RECENT DEVELOPMENTS IN INDIANA TORT LAW

PAUL S. KRUSE*
ROBERT DREW AND LARRY MORRIS**
LORI M. CRAIG***

This Article discusses noteworthy case law developments in tort law in Indiana during the survey period. It is not intended as a comprehensive or exhaustive overview.

I. IMMUNITY

A. Sovereign Immunity

In *Veolia Water Indianapolis, LLC v. National Trust Insurance Co.*, the Indiana Supreme Court held that a for-profit private company operating a public water utility under a contract with a governmental unit does not have common-law sovereign immunity.[1]

In this case, the Indianapolis Fire Department responded to a restaurant fire in January, 2010, and its efforts were delayed because several of the nearby fire hydrants were frozen.[2] At the time of the fire, Veolia, a private company, was responsible for operating the city's water utility through a management agreement with the fire department.[3] Under this arrangement, Veolia agreed to maintain the hydrants and license access to the hydrants' water supply to other companies for commercial use.[4] The insurers of the restaurant brought suit against the city and Veolia on the theory that the hydrants froze, because the licensed users failed to properly close the hydrants and that the diminished water supply so hampered the efforts of the fire department that the restaurant was a total loss.[5]

The court first considered whether the city was entitled to immunity.[6] While the city was not entitled to immunity for a discretionary function under Indiana Code section 34-13-3-3(7), it was entitled to "common law sovereign immunity on the Insurers' claim that it failed to provide an adequate supply of water from

---

* Partner, Parr Richey Obremskey Frandsen & Patterson since 1984 with practice focusing on a wide range of personal injury matters; including extensive experience handling catastrophic damage and wrongful death claims involving all types of personal injury liability theories. J.D., *cum laude*, Indiana University Robert H. McKinney School of Law.

** Robert Drew is a Bloomington, Indiana attorney who recently retired as Senior Judicial Clerk for the Hon. John G. Baker of the Indiana Court of Appeals; Larry Morris is the Senior Judicial Clerk for the Hon. Ezra H. Friedlander of the Indiana Court of Appeals.

*** Law Clerk, Parr Richey Obremskey Frandsen & Patterson. J.D. Candidate, 2014, Indiana University Robert H. McKinney School of Law.

1. Veolia Water Indianapolis, LLC v. Nat'l Trust Ins. Co., 3 N.E.3d 1, 10 (Ind. 2014).
2. *Id.* at 3.
3. *Id*.
4. *Id*. at 3, 4.
5. *Id*. at 4.
6. *Id*. at 5.

http://dx.doi.org/10.18060/4806.0048

which to fight the fire."[7]

The court then turned to the question of whether Veolia was entitled to immunity as an instrumentality of the city.[8] The court noted that "Veolia is a wholly private entity bound to the [c]ity only by contract."[9] The court also distinguished "this case from the circumstances of *Metal Working Lubricants*[10] and respond[ed] to the increasingly common practice of private, for-profit companies contracting with a governmental unit to provide services—such as managing public water utilities—historically undertaken by the governmental unit."[11] The court indicated that it was most persuaded by the "argument that granting common law sovereign immunity to a private company—with a fundamental goal of maximizing profits—invites negligence."[12] The crucial element was "the nature of the link between the private company and the governmental unit."[13]

B. Federal Communications Decency Act

In *Miller v. Federal Express Corp.*, the Indiana Court of Appeals held that the provider of an interactive computer service is immune from lawsuit under the Federal Communications Decency Act for allegedly defamatory statements made by individuals while using its computers.[14]

In response to an online news article, commenters posted statements on which plaintiffs, Mr. and Mrs. Miller, brought claims of defamation and intentional infliction of emotional distress.[15] The plaintiffs were able to identify the internet protocol ("IP") addresses of the commenters and amended their complaint to add the companies associated with the IP addresses on a theory of publication of defamatory comments.[16] One of the companies employed one of the commenters, who used the company's Internet access to post the comments using his personal email account.[17] The other IP address was associated with a proxy server and the commenter remained unidentified.[18] The companies asserted that operation of the federal Communications Decency Act ("CDA") protected them from liability.[19]

In determining that the companies did not bear liability for the comments posted by third parties, the court first analyzed the statutory provisions of the

---

7. *Id.* at 8.
8. *Id*.
9. *Id*. at 9.
10. 746 N.E.2d 352 (Ind. Ct. App. 2001).
11. *Veolia*, 3 N.E.3d at 9.
12. *Id*.
13. *Id*. at 10.
14. Miller v. Fed. Express Corp., 6 N.E.3d 1006, 1018 (Ind. Ct. App. 2014).
15. *Id*. at 1009.
16. *Id*. at 1009-10.
17. *Id*. at 1010.
18. *Id*.
19. *Id*.

CDA:[20]

> [F]or a defendant to claim the protection afforded by Section 230 of the CDA, it must establish three elements: (1) that the defendant is a provider or user of an interactive computer service; (2) that the cause of action treats the defendant as a publisher or speaker of information; and (3) that the information at issue is provided by another information content provider.[21]

The court determined that the companies qualified as providers of an "interactive computer service" because "[the companies] provide or enable computer access for multiple users on their respective computer networks to access the Internet by means of the servers on each network."[22] The court further said that "this is all that is required under Section 230(c)(1) [of the CDA] to be considered a provider of an interactive computer service."[23] The cause of action treated defendants as publishers and the court noted that "[t]he [complaint] seeks to hold [the companies] liable for what they *published*."[24] Finally, the comments posted to the news website (the information at issue) "was provided by another 'information content provider,' which is defined as 'any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet[.]'"[25] Accordingly, plaintiffs' claims were barred by operation of the CDA and the companies were not liable for the comments posted by use of their computers and Internet access.[26]

C. Privilege

In *Estate of Mayer v. Lax, Inc.*, the Indiana Court of Appeals held that an attorney who made statements in a counterclaim is protected by absolute privilege from a subsequent defamation action based upon those statements although this privilege does not bar a claim of malicious prosecution or abuse of process.[27]

This case arose from a web of claims and cross-claims, but the critical matter was that Lax, a real estate development company, initiated proceedings supplemental to recover from JME, an excavating company, its net judgment from a jury verdict.[28] The attorney for JME ("Mayer") filed a counterclaim alleging that Lax had perpetrated fraud and had violated the Indiana RICO Act.[29]

---

20. *Id*. at 1013.
21. *Id.* at 1018.
22. *Id.* at 1017.
23. *Id.*
24. *Id.* at 1018 (emphasis omitted).
25. *Id*. (alteration in original).
26. *Id.*
27. Estate of Mayer v. Lax, Inc., 998 N.E.2d 238, 263 (Ind. Ct. App. 2013), *trans. denied*, 2 N.E.3d 686 (Ind. 2014).
28. *Id.* at 242-45.
29. *Id.* at 243. *See generally* IND. CODE §§ 35-45-6-1 to -2 (2014).

The counterclaim was dismissed as an impermissible collateral attack on the prior verdict.[30] Mayer then amended the complaint alleging that Lax had conspired to commit bribery, perjury, obstruction of justice, intimidation, business corruption, and other violations of the Indiana RICO Act.[31] The trial court granted summary judgment to Lax on these claims on res judicata grounds.[32] While the counterclaims were pending, Lax was in negotiations with a casino.[33] Lax asserted that the negotiations broke off because of the damage to Lax's reputation caused by the counterclaims filed by Mayer.[34] Lax sued Mayer and Mayer's firm for defamation, abuse of process, malicious prosecution, tortious interference with a contract, and tortious interference with a business relationship.[35] Mayer died and his Estate was substituted.[36]

First, in Indiana, a "litigant defeated in a tribunal of competent jurisdiction may not maintain an action for damages against his adversary or adverse witnesses on the ground the judgment was obtained by false and fraudulent practices or by false and forced evidence."[37] Second, for the "'absolute privilege' to apply, statements made during litigation must be 'relevant and pertinent to the litigation or bear some relation thereto.'"[38] Finally, "relevancy is not necessarily measured with respect to the pleadings of an opposing party, but with respect to a cause of action or defense raised by the party claiming the privilege."[39]

II. PROCEDURE

A. Small Claims

In *Palmer v. Sales*, the Indiana Court of Appeals held that a change of judge request is governed by Trial Rule 76(C)(1).[40]

In this case a homeowner brought an action in small claims court against a driver who lost control of her vehicle and caused damage to the homeowner's yard.[41] The driver requested a change of judge.[42] The court denied the request as untimely, citing *McClure v. Cooper*.[43] *McClure* held that a party in small

30. *Estate of Mayer*, 998 N.E.2d at 244.
31. *Id.* at 243-44.
32. *Id.* at 244.
33. *Id.*
34. *Id.*
35. *Id.* at 245.
36. *Id.*
37. *Id.* at 247 (citing South Haven Sewer Works, Inc. v. Jones, 757 N.E.2d 1041, 1045 (Ind. Ct. App. 2001) (quoting Dodd v. Estate of Yanan, 625 N.E.2d 456, 457 (Ind. 1993))).
38. *Id.* at 248.
39. *Id*.
40. Palmer v. Sales, 995 N.E.2d 1073, 1078 (Ind. Ct. App. 2013).
41. *Id.* at 1075.
42. *Id*.
43. *Id*.

claims proceedings must file a request for a change of judge within three days of receiving the notice of claim, pursuant to Trial Rule 76(C)(5).[44]

In *Palmer*, the court held that the "practical effect of the *McClure* rule is to foreclose the right to request a change of judge."[45] The court also gave special attention to the aims of small claims proceedings, noting:

> While speedy resolution is one of the aims of small claims proceedings, they are also meant to be accessible to pro se parties. While we often tell pro se parties that ignorance of the law is not an excuse, pro se parties in a small claims case should be given a reasonable opportunity to discover what the applicable rules are or to decide to hire an attorney.[46]

