wanton.<sup>298</sup> The defendant nursing home moved for partial judgment on the pleadings with respect to the issue of punitive damages. The trial court granted the motion, finding that punitive damages are not allowed under the Child Wrongful Death

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290. *See id.*

291. *See id.* (Boehm, J., dissenting).

292. *Id.*

293. *Id.*

294. *See id.*

295. *See id.*

296. *See id.*

297. 702 N.E.2d 1108 (Ind. Ct. App. 1998), *trans. granted*, 702 N.E.2d 1168 (Ind. 1999) (mem.).

298. *See id.* at 1110.

Statute.<sup>299</sup>

On appeal, the court began its analysis by noting that, at common law, there was no liability in tort for killing another person because actions for personal injury did not survive the death of an injured party.<sup>300</sup> Thus, wrongful death actions have been held to be purely creatures of statute and only those damages prescribed by the statute may be recovered.<sup>301</sup> The court of appeals therefore agreed that Indiana courts have consistently held that punitive damages are not recoverable under the statutes governing wrongful death actions.<sup>302</sup>

However, the court of appeals stated that a wrongful act resulting in an injury to a minor child gives rise to a common law cause of action in favor of the parent for the loss of the child's services.<sup>303</sup> Thus, the court found that a common law cause of action survives and continues to provide a remedy for parents for the loss of their child's services from the time of injury up until the child's death. "[A]s the common law right of recovery ends at the child's death, the child wrongful death statute provides a parent with an additional remedy to recover damages, including the damages related to the loss of a child's services, which pertain to a period of time after a child's death."<sup>304</sup>

The court noted that the plaintiff brought her lawsuit in her individual capacity as well as on behalf of her son's estate, and therefore stated a redressable common law claim for the loss of her son's services from the date of defendant's first negligent act or omission until the time of the child's death.<sup>305</sup> It found that the common law remedy therefore preceded and survived the additional remedy provided by the Wrongful Death Statute.<sup>306</sup> Accordingly, the court held that the plaintiff had appropriately stated a redressable claim for punitive damages in her individual capacity, and that the trial court erred to the extent it granted judgment on the pleadings with respect to the plaintiff's individual claim for punitive damages associated with her common law claim for the loss of her child's services.<sup>307</sup>

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299. *See id.*

300. *See id.* at 1111 (citing *Ed Wiersma Trucking Co. v. Pfaff*, 643 N.E.2d 909, 911 (Ind. Ct. App. 1994)).

301. *See id.*; *see also* *Wolf v. Boren*, 685 N.E.2d 86, 88 (Ind. Ct. App. 1997); *Andis v. Hawkins*, 489 N.E.2d 78, 81 (Ind. Ct. App. 1986).

302. *Forte*, 702 N.E.2d at 1111 (citing *Rogers v. R.J. Reynolds Tobacco Co.*, 557 N.E.2d 1045, 1056 (Ind. Ct. App. 1990) (Adult Wrongful Death Statute); *Andis*, 489 N.E.2d at 83 (Child Wrongful Death Statute)). Based on these observations, Indiana courts have consistently held that punitive damages are not recoverable under the statutes governing wrongful death actions. *See id.*

303. *See Forte*, 702 N.E.2d at 1112 (citing *Boyd v. Blaisdell*, 15 Ind. 73, 75-76 (1860); *Buffalo v. Buffalo*, 441 N.E.2d 711, 714 (Ind. Ct. App. 1992)).

304. *Id.* at 1112-13 (citing IND. CODE § 34-23-2-1(f) (1998) (the child wrongful death statute provides that: "Damages may be awarded . . . only with respect to the period of time from the death of the child until [one of the three later dates.]").

305. *See id.* at 1113.

306. *See id.*

307. *See id.* at 1114-15 (citing *Rogers*, 557 N.E.2d at 1057).

In a dissenting opinion, Judge Baker stated that actions for the death of a child continued to be limited to pecuniary loss and cannot be extended to punitive damages.<sup>308</sup> Judge Baker noted that the item of punitive damages remains conspicuously absent from Indiana's Wrongful Death Act, and that neither the court of appeals nor the supreme court should simply "cast away" longstanding precedent.<sup>309</sup> Judge Baker indicated that because the legislature has not permitted the recovery of punitive damages with respect to actions involving the death of a child, he would affirm the trial court's order granting the defendant's motion for partial judgment on the pleadings.<sup>310</sup>

### B. Adult Wrongful Death Statute

1. *Determination of Beneficiary Status.*—In *Johnson Controls, Inc. v. Forrester*,<sup>311</sup> a decedent's wife, as administrator of his estate, brought a wrongful death action against defendants, seeking, among other things, monetary damages on behalf of their minor child for loss of love and affection. Defendants moved to compel discovery and for a physical examination seeking to prove that the child born during decedent's marriage to the wife was not the decedent's biological child. Defendants argued that the plaintiff was not entitled to recover emotional damages on behalf of the child under Indiana's Wrongful Death Statute.<sup>312</sup> On appeal, the court restated the issue in this case as follows: "whether a third-party in a wrongful death action may seek to disestablish paternity, and thus, the statutory beneficiary status of a dependent child born into an intact marriage when the decedent, during his lifetime, did not challenge such paternity."<sup>313</sup> Specifically, the court was faced with the issue of whether, through discovery, defendant could challenge the plaintiff's son's status as a statutory beneficiary in a wrongful death case by attempting to disestablish paternity even though the child was born into an intact marriage and the decedent, during his lifetime did not challenge the paternity of the child.<sup>314</sup>

The court began its discussion by noting that the issue raised necessarily involves elements of paternity and inheritance.<sup>315</sup> It further noted that the Wrongful Death Statute "specifically links a beneficiary's [r]ight to recovery under the [statute] with his or her [r]ight to receive a distribution of the decedent's personal property."<sup>316</sup> It then looked to Indiana's probate laws, and determined that the Indiana legislature intended for all heirship relationships to become absolute at a decedent's death, except as provided for by statute relating

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308. See *id.* at 1115-16 (Baker, J., dissenting).

309. See *id.*

310. See *id.* at 116-17.

311. 704 N.E.2d 1082 (Ind. Ct. App.), *trans. denied*, 726 N.E.2d 300 (Ind. 1999).

312. See *id.* at 1083.

313. *Id.*

314. See *id.* at 1084.

315. See *id.* at 1083.

316. *Id.* at 1084 (citing *Melvin v. Patterson*, 965 F. Supp. 1212, 1217 (S.D. Ind. 1997)).

to a child born out of wedlock.<sup>317</sup> It next looked to the reasoning in *Estate of Lamey*, where the court of appeals reasoned that the heirship relationship between a child and a decedent is "frozen" at a decedent's death.<sup>318</sup>

Due to the interrelationship between wrongful death and heirship, the Indiana Court of Appeals found that the reasoning in *Lamey* is applicable to wrongful death actions, and the court held that the relationship between the plaintiff's child and the decedent was fixed upon decedent's death for purposes of the child's status as a beneficiary under the Wrongful Death Statute.<sup>319</sup> The court reasoned that the presumption that the child is a statutory beneficiary under the Wrongful Death Statute became irrefutable upon decedent's death and could not now be challenged by defendants.<sup>320</sup> It further reasoned that to allow defendant to make such challenge to a child born into an intact marriage where the decedent did not challenge paternity during his lifetime would open the door for a paternity challenge in every wrongful death case where the decedent is survived by a dependent child and that public policy did not support such attacks.<sup>321</sup>

2. *Intervening Cause of Death*.—In *Best Homes, Inc. v. Rainwater*,<sup>322</sup> the decedent was seriously injured in a construction site accident as a result of defendant's alleged negligence. The decedent's injuries caused him considerable pain, prevented him from working, created financial hardship, and caused stress in his marriage. Decedent became addicted to pain killers and his inability to work took a toll on his mental state.<sup>323</sup> Ultimately, decedent became unbearable to live with and he and his wife divorced. Decedent's emotional state continued to decline and, after battering his estranged wife, he was arrested. While in jail decedent hung himself.<sup>324</sup>

Decedent's complaint for damages was subsequently amended, substituting his estate as the plaintiff and requesting damages under the alternate theories of Indiana's Wrongful Death Statute and Indiana's Survivorship Statute. Defendant moved for partial summary judgment on the wrongful death claim, asserting that decedent's suicide was an independent intervening and superseding cause which served to cut off its liability for decedent's death.<sup>325</sup> On appeal following the trial court's denial of the motion, the Indiana Court of Appeals noted that the Wrongful Death Statute provides a cause of action when "the death is caused by the wrongful act or omission of another."<sup>326</sup> In contrast, the Survivorship Statute applies when a person: (1) receives personal injuries caused by the wrongful act or omission of another; and (2) subsequently dies from causes other than those

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317. See *id.* (citing *Estate of Lamey v. Lamey*, 689 N.E.2d 1265 (Ind. Ct. App. 1997)).

318. See *id.* at 1085 (citing *Lamey*, 689 N.E.2d at 1268).

319. See *id.*

320. See *id.*

321. See *id.*

322. 714 N.E.2d 702 (Ind. Ct. App. 1999).

323. See *id.* at 704.

324. See *id.*

325. See *id.*

326. *Id.* at 705 (citing IND. CODE § 34-23-1-1 (1998)).

personal injuries.<sup>327</sup> The court noted that a comparison of the language of the two statutes reveals that a tortfeasor may be held liable under *either* the Wrongful Death Statute or the Survivorship Statute, *but not both*.<sup>328</sup> If the victim dies from injuries sustained in the accident, the case falls under the Wrongful Death Statute. However, if the victim dies from unrelated causes, the case falls under the Survivorship Statute. In an action brought under the Wrongful Death Statute, a personal representative may recover damages “including, but not limited to, reasonable medical, hospital, funeral and burial expenses, and lost earnings of such deceased person.”<sup>329</sup> In an action brought under the Survivorship Statute, “the personal representative of the decedent may recover all damages resulting before the date of death from those injuries that the decedent would have been entitled to recover had the decedent lived.”<sup>330</sup>

With respect to defendant’s argument concerning intervening and superseding cause, the court of appeals noted that where harmful consequences are brought about by intervening and independent forces that were not reasonably foreseeable at the time of the defendant’s conduct, the chain of causation is broken and the intervening cause may serve to cut off the defendant’s liability.<sup>331</sup> It further noted that although the issue of proximate cause is not properly resolved by summary judgment, where the injuries could not, as a matter of law, have been reasonably foreseen due to the unforeseeability of an intervening, superseding cause, summary judgment may appropriately be entered in favor of the defendant.<sup>332</sup>

The court of appeals looked to supreme court precedent finding that suicide constitutes an intervening cause only if it is the “voluntary” and “willful” act of the victim.<sup>333</sup> The court found that a jury could reasonably conclude that decedent’s suicide was neither voluntary nor willful, but accomplished in delirium or frenzy.<sup>334</sup> It reasoned that the decedent’s severe pain prevented him from working and caused severe depression and an addiction to pain medication.<sup>335</sup> Because the decedent’s state of mind at the time of his suicide was an issue, the court determined that the question as to whether the suicide was voluntary or willful was properly left to a jury.<sup>336</sup>

3. *Waiver of Rights to Recovery.*—In *Flock v. Snider*,<sup>337</sup> the Indiana Court

327. See *id.* (citing IND. CODE § 34-9-3-4).

328. See *id.* (citing *American Int’l Adjustment Co. v. Galvin*, 86 F.3d 1455, 1457 (7th Cir. 1996)).

329. *Id.* (citing IND. CODE § 34-23-1-1; *Ed Wiersma Trucking Co. v. Pfaff*, 643 N.E.2d 909, 911 (Ind. Ct. App. 1994)).