The court also suggested that the Small Claims Rules might benefit from a specific rule for changes of judge that better balances the aims of speedy resolution and accommodation of pro se parties.[47] The court concluded that "Trial Rule 76(C)(5) does not apply, and the request for a change of judge was timely pursuant to Trial Rule 76(C)(1) and should have been granted."[48]

B. Statutes of Limitations

In *Moryl v. Ransone*, the Indiana Supreme Court held that, for purposes of the statute of limitations, a proposed medical malpractice complaint is filed when it is mailed via a private delivery service, as well as United States Postal Service ("USPS"), so long as it satisfies the statute governing requirements that matters be sent by registered or certified mail.[49]

In *Moryl*, a patient died on April 20, 2007 while under medical care, and plaintiff sought to bring a medical malpractice action against the healthcare providers.[50] The plaintiff sent a proposed complaint addressed to the Indiana Department of Insurance ("IDOI") on Sunday, April 19, 2009 via FedEx Priority Overnight.[51] The IDOI received and file-stamped the proposed complaint on Tuesday, April 21, 2009, and both parties agreed that April 21 was "one day after the expiration of the applicable two-year statute of limitations."[52]

The defendant healthcare providers asserted that the plaintiff's medical malpractice action was "belatedly commenced because it was sent by commercial courier rather than mailed by registered or certified mail."[53] The plaintiff

---

44. McClure v. Cooper, 893 N.E.2d 337, 340 (Ind. Ct. App. 2008).

45. *Palmer*, 995 N.E.2d at 1078.

46. *Id.* at 1077.

47. *Id*. at 1078.

48. *Id.*

49. Moryl v. Ransone, 4 N.E.3d 1133, 38-39 (Ind. 2014), *vacating in part*, 987 N.E.2d 1159 (Ind. Ct. App. 2013).

50. *Palmer*, 995 N.E.2d at 1135.

51. *Id.*

52. *Id.*

53. *Id.*

responded that "whether so mailed or otherwise deposited with a commercial courier, the date of commencement of the action is the same: the date of such mailing or deposit."[54] Two statutes potentially govern the filing of a proposed complaint for medical malpractice: Indiana Code sections 1-1-7-1 and 34-18-7-3(b).[55] The court held that "[h]armonizing the uncertainties [between the statutes], . . . a proposed medical malpractice complaint is filed upon mailing with a designated private delivery service—as well as the USPS—so long as it satisfies Indiana Code section 1-1-7-1."[56]

In *Magic Circle v. Schoolcraft*, the Indiana Court of Appeals held that, for purposes of the statute of limitations, an action against a new party commences with the date of filing the motion to amend the complaint, even if the motion is not granted until after the expiration of the limitations period.[57]

In this case a man was injured in a lawn mowing accident on May 5, 2010 and died three days later.[58] On January 16, 2012, the personal representative of the man's estate brought a wrongful death action sounding in products liability and negligence against the manufacturer of the mower.[59] The day before the limitations period expired, the representative moved to amend the claim to add new defendants and, although the motion was file-stamped that day (May 4, 2012), the trial court did not grant the motion to amend until May 15, 2012.[60] The new defendants challenged the plaintiff's amended complaint on statute of limitations grounds.[61]

Here, the court acknowledged that, previously, "when faced with circumstances almost identical to those now before us, a panel of this Court determined an action against a new defendant should have been dismissed."[62] The court then declined to follow the previous case.[63] Instead, the court adopted the rule as articulated by the Supreme Court of Vermont in *The Children's Store v. Cody Enterprises, Inc.*, that "an action against a new party, brought in through amendment to a preexisting complaint, is commenced when the motion to amend, and the new complaint, is filed even though permission to make the amendment is given at a later date."[64]

In *Alldredge v. Good Samaritan*, the Indiana Supreme Court held that if a plaintiff makes the necessary factual showing, the Fraudulent Concealment

---

54. *Id.*

55. *Id*. at 1136; *see also* IND. CODE § 1-1-7-1 (2014) and IND. CODE § 34-18-7-3(b) (2014).

56. *Palmer*, 995 N.E.2d at 1138.

57. Magic Circle v. Schoolcraft, 4 N.E.3d 768, 772 (Ind. Ct. App. 2014), *adopted by*, Camoplast Crocker, LLC v. Schoolcraft, 12 N.E.3d 251 (Ind. 2014).

58. *Id.* at 769.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 770 (citing A.J.'s Auto Sales, Inc. v. Freet, 725 N.E.2d 955 (Ind. Ct. App. 2000), *reh'g denied, trans. denied,* 741 N.E.2d 1249 (Ind. 2000)).

63. *Id*.

64. *Id.* at 771 (quoting The Children's Store, 580 A.2d 1206, 1209-11 (Vt. 1990)).

Statute[65] may apply to toll the Wrongful Death Act's[66] two-year filing period.[67]

Alldredge involved a nursing home patient who was a high fall risk.[68] On November 17, 2009, a nurse from the nursing home called one of the patient's daughters and told her the patient had suffered a fall, started vomiting a few hours later, and was transported to the hospital.[69] Nine days later, the patient died as a result of the head injury she sustained in the alleged fall.[70] Nearly three years later, on November 24, 2009, a former employee of the nursing home visited another of the patient's daughters and told her that a fall did not cause the patient's head injury, but another resident had attacked the patient and pushed her to the floor.[71]

After exploring Indiana's Adult Wrongful Death Statute, the court noted that "a tortfeasor's fraudulent concealment of his wrong ordinarily will operate to toll the statute of limitation until the plaintiff discovers the wrong."[72] The court further said that "when a plaintiff can prove [the Fraudulent Concealment Act] applies, it effectively moves the date on which the statute of limitation begins to run forward from the date of the alleged tort to the discovery date."[73] The court continued, "*[f]raud vitiates anything*. Courts will not uphold fraud, or presume the Legislature intended to do so by allowing one in a confidential relationship to conceal an injury done another until the statute of limitations has run."[74] Thus, "the Fraudulent Concealment Statute may apply to toll the Adult Wrongful Death Act's two-year filing period."[75]

In *Groce v. American Family Insurance Co.*, the Indiana Supreme Court held that if, in the exercise of ordinary diligence in reviewing their homeowner's insurance policy, the insureds could have timely discovered the loss-coverage limitations, their statute of limitations period began to run no later than the first policy renewal after the agent's alleged representations to insured.[76]

In this case an insurance company issued a homeowners policy through an insurance agent to the homeowners.[77] In discussing the policy, the agent said "'I'm assuming you want replacement cost coverage . . . if anything ever happens

---

65. IND. CODE § 34-11-5-1 (2014).

66. *Id.* §§ 34-23-1-0.1 to -2.

67. Alldredge v. Good Samaritan Home, Inc., 9 N.E.3d 1257, 1264 (Ind. 2014), *vacating* 982 N.E.2d 378 (Ind. Ct. App. 2013).

68. *Id*. at 1258.

69. *Id.*

70. *Id.*

71. *Id*.

72. *Id.* at 1261.

73. *Id.* at 1262.

74. *Id.* at 1263 (quoting Guy v. Schuldt, 138 N.E.2d 891, 96-97 (Ind. 1956)) (emphasis in original).

75. *Id.* at 1264.

76. Groce v. Am. Family Ins. Co., 5 N.E.3d 1154, 1159 (Ind. 2014).

77. *Id.* at 1155.

[the residence] will be replaced 100%.'"[78] The homeowners agreed to replacement cost coverage, and the agent said he would "'get this written up.'"[79] The homeowners believed that the policy would cover the "'entire cost of reconstruct[ion] [if the home] was damaged or destroyed by fire.'"[80] The home sustained substantial fire damage and a "dispute arose regarding the amount of insurance claim benefits payable under the policy."[81] The homeowners brought suit against the insurance company and the insurance agent.[82] The policy provided that the "insurance company would pay 'the full cost to repair or replace the damaged building, without deducting for depreciation, *but not exceeding*' repair costs and '*the limit in this policy.*'"[83] The court explained that the amount paid to the homeowners represented the full policy limits rather than an actual cash value.[84] Therefore, the amount the homeowners received was "'replacement cost' coverage, but in an amount capped by the policy limits."[85]

The court then turned to the homeowners' claim of negligence as to the agent.[86] An insured's "reasonable reliance upon an agent's representations can override an insured's duty to read the policy."[87] Here, the homeowners' claim is not that the agent "made a representation of existing coverage but rather that, perceiving that [the homeowners] wanted 100% replacement coverage, [the agent would] 'get this written up.'"[88] The agent's "alleged comments dealt with his promise of future activity, and did not constitute any representation about existing provisions related to coverages or limits in the homeowners policy."[89] Further, the homeowners "could have discovered that their dwelling loss replacement coverage did not exceed the applicable policy limits."[90] As a result, the applicable statute of limitations began to run "no later than the first policy renewal after the alleged statements of [the agent] to [the homeowner.]"[91]

In *David v. Kleckner*, the Indiana Supreme Court held that in order to determine whether a medical malpractice claim has been commenced within the applicable statute of limitations, the discovery or trigger date is the point when a claimant either knows of the malpractice and resulting injury or learns of facts that in the exercise of reasonable diligence should lead to the discovery of the

78. *Id.* at 1157.
79. *Id*.
80. *Id.* at 1156.
81. *Id.*
82. *Id.*
83. *Id.* at 1158 (emphasis in original).
84. *Id.*
85. *Id.*
86. *Id.* at 1159.
87. *Id.* (quoting Filip v. Block, 879 N.E.2d 1076, 1084 (Ind. 2008)).
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*

malpractice and the resulting injury.[92]