330. *Id.* (citing IND. CODE § 34-9-3-4).

331. See *id.* at 706 (citing *Havert v. Caldwell*, 452 N.E.2d 154, 158-59 (Ind. 1993)).

332. See *id.* (citing *Havert*, 452 N.E.2d at 159).

333. See *id.* (citing *Hooks SuperX, Inc. v. McLaughlin*, 642 N.E.2d 514, 521 (Ind. 1994)).

334. See *id.* at 707.

335. See *id.*

336. See *id.*

337. 700 N.E.2d 466 (Ind. Ct. App. 1998).

of Appeals was faced with the issue of whether a statutory beneficiary has the authority to waive a claim for damages recoverable under the Indiana Wrongful Death Statute.<sup>338</sup> Decedent was killed in an automobile accident in which he was a passenger in a car driven by his step-daughter. The executrix of the decedent's estate subsequently filed a wrongful death action against decedent's step-daughter.<sup>339</sup> The defendant's mother, decedent's widow, then signed an affidavit that stated her desire to waive her right to any benefits available to her under the Wrongful Death Statute. This affidavit was presented in support of a motion for partial summary judgment filed by defendant. The trial court granted defendant's motion, thereby precluding the executrix from recovering damages otherwise available under the statute.<sup>340</sup>

On appeal, the plaintiff maintained that the trial court's decision was erroneous because the widow's affidavit relinquishing her rights under section 34-1-1-2 of the Indiana Code was not a valid waiver.<sup>341</sup> Specifically, the plaintiff claimed that the waiver was premature and therefore ineffective in precluding the executrix of the estate from recovering all damages provided by the Wrongful Death Statute.<sup>342</sup> On this issue, the Indiana Court of Appeals concluded that decedent's widow, the sole beneficiary under the statute, had the authority to waive her claim to any damages recoverable under the statute.<sup>343</sup> It noted that although the statute authorizes only the personal representative of the decedent to commence a wrongful death action, the personal representative does so only as a trustee for the statutory beneficiaries.<sup>344</sup> The court concluded that although the executrix had standing on behalf of the estate to seek such damages, she lacked the factual basis to prosecute such a claim because decedent's widow relinquished her claim under the Wrongful Death Statute, thus terminating the executrix's basis upon which to bring an action to recover damages on the beneficiary's behalf.<sup>345</sup>

4. *Evidence of Personal Maintenance Expenses.*—During the course of this survey period, the Indiana Court of Appeals rendered a controversial decision interpreting damages recoverable under the Indiana Wrongful Death Statute. In *Elmer Buchta Trucking, Inc. v. Stanley*,<sup>346</sup> the court of appeals held that the Wrongful Death Act mandates, by its plain language, that a wrongful death plaintiff recover the entire amount of the decedent's lost earnings, without an

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338. See *id.* at 468.

339. See *id.* at 467.

340. See *id.*

341. See *id.* at 468.

342. See *id.*

343. See *id.*

344. See *id.* (citing *Rogers v. Grunden*, 589 N.E.2d 248, 258 (Ind. Ct. App. 1992); *Thomas v. Eads*, 400 N.E.2d 778, 782 (Ind. Ct. App. 1980)).

345. See *id.*

346. 713 N.E.2d 925 (Ind. Ct. App. 1999), *trans. denied*, No. 14A01-9805-CV-1649, 2000 Ind. LEXIS 172 (Ind. Feb. 17, 2000).

offset for the decedent's personal maintenance expenses.<sup>347</sup>

In *Buchta*, the decedent died as a result of injuries he sustained during a collision between his vehicle and a truck driven by an agent of the defendant. The co-representatives of decedent's estate brought a wrongful death action and the case proceeded to trial by jury.<sup>348</sup> During the trial, defendant sought to introduce evidence of the decedent's "personal maintenance" to reduce the damage award by proving that a portion of decedent's lost earnings would have been unavailable to his family even if he had lived to his expected age. The trial court granted the plaintiff's motion in limine to exclude such evidence, and defendant preserved the issue for appeal by making an offer to prove at trial in which an expert testified that decedent would have consumed approximately twenty-four percent of his lifetime earnings for his personal maintenance.<sup>349</sup>

On appeal, defendant contended that the trial court abused its discretion by misinterpreting Indiana's Wrongful Death Act. Specifically, defendant argued that the Act requires that damages based upon a decedent's lost earnings be reduced by personal maintenance expenses and the trial court's failure to admit personal maintenance evidence constituted an abuse of discretion.<sup>350</sup> Plaintiff responded that the Act requires the full amount of damages of a decedent's lost earnings be included in a damage award. Thus, the plaintiff argued that personal maintenance evidence is never admissible in a wrongful death action.<sup>351</sup>

The court of appeals found that the Indiana Supreme Court had long interpreted the damage provision of the Wrongful Death Act to permit recovery for a decedent's lost earnings, but that such precedent also required that those damages be reduced by the decedent's personal maintenance expenses.<sup>352</sup> The court noted, however, that the 1965 amendments to the Wrongful Death Statute had previously unmentioned language with respect to a decedent's lost earnings and found that since that time Indiana appellate courts have not addressed whether trial courts are required to admit or exclude evidence of personal maintenance expenses pursuant to this provision.<sup>353</sup>

In response, defendants argued that statements of the Indiana Supreme Court in *Burnett v. State*,<sup>354</sup> suggested that the supreme court believed personal maintenance evidence relevant in determining wrongful death damages.<sup>355</sup> However, the court of appeals stated that, although these statements by the supreme court do suggest that the court believes personal maintenance evidence relevant in determining wrongful death damages, it did not believe the supreme

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347. *See id.* at 930.

348. *See id.* at 927.

349. *See id.*

350. *See id.* at 928.

351. *See id.*

352. *See id.* (citing *Pittsburgh, C.C. & St. L. Ry. Co. v. Burton*, 37 N.E. 150, 156 (Ind. 1894)).

353. *See id.*

354. 467 N.E.2d 664 (Ind. 1984).

355. *See Buchta*, 713 N.E.2d at 931 n.5 (citing *Burnett*, 467 N.E.2d at 666).

court directly confronted the issue presented by this case; i.e., the precise meaning of the Wrongful Death Statute as it pertains to damages based upon lost earnings.<sup>356</sup> Therefore, the court did not consider *Burnett* binding precedent on this point of law.<sup>357</sup>

The court next looked to the plain language of the Wrongful Death Act for guidance. Defendant contended that the damage provision of the Act as it relates to lost earnings is ambiguous, while the plaintiffs contended that the damage provision is unambiguous and the plain language of the Act mandates that a wrongful death plaintiff recover the entire amount of a decedent's lost earnings without the offset for personal maintenance.<sup>358</sup> The court of appeals agreed with the plaintiffs.<sup>359</sup>

Indiana's Wrongful Death Act provides, in relevant part: "[D]amages shall be in such an amount as may be determined by the court or jury, including, but not limited to . . . lost earnings of such deceased person . . . ." <sup>360</sup> The court agreed with defendant that the statute vests the fact-finder with the discretion to determine the amount of the wrongful death damages, but noted that the statute also specifies, in part, the manner by which these damages are to be determined.<sup>361</sup> Specifically, it found that the statute specifies that wrongful death damages include the decedent's lost earnings and that there is nothing ambiguous about this requirement.<sup>362</sup> It therefore determined that personal expenses are not pertinent to the calculation of the decedent's lost earnings.<sup>363</sup>

Recognizing the significance of the court of appeals' decision with respect to the issue of personal maintenance expenses under Indiana's Wrongful Death Act, the Indiana Supreme Court has accepted transfer of this case. Therefore, the court of appeals' decision has been vacated.<sup>364</sup> A decision has not yet been rendered by the Indiana Supreme Court.

### C. *Survival Statute and Punitive Damages*

In *Foster v. Evergreen Healthcare, Inc.*,<sup>365</sup> the personal representative of the estate of a nursing home resident who had suffered burns over fifty percent of his

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356. *See id.*

357. *See id.*

358. *See id.* at 929.

359. *See id.*

360. IND. CODE § 34-1-1-2 (1998).

361. *Buchta*, 713 N.E.2d at 929.

362. *See id.*

363. *See id.*

364. *See Southern Ry. Co. v. Ingle*, 69 N.E.2d 746 (Ind. Ct. App. 1946) (holding that when the supreme court transfers a case decided by the court of appeals, the appellate court's decision is set aside, vacated and expunged from the record, and the case stands as though it had been appealed directly to the supreme court).

365. 716 N.E.2d 19 (Ind. Ct. App. 1999), *trans. denied*, No. 49A04-9808-CV-422, 2000 Ind. LEXIS 144 (Ind. Feb. 17, 2000).

body while being lowered into a tub for a whirlpool bath, and who subsequently died of unrelated causes, brought a survival action against the operator of the nursing home.<sup>366</sup> Defendant filed a motion for partial summary judgment on the plaintiff's punitive damage claim. The trial court issued an order granting defendant's motion, finding that punitive damages cannot be recovered under the Indiana Survival Statute.<sup>367</sup>

In support of its summary judgment motion on the punitive damage claim, and on appeal, defendant relied on the federal district court's opinion in *Mundell v. Beverly Enterprises-Indiana, Inc.*,<sup>368</sup> in which Judge Tinder held that the Survival Statute prohibits a personal representative from seeking punitive damages in a personal-injury action brought on behalf of the decedent's estate.<sup>369</sup> The court of appeals noted that although it is not bound by federal court decisions interpretation of Indiana law, it gives them "respectful consideration" to assist in "coming to the ultimate conclusion of what the law is in Indiana on a particular issue."<sup>370</sup> After providing a brief analysis with respect to the legislative history of Indiana's Survival Statute and the interpretative limitations imposed on both the legislature and the courts by Indiana's common law, the court of appeals respectfully disagreed with Judge Tinder's interpretation for the reason that it did not find the statute to be ambiguous and consequently in need of judicial interpretation.<sup>371</sup>

In *Mundell*, Judge Tinder observed that the amended language of Indiana's Survival Statute allows recovery by the decedent's personal representative of any damages resulting from personal injury from which the decedent could have recovered had he lived.<sup>372</sup> Judge Tinder also observed that while punitive damages are not explicitly excluded, they are also not explicitly included.<sup>373</sup> The court of appeals, however, stated that although Judge Tinder may have been correct in stating that punitive damages do not result from personal injury and instead arise from a defendant's egregious conduct, it could not agree that the legislature did not intend to include punitive damages among "all" the damages "resulting before the date of death from those injuries that the decedent would have been entitled to recover had the decedent lived."<sup>374</sup> The court reasoned that had the decedent lived, he unquestionably would have been entitled to seek punitive damages as a means of punishing the defendant for its allegedly oppressive conduct that may have caused his injuries.<sup>375</sup>

The court of appeals additionally noted that public policy concerns impacted

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366. See *id.* at 22.

367. See *id.*

368. 778 F. Supp. 459 (S.D. Ind. 1991).

369. See *id.* at 462.

370. *Foster*, 716 N.E.2d at 25 (citing *Miller v. Cilts*, 463 N.E.2d 257, 263 (Ind. 1984)).

371. See *id.* at 26.

372. See *Mundell*, 778 F. Supp. at 462.

373. See *id.*

374. *Foster*, 716 N.E.2d at 27.

375. See *id.*

this decision. Specifically, the court found that a tortfeasor would merely have to outlast a dying potential plaintiff to avoid liability for punitive damages under Judge Tinder's reasoning in *Mundell*.<sup>376</sup> The court declined to adopt such a position. Accordingly, it held that section 34-9-3-4 of the Indiana Code, Indiana's Survival Statute, allows for the recovery of punitive damages by the personal representative of the decedent's estate.<sup>377</sup>

## V. MEDICAL MALPRACTICE

The Indiana Court of Appeals and Indiana Supreme Court decided several significant cases concerning medical malpractice during this survey period.

### A. *Scope of the Medical Malpractice Act*

The Indiana Court of Appeals decided two cases in which the scope of the Medical Malpractice Act was addressed. First, in *M.V. v. Charter Terre Haute Behavioral Health System, Inc.*,<sup>378</sup> the court of appeals held that a patient's false imprisonment claim fell within the scope of the Medical Malpractice Act. In *M.V.*, the patient, M.V., voluntarily admitted himself to Charter because he was suicidal and depressed. During the initial interview it was discovered that M.V. was experiencing marital, financial, and health problems.<sup>379</sup> Dr. Harshawat, M.V.'s attending physician, reviewed the findings and ordered M.V. to be admitted to the skilled adult unit on a suicide watch. M.V. signed several consent forms and was prescribed medications. That night M.V. was told to put on a hospital gown and sleep on a thin mattress on the floor. During his stay at Charter, M.V. participated in various forms of therapy, including medication therapy. He was diagnosed with major depression - suicidal.<sup>380</sup> He was instructed to write a letter to his wife stating all of his guilt about an affair and to writing the pros and cons of divorcing his wife. M.V. then left Charter on a day pass and did not return.<sup>381</sup>

M.V. filed a complaint against Charter alleging that he had been unlawfully detained and forced to take medication. Charter responded by claiming that M.V. had failed to comply with the procedural requirements of Indiana's Medical Malpractice Act and that the trial court lacked subject matter jurisdiction to hear the complaint because the Act required that a Medical Review Panel be formed and a Panel opinion issued before M.V. could bring an action in state court.<sup>382</sup> Charter then filed a motion to dismiss for lack of subject matter jurisdiction. M.V. responded claiming that Charter's tortious acts of false imprisonment were unrelated to the promotion of his health or its exercise of professional expertise,

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376. *See id.*

377. *See id.* at 28.

378. 712 N.E.2d 1064 (Ind. Ct. App. 1999).

379. *See id.* at 1065.

380. *See id.*

381. *See id.*

382. *See id.*

skill, or judgment and therefore fell outside the purview of the Act. Charter responded that the complained of actions were all healthcare related decisions governed by the Act. The trial court dismissed M.V.'s complaint for lack of subject matter jurisdiction, and M.V. appealed.<sup>383</sup>

The court of appeals found that "merely labeling acts performed by a health care provider as intentional torts does not automatically shield a plaintiff's claim from the procedural mandates of the Act."<sup>384</sup> The court noted that Charter's actions such as admitting M.V. as a patient, requesting him to put on a hospital gown, ordering him to sleep on a thin mattress on the floor as a suicide watch, and requiring him to take medication, were all professional judgments made by healthcare providers in psychiatric facilities. Further, discharge decisions were also designed to promote patient health and involved professional judgment and thereby generally fall under the Act.<sup>385</sup> However, the court noted that M.V. contended that he submitted a written request to be released from the facility that was denied by Charter. It was noted that there was no indication in the record that M.V. ever acknowledged the existence of the alleged request until his appellate brief. Because M.V. did not properly present the issue of the written request to the trial court, the court held that he could not argue this issue on appeal.<sup>386</sup>

The court went on to find that a waiver notwithstanding, Charter correctly observed that the receipt of a release request gives the facility five days in which to file a written report with the court that there is probable cause to believe that the patient is mentally ill and either dangerous or gravely disabled and requires continuing care.<sup>387</sup> Therefore, the court held that even assuming that M.V. had properly submitted a written request for release, he left Charter before the expiration of the statutory five day deadline.<sup>388</sup> The court then found that the release issue had been waived and that Charter's actions with respect to M.V. constituted professional services that fell within the purview of the Act and that the trial court correctly determined that it lacked subject matter jurisdiction to hear M.V.'s complaint.<sup>389</sup>

In another decision by the Indiana Court of Appeals concerning similar issues, the court held that a counterclaim for battery, under the circumstances of the case, did not fall within the coverage of the Medical Malpractice Act. In *Weldon v. Universal Reagents, Inc.*,<sup>390</sup> the operator of a red blood cell donor program brought an action against a donor claiming that the donor breached a contract by entering into an agreement with another donor program. The donor filed a counterclaim alleging that the operator committed battery upon her and

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383. *See id.* at 1065-66.

384. *Id.* at 1066 (citing *Boruff v. Jesseph*, 576 N.E.2d 1297, 1298 (Ind. Ct. App. 1991)).

385. *See id.*

386. *See id.* at 1067.

387. *See id.* (citing IND. CODE § 12-26-3-5 (1998)).

388. *See id.*

389. *See id.*

390. 714 N.E.2d 1104 (Ind. Ct. App. 1999).

caused her emotional distress.<sup>391</sup> The trial court dismissed the counterclaim for lack of subject matter jurisdiction holding that it fell within the privity of the Indiana Medical Malpractice Act. The court of appeals reversed holding that the operator was not estopped from raising lack of subject matter jurisdiction and that the donor's counterclaim did not fall within the coverage of the Medical Malpractice Act.<sup>392</sup>

Distinguishing prior cases,<sup>393</sup> the court held that the donor did not have a physician-patient relationship with the operator and did not seek medical treatment.<sup>394</sup> Instead, the donor participated in the operator's program. The fact that the operator may be considered a healthcare provider for purposes of the Act does not, alone, bring the donor's counterclaim within the privity of the Act.<sup>395</sup> Here, the donor responded to an advertisement seeking participants in a red blood cell donor program. There were no facts before the court that the donor suffered from any medical condition or that she went to the operator in search of medical treatment or care. The court concluded that the donor was not a patient for purposes of the Act and that the trial court erred when it so found.<sup>396</sup> The court further found that a physician-patient relationship was necessary to bring the donor's claims under the procedures of the Act.<sup>397</sup>

Similarly, in determining what is and is not covered under the Medical Malpractice Act, the Indiana Court of Appeals in *Emergency Physicians v. Pettit*,<sup>398</sup> held that a medical malpractice plaintiff who has received judgment for the maximum amount available under the Medical Malpractice Act, may not be awarded prejudgment interest in addition to that statutory cap.<sup>399</sup> The court noted that it had no quarrel with the general proposition that prejudgment interest may be awarded on the judgment entered on a claim of medical malpractice.<sup>400</sup> However, the court was presented with the question as to whether or not prejudgment interest could be awarded where a party received a judgment in the maximum amount recoverable under the Act.

In analyzing the concept of prejudgment interest, the court found that it represented an element of complete compensation; it was not simply an award of interest on a judgment but rather was recoverable as additional damages to accomplish full compensation.<sup>401</sup> The court further found that, in the context of a medical malpractice action, the "additional damages" aspect of prejudgment

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391. See *id.* at 1106.

392. See *id.* at 1110.

393. See *Boruff v. Jesseph*, 576 N.E.2d 1297, 1298 (Ind. Ct. App. 1991).

394. See *Weldon*, 714 N.E.2d at 1110.

395. See *id.*

396. See *id.*

397. See *id.*

398. 714 N.E.2d 1111 (Ind. Ct. App.), *aff'd in part and vacated in part*, 718 N.E.2d 753 (Ind. 1999).