In *Kleckner*, a patient was clinically indicated to undergo an endocervical and endometrial biopsy.[93] The physician performed the endometrial biopsy, but not the endocervical biopsy.[94] The endometrial biopsy was negative for cancer.[95] Over the next several months, the patient began to exhibit additional symptoms for which she consulted a specialist.[96] The specialist identified and diagnosed a cancerous cervical tumor.[97] The patient consulted her physician who advised that the mass had not been present at the time of the biopsy.[98] The patient began treatments that were ultimately unsuccessful, and the patient died less than two years after her diagnosis.[99] A month or two before she died, her husband began to wonder how the physician had not found any evidence of cancer.[100] He obtained the physician's medical records concerning the patient's treatment and submitted the records to an attorney for review by medical experts.[101] Not until after the patient's death did the husband learn that the physician had not performed the endocervical biopsy.[102] Shortly after the patient's death, the estate commenced a medical malpractice action by filing a proposed complaint with the Indiana Department of Insurance.[103] The physician moved for summary judgment based on the two-year statute of limitations.[104] The trial court granted the motion, the court of appeals affirmed, and this appeal followed.[105] In its analysis, the court first noted that:

> [T]he medical malpractice statute of limitations is unconstitutional as applied when plaintiff did not know or, in the exercise of reasonable diligence, could not have discovered that she had sustained an injury as a result of malpractice, because in such a case the statute of limitations would impose an impossible condition on plaintiff's access to courts and ability to pursue an otherwise valid tort claim.[106]

The court then explored the "discovery opportunity element: 'In order for the date to be triggered, our case law requires that a plaintiff be aware of facts that, in the exercise of reasonable diligence, should lead to the discovery of the

---

92. David v. Kleckner, 9 N.E.3d 147, 152-53 (Ind. 2014).
93. *Id.* at 149.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 150.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 148.
106. *Id.* at 150 (quoting Martin v. Richey, 711 N.E.2d 1273, 1284 (Ind. 1999)).

malpractice and the resulting injury.'"[107] The court further explained that "[d]epending on the individual circumstances of each case, a patient's learning of the resulting disease or the onset of resulting symptoms may or may not constitute the discovery or trigger date."[108]

Here, the patient underwent the biopsy and was informed that there was no cancer.[109] She continued to have symptoms and sought out a specialist.[110] When the specialist identified a cancerous tumor, the patient consulted her physician who advised that the mass had not been present at the time of the biopsy.[111] "Where the plaintiff knows of an illness or injury, but is assured by professionals that it is due to some cause other than malpractice, this fact can extend the period for reasonable discovery."[112] The physician was able to establish that the action was commenced more than two years after the date of the alleged malpractice, but the plaintiff was able to show an issue of fact material to a theory that avoids the defense.[113] As a result, the physician was "not entitled to summary judgment on his defense asserting the medical malpractice statute of limitations."[114]

C. Summary Judgment

In *Boyd v. WHTIV, Inc.*, the Indiana Court of Appeals determined that the three-day extension of time under Trial Rule 6(E) applies in summary judgment proceedings.[115]

In *Boyd*, an employee filed a complaint against his employer for damages.[116] The employer filed a motion for summary judgment and served the employee by U.S. mail.[117] Thirty-three days later, the employee sought additional time to respond to the employer's motion.[118] The employer objected that the request for additional time was not made within thirty days and was not timely.[119] The trial court agreed, denied the employee's motion for extension of time, and granted the employer's motion for summary judgment.[120] The employee filed a motion to correct error asserting that the motion for extension was timely because Trial Rule 6(E) extends the deadline to respond by three days.[121] The trial court denied

---

107. *Id.*
108. *Id.* at 153.
109. *Id.* at 149.
110. *Id*.
111. *Id.*
112. *Id.* at 153 (quoting Herron v. Anigbo, 897 N.E.2d 444, 451 (Ind. 2008)).
113. *Id.*
114. *Id.* at 154.
115. Boyd v. WHTIV, Inc., 997 N.E.2d 1108, 1113 (Ind. Ct. App. 2013).
116. *Id*. at 1109-10.
117. *Id.* at 1110.
118. *Id*.
119. *Id*.
120. *Id.*
121. *Id.*

the motion and reiterated that the motion for extension of time was untimely.[122] This appeal followed.[123]

The court first addressed the question of whether Indiana Trial Rule 6(E) extends the date by which a non-movant must respond to a motion for summary judgment or request an extension of time to respond.[124] The court reviewed the text of the rule governing motions for summary judgment, i.e., Trial Rule 56, and observed that the "response time is not thirty days from the date of the filing of the motion; rather, it is thirty days from the date of service on the recipient."[125] The court also observed that the trial rules "specifically provide for additional time for service by mail."[126] The court further noted that "a review of Indiana case law reveals that Trial Rule 6(E)'s three-day extension of time is permitted and calculated into the required response time for summary judgment motions."[127]

As part of its analysis, the court considered its prior opinion in *DeLage Landen Financial Services, Inc. v. Community Mental Health Center*.[128] In that case, non-movant requested an enlargement of time to respond pursuant to Trial Rule 6(B)(2), which allows a "trial court to permit an act to be done upon motion made after the expiration of the time period . . . if the failure to act was the result of excusable neglect."[129] There, the court determined that Trial Rule 6(B)(2) does not apply to summary judgment proceedings; however, it did not determine that no provision of Trial Rule 6 could be applicable to summary judgment proceedings.[130] In fact, a later case, *State v. Gonzalez-Vazquez* pointed out that *DeLage* referred to and relied on Trial Rule 6(E).[131] Here, in *Boyd,* the court was guided by *Gonzalez-Vazquez* in determining that "the three-day extension of time provided by Trial Rule 6(E) applies in the context of [the employee's] request for an extension of time to respond to Employer's motion for summary judgment."[132]

In *Mitchell v. 10th and the Bypass, LLC*, the Indiana Supreme Court held that evidence obtained after entry of summary judgment may not form the basis for vacating that order on grounds that a non-final order is subject to revision at any time before entry of a final judgment, nor is relief from judgment under the trial rules limited to final judgments.[133]

Here, a property owner sued tenants on claims they were responsible for environmental contamination while operating their businesses at the property.[134]

---

122. *Id*.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id*. at 1111.
128. 965 N.E.2d 693 (Ind. Ct. App. 2012).
129. *Boyd*, 997 N.E.2d at 1111.
130. *Id.* at 1112.
131. *Id.* (citing State v. Gonzales-Vazquez, 984 N.E.2d 704 (Ind. Ct. App. 2013)).
132. *Id.* at 1112-1113.
133. Mitchell v. 10th and the Bypass, LLC, 3 N.E.3d 967, 968 (Ind. 2014).
134. *Id.* at 968-69.

Mitchell, an officer of one of the businesses, filed a motion for partial summary judgment on grounds that "he was not personally liable for [the] damages and that neither the responsible corporate officer doctrine nor the doctrine of piercing the corporate veil was applicable."[135] In support of the motion, Mitchell included an affidavit which alleged that he never dumped chemical waste and that he never caused or contributed to the release of a hazardous substance.[136] Rather than responding to Mitchell's motion, the property owner filed its own motion for partial summary judgment.[137] None of the property owner's designated exhibits disputed the material substance of Mitchell's affidavit, and Mitchell's motion for partial summary judgment was granted.[138] About a year later, the property owner obtained a statement that cast doubt on the veracity of Mitchell's affidavit.[139] The property owner then moved to vacate the grant of summary judgment based on newly discovered inculpatory evidence.[140] Mitchell did not dispute the new allegations, but opposed the motion on grounds that the property owner had not properly designated or timely submitted the new evidence.[141] The trial court granted the property owner's motion to vacate, declaring in part that the "'order granting partial summary judgment was a non-final order, . . . and therefore is subject to revision at any time before entry of a final judgment.'"[142] The court of appeals affirmed and this appeal ensued.[143]

The court began its analysis by exploring the "interplay between Trial Rule 54(B)—Judgment upon multiple claims or involving multiple parties and Trial Rule 56—Summary judgment, when new evidence is submitted to the trial court following entry of partial summary judgment."[144] Starting with Trial Rule 54(B), the court recognized that it has "long and consistently held a trial court has inherent power to reconsider, vacate, or modify any previous order so long as the case has not proceeded to final judgment."[145] In this case, the order granting partial summary judgment was not final.[146] The court then turned to Trial Rule 56 and the procedure governing summary judgment.[147] Indiana case law has established and affirmed a "bright-line rule . . . which precludes the late filing of responses in opposition to a motion for summary judgment."[148] The court

---

135. *Id.* at 969.
136. *Id*.
137. *Id.*
138. *Id.*
139. *Id.* at 970.
140. *Id*.
141. *Id.*
142. *Id.*
143. *Id*.
144. *Id.* at 970-971.
145. *Id.* at 971 (quoting Haskell v. Peterson Pontiac GMC Trucks, 609 N.E.2d 1160, 1163 (Ind. Ct. App. 1993)).
146. *Id*.
147. *Id.*
148. *Id.* at 972.

concluded that "[i]n order to harmonize Trial Rule 54(B) and Trial Rule 56(C) we hold that although a trial court may indeed make material modifications to a non-final summary judgment order, it must do so based on the timely submitted materials already before the court when the order was initially entered."[149]

III. INSURANCE

A. UIM Coverage Setoff for Workmen's Compensation Benefits

In *Justice v. American Family Insurance Co.*, the Indiana Supreme Court held that the phrase "limits of liability of this coverage" in an insurance policy refers to the policy limit and not to the insured's total damages.[150]