399. See *id.* at 1114.

400. See *id.*

401. See *id.*

interest compelled the conclusion that the interest was necessarily a part of the award for an occurrence of medical negligence or an amount recovered for an injury or death.<sup>402</sup> “Stated differently, the interest is a part of the judgment to which it is attached.”<sup>403</sup>

In contrast, the court held that attorney’s fees ordered to a prevailing party against a party whose actions or defense is frivolous, unreasonable or groundless, or litigated in bad faith were part of the damage award and could be collected in addition to the statutory cap.<sup>404</sup> However, the court found that attorney’s fees were not properly awarded under the facts of the case.<sup>405</sup>

An Indiana Supreme Court case decided later in 1999 may cause some confusion as to the court’s holding in *Pettit*. In *Poehlman v. Feferman*,<sup>406</sup> the supreme court held that post-judgment interest on a judgment could be collected against the healthcare provider and the Indiana’s Patient Compensation Fund (“the Fund”) and that the statutory cap on damages did not include post-judgment interest and court costs.<sup>407</sup> The court found that the Medical Malpractice Act limited only damage amounts and that the court must decide who was responsible for paying the interest, costs, and other expenses which the court referred to as “collateral litigation expense.”<sup>408</sup> The court noted that if it did not find that the Fund or the healthcare provider could be responsible for post-judgment interest, it would give the healthcare provider a blank check to run up collateral litigation expenses to be subsidized with the money for the Patient’s Compensation Fund.<sup>409</sup> Similarly, if the Fund was not required to pay any amount over the cap, it too would not have any incentive to pay the judgment. The court held that the post-judgment interest statute was fully applicable to a judgment rendered in any amount under the Act against both a qualified healthcare provider and the Fund.<sup>410</sup> Given this decision, it is unclear whether the Indiana Supreme Court would agree with the court of appeals in *Pettit* and find that prejudgment interest is a part of “damages” and is not recoverable in addition to the statutory cap.

In *Sword v. NKC Hospital’s Inc.*,<sup>411</sup> the Indiana Supreme Court adopted the formulation of an apparent or ostensible agency test set forth in the Restatement (Second) of Torts section 429.<sup>412</sup> In *Sword*, a medical malpractice action was brought against a hospital based on the negligence of an independent-contractor anesthesiologist in administering epidural anesthetic to an obstetrical patient. The trial court entered judgment in favor of the hospital and an appeal was taken.

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402. *Id.*

403. *Id.*

404. *See id.* at 1116.

405. *See id.*

406. 717 N.E.2d 578 (Ind. 1999).

407. *See id.* at 582.

408. *Id.*

409. *See id.*

410. *See id.* at 584.

411. 714 N.E.2d 142 (Ind. 1999).

412. *See id.* at 152.

The trial court held as a matter of law that the hospital could not be held liable for the injuries to the patient because the patient asserted that she was injured through the negligence of an independent contractor physician who practiced at the hospital.<sup>413</sup> The court of appeals affirmed and an appeal was taken to the Indiana Supreme Court.

The supreme court was confronted with the question of whether an application of the doctrine of apparent or ostensible agency was appropriate and warranted a conclusion that there are genuine issues of material fact in dispute on the issue.<sup>414</sup> The supreme court concluded that the trial court did err when it ruled that the hospital was not liable to the patient because an independent contractor physician assertedly committed the negligent acts and because the record did not establish material issues of fact on the question of causation.<sup>415</sup>

The principle issue in the case was whether, under Indiana law, the hospital could be held liable for the alleged negligence of an independent contractor anesthesiologist. After reviewing the basic tort and agency concepts relevant to theories of vicarious liability, as well as the jurisprudence in Indiana and other jurisdictions in the specific context of this case, the supreme court adopted the theory of apparent and ostensible agency formulated in the Restatement (Second) of Torts section 429.<sup>416</sup>

First, the court discussed the theory of vicarious liability noting that respondeat superior was the applicable tort theory of vicarious liability.<sup>417</sup> The court noted that one important aspect in applying respondeat superior was differentiating between those who are servants and those who are independent contractors because a master can be held liable for the servant's negligent conduct under respondeat superior but could not be held liable for the negligence of an independent contractor.<sup>418</sup> Next, the court addressed the apparent agency doctrine which is mostly associated with contracts and the ability of an agent with apparent authority to bind the principal to a contract with a third party. It noted that in certain instances, apparent or ostensible agency also can be a means by which to establish vicarious liability. One annunciation of this doctrine is set forth in the Restatement (Second) of Agency § 267 which provides:

One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.<sup>419</sup>

The court noted that under a section 267 analysis, if, because of the

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413. *See id.* at 145.

414. *See id.* at 147.

415. *See id.* at 152.

416. *See id.* at 147.

417. *See id.*

418. *See id.* at 148.

419. RESTATEMENT (SECOND) OF AGENCY § 267 (1958), *quoted in Sword*, 714 N.E.2d at 149.

principal's manifestations, a third party reasonably believes that in dealing with the agent he is dealing with the principal servant or agent and exposes himself to the negligent conduct because of the principal's manifestations, then the principal may be held liable for the negligent conduct.<sup>420</sup> The court noted that another similar enunciation of the doctrine was set forth in the Restatement (Second) of Torts section 429, which is captioned "Negligence in Doing Work which is Accepted in Reliance on the Employer Doing the Work Himself."<sup>421</sup> This section provides:

One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer was supplying them himself or by his servants.<sup>422</sup>

Next, the supreme court examined Indiana law in the hospital setting context and noted that the general rule was that hospitals could not be held liable for the negligent actions of independent contractor physicians.<sup>423</sup> The court felt that respondeat superior simply did not apply because the hospitals could not legally assert any control over the physicians.<sup>424</sup> However, the holdings of these cases have eroded over time and the courts no longer allow hospitals to use their inability to practice medicine as a shield to protect themselves from liability, noted the court.<sup>425</sup> The court found that although Indiana law may support a claim of vicarious liability through apparent or ostensible agency in some instances, the courts in Indiana rarely have considered this doctrine in a hospital setting and have never applied it to hold a hospital liable for the acts of an independent contractor physician.<sup>426</sup> Rather, Indiana courts have continued to limit hospital liability under the doctrine of respondeat superior and have focused on the question of whether the alleged acts of negligence were committed by an employee of the hospital or by an independent contractor.<sup>427</sup> If it were the latter, the courts have held that the hospital cannot be held liable for those actions.<sup>428</sup> The court then examined the law in other jurisdictions noting that courts have held hospitals liable for the negligence of independent contractor physicians under apparent agency and have many times adopted section 267 of the Restatement, section 429 or both.<sup>429</sup>

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420. *See Sword*, 714 N.E.2d at 149.

421. *Id.*

422. RESTATEMENT (SECOND) OF TORTS § 429, *quoted in Sword*, 714 N.E.2d at 149.

423. *See Sword*, 714 N.E.2d at 149.

424. *See id.*

425. *See id.*

426. *See id.*

427. *See id.* at 150.

428. *See id.*

429. *See id.*

In *Sword*, the court of appeals invited the Indiana Supreme Court to consider the appropriateness of more clearly defining a test and adopting one of the two formulations of the test set forth in the Restatements. The Indiana Supreme Court accepted the invitation and concluded that in the specific context of a hospital setting, Indiana would expressly adopt the formulation of apparent or ostensible agency set forth in the Restatement (Second) of Torts section 429.<sup>430</sup> Applying the test to the present case, the court concluded that there were genuine issues of material fact as to whether or not the doctor was an apparent or ostensible agent of the hospital and whether the hospital may be held liable for any of the doctor's asserted negligent acts.<sup>431</sup>

### B. Statute of Limitations

The Indiana Supreme Court rendered several decisions during this survey which are significant to the issue of statute of limitations in medical malpractice cases. In the first of these decisions, the court held, in *Martin v. Richey*,<sup>432</sup> that the current medical malpractice statute of limitations<sup>433</sup> was invalid as applied to the plaintiff because the plaintiff was unable to discover her tort claim before the expiration of the limitations period. The court held that to bar the plaintiff in *Martin* from pursuing her tort claim would violate both the Privileges and Immunities Clause<sup>434</sup> and the Open Courts Law Clause<sup>435</sup> of the Indiana Constitution where the plaintiff claimed that the defendant had failed to diagnose and treat breast cancer in a timely manner.<sup>436</sup> In *Martin*, the plaintiff had gone to the defendant to have him check a lump in her breast and did not consult with any other doctors after he aspirated the lump.<sup>437</sup> Three years later she began to experience increased pain, at which time her medical malpractice claim would have already expired under an occurrence based statute of limitations.<sup>438</sup> Declining to strike down the statute of limitations, the court found it invalid as applied to the plaintiff.<sup>439</sup> Pursuant to *Martin*, a plaintiff may not possess the pre-science to file a claim before she knows or has reason to know a claim exists.<sup>440</sup>

In a companion case, the Indiana Supreme Court reemphasized that the occurrence based statute of limitations is not unconstitutional, but only unconstitutional as applied to particular plaintiffs. In *Van Dusen, M.D. v.*

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430. See *id.* at 152.

431. See *id.*

432. 711 N.E.2d 1273 (Ind. 1999).

433. IND. CODE § 34-18-7-1(b) (1998) (repealing § 27-12-7-1 (1993)).

434. IND. CONST. art. I, § 23.

435. IND. CONST. art. I, § 23; see also *Martin*, 711 N.E.2d at 1285.

436. See *Martin*, 711 N.E.2d at 1277.

437. See *id.* at 1276-77.

438. See *id.* at 1277.

439. See *id.* at 1279.

440. See *id.* at 1284.

*Stotts*,<sup>441</sup> the plaintiff was also besieged by a disease, the latency of which made it impossible for him to discover the malpractice until after the two year occurrence based statute of limitations had run. The court faced the additional issue of how the statute of limitations could be constitutionally applied.<sup>442</sup> The court concluded that the statute should apply to limit the time in which such plaintiffs can make a claim against their physician to two years from the discovery of the malpractice or two years from when the plaintiff should have discovered the malpractice using reasonable care and due diligence, whichever is earlier.<sup>443</sup>

Thus, the Indiana Supreme Court in *Martin* and *Van Dusen* determined that for the statute to be constitutionally applied, the occurrence based statute of limitations would be interpreted to run from the date of discovery for the fixed class of plaintiffs represented by those two cases.

Shortly after these two decisions were rendered, the Indiana Supreme Court issued another opinion concerning the statute of limitations in Medical Malpractice Act cases. In *Harris v. Raymond*,<sup>444</sup> the patient brought a medical malpractice action against a dentist after discovering that TMJ implants surgically inserted by the dentist had ruptured. The trial court denied the dentist's motion for summary judgment and the dentist appealed. The court of appeals affirmed.<sup>445</sup> Transfer was granted, and the Indiana Supreme Court held that the dentist had a duty to make reasonable efforts to contact current and former patients to pass along safety alerts regarding TMJ devices issued by the FDA and that the dentist breached that duty.<sup>446</sup> The court also held that to bar the present action on grounds that the medical malpractice limitations period had expired would be unconstitutional based on the court's recent decision in *Martin*.<sup>447</sup> Finally, the court held that when the medical malpractice limitations period cannot constitutionally be applied to bar a claim, the plaintiff has two years after the discovery of the malpractice or of those facts which should lead to discovery of the malpractice within which to bring a claim.<sup>448</sup>

In a case factually distinguishable from *Martin* and *Van Dusen*, the Indiana Court of Appeals addressed the statute of limitations applying *Martin*. In *Boggs v. Tri-State Radiology Inc.*,<sup>449</sup> a deceased patient's spouse sued the employer of the patient's radiologist for medical malpractice and alleged that the radiologist in reviewing the patient's mammogram negligently failed to notice breast cancer. The trial court granted the employer's motion for preliminary determination and

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441. 712 N.E.2d 491 (Ind. 1999).