In this case an underinsured motorist collided with a city bus.[151] The bus driver was injured as a result of the accident and received workers' compensation benefits in the amount of $77,469.56.[152] This total was comprised of payments to his medical providers for $51,829.81; $18,939.75 in lost wages and disability; and $6,700 as compensation for his permanent partial impairment.[153] The driver also received policy limits of $25,000 from the underinsured motorist's insurer.[154] In addition, the bus driver carried his own underinsured motorist policy, which provided coverage up to $50,000 per person.[155] When the bus driver made his claim under that policy his insurer denied coverage.[156] He then sued for breach of contract arguing he was entitled to the difference between his policy limits and the policy limits of the underinsured driver which was $25,000.[157] The insurer asserted that it was entitled to a setoff of the workers' compensation benefits against the $50,000 policy limit, thus reducing its liability to zero.[158]

The court looked at the "limits of liability" section of the driver's policy and found that the language unambiguously provided for a set-off against the policy limit.[159] The court noted that "[t]he phrase 'limits of liability of this coverage' clearly refers to the $50,000 policy limit, not to [the bus driver's] total damages."[160] The court then turned to Indiana's Uninsured/Underinsured Motorist Statute,[161] which prohibits underinsured motorist coverage in an amount

149. *Id.* at 973.
150. Justice v. Am. Family Ins. Co., 4 N.E.3d 1171, 1173 (Ind. 2014).
151. *Id*.
152. *Id.*
153. *Id*.
154. *Id*.
155. *Id.* at 1173-74.
156. *Id.* at 1174.
157. *Id*.
158. *Id.*
159. *Id.* at 1176.
160. *Id.* at 1177.
161. IND. CODE § 27-7-5-2(a) (2014).

less than $50,000.[162] The driver's policy limit met the statutory minimum, but the workers' compensation setoff provision would operate to reduce the policy limit to zero.[163] The court determined that the purpose of Indiana's Uninsured/Underinsured Motorist Statute is to put the driver in a position to recover the minimum coverage amount.[164] The court said that "in light of that statutory purpose and [case law], we conclude [the bus driver] is entitled to recover the remaining $25,000."[165] The court further said that "[a]ny policy provision to the contrary is unlawful and unenforceable."[166] Because the driver received less than the statutory minimum from the third party, the policy provision for setoff was unlawful and unenforceable.[167]

B. Explicit Policy Exclusions

In *Deeter v. Indiana Farmers Mutual Insurance Co.*, the Indiana Court of Appeals held that when an insurance company includes an explicit exclusion in its policy to cover a loss that results from an intentional act by a co-insured, the court will enforce that exclusion.[168]

In this case, a husband and wife were co-insureds on a homeowner's insurance policy.[169] The wife was informed that her husband was having an affair, and she began "tearing up the house" and ultimately set fire to the home.[170] The wife was charged with arson and later entered a plea agreement wherein she pleaded guilty to criminal mischief.[171] The husband made a claim against the policy, but the insurer determined the loss was intentional and refused to pay.[172] The relevant exclusion clause stated that the insurer "do[es] not pay for loss which results from an act committed by or at the direction of an 'insured' and with the intent to cause a loss."[173] The husband asserted that the exclusion clause was ambiguous and that he was an "innocent co-insured spouse."[174] The court found no ambiguity in the clause and noted that "[the wife] intentionally set fire to her home and took criminal responsibility for her actions, placing the [homeowners] squarely within the policy exclusion."[175] Turning then to the

---

162. *Justice*, 4 N.E.3d at 1177-78.

163. *Id.* at 1179.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. Deeter v. Ind. Farmers Mut. Ins. Co., 999 N.E.2d 82, 86 (Ind. Ct. App. 2013), *trans. denied*, 999 N.E.2d 82 (Ind. 2014).

169. *Id.* at 84.

170. *Id.*

171. *Id.*

172. *Id.* at 84-85.

173. *Id.* at 84.

174. *Id.* at 85.

175. *Id.*

question of an "innocent co-insured," the court distinguished the precedent cited by the husband by noting that those policies had not provided an explicit exclusion for intentional loss by a co-insured.[176] The court explained that "when an insurance company has included an explicit exclusion in its policy to cover loss that results from an intentional act by a co-insured, we will respect the parties' right to contract and enforce that exclusion."[177] Thus, the insurer "was within the scope of its contractual rights to deny the [homeowners'] insurance claim in accordance with the intentional loss exclusion contained in the policy."[178]

C. Groundless Suit

In *State Farm Fire & Casualty Co. v. H.H. Niswander*, the Indiana Court of Appeals held that an insurer's suit is groundless, and a defendant may be awarded attorney fees, when a claim requires expert testimony and the insurer's own experts indicated that no facts would support a claim of negligence, but the insurer files suit and nevertheless continues to litigate it for two years.[179]

In this case, an insured parked his vehicle in his attached garage.[180] The vehicle caught fire and the flames "engulfed the garage, destroying its contents, three other cars, and a portion of the house."[181] When making the claim to his insurer, the insured stated that the last people to access the engine compartment were employees of a dealership that had performed an oil change about a week before the fire.[182] Approximately two weeks after the fire, the insurer hired investigators to determine the cause of the fire.[183] The investigators determined that the fire was an "accidental combustible fluid fire."[184] The investigators classified the fire as an "accidental fire."[185]

Ten months after the insurer received the report, it filed suit against the dealership alleging that the dealership was "negligent, reckless, and careless in service, thereby causing the fire"[186] and that the property damage was due to the dealership's negligence.[187] The lawsuit was actively litigated for more than two years, during which the parties participated in written discovery.[188] The insurer finally supplied the investigative report to the dealership nearly a year after the

---

176. *Id.*
177. *Id.* at 86.
178. *Id.*
179. State Farm Fire & Cas. Co. v. H.H. Niswander, 7 N.E.3d 295, 300 (Ind. Ct. App. 2014).
180. *Id.* at 295.
181. *Id.* at 296.
182. *Id.*
183. *Id.*
184. *Id.* at 297.
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*

suit was filed.[189] In response, the dealership deposed the investigators who created the report.[190] One of the investigators testified that he believed that the dealership did not cause the fire and that the fire was, in fact, the result of a manufacturing defect in the valve cover.[191] Following the deposition, the dealership asked the insurer to dismiss the lawsuit with prejudice and to reimburse the dealership for its legal fees.[192] The insurer informed counsel for the dealership that it was unwilling to pay the legal fees.[193] The dealership then filed a motion to dismiss with requests for the court to impose sanctions and fees on the insurer.[194] The trial court granted the motion to dismiss and ordered the insurer to pay the dealership's legal fees.[195] The insurer appealed.[196]

The court began its analysis by noting that in Indiana litigants typically pay their own attorney fees, but there is a statutory provision for the recovery of attorney fees for bringing or continuing frivolous lawsuits.[197] It then listed the three-step process for reviewing an award under that section of the Indiana Code.[198] First, "[the court] review[s] the trial court's findings of fact for clear error."[199] Second, "[it] review[s] de novo the trial court's legal conclusion that a lawsuit is 'frivolous, groundless, unreasonable, or asserted in bad faith.'"[200] Third, "'[it] look[s] to see whether the trial court's decision to award fees and the amount of the fees awarded constitute an abuse of discretion.'"[201]

Here, the court found no error in the trial court's finding that, prior to the filing of the suit, the insurer knew that its experts were of the opinion that the dealership did not cause the fire.[202] It then reviewed the determination that the insurer's claim was frivolous and reached the same conclusion as the trial court, noting that the insurer's claim required expert testimony, but that the insurer's experts drafted a report that showed no facts would support a claim of negligence against the dealership.[203] Finally, the court determined whether the trial court abused its discretion in awarding attorney fees.[204] Here the court said that "only after [the dealership's] counsel had prepared for the deposition of [the insurer's]

189. *Id.*
190. *Id.*
191. *Id.* at 297-98.
192. *Id.* at 298.
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*; *see* IND. CODE § 34-52-1-1(b) (2014).
198. *State Farm Fire & Cas. Co.*, 7 N.E.3d at 299.
199. *Id.*
200. *Id.* (citing Alaska Seaboard Partners Ltd. P'ship v. Hood, 949 N.E.2d 1247, 1255 (Ind. Ct. App. 2011)).
201. *Id.* (citing *Alaska Seaboard Partners Ltd. P'ship*, 949 N.E.2d at 1256).
202. *Id.*
203. *Id*. at 299-300.
204. *Id.* at 300.

experts and traveled to Michigan did [the insurer] concede that the experts did not blame [the dealership] for the fire."[205] And then [the insurer] allowed the suit to proceed until the trial court dismissed it."[206] The court found that "[the insurer's] lawsuit was groundless and that the trial court did not abuse its discretion in awarding [the dealership] attorney's fees."[207]

IV. ATTORNEY FEES

A. Attorney Fees in Cases Subject to Both the Medical Malpractice Act and the Adult Wrongful Death Statute

In *Indiana Patient's Compensation Fund v. Holcomb*,[208] the Indiana Supreme Court held that the fee cap provision of the Indiana Medical Malpractice Act ("MMA") [209] serves only to cap fees a plaintiff's lawyer may charge his or her client as to the award the client receives from the Patient's Compensation Fund ("the Fund"), but it does not lessen the Fund's liability to a claimant.[210]

In this case, a decedent's estate settled an adult wrongful death medical malpractice claim against a healthcare provider in an amount that allowed the estate to pursue excess damages from the Fund.[211] The Fund asserted that "in an action to recover for the wrongful death of an adult, the Fee Cap Provision should be construed and applied such that the Fund should not be required to pay to a claimant an amount for attorney fees that exceeds the 15% Fee Cap Provision."[212] However, "[u]nder the MMA, the Fund must pay all damages in excess of the initial $250,000 payable from qualified health care providers," which includes reasonable attorney's fees.[213] The court noted that "in cases subject to both the Medical Malpractice Act and the Adult Wrongful Death Statute, attorney fees as an element of damages are to be included in the overall calculation of damages."[214] The court also said that "attorney fees payable from the excess damages recovered from the Fund are limited . . . to 15% of the excess payment."[215] The purpose of this limitation is not part of the "litigation of a plaintiff's claim against the Fund, but rather in the course of resolving the plaintiff's attorney's claim for fees from [the] client."[216]

Therefore, the court declined to construe the fee cap provision of the MMA

---

205. *Id.*
206. *Id.*
207. *Id.*
208. 17 N.E.3d 255 (Ind. 2014).
209. IND. CODE § 34-18-18-1 (2014).
210. *Holcomb*, 17 N.E.3d at 258.
211. *Id.* at 255.
212. *Id.* at 256.
213. *Id.*
214. *Id.* at 257.
215. *Id.*
216. *Id.*

so as to reduce the Fund's liability to a plaintiff Adult Wrongful Death Statute claimant because that provision serves only to cap fees a plaintiff's lawyer may charge his or her client as to the award the client receives from the Fund, but it does not lessen the Fund's liability to a claimant.[217]

B. Attorney Fees Under Indiana's General Wrongful Death Statute

In *SCI Propane, LLC v. Frederick*, the Indiana Court of Appeals held that the omnibus provision of the General Wrongful Death Statute ("GWDS") permits recovery of reasonable attorney fees for dependents who survive decedents.[218]

This matter arose after a lengthy and complex litigation.[219] The appeal was limited to the question of the propriety of an award of attorney fees to the estate and the calculation of such an award.[220] In the beginning of its analysis, the court looked to the text of the GWDS and noted that it is divided into two parts.[221] The first part addresses decedents survived by dependents while the second part addresses decedents who are without any dependents.[222] The second part explicitly lists attorney fees, but the first part does not.[223] The court held that the omnibus provision of the GWDS is "ambiguous with respect to whether attorney fees are recoverable, because it provides that recoverable damages are not limited to those the statute delineates."[224] After looking to prior cases and finding none of them directly on point, the court held that "attorney fees are recoverable under the first part of the GWDS for multiple reasons, including that: (1) attorney fees are the 'type' of damages contemplated by the statute; (2) such a conclusion comports with our principles of statutory construction; and (3) the Legislature has 'acquiesced' to the recoverability of attorney fees."[225]

Having determined that attorney fees are recoverable, the court then addressed the calculation of such fees.[226] Citing *Butler v. Indiana Department of Insurance*,[227] SCI Propane argued that the "Estate should only be able to recover the amount it would have actually had to pay for attorney fees, which was governed by the contingent fee agreement."[228] The court agreed and noted that "an award of attorney fees under the GWDS is compensatory in nature."[229]

Because attorney fee awards are compensatory in nature and the trial

---

217. *Id.* at 258.
218. SCI Propane, LLC v. Frederick, 15 N.E.3d 1015, 1023 (Ind. Ct. App. 2014).
219. *Id.* at 1018-21.
220. *Id.* at 1018.
221. *Id.* at 1022-24.
222. *Id.*
223. *Id.* at 1023.
224. *Id.*
225. *Id.* at 1025.
226. *Id.* at 1027.
227. 904 N.E.2d 198 (Ind. 2009).
228. *Frederick*, 15 N.E.3d at 1028.
229. *Id.*

> court's award placed the Estate in a better position than it would have been under the contingent fee agreement, we conclude that the trial court abused its discretion in calculating attorney fees. Instead, the trial court should have based its award on the amount that the Estate had actually lost as a result of its claim, which is equal to the amount it owed its counsel under that agreement.[230]

The court also affirmed a reduction of recovery due to non-party fault and denied the estate's request for appellate attorney fees.[231]

V. NEGLIGENCE

A. Assumption of Risk

In *South Shore Baseball, LLC v. DeJesus*, the Indiana Supreme Court held that a baseball facility is not liable for injuries received by a fan as a result of a foul ball flying into the stands where the fan admitted she had seen foul balls enter the stands at the ballpark before, and that she was aware there was a chance that the ball could come her way based upon the positioning of the protective netting.[232]

In this case a spectator attended a baseball game and sat in a section of the stadium without protective netting.[233] A foul ball struck her and she suffered multiple fractures of facial bones and permanent blindness in her left eye.[234] She brought claims in premises liability and in negligence.[235]

The Indiana Supreme Court determined that South Shore was entitled to summary judgment.[236] Notably, the court declined to adopt a special limited-duty rule for baseball stadiums and franchises; the so-called Baseball Rule.[237] Pursuant to this rule, "a ballpark operator that 'provides screening behind home plate sufficient to meet ordinary demand for protected seating has fulfilled its duty with respect to screening and cannot be subjected to liability for injuries resulting to a spectator by an object leaving the playing field.'"[238] The court declined to adopt this rule, concluding that this was within the purview of the state legislature, and should not be enacted by the judiciary.[239]

Nevertheless, the court found in favor of South Shore on the plaintiff's premises liability claim on grounds that there was no genuine issue of fact

---

230. *Id.* at 1028-29.

231. *Id.* at 1029.

232. S. Shore Baseball, LLC v. DeJesus, 11 N.E.3d 903, 911 (Ind. 2014).

233. *Id.* at 905.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* at 904.

238. *Id.* at 907 (citing Benejam v. Detroit Tigers, Inc., 635 N.W.2d 219, 225 (Mich. Ct. App. 2001)).

239. *Id.* at 909.

concerning the second element of such a claim, i.e., that South Shore should have expected that the plaintiff would not discover or realize the danger of sitting where she sat in the ballpark or that she would fail to protect herself against it.[240] The court cited evidence that "South Shore notified [the spectator] of the danger of foul balls by printing a warning on her ticket, posting a [warning] sign in the aisle near her seat, and making an announcement over the loudspeaker before the beginning of the game."[241]

South Shore was also entitled to summary judgment on the plaintiff's negligence claim.[242] That claim alleged that South Shore assumed a duty of care to protect the spectator from foul balls by erecting protective netting in the stadium.[243] The court held that, "[a]ssuming without deciding that South Shore undertook such a duty,"[244] the plaintiff failed to allege an increased risk of harm, nor could she establish reliance.[245] According to the court, "[the] undisputed evidence show[ed] that [the plaintiff] was not relying on the netting to protect her from the danger of foul balls," because she admitted knowing that when she was in her seat, there could be a chance that a foul ball could come her way.[246]

B. Contributory Negligence

In *Whitmore v. South Bend Public Transportation Corp*., in a lawsuit against a governmental entity under the Indiana Tort Claims Act, the Indiana Court of Appeals reversed a grant of summary judgment in favor of the entity because the court questioned the wisdom of determining as a matter of law that an individual was contributorily negligent when he was not the first aggressor in an altercation, but simply failed to walk away from an individual who was violently disposed.[247]

After attending a football game with friends and consuming several alcoholic beverages, a passenger boarded a TRANSPO bus.[248] TRANSPO is a government entity.[249] The passenger was under the influence of alcohol and the bus was crowded.[250] While walking down the aisle, the passenger tripped but did not fall and determined that another passenger, a commuter who had stretched his legs into the aisle, tripped him.[251] The passenger sat near his friends and next to the

---

240. *Id.* at 910.

241. *Id.*

242. *Id.* at 907.

243. *Id.* at 905.

244. *Id.* at 911.

245. *Id.*

246. *Id.*

247. Whitmore v. South Bend Pub. Transp. Corp., 7 N.E.3d 994, 995 (Ind. Ct. App.), *trans. denied*, 12 N.E.3d 878 (Ind. 2014).

248. *Id.*

249. *Id.* at 996.

250. *Id.* at 995.

251. *Id.*

commuter.[252] The passenger and the commuter began "'verbally kind of bashing each other and the situation escalated very quickly.'" [253] The passenger turned to his friends and the commuter stood up and punched the passenger.[254] A friend of the passenger intervened and the commuter placed the friend in a choke hold.[255] The passenger attempted to separate his friend from the commuter, but the commuter's girlfriend intervened and pushed the passenger.[256] The commuter struck the passenger in the eye and broke the passenger's orbital bones.[257] The commuter and his girlfriend fled the bus.[258]

The passenger sued TRANSPO for failing to provide a safe environment for its invitees.[259] TRANSPO, as a government entity, defended on the doctrines of contributory negligence and incurred risk.[260] The trial court granted summary judgment in favor of TRANSPO and this appeal followed.[261]

The court first analyzed whether the passenger was contributorily negligent.[262] When a plaintiff brings a tort claim against a governmental entity, that entity may use the common law defense of contributory negligence.[263] Therefore, the court said that "if a plaintiff is negligent to even a small degree and that negligence proximately contributes to his claimed damages, contributory negligence will operate as a complete bar to his action . . . ."[264] The court further said that "contributory negligence is the failure of a person to exercise for his own safety that degree of care and caution which an ordinary, reasonable, and prudent person in a similar situation would exercise."[265] Whether a plaintiff was contributorily negligent is generally a question of fact rather than a question of law and inappropriate for summary judgment unless the facts are "undisputed and only a single inference can be drawn therefrom."[266] The court then questioned "the wisdom of determining as a matter of law that an individual is contributorily negligent when he is not the first aggressor in an altercation, but simply fails to meekly walk away from an individual that is violently disposed."[267] The court concluded "that a question of material fact exist[ed] as to whether or not [the

252. *Id.* at 996.
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.* at 997.
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.*

passenger's] actions constituted contributory negligence."[268]

The court then turned to incurrence of risk.[269] TRANSPO argued that the passenger incurred "the risk of his injuries because [he] knew or should have known that his words and actions risked provoking a physical altercation and serious physical injury."[270] The court said that "[i]ncurred risk is a defense to a claim of negligence, separate and distinct from the defense of contributory negligence."[271] An incurred risk must be voluntary and "requires much more than the general awareness of a potential for mishap. [It] contemplates acceptance of a specific risk of which the plaintiff has *actual* knowledge . . . ."[272] While the trial court determined that Passenger incurred the risk of his injuries, it looked to only a portion of the circumstances surrounding the incident.[273] The appellate court then held that it could not "say that one, as a matter of law, incurs the risk of assault when he defends himself."[274] Therefore, whether the passenger incurred the risk of assault was a question of fact and inappropriate for summary judgment.[275]

VI. PUNITIVE DAMAGES

A. State Intervention in Action

In *Weinberger v. Estate of Barnes*,[276] the Indiana Court of Appeals held that Indiana's punitive damages statute[277] does not grant the state the power to intervene in otherwise private litigation at any stage in the proceedings.[278]

After a jury in a medical malpractice action returned a verdict against the defendant in the amount of $3 million in compensatory damages and $10 million in punitive damages, the court reduced the judgment to $1.25 million in compensatory damages and $9 million dollars in punitive damages.[279] Both parties filed notices of appeal but then engaged in mediation and reached a settlement agreement.[280] The plaintiff then moved to dismiss the appeal because the matter had been "amicably resolved and settled."[281] The state then moved to

---

268. *Id.* at 998.