442. *See id.* at 495.

443. *See id.* at 497.

444. 715 N.E.2d 388 (Ind. 1999).

445. *See id.* at 391.

446. *See id.* at 395.

447. *See id.*

448. *See id.* at 395-96.

449. 716 N.E.2d 45 (Ind. Ct. App. 1999), *trans. denied*, No. 82A04-9809-CV-450, 2000 Ind. LEXIS 173 (Ind. Feb. 17, 2000).

the spouse appealed.<sup>450</sup> The court of appeals held that the plaintiff in *Boggs* represented a different class of plaintiffs than in *Martin* and *Van Dusen*.<sup>451</sup> Here, the plaintiff discovered the defendant's alleged malpractice within the two years of the alleged malpractice. In fact, the plaintiff had eleven months following the discovery to file his claim in accordance with the Medical Malpractice Act. The trial court had concluded this and rested its judgment of dismissal, in part, on this fact.<sup>452</sup> The court of appeals found that applying *Martin* and *Van Dusen* to the facts of *Boggs* was problematic as the decisions in those cases were written in specific rather than general terms.<sup>453</sup> Justice Robb, writing for the court of appeals, concluded from the language in *Van Dusen* and *Martin* that the Indiana Supreme Court's holdings were specifically limited to plaintiffs who could not have discovered the malpractice within the occurrence based statute of limitations.<sup>454</sup> The issue before the court in *Boggs*, however, was one which Justice Robb believed was left open by *Martin* and *Van Dusen*, which was: "whether plaintiffs who discover the malpractice during the occurrence based statute of limitations but file their claim after the same has expired may also bring their action within two years of discovering the malpractice."<sup>455</sup> Justice Robb concluded that they may.<sup>456</sup>

Justice Robb went on to note that there were two possible interpretations of *Martin* and *Van Dusen*. First, they only apply to those plaintiffs who could not have discovered the alleged malpractice within two years of the same.<sup>457</sup> Or, the second interpretation would be to apply their two year discovery based statute of limitations to all medical malpractice plaintiffs.<sup>458</sup> The court of appeals concluded that the latter reading more appropriately applied the rationale behind the Indiana Supreme Court's holdings in *Martin* and *Van Dusen*.<sup>459</sup> Transfer was granted in February 2000, and the decision by the supreme court will clarify the ruling's interpretation.

Two other companion decisions were rendered by the Indiana Supreme Court during the survey addressing the statute of limitations and medical malpractice cases. In both cases, the Indiana Supreme Court followed and reaffirmed its holding in *Martin*.<sup>460</sup>

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450. See *id.* at 46.

451. See *id.* at 74.

452. See *id.* at 47.

453. See *id.*

454. See *id.*

455. *Id.*

456. See *id.* at 48.

457. See *id.* at 49.

458. See *id.*

459. See *id.*

460. See also *Albi v. Weinberg*, 717 N.E.2d 876 (Ind. 1999); *Weinberg v. Bess*, 717 N.E.2d 584 (Ind. 1999) (both cases holding that the medical malpractice action accrued when the patient discovered that the implants contained silicon, not several years earlier when the physician-patient relationship terminated).

It should also be noted in the medical malpractice area that, during the survey period, section 34-18-15-3 of the Indiana Code was amended to increase the limits that a healthcare provider or his insurer must pay before funds can be reached by the Indiana Patient's Compensation Fund. Previously, the limit had been \$100,000 and the limit has now been raised to \$250,000. The statute was effective July 1, 1999.

## VI. DEFAMATION

The Indiana Court of Appeals decided several cases on the issue of defamation during the survey period. However, prior to rendering those decisions, the U.S. District Court for the Southern District of Indiana, Indianapolis Division, issued an opinion in January 1999 which provides a good discussion on Indiana law on defamation and invasion of privacy. In *St. John v. Town of Ellettsville*,<sup>461</sup> a former manager of a town sewage plant brought an action under section 1983 against the town and members of the town counsel alleging that they violated his right to due process by terminating his job without providing him notice and a meaningful opportunity to be heard.<sup>462</sup> In addition, he brought state law claims for breach of contract, defamation, and invasion of privacy. Both sides moved for summary judgment. The court held, among other things, that the counsel president's statements were not defamatory.<sup>463</sup> The statements at issue were ones that were made to a newspaper reporter. The newspaper published a front page article entitled "Ellettsville in danger of sewer hook-on ban, Town officials scrambling to clean up problems before state stops growth."<sup>464</sup>

The defendants claimed that the defamation and invasion of privacy claims failed because the plaintiff never demonstrated that the allegedly defamatory statements placed the plaintiff in a false light. The defendants also invoked various forms of immunity, including qualified, legislative and discretionary function immunity.

The court found that the plaintiff's state law claims for defamation and invasion of privacy both "suffer so substantial and evidentiary infirmity that we must find for the defendant as a matter of law."<sup>465</sup> After reviewing Indiana law on defamation, the court found that the following passage in the newspaper which provided the basis for the defamation and invasion of privacy claims, did not provide an evidentiary basis for plaintiff's claims:

[Town Counsel President] DeFord was shocked to learn the violations IDEM outlined. "I thought it was unbelievable," he said. "As a board we are ultimately responsible. We just assumed everything was being done as it should be."

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461. 46 F. Supp.2d 834 (S.D. Ind. 1999).

462. *See id.* at 836.

463. *See id.* at 839.

464. *Id.*

465. *Id.* at 848.

When board members learned of the threat of heavy fines, they convinced state officials to give them a second chance to get things back on track.

"There are these violations that the town has made that we are correcting and the board's feeling was that by privatizing those things will be taken care of," DeFord said. "I am not pointing any fingers, but there were things that went undone. And I am not saying anything about Fred St. John."<sup>466</sup>

The plaintiff contended that the statement that the defendant was "not saying anything" about the plaintiff did just the opposite by associating the plaintiff with the violations and the things that went undone.<sup>467</sup> Plaintiff claimed that the statements and the reasonable imputations were false and made intentionally and maliciously. Thus, the plaintiff concluded that the statements both defamed him and invaded his privacy by unreasonably placing him in a false light before the public.<sup>468</sup>

The court, however, found, as a matter of law, that the statement, understood in the context of the entire passage, could not reasonably be read as defamatory.<sup>469</sup> Viewed in the context of the entire article, which the plaintiff chose not to provide in his brief, it was clear to the court that the implication of the defendant's statement was not to associate the plaintiff with violations and things that were undone.<sup>470</sup> The court found that even if the defendant's statement could reasonably be interpreted as defaming the plaintiff, the plaintiff came "nowhere close to demonstrating that [defendant] uttered his statements falsely and with actual malice."<sup>471</sup> The court then examined the law concerning malice.

The court next addressed the plaintiff's "false light" invasion of privacy claims and found that they fell "ill of the same superficial treatment he gives to his defamation claim."<sup>472</sup> The court cited *Doe v. Methodist Hospital*,<sup>473</sup> for discussion of Indiana's recognition of the "public disclosure of private facts" and the tort of invasion of privacy. The court found that instead of addressing or referencing the body of case law concerning "false light," the plaintiff alleged "hallowly" that the "false public statements made by [defendant] individually constitute publicity which has unreasonably placed [plaintiff] in a false light before the public."<sup>474</sup> The court found that these "skeletal allegations dictate the

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466. *Id.* (citation omitted).

467. *See id.*

468. *See id.*

469. *See id.*

470. *See id.* at 848-49.

471. *Id.* at 849.

472. *Id.* at 850.

473. 698 N.E.2d 681 (Ind. 1997) (discussed in last year's survey edition).

474. *St. John*, 46 F. Supp. at 851-52 (citations omitted).

granting of defendant's summary judgment motion."<sup>475</sup>

Although the district court in *St. John* found, as a matter of law, that the statements were not defamatory when examined in light of all of the statements made, the Indiana Court of Appeals in *Davidson v. Perron*,<sup>476</sup> refused to grant similar relief at an earlier stage in the litigation—the filing of a motion to dismiss. In *Davidson*, the court found that a motion to dismiss was improperly granted on allegedly defamatory statements and that it could not be determined at that early stage whether or not statements made by the mayor concerning a police officer were defamatory as a matter of law.<sup>477</sup> The trial court had granted a motion to dismiss as to the statement that the plaintiff was “soft on crime” but denied the motion as to the statement that the plaintiff “has abused privileges given to police officers.”<sup>478</sup> The communication at issue was the statement that “police certainly have privileges, but I do not believe that they should be abused in the way that some officers like Davidson have done.”<sup>479</sup> The Indiana Court of Appeals found that considering the statement in context, and according to the idea that the statement was calculated to convey to the public, it would not hold that the statement was not defamatory as a matter of law.<sup>480</sup> The court noted that this was no minor charge against the police officer and that issues existed as to whether or not the communication was defamatory. The court stated that “unlike the dissent, we are unwilling to arbitrarily “draw the line” between free expression and defamation under the circumstances presented and at this early procedural stage.”<sup>481</sup> The court expressed no opinion whether or not summary judgment might be appropriate after the facts had been more thoroughly developed.<sup>482</sup> Although it concurred with the majority's resolution of some of the issues, the dissent believed that the majority failed to view the statement in context and failed to look at the idea that the statement was calculated to convey. The dissent concluded that the trial court's decision should be revised and the case remanded for dismissal of the plaintiff's defamation claim for failure to state a claim upon which relief could be granted.<sup>483</sup>

Similarly, in *Kitco, Inc. v. Corporation for General Trade d/b/a WKJG-TV 33*,<sup>484</sup> the Indiana Court of Appeals held that claims for defamation by an automobile parts manufacturer and its chief executive officer against a television station for broadcasting a news story on the termination of five employees, could

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475. *Id.*

476. 716 N.E.2d 29 (Ind. Ct. App. 1999), *trans. denied*, No. 43A03-9902-CV-63, 2000 Ind. LEXIS 125 (Ind. Feb. 17, 2000).

477. *See id.*

478. *Id.* at 37.