269. *Id.*

270. *Id*.

271. *Id.* (citing Power v. Brodie, 460 N.E.2d 1241, 1243 (Ind. Ct. App. 1984)).

272. *Id.* (citing Richardson v. Marrell's Inc., 539 N.E.2d 485, 487 (Ind. Ct. App. 1989) (emphasis in original)).

273. *Id.*

274. *Id.*

275. *Id.*

276. 2 N.E.3d 43 (Ind. Ct. App. 2013), *trans. denied*, 8 N.E.3d 202 (Ind. 2014).

277. *See* IND. CODE § 34-51-3-6 (2014).

278. *Barnes*, 2 N.E.3d at 50.

279. *Id.* at 44.

280. *Id.*

281. *Id.* at 45 (internal quotation marks omitted).

intervene and the court preliminarily granted the motion.[282] The question before the court on appeal was whether the lower court properly permitted the state to intervene.[283]

As part of a comprehensive tort-reform package, Indiana's legislature passed a split-recovery statute,[284] which provided that, "[w]hen a punitive damage award is paid, the party against whom the judgment was entered shall pay the punitive damage award to the clerk of the court where the action is pending" and that the clerk of the court shall pay out twenty-five percent to the person to whom the damages were awarded and seventy-five percent to the treasurer of the state.[285] The court noted that the question would be resolved by recourse to statutory interpretation.[286] The court observed that the "statute does not provide for the entry of judgment in the state's favor or that the state becomes a party or judgment creditor at the time the verdict is announced, nor does it specifically provide for intervention by the State."[287] In fact, until such time as the award is actually paid, the state's interest is best described as "a mere expectancy."[288] Looking to the legislative history surrounding the split-recovery statute, the court observed that "the overarching goal of the split-recovery statute is to protect defendants from excessive punitive damage awards."[289] The court continued: "[a]lthough the split-recovery statute has the effect of redirecting a portion of any punitive damages award into public coffers, we cannot conclude that the General Assembly's goal was to use punitive damage awards as a new revenue source."[290] In addition, "Indiana strongly favors settlement agreements."[291] The court concluded that the statute "does not permit the State to become a party to otherwise private litigation at any stage of the proceedings."[292]

B. Recovery from the Estate of a Deceased Tortfeasor

In *Estate of Mayer v. Lax, Inc.*, the Indiana Court of Appeals held that a plaintiff may not recover punitive damages from the estate of a deceased tortfeasor.[293]

---

282. *Id.*

283. *Id.*

284. *See* H.E.A. 1741, 109th Gen. Assemb., 1st Reg. Sess. (Ind. 1995) (partially codified in IND. CODE § 34-51-3-6 (2014)).

285. *Barnes*, 2 N.E.3d at 47 (quoting IND. CODE § 34-51-3-6 (2014)).

286. *Id.* at 46.

287. *Id.* at 47.

288. *Id.* at 48.

289. *Id.* at 49.

290. *Id.*

291. *Id.* (quoting Georgos v. Jackson, 790 N.E.2d 448, 453 (Ind. 2003) (internal quotation marks omitted)).

292. *Barnes,* 2 N.E.3d at 50.

293. Estate of Mayer v. Lax, Inc., 998 N.E.2d 238, 263 (Ind. Ct. App. 2013), *trans. denied*, 2 N.E.3d 686 (Ind. 2014).

This case arose from a web of claims and cross-claims, but the critical matter was that Lax, a real estate development company, initiated proceedings supplemental to recover its net judgment from a jury verdict from JME, an excavating company.[294] The attorney for JME ("Mayer") filed a counterclaim alleging that Lax had perpetrated fraud and had violated the Indiana RICO Act.[295] The court dismissed the counterclaim as an impermissible collateral attack on the prior verdict.[296] Mayer then amended the complaint, alleging that Lax had conspired to commit bribery, perjury, obstruction of justice, intimidation, business corruption, and other violations of the Indiana RICO Act.[297] The trial court granted summary judgment to Lax on these claims on the grounds of res judicata.[298] While the counterclaims were pending, Lax was in construction negotiations with a casino.[299] Lax asserted that the negotiations broke off because of the damage to Lax's reputation caused by the counterclaims filed by Mayer.[300] Lax sued Mayer and Mayer's firm for defamation, abuse of process, malicious prosecution, tortious interference with a contract, and tortious interference with a business relationship.[301] Mayer subsequently died and his estate was substituted.[302]

The Indiana Supreme Court has previously ruled on the issue of whether a plaintiff can recover punitive damages from a deceased tortfeasor's estate in *Crabtree ex rel. Kemp v. Estate of Crabtree*.[303] The court of appeals noted that in *Crabtree*, the Indiana Supreme Court held that "Indiana law does not permit recovery of punitive damages from the estate of a deceased tortfeasor."[304] The court therefore affirmed that there is a general rule that punitive damages are not recoverable from the estate of a deceased tortfeasor.[305]

C. Limitations

In *Andrews v. Mor/Ryde International, Inc.*,[306] the Indiana Supreme Court held that treble damages under the Sales Representatives Act[307] are not subject to the Punitive Damages Act.[308]

---

294. *Id.* at 243-44. *See generally* IND. CODE §§ 35-45-6-1 to -2 (2014).
295. *Estate of Mayer*, 998 N.E.2d at 243.
296. *Id.*
297. *Id.* at 243-44.
298. *Id.* at 244.
299. *Id.*
300. *Id.*
301. *Id.* at 245.
302. *Id.*
303. 837 N.E.2d 135 (Ind. 2005).
304. *Estate of Mayer*, 998 N.E.2d at 258 (quoting *Crabtree*, 837 N.E.2d at 139).
305. *Id.* at 259.
306. 10 N.E.3d 502 (Ind. 2014), *reh'g denied.*
307. IND. CODE §§ 24-4-7-0.1 to -8 (2014).
308. *Andrews*, 10 N.E.3d at 506. *See generally* IND. CODE §§ 34-51-3-0.2 to -6 (2014).

In this case, after a vendor terminated an independent commissioned sales representative's contract, the sales representative sued the vendor for unpaid commissions.[309] One count of the complaint sought recovery under the Indiana Sales Representative Act, or Indiana Code section 24-4-7.[310] The statute states that a principal who in bad faith fails to pay all accrued commissions within fourteen days of terminating the relationship "shall be liable, in a civil action brought by the sales representative, for exemplary damages in an amount no more than three (3) times the sum of the commissions owed to the sales representative."[311] The vendor argued that the exemplary damages under the act are subject to Indiana's statutory restrictions on awards of punitive damages because "'exemplary' and 'punitive' are often used interchangeably."[312]

The court began its analysis by noting that, "[s]ince punitive damages are a creation of common law, limiting (or even prohibiting) their recoverability is within the Legislature's discretion."[313] The court went on to say that:

> By contrast, other causes of action and corresponding remedies are purely the Legislature's own creation. . . . While the Punitive Damages Act was enacted to drastically *restrict* recovery in light of perceived *abuses* at common law generally, the Sales Representative Act's treble-damage provisions at issue here . . . were enacted to *increase* recovery from what the common law would otherwise permit.[314]

The court thought "it highly unlikely that the Legislature would expand a remedy with one hand (the Sales Representative Act or the Crime Victims Relief Act), while restricting it with the other (the Punitive Damages Act)."[315]

The court also observed "a substantive distinction between statutory treble damages under the Sales Representative Act and common-law punitive damages[, because a] claim for unpaid commissions sounds in contract," but Indiana typically does not allow punitive damages in contract cases absent an independent tort or a special relationship between the parties.[316] The "Sales Representative Act deviates from those common-law principles by permitting treble damages for a principal's 'bad faith' failure to pay commissions within the specified time."[317]

Finally, the court stated that the legislature had the opportunity to abolish the "distinction between common law and statutory punitive damages as part of the major 1995 amendments to Punitive Damages Act, but it chose not to do so."[318] Thus, while "Indiana significantly restricts recovery of common-law punitive

---

309. *Id.* at 503.
310. *See id.* at 503-04; *see also* IND. CODE § 24-4-7-5 (2014).
311. IND. CODE § 24-4-7-5(b) (2014).
312. *Andrews*, 10 N.E.3d at 504.
313. *Id.* at 505 (citing Cheatham v. Pohle, 789 N.E.2d 467, 471-72 (Ind. 2003)).
314. *Id.* (emphasis in original).
315. *Id.*
316. *Id.*
317. *Id.* at 505-06.
318. *Id.* at 506.