479. *Id.*

480. *See id.* at 38.

481. *Id.*

482. *See id.*

483. *See id.* at 38 (Kirsh, J., concurring in part and dissenting in part).

484. 706 N.E.2d 581 (Ind. Ct. App. 1999).

not withstand a motion for summary judgment.<sup>485</sup> The court held that the evidence did not establish that the television station acted with “actual malice” in broadcasting the allegedly defamatory news story.<sup>486</sup> The court found that the CEO’s denial of the employees’ allegations did not automatically make their claims untrue, nor did his denial prove, as a matter of law, that the broadcasts were made with actual malice.<sup>487</sup> Rather, the court found that there were contradictory stories regarding why employees were terminated and that the plaintiff had failed to show the court how the station’s decision to believe the employees’ version amounted to actual malice.<sup>488</sup> The court further noted that while the station may not have investigated the story as thoroughly as plaintiffs may have wished, and while some of the statements made were misleading, there was not sufficient evidence to demonstrate that the station had knowledge that the story was false or that the station entertained serious doubts as to the truth of the story.<sup>489</sup> The court held that to establish recklessness, it was not sufficient to just show that the reporting in question was speculative or even sloppy.<sup>490</sup>

Upon reviewing *St. John, Davidson, and Kitco*, there appears to be a pattern that while the courts may be willing to grant summary judgment to a defendant on a claim for defamation, a defendant is not likely to prevail at an earlier stage on a motion to dismiss.

In *Brazauskas v. Fort Wayne-South Bend Dioceses, Inc.*,<sup>491</sup> the Indiana Court of Appeals was confronted with resolving the issue of defamation along with First Amendment issues concerning freedom of religion. Brazauskas entered into an employment contract with the parish whereby she was hired as a director of religious education. Several employment contracts were signed and she was later hired as the pastoral associate.<sup>492</sup> The contract contained provisions regarding dismissal. After several years of employment, Martelli became the parish pastor. He met with Brazauskas and gave her the choice of either resigning or being fired from her position. He then fired her; however, the circumstances surrounding the firing were vigorously disputed by the parties.<sup>493</sup> Brazauskas alleged that Martelli’s stated reasons for the firing was that she intimidated him, they were not getting along, and that he did not like working with her. The defendant claimed that Brazauskas was fired for her expression of unorthodox theological views and conduct offensive to church teachings.<sup>494</sup> Brazauskas filed suit, and the defendants filed a motion to dismiss that was denied. Brazauskas filed an amended complaint and claimed that Martelli had, among other things,

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485. See *id.* at 589.

486. *Id.*

487. See *id.*

488. See *id.* at 589.

489. See *id.* at 590.

490. See *id.*

491. 714 N.E.2d 253 (Ind. Ct. App. 1999), *trans. denied*, 726 N.E.2d 313 (Ind. 1999).

492. See *id.* at 255-56.

493. See *id.* at 256.

494. See *id.*

unlawfully, untruthfully, and intentionally made misleading and slanderous remarks about her and implied that there was something of a bad and sinister nature about her thereby causing her irreparable harm.<sup>495</sup> Defendants asserted that the trial court lacked subject matter jurisdiction to hear Brazauskas' claim and that any statements made by the defendants were privileged. Defendants then filed a motion for summary judgment claiming that the trial court lacked subject matter jurisdiction.<sup>496</sup>

The church argued that the First Amendment to the U.S. Constitution, applicable to the courts of Indiana by the Fourteenth Amendment to the U.S. Constitution, prohibited the trial court from exercising judicial authority to hear the plaintiff's claims in that her primary duties had been "religious and clerical" and her claims were inextricably linked to the circumstances of her termination as an ecclesiastical matter that could not be considered by the trial court.<sup>497</sup> Brazauskas opposed the motion, arguing that no doctrinal issue was at stake that would prevent the trial court from addressing her claim. She claimed that the church had gone to extraordinary lengths to misconstrue the matter as an ecclesiastical dispute when in reality it was clearly a breach of contract action.<sup>498</sup> The trial court granted the defendants' first motion for summary judgment and noted that the plaintiff's position was pastoral and her duties involved the preservation and propagation of the Catholic faith. The trial court also noted that the firing of a pastor was an ecclesiastical matter, concluding that the First Amendment rendered Brazauskas' contract illusory.<sup>499</sup> Defendants then filed a third motion for summary judgment asserting that the trial court lacked subject matter jurisdiction to hear Brazauskas' defamation claim on First Amendment grounds. They argued that an examination of the alleged defamatory statements would require an evaluation of Brazauskas' actions in an ecclesiastical light and could not be examined without reference to church teachings and governess.<sup>500</sup> Defendants also asserted that the statements were protected by qualified privilege and common interest.<sup>501</sup>

As to the defendants' third motion for summary judgment concerning defamation, the court noted the following statements concerning the firing of Brazauskas which were allegedly defamatory:

"She cannot be trusted with seven year old children"

"That the reasons for her termination were personal and confidential"

"She is incapable of Christian ministry and had a vindictive heart"<sup>502</sup>

The court noted that in the instant case, Brazauskas argued that the defendants' alleged statements constitute a defamation of character to be decided

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495. *See id.*

496. *See id.*

497. *Id.* at 257.

498. *See id.*

499. *See id.*

500. *See id.*

501. *See id.*

502. *Id.*

by neutral principals of law. However, the defendants claim that the First Amendment prevents civil courts from exercising jurisdiction over claims related to the employment of church employees whose duties are primarily religious. The court found that the initial determination of whether a communication is defamatory is a question of law for the court.<sup>503</sup> In conducting this analysis, however, the court concluded that the trial court would be engaging in an impermissible scrutiny of religious doctrine.<sup>504</sup> The court held that:

Both society and the state have rightfully conferred significant importance on the protection of an individual's personal and professional reputation, even to the point of restricting the rights of others to communicate freely in this regard. However, when officials of a religious organization state their reasons for terminating a pastoral employee in ostensibly ecclesiastical terms, the First Amendment effectively prohibits civil tribunals from reviewing these reasons to determine whether the statements are either defamatory or capable of a religious interpretation related to the employee's performance of her duties.<sup>505</sup>

The court of appeals held that the First Amendment prevented the court from scrutinizing the possible interpretation of defendants' statements and their purported reasons for uttering them, and that to conclude otherwise would effectively thrust the court into the forbidden role of arbiter of a strictly ecclesiastical dispute over the suitability of a pastoral employee to perform her designated responsibilities.<sup>506</sup> The court found that the trial court erred in granting defendants' third motion for summary judgment because it never had subject matter jurisdiction to decide Brazauskas' defamation claim.<sup>507</sup>

In another defamation case which involved jurisdictional issues, the Indiana Court of Appeals, in *Samm v. Great Dane Trailers*,<sup>508</sup> addressed the issue of whether the Worker's Compensation Board had exclusive jurisdiction to determine whether an employer had made defamatory statements while adjusting or settling a former employee's claim for compensation.

In *Great Dane*, Samm, a Great Dane employee, injured his lower groin area while on the job. He went to his family doctor and was advised that he had a hernia which required surgery. He was referred to a general surgeon for evaluation and a company physician confirmed the diagnosis.<sup>509</sup> He requested worker's compensation benefits and the company responded that it would have to investigate the matter. Samm met with a company representative and was

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503. See *id.* at 263.

504. See *id.*

505. *Id.* at 262.

506. See *id.* at 263.

507. See *id.*

508. 715 N.E.2d 420 (Ind. Ct. App. 1999), *trans. denied*, No. 84A01-9810-CV-381, 2000 Ind. LEXIS 66 (Ind. Jan. 26, 2000).

509. See *id.* at 422.

advised that his injury was not work related and that he was being terminated for making a false claim for worker's compensation benefits. He was then terminated.<sup>510</sup> Samm's employer then informed the surgeon that it would pay Samm's surgery costs, so Samm underwent surgery. However, the employer later refused to cover Samm's medical expenses. Samm filed a complaint and alleged that the company had falsely accused him of a criminal act of fraud which accusation constituted libel.<sup>511</sup> He also claimed that his discharge was in sole and direct retaliation for his assertion of his right to remedies under Indiana's Worker's Compensation Act. Samm sought compensatory and punitive damages. Samm's employer filed a motion to dismiss for lack of subject matter jurisdiction claiming the Worker's Compensation Board had exclusive jurisdiction. In dismissing the action, the trial court stated that Samm's complaint alleged bad faith and an independent tort against the employer and that these matters were clearly under the jurisdiction of the Worker's Compensation Board.<sup>512</sup>

The court of appeals, referring to Indiana Code section 22-3-4-12, found that the Board did have exclusive jurisdiction over worker's compensation matters, including the bad faith handling of an adjustment of a claim and that the application could be applied retroactively.<sup>513</sup> However, with respect to the plaintiff's claim for defamation, the court found that there was no well defined and well established public policy in Indiana which dictated that a separate civil action remained available outside of the Board's exclusive jurisdiction for employees making defamation claims.<sup>514</sup> The court found that it was not clear whether the employer's alleged defamatory actions were part of its procedure for "adjusting or settling" Samm's claim.<sup>515</sup> The court noted that what constituted the alleged "publication" element of defamation was important to a finding that the publication involved either the denial of benefits or Samm's termination.<sup>516</sup> Such would help indicate whether the alleged defamatory statements were or were not separate and independent of the employer adjusting or settling benefits. The appellate court found that the trial court did not address this issue and that it was improper for the trial court to have granted the motion to dismiss for lack of subject matter jurisdiction.<sup>517</sup>

## VII. GOVERNMENTAL IMMUNITY AND TORT CLAIMS ACT

In a case of first impression, the Indiana Court of Appeals in *Barnes v.*

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510. *See id.* at 426.

511. *See id.* at 423.

512. *See id.*

513. *See id.* at 426-27.

514. *See id.* at 427.

515. *See id.*

516. *Id.*

517. *See id.*

*Antich*,<sup>518</sup> held that a municipality was immune from liability under the Indiana Tort Claims Act for operation of an enhanced emergency communication system. In *Antich*, Joseph Antich suffered a heart attack at home. A call was made to 911 which accessed the City of Gary's enhanced emergency communications system. The City's dispatcher answered the call and assured that an ambulance would be dispatched.<sup>519</sup> Approximately ten minutes later, another call was made to 911 and the caller was again assured that an ambulance was on the way. Five minutes later a third call was made, and then a fourth call. The dispatcher repeatedly gave assurances that an ambulance was on the way. However, the City never dispatched an ambulance and Joseph Antich died.<sup>520</sup> Joseph Antich's widow brought a wrongful death lawsuit against the City of Gary. The City moved to dismiss the action under section 34-4-16.5-3(17) of the Indiana Code.<sup>521</sup> The relevant portion of the statute 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:

...