damages . . . those restrictions do not reach . . . mandatory 'exemplary damage' awards under the Indiana Sales Representative Act."[319]

VII. AGENCY

A. Termination of an Action Following Death of an Agent

In *Estate of Mayer v. Lax, Inc.*, the Indiana Court of Appeals held that the termination of a cause of action against an alleged agent-tortfeasor following the agent's death does not require termination of the cause of action against the agent's principal.[320]

As discussed above, this case arose from a web of claims and cross-claims, but primarily involving an action in which Lax, a real estate development company, initiated proceedings supplemental to recover a money judgment following a favorable jury verdict from JME, an excavating company.[321] The attorney for JME ("Mayer") filed a counterclaim alleging that Lax had perpetrated fraud and had violated the Indiana RICO Act.[322] The court dismissed the counterclaim as an impermissible collateral attack on the prior verdict.[323] Mayer then amended the complaint alleging that Lax had conspired to commit bribery, perjury, obstruction of justice, intimidation, business corruption, and other violations of the Indiana RICO Act.[324] The trial court granted summary judgment to Lax on these claims on res judicata grounds.[325] While the counterclaims were pending, Lax was in negotiations with a casino.[326] Lax asserted that these negotiations broke off because of damage to Lax's reputation caused by the counterclaims filed by Mayer.[327] Lax sued Mayer and Mayer's firm for defamation, abuse of process, malicious prosecution, tortious interference with a contract, and tortious interference with a business relationship.[328] Mayer died and his Estate was substituted.[329]

Beginning its analysis, the court stated that the law is unclear on "whether the death of an agent and subsequent barring of a cause of action because of that death also bars a cause of action against the principal."[330] The court noted the general rule that where "a servant or agent is released of liability, no liability can

---

319. *Id.* at 503 (emphasis omitted).

320. Estate of Mayer v. Lax, Inc., 998 N.E.2d 238 (Ind. Ct. App. 2013), *trans. denied*, 2 N.E.3d 686 (Ind. 2014).

321. *Id.* at 243-44.

322. *Id.* at 243; *see* IND. CODE §§ 35-45-6-1 to -2 (2014).

323. *Estate of Mayer*, 998 N.E.2d at 243.

324. *Id.* at 243-44. *See generally* IND. CODE §§ 35-45-6-1 to -2 (2014).

325. *Estate of Mayer*, 998 N.E.2d at 244.

326. *Id.*

327. *Id.*

328. *Id.* at 245.

329. *Id.*

330. *Id.* at 252.

be imputed to the principal," but this rule seems to result from a finding that the principal is only vicariously liable to the extent that the agent is liable.[331] The court then explored the scant case law available and determined that "termination of an action because of an alleged agent-tortfeasor's death is not the same as a judgment on the merits or an exoneration of the agent's conduct, which would flow to the principal, but is instead a form of personal immunity from suit, which is not transferable to others."[332] The court then concluded that "a procedural defense to an action that is personal to an agent, and not based on the merits of the action, does not preclude proceeding with a cause of action against the principal under a respondeat superior theory."[333]

B. Vicarious Liability

In *Smith v. Delta Tau Delta*, *Inc.*, the Indiana Supreme Court determined that as a matter of law that, although a national fraternity furthers joint aspirational goals by encouraging individual members' good behavior, and by offering informational resources, organizational guidance, common tradition, and its brand, the local fraternity's everyday management and supervision of activities and conduct of its residents is not undertaken at the direction and control of the national fraternity; therefore, the national fraternity was not liable for the acts of the local chapter.[334]

Parents of a pledge who died of acute alcohol ingestion brought various claims in negligence against the national fraternity the young man was pledging.[335] The national fraternity moved for summary judgment as to (1) whether it had "assumed a duty to protect freshmen pledges from hazing and the dangers of excessive alcohol consumption"; and (2) "whether the local fraternity was the agent of the national fraternity thereby subjecting [the national fraternity] to vicarious liability for the actions of the officers and representatives of the local chapter with respect to claims of negligence per se for hazing and furnishing alcohol to a minor."[336]

As to whether the national fraternity had liability for breach of an assumed duty, the court first turned to its recent decision in *Yost v. Wabash College*,[337] "which presented factual similarities and related questions of law."[338] There, the court held that "[a] duty of care may arise where one party assumes such a duty . . . [but] without actual assumption of the undertaking there can be no correlative

---

331. *Id.* (quoting Comer-Marquardt v. A-1 Glassworks, LLC, 806 N.E.2d 883, 887 (Ind. Ct. App. 2004).

332. *Id.* at 254.

333. *Id.* at 254-55.

334. Smith v. Delta Tau Delta, Inc., 9 N.E.3d 154, 164-65 (Ind. 2014).

335. *Id.* at 157.

336. *Id.* at 159.

337. 3 N.E.3d 509 (Ind. 2014).

338. *Delta Tau Delta*, 9 N.E.3d at 157, 160.

legal duty to perform the undertaking carefully."[339] Here, the national fraternity did not dispute that it was involved with the local chapter, but asserted that it "'lacked any direct oversight and control of the individual fraternity members' [and] . . . 'did not assume any duty related to their actions.'"[340] The court held:

> There is no evidence that the national fraternity assumed any duty of preventative, direct supervision and control of the behaviors of its local chapter members . . . . [T]he national fraternity's conduct did not demonstrate any assumption of a duty directly to supervise and control the actions of the local fraternity and its members. The national fraternity did not have a duty to insure the safety of the freshman pledges at the local fraternity.[341]

As to whether the national fraternity was vicariously liable for the negligence of the local fraternity and its officers, the court turned to its discussion of agency from *Yost* and restated that "for the liability of an agent to be imputed to a principal, an agency relationship must exist, and an essential element of that relationship is that the agent must 'act on the principal's behalf.'"[342] Here, the court held that the national fraternity possessed only remedial enforcement powers and that the "national fraternity's role in imposing post-conduct sanctions does not establish the right to control for purposes of creating an agency relationship."[343] Further, "[l]ocal officers are expected to abide by the aspirational goals promulgated by the national fraternity, but are never given the authority to act on behalf of the national fraternity."[344] The court then concluded:

> [A]n agency relationship does not exist between the national fraternity and the local fraternity or its members. Although subject to remedial sanctions, in their choice of conduct and behavior, the local fraternity and its members were not acting on behalf of the national fraternity and were not subject to its control.[345]

VIII. ASSORTED OTHER MATTERS

A. Dram Shop

In *Pierson v. Service America Corp.*, the Indiana Court of Appeals held that in a dram shop action against vendors of alcoholic beverages at Lucas Oil Stadium, a plaintiff need not identify the person who served alcohol to the

339. *Id.* at 160 (quoting *Yost*, 3 N.E.3d at 517).
340. *Id.* at 161.
341. *Id.* at 163.
342. *Id.* at 164.
343. *Id.*
344. *Id.*
345. *Id.* at 164-65.

intoxicated driver in order to survive summary judgment.[346]

In this case, an intoxicated driver had attended a pre-game tailgate party, the game, and a post-game tailgate party, all at Lucas Oil Stadium, consuming alcoholic beverages at each.[347] He later drove his vehicle into two twelve-year-old girls, killing one of the girls and injuring the other.[348] Their families brought suit against the vendor of alcoholic beverages at the stadium, alleging that the vendor had "'negligently failed to train, instruct, monitor, and restrict the sale of alcoholic beverages to visibly intoxicated patrons.'"[349] One is to "refrain from serving alcohol to a person he or she knows to be visibly intoxicated."[350] The vendor moved for summary judgment asserting that because the families could not prove which, if any, of the vendor's designees served alcohol to the driver when the designee knew the driver was visibly intoxicated.[351] The court restated that the "'Dram Shop Act represents a legislative judgment and the declared public policy of this state that providers of alcoholic beverages should be liable for the reasonably foreseeable consequences of knowingly serving visibly intoxicated persons.'"[352] A research scientist working backwards from the blood alcohol content at the time of the blood draw opined that the driver "had more likely than not been intoxicated and exhibit[ed] visible signs of intoxication when he purchased alcohol inside the stadium."[353] This was enough to raise a question of material fact and render the matter inappropriate for summary judgment: "How much alcohol [the driver] imbibed at each point of consumption, whether he was intoxicated [inside the stadium], and whether or not he would have appeared visibly intoxicated, is not resolved by reference to undisputed facts."[354]

The court then turned to prior cases.[355] In the first case discussed, the court held that "the fact that the tavern served even one beer to a person who shortly thereafter was in a state of serious intoxication gives rise to a question of fact whether the intoxicated motorist was visibly intoxicated at the time he was served."[356] In the second case, the court held that "a reasonable inference could be drawn that the [vendor] had actual knowledge of [the patron's] intoxication at the time he was served and therefore, the trial court did not err by denying the [vendor's] motion for summary judgment."[357] The court then determined that

---

346. Pierson v. Serv. Am. Corp., 9 N.E.3d 712, 720 (Ind. Ct. App. 2014), *trans. denied*, 16 N.E.3d 980 (Ind. 2014).

347. *Id*. at 714.

348. *Id.*

349. *Id.*

350. *Id.* at 716.

351. *Id.* at 714.

352. *Id.* at 716.

353. *Id.* at 718.

354. *Id.*

355. *Id.* at 719.

356. *Id.* (citing Ward v. D&A Enters. of Clark Cnty., Inc., 714 N.E.2d 728, 730 (Ind. Ct. App. 1999)).