The development, adoption, implementation, operation, maintenance, or use of an enhanced emergency communications system.<sup>522</sup>

Both the City and Joseph Antich's widow moved for summary judgment. The City of Gary's motion was based on the above statute. The trial court denied the City's motion for summary judgment and granted Antich's motion finding that the City owed Antich a private duty, that the City breached that duty, and that the breach was the proximate cause of Antich's injuries.<sup>523</sup> The matter was then certified for appeal.<sup>524</sup>

On appeal, the court noted that this case was the first to be decided under section 34-4-16.5-3(17) (later 18) of the Indiana Code.<sup>525</sup> The court noted that Indiana's General Assembly had declared that the providing of emergency medical services was a matter of vital concern affecting the public's health, safety and welfare, the provision of which was an essential purpose of the political subdivisions of the State.<sup>526</sup> The court also noted that the operation of an emergency dispatch system constituted a governmental function entitled to immunity from tort liability.<sup>527</sup> The court found that the operation of such as

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518. 700 N.E.2d 262 (Ind. Ct. App. 1998), *trans. denied*, 714 N.E.2d 172 (Ind. 1999).

519. *See id.* at 264.

520. *See id.*

521. This was later recodified under the present subsection 18.

522. *Antich*, 700 N.E.2d at 264.

523. *See id.*

524. *See id.*

525. In a case similar to *Antich*, Judge Barker stated in a concurring opinion that the City would have been immune had it pled the subsection of the Indiana Tort Claims Act as an affirmative defense. *See City of Gary v. Odie*, 638 N.E.2d 1326, 1334-35 (Ind. Ct. App. 1994).

526. *See Antich*, 700 N.E.2d at 265.

527. *See id.*

system involved the making of decisions concerning the seriousness of each call and the order of priority for response which should be attached to the calls.<sup>528</sup> The court found that the present case fell squarely within the immunity provided municipalities under the statute.<sup>529</sup>

In another case of first impression, the Indiana Court of Appeals, in *Wright v. Elston*,<sup>530</sup> held that Indiana's Tort Claims Act, as amended in 1995, extended immunity to public defenders.<sup>531</sup> Previously, the Indiana Court of Appeals had held that Indiana's Tort Claim Act did not apply to a public defender.<sup>532</sup> However, since the court's decision in *White*, Indiana's Tort Claims Act was amended<sup>533</sup> and the definition of employee was changed to read as follows:

"Employee" and "public employee" means a person presently or formerly acting on behalf of a governmental entity rather temporarily or permanently or with or without compensation. . . . The term also includes attorneys at law whether employed by the government or entity as employees or independent contractors. . . .<sup>534</sup>

The court found that the statute extended immunity under the Tort Claims Act to attorneys employed by a governmental entity whether as an employee or as an independent contractor.<sup>535</sup> A chief public defender for a county as a full time, salaried employee of the county, would be considered an employee for purposes of a Tort Claims Act.<sup>536</sup>

In another case, the court of appeals once again addressed who was considered an "employee" under Indiana's Tort Claims Act. In *Williams v. Indiana Department of Corrections*,<sup>537</sup> the court found that a fellow inmate was not a "governmental employee" at the time of an accident such that the Department of Corrections was immune from liability for the fellow inmates negligence in opening a defective window.<sup>538</sup> In *Williams*, an inmate sued the Department of Corrections for injuries sustained while he was working at a prison facility when he was struck by a defective window that a fellow inmate

528. *See id.*

529. It should be noted that Judge O'Riley dissented, finding that a private duty existed between Antich and the City based on the four requests for emergency assistance and the City repeatedly assuring the caller that an ambulance had been called. Judge O'Riley further noted that "if immunity is allowed in this case, each time a call is made to an enhanced emergency communications system, no matter how egregious the conduct, the government would be immune. I cannot believe that the legislature intended this result." *Id.* at 267 (O'Riley, J., dissenting).

530. 701 N.E.2d 1227 (Ind. Ct. App. 1998), *trans. denied*, 714 N.E.2d 169 (Ind. 1999).

531. *See id.* at 1233.

532. *See White v. Galvin*, 524 N.E.2d 802 (Ind. Ct. App. 1988).

533. The amendment became effective July 1, 1995.

534. *Wright*, 701 N.E.2d. at 1233 (citing IND. CODE § 34-6-2-38 (1998)).

535. *See id.*

536. *See id.*

537. 702 N.E.2d 1117 (Ind. Ct. App. 1998).

538. *See id.* at 1119.

had opened. The inmate contended that the Department of Corrections was vicariously liable for the other inmate's negligence because the other inmate was under the direction and control of a Department employee at the time the accident occurred.<sup>539</sup> The court noted that there was no case law in Indiana supporting this argument and that the plaintiff had relied on cases from other jurisdictions.<sup>540</sup> The court noted that it could conceive of circumstances where a non-governmental employee ordered by a governmental employee to engage in some task would, by the undertaking of the task on behalf of the government, become a governmental employee for purposes of the Tort Claims Act.<sup>541</sup> However, the court refused to conclude that the circumstances in the present case would be sufficient to warrant a finding by the jury that the inmate was acting as a governmental employee and instead found, as a matter of law, that the inmate was not a governmental employee at the time of the accident.<sup>542</sup>

In *Gregor v. Szarmach*,<sup>543</sup> the Indiana Court of Appeals held that where a governmental employee in the course of his duties acts in a manner which disguises or fails to reveal his status as a governmental employee, he may be estopped from asserting the Indiana Tort Claims Act as a bar to a plaintiff actually and reasonably lacking knowledge of the governmental employee's status.<sup>544</sup> In *Gregor*, a motorist brought an action arising out of an automobile accident. The defendant driver claimed he was driving in the course of his employment for a county agency and moved for summary judgment under the Indiana Tort Claims Act claiming that the motorist failed to comply with the notice requirements of the Act.<sup>545</sup> Defendant claimed that he was engaged in official county business delivering food stamps and related supplies at the time of the accident. He claims there was a placard on the dashboard of his car stating "Lake County Welfare."<sup>546</sup> In response, the plaintiff submitted portions of the employee's deposition in which he testified that he was driving his own personal vehicle, the placard was not affixed to the car's dashboard in any way, and he had no idea whether the placard remained in the dashboard after the collision.<sup>547</sup>

The court noted that a district court in Indiana had confronted a similar issue in *Baker v. Schaffer*.<sup>548</sup> In that case, Judge Dillon noted that he found "no Indiana case law directly addressing the significance of a plaintiff's legitimate and complete ignorance that a defendant is a government employee as that ignorance

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539. *See id.*

540. *See id.* (citing *Hall County v. Loggins*, 138 S.E.2d 699 (Ga. 1964); *Wolfe v. City of Miami*, 137 So. 892 (Fla. 1931)).

541. *See id.*

542. *See id.*

543. 706 N.E.2d 240 (Ind. Ct. App. 1999).

544. *See id.* at 243.

545. *See id.* at 241.

546. *Id.*

547. *See id.*

548. 922 F. Supp. 171, 173 (S.D. Ind. 1996).

relates to a plaintiff's failure to comply with the [Tort Claims Act]."<sup>549</sup> The court found in the present case, as in *Baker*, that the evidence indicated that the defendant was not wearing any type of government uniform, his vehicle did not bear or display any type of identification to indicate it was being operated in the course of government business, and the vehicle was the defendant's personal vehicle.<sup>550</sup> Here, the court noted that the defendant did not say anything to the plaintiff at the time of the accident about being engaged in government business and that the collision took place on a public thoroughfare.<sup>551</sup> The court held that in a case where a government employee in the course of his duties acts in a manner which disguises or fails to reveal his status as a government employee, he may be estopped from asserting the Indiana Tort Claims Act as a bar to a claim if the plaintiff actually and reasonably lacked knowledge of the government employee's status.<sup>552</sup>

Similarly, in *Davidson v. Perron*,<sup>553</sup> the court, citing *Gregor*, once again held that a party "may not utilize a subterfuge to bar a claim for failure to comply with a notice provision of the ITCA."<sup>554</sup> In *Davidson*, a police officer petitioned for judicial review of a Board of Public Works decision to terminate him for making unauthorized statements to the press regarding a shooting. The trial court affirmed the Board's decision and the police officer appealed. The court of appeals affirmed the decision.<sup>555</sup> The police officer then filed an action against the Mayor and City alleging civil rights violations, defamation, and liable. The trial court granted the defendant's motion to dismiss and the police officer appealed.

The court of appeals held that the Mayor and City were estopped from asserting the notice provisions of the Tort Claims Act to bar the officer's defamation claim because the Mayor, in the course of his duties, purposely disguised his identity as the author of the alleged defamatory letter.<sup>556</sup> The Mayor then prevented the officer from knowing his true identity and status as a governmental employee. The Mayor failed to sign the letter and continued to deny his authorship publically until questioned under oath at a deposition.<sup>557</sup> The court found that the plaintiff had sufficiently established that the Mayor's deceitful conduct lead to his ignorance that the true author of the alleged defamatory letter was the Mayor which prevented the officer from complying with the notice provisions of the Act.<sup>558</sup> The court found that the Mayor and City

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549. *Id.*

550. *See Gregor*, 706 N.E.2d at 243.

551. *See id.*

552. *See id.*

553. 716 N.E.2d 29 (Ind. Ct. App. 1999), *trans. denied*, No. 43A03-9902-CV-63, 2000 Ind. LEXIS 125 (Ind. Feb. 17, 2000).

554. *Id.* at 34.

555. *See id.*

556. *See id.*

557. *See id.* at 32.

558. *See id.* at 35.

were estopped from asserting the notice provisions of the Act to bar the officer's defamation claim.<sup>559</sup>

## VII. FRAUD

During the course of this survey, the Indiana Court of Appeals rendered numerous decisions interpreting Indiana law with respect to claims of actual and constructive fraud. Actual fraud consists of five elements: (1) that there was a material misrepresentation of a past or existing fact; (2) that the representation was false; (3) that the representation was made with knowledge of its falsity; (4) that the complainant relied on the representation; and (5) that the representation proximately caused the complainant's injury.<sup>560</sup> Constructive fraud consists of: (1) a duty existing by virtue of the relationship between the parties; (2) representations or omissions made in violation of that duty; (3) reliance thereon by the complainant; (4) injury to the complainant as a proximate result thereof; and (5) the gaining of an advantage by the party to be charged at the expense of the complainant.<sup>561</sup>

In *Darst v. Illinois Farmers Insurance Co.*,<sup>562</sup> Sloan was involved in an automobile accident when his van was rear-ended by another vehicle driven by Weger. Sloan was insured by Illinois Farmers, and Weger was insured by Sagamore. After the accident, Sloan had several conversations with a Sagamore adjuster regarding the damage to his van as well as his personal injuries.<sup>563</sup> The adjuster told Sloan that \$4000 was the best settlement offer that he could give him. Instead of calling an attorney, Sloan sought the advice of his own insurance agent. The Illinois Farmers' agent told him "you can call an attorney if you want to, but you're not going to get any more money in your pocket. It's only going to go in the attorney's pocket. It's up to you."<sup>564</sup> The agent further represented to Sloan that in his opinion \$4000 was a fair settlement. Thereafter, without contacting an attorney, Sloan accepted Sagamore's offer and signed a form releasing Sagamore from further liability for Sloan's personal injuries. Sloan subsequently filed bankruptcy and the bankruptcy trustee brought suit against Illinois Farmers.<sup>565</sup>

On appeal, the plaintiff argued that defendant's actions constituted both actual and constructive fraud. The court of appeals noted that each tort requires a misrepresentation of fact and that expressions of opinion are not actionable.<sup>566</sup>

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559. *See id.*

560. *See Wells v. Stone City Bank*, 691 N.E.2d 1246, 1250 (Ind. Ct. App.), *trans. denied*, 706 N.E.2d 166 (Ind. 1998).

561. *See id.* at 1250-51.

562. 716 N.E.2d 579 (Ind. Ct. App. 1999), *trans. denied*, No. 49A02-9809-CV-775, 2000 Ind. LEXIS 285 (Ind. Mar. 23, 2000).

563. *See id.* at 580.

564. *Id.* at 581.

565. *See id.* at 580-81.

566. *See id.* at 582.

Further, the court noted that to establish either tort, the complaining party must have had a reasonable right to rely upon the statements made or omitted.<sup>567</sup> Applying the facts to this law, the court concluded that the agent's statements to Sloan constituted expressions of opinion rather than fact and that Sloan had no reasonable right to rely upon them.<sup>568</sup>

The court reasoned that although a person reasonably expects that his insurance agent will be aware of what is covered under his insurance policy, the advice given by the defendant's agent was not information which could have been ascertained easily by him.<sup>569</sup> Sloan called to obtain advice about the fairness of a settlement offer, meaning he called to get a subjective opinion. Therefore, the court found that Sloan had no reasonable right to rely upon defendant's agent's subjective opinion as a representation of fact, and that the opinion he solicited and chose to follow, though possibly ill advised, was not actionable.<sup>570</sup> The court concluded that the advice sought was not related to the essence of the relationship between the two parties and was not a fact related to the policy which Sloan maintained with defendant about which its agent should be expected to know.<sup>571</sup> Rather, it was a request for the agent's advice as a matter outside the limited scope of their relationship. Thus, Sloan had no reasonable right to rely on the agent's opinions as assertions of fact.<sup>572</sup>

The issue of fraudulent inducement was visited by the Indiana Court of Appeals in *Cacdac v. West*,<sup>573</sup> in the context of medical consent to a surgical procedure. In *Cacdac*, the plaintiff claimed that she consented to a surgery based on the defendant doctor's representations that she risked becoming paralyzed if she declined the surgery. She submitted her claim against the physician to the Medical Review Panel and then filed her complaint in the trial court alleging, inter alia, that the physician fraudulently induced her to undergo unnecessary surgery by misrepresenting the risks of foregoing it. The defendant subsequently filed a motion for partial summary judgment directed at this claim.<sup>574</sup>

Defendant argued that any statements he made about the plaintiff's possible future paralysis did not amount to actionable fraud. Defendant first contended that the statements relied upon by the plaintiff were not fraudulent because they were true.<sup>575</sup> In support of this argument, the doctor submitted an affidavit of a fellow physician indicating that the plaintiff did indeed face the possibility of paralysis. However, the plaintiff countered with an affidavit of a physician who testified that it would be almost impossible for paralysis to result by foregoing

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567. See *id.* at 581-82 (citing *Pugh's IGA, Inc. v. Super Food Servs., Inc.*, 531 N.E.2d 1194, 1197-98 (Ind. Ct. App. 1988)).

568. See *id.* at 582.

569. See *id.*

570. See *id.* at 582-83.

571. See *id.*

572. See *id.*

573. 705 N.E.2d 506 (Ind. Ct. App.), *trans. denied*, 626 N.E.2d 306 (Ind. 1999) (mem.).

574. See *id.* at 508.

575. See *id.* at 510.

the surgery. The court noted that to sustain an action for fraud,<sup>576</sup> it must be proven that a material representation of a past or existing fact was made which was untrue and known to be untrue by the party making it or else recklessly made and that another party did in fact rely on the representation and was induced thereby to act to his detriment.<sup>577</sup> Applying this law to the facts, the court found that a reading of the plaintiff's expert's affidavit could lead to the conclusion that the physician's statements to the plaintiff that she could become paralyzed from everyday movement were false because they conveyed the misimpression that such an occurrence was likely.<sup>578</sup> The court of appeals therefore found resolution of the issue inappropriate for summary judgment.<sup>579</sup>

Defendant next argued that the statements were not fraudulent because they did not relate to a present existing fact, but to a future occurrence. The court of appeals noted that one of the elements of a cause of action for fraud is a material misrepresentation of a "past or existing fact."<sup>580</sup> However, it found that the physician's statements referred to her condition as it existed at the time of their conversation, and this related to a present and existing fact contrary to defendant's argument.<sup>581</sup> Accordingly, the court found genuine issues of material fact relating to the plaintiff's claim of fraud that precluded entry of summary judgment on that claim.<sup>582</sup>

In *Mid-Continent Paper Converters, Inc. v. Brady, Ware & Schoenfeld, Inc.*,<sup>583</sup> the court of appeals interpreted the attribution of fraud to a corporation. In this case, an accounting firm brought suit against a corporate client for unpaid fees, and the corporation counterclaimed alleging that the accounting firm had committed professional malpractice for failing to discover fraud committed by the corporation's Chief Financial Officer.<sup>584</sup> The trial court entered summary judgment in favor of the plaintiff on defendant's counterclaim, holding that the fraud perpetrated by Gleeson, the corporation's Chief Financial Officer, against the plaintiff was imputed to defendant because Gleeson committed fraud on behalf of defendant while in the scope of his employment and the fraud committed by Gleeson is therefore the fraud of defendant.<sup>585</sup> In addition, the trial court held that since defendant committed fraud against the plaintiff, defendant could not recover damages from the plaintiff because the plaintiff was also a victim of the fraud committed by defendant.<sup>586</sup>

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576. *See id.*

577. *See id.* at 509-10 (citing *Fleetwood Corp. v. Mirich*, 404 N.E.2d 38, 42 (Ind. Ct. App. 1980)).

578. *See id.* at 510.

579. *See id.*

580. *Id.* (citing *Fleetwood Corp.*, 404 N.E.2d at 42).

581. *See id.*

582. *See id.*

583. 715 N.E.2d 906 (Ind. Ct. App. 1999).

584. *See id.* at 908.

585. *See id.*

586. *See id.*

With respect to the issue of imputation of fraud, the court of appeals looked to Indiana agency law for the conclusion that the actions of employees and agents of a corporation are attributable to the corporation when the actions are done within the scope of employment.<sup>587</sup> However, it acknowledged that an employer will not be liable for the actions of its agent if the agent commits an independent fraud for his own benefit or the agent's conduct raises a presumption that the agent would not communicate his knowledge.<sup>588</sup>

In the case of fraud by the employee on behalf of a corporation, the court of appeals recognized that the issue of whether a company benefits from an employee's fraud becomes complicated in two situations: (1) a "loyal but misguided" employee who intended to benefit the corporation by his fraudulent acts and did produce a short term benefit may ultimately cause real damage to the company even before the fraud is unmasked; and (2) the employee may also have his own interests while the employee's fraud serves the interest of the corporation.<sup>589</sup> After a brief discussion of how these concerns have been treated in other jurisdictions and by the Restatement (Second) of Agency section 261, the court stated that it did not find the enrichment of the corporation to be a dispositive element.<sup>590</sup> Rather, a finding that the agent or employee acts on the corporation's behalf and within the scope of authority is more relevant criteria in determining if an employee's fraud is imputable.<sup>591</sup> Moreover, the court found that it is not a requirement that the employee be top management in order to impute fraud, although the employee's position in the company is certainly a factor in analyzing whether the fraud will be attributable to the corporation.<sup>592</sup> Applying this law to the facts, the court held that the chief financial officer committed fraud on behalf of the company, which was intended to benefit the company and did benefit the company.<sup>593</sup> The court further held that although Gleeson was not a shareholder nor a business decision maker, it believed that his position of authority sufficiently enabled him to act on behalf of defendant and thus his fraud should be attributed to the company.<sup>594</sup>

With respect to defendant's counterclaim against the plaintiff for professional malpractice, the court held that it was not clearly erroneous for the trial court to find that the plaintiff was a victim of the fraud committed by Gleeson on behalf of defendant, and that defendant could not recover damages from the victim of its own fraud.<sup>595</sup> The court agreed that imputation of fraud is not necessarily an absolute defense to malpractice claims against auditors under

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587. *See id.* at 909 (citing *Bud Wolf Chevrolet v. Robertson*, 519 N.E.2d 135, 137 (Ind. 1988)).

588. *See id.* at 909-10 (citations omitted).

589. *Id.* at 910.

590. *See id.* at 911 (citing RESTATEMENT (SECOND) OF AGENCY § 261 (1958)).

591. *See id.* at 911.

592. *See id.* at 912.

593. *See id.* at 913.

594. *See id.*

595. *See id.*

all circumstances.<sup>596</sup> However, because the court found that the plaintiff was entitled to rely and did rely on the truthfulness of Gleeson's representations on behalf of defendant, defendant was barred from recovery on its counterclaim for damages.<sup>597</sup>

The opinions rendered by the Indiana Court of Appeals during the course of this survey period demonstrate the wide array of factual circumstances upon which individuals may seek recovery under the tort of fraud. Likewise, they clarify the boundaries to which our courts are willing, or unwilling, to extend its application.

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596. *See id.* at 912.

597. *See id.* at 912-13.