357. *Id.* (citing Vanderhoek v. Willy, 728 N.E.2d 213, 217 (Ind. Ct. App. 2000)).

here, "there [was] likewise a genuine issue of material fact as to whether [an agent of the vendor] served [the driver] even a single drink with actual knowledge of his visible intoxication."[358]

Before concluding, the court addressed a public policy concern, stating that if the court were to accept that "no liability can ensue because no particular server to [the driver] has been identified, such would circumvent the public policy associated with the Dram Shop Act."[359] The court further noted that "[i]n comparison to a neighborhood bar owner employing a few servers, a provider of alcoholic beverages using hundreds of volunteers to sell alcohol to thousands of patrons in a stadium may well seem ideally situated to lessen liability although the potential consequences are greatly increased."[360] The court concluded that this must not have been the intent of the legislature.[361] Finally, the court decided that the fact-finder, not the court, must determine whether the vendor "knowingly provided one more alcoholic beverage to a visibly intoxicated patron."[362]

B. Deception/Fraud

In *Kesling v. Hubler Nissan, Inc.*, the Indiana Supreme Court held that "[a]n auto dealership's advertisement of an inexpensive used car as a 'Sporty Car at a Great Value Price,' is textbook puffery."[363] It was "not actionable as deception or fraud, because a reasonable buyer could not take it as a warranty about the car's performance or safety characteristics."[364]

In this case, in response to an advertisement for a "Sporty Car at a Great Value Price," a buyer went to a car dealership and asked to see and test-drive the car.[365] Although the car had to be jump-started before it could be driven and it idled roughly, the buyer purchased the car and "signed an acknowledgement that the car was sold 'AS IS – NO WARRANTY.'"[366] When the buyer asked the salesperson about the rough idle, the salesperson advised that the car needed a tune-up because "'it had been sitting for a while.'"[367] In truth, the car had not been sitting long because the car dealership had accepted it on a trade only a couple of weeks earlier.[368] Immediately after making the purchase, the buyer took the car for two inspections each of which showed extensive problems with the car "well beyond needing a tune-up."[369] The buyer also received an expert inspection

---

358. *Id.*
359. *Id*. at 720.
360. *Id.*
361. *Id.*
362. *Id.*
363. Kesling v. Hubler Nissan, Inc., 997 N.E.2d 327, 329 (Ind. 2013).
364. *Id.*
365. *Id.* at 330.
366. *Id.*
367. *Id.*
368. *Id.*
369. *Id.*

for litigation:[370]

> The expert's report revealed a loose tie rod and misrouted accessory belt, either of which . . . could cause loss of steering control. Moreover, the engine had a fuel-return line that had been blocked off, leaked fuel, and could cause the car to catch fire while driving. And because there was not provision for connecting the blocked-off line to the other systems of the car—and other signs, including poorly spliced wiring—the original engine had apparently been replaced with one from a different [model of the same make of car].[371]

The expert stated that "each of these three problems made the car unsafe to operate, and would have been obvious to anyone who would have inspected or serviced the car at a dealership."[372]

The buyer ultimately brought two claims against the car dealership for deceptive claims. One claim was civil and the other was quasi-criminal, but "the issue of 'puffing' [was] dispositive of both."[373] The court noted that, "'statements of the seller's opinion, not made as a representation of fact . . . are simply puffing which does not create an express warranty.'"[374] The court went on to state that "[w]hether a car is 'sporty' is a subjective assertion of opinion [and] . . . we believe the term refers to a car's styling or design, not its drivability."[375] It made a similar analysis of the claim, "great value price": "Reasonable buyers . . . cannot take seriously an assurance that the price is a . . . 'Great Value.'"[376] The terms are mere puffery, which is opinion, and cannot be a representation of fact or deceptive.[377]

As to the buyer's claim of fraud at common law based on the salesperson's assertion that the car needed just a tune-up, the court held that there was evidence supporting the inference that the "salesperson knew his statements to be false, but made them anyway with intent to deceive [the buyer]."[378] The court also found that the record showed "a genuine issue of fact as to [the buyer's] reliance on the salesperson's statements."[379] While the puffery in the advertisement was mere opinion and could not be the basis of deception or fraud claims, the statement of fact made by the salesperson may be the basis of a fraud claim "when a seller gives [such a statement] as a knowingly incomplete answer to a buyer's specific

---

370. *Id.*

371. *Id.* at 330-31.

372. *Id.* at 331.

373. *Id.* at 332.

374. *Id.* at 333 (citing Martin Rispens & Son v. Hall Farms, Inc., 621 N.E.2d 1078, 1082 (Ind. 1993)) (internal emphasis and punctuation omitted).

375. *Id.*

376. *Id.*

377. *Id.*

378. *Id.* at 336.

379. *Id.*

question."[380]

C. Confidential Materials—No Public Access

In *Angelopoulos v. Angelopoulos*, the Indiana Court of Appeals held that although the trial court issued a protective order regarding deposition materials, those materials were not automatically confidential under Indiana Administrative Rule 9(g)(1)(c).[381]

This case arose from an inheritance dispute between two brothers, Theodore and Constantinos, whose father died intestate.[382] In the course of litigation, the parties agreed to treat certain designated materials as confidential and restrict disclosure of those materials only to the parties, the court, counsel, experts, and deponents or witnesses.[383] During a deposition, Theodore refused to answer certain questions, and Theodore's counsel designated much of it as confidential.[384] Constantinos then filed a request for a hearing "to determine whether the deposition warranted protection from public access."[385] The trial court ordered Theodore to appear for a second deposition to answer the previously unanswered questions.[386] It also found that the "agreed-to protective order operated to protect the depositions from public access."[387] Ultimately, Constantinos filed the second deposition with the trial court in support of his response to Theodore's motion to dismiss.[388] The motion to dismiss was granted, and Constantinos argued in his appeal that "the trial court erred in concluding that the matters marked by Theodore as confidential were still excluded from public access even though Constantinos had filed them in court."[389]

The court began its analysis by reviewing Indiana Administrative Rule 9 and a prior similar case, *Travelers Casualty & Surety Co. v. U.S. Filter Corp.*[390] In *Travelers*, the parties entered a "'Confidentiality Stipulation and Order' that provided a framework under which information shared by the parties could be deemed confidential."[391] The *Travelers* court held that materials tendered to a court by litigants "'stand on a very different footing.'"[392] There is not an automatic exclusion of such materials, but a mechanism provided in

---

380. *Id.*

381. Angelopoulos v. Angelopoulos, 2 N.E.3d 688, 701-02 (Ind. Ct. App. 2013), *trans. denied*, 7 N.E.3d 992 (Ind. 2014).

382. *Id.* at 692.

383. *Id.* at 694.

384. *Id.* at 695.

385. *Id.* at 698.

386. *Id.*

387. *Id.* at 698-99.

388. *Id.* at 699.

389. *Id.*

390. *Id.* (citing Travelers Cas. & Sur. Co. v. U.S. Filter Corp., 895 N.E.2d 114 (Ind. 2008)).

391. *Id.* (citing *Travelers*, 895 N.E.2d at 115).

392. *Id.*

Administrative Rule 9(H) that "'provides a process by which any person affected by the release of information may ask the court to exclude it from public access, requires a public hearing before the trial court can grant such exclusion, and lists the grounds on which the court can do so.'"[393] Therefore, even where "a trial court has ordered certain materials to be deemed confidential for purposes of discovery, these materials will still be subject to public access unless the trial court complies with Administrative Rule 9(H)."[394] Here, because the trial court presumed an "automatic" exclusion of the materials, it did not ensure compliance with Administrative Rule 9(H) and the matter was remanded with instructions to hold a "hearing at which the burden will be on Theodore to demonstrate by clear and convincing evidence to prove how public access to these [materials] will create a significant risk of substantial harm to him pursuant to Administrative Rule 9(H)."[395]

D. Sanctions

In *In re Mental Health Actions for A.S.*, the Indiana Supreme Court held that a person who makes false statements in an application for emergency detention cannot be held in indirect civil contempt when she does not resist, hinder, or delay execution of a lawful process or court order.[396] The court also held that such an act is not within trial court's inherent power to impose sanctions.[397]

In this case a nurse's co-worker ("Complainant"), who was also a nurse, completed an application to have the nurse placed on a seventy-two hour emergency detention.[398] The warrant was issued and the nurse was taken into custody the same day.[399] The judge who had issued the order "later grew skeptical as to the truth of the allegations set forth in the application."[400] The judge issued Complainant "a citation and order to appear and show cause why she should not be 'held in contempt for willfully hindering and delaying or disobeying lawful process of this court and directly making false and inaccurate statements."[401] Complainant moved to dismiss the citation "arguing that there was no statutory basis to hold her in contempt and that the Indiana Code provides immunity for persons who initiate such emergency detention actions without malice, bad faith, or negligence."[402] The trial court found Complainant in indirect civil contempt and issued several sanctions, including the hospital bills the nurse incurred as a result of the detention, the nurse's attorney fees, and an additional

393. *Id.* at 699-700.
394. *Id.* at 700.
395. *Id.* at 701.
396. *In re* Mental Health Actions for A.S., 9 N.E.3d 129, 132-33 (Ind. 2014).
397. *Id.* at 133.
398. *Id.* at 130.
399. *Id.* at 131.
400. *Id.* at 130.
401. *Id.* at 131.
402. *Id.*

fine.[403] This appeal ensued after the Indiana Supreme Court granted transfer.[404]

The Indiana Supreme Court first looked to the definition of contempt and the types of contempt recognized in Indiana's jurisprudence.[405] Contempt of court generally "'involves disobedience of a court which undermines the court's authority, justice, and dignity.'"[406] Direct contempt involves "acts which are committed in the presence of the court or in such close proximity to it so as to disrupt its proceedings while in session."[407] Indirect contempt involves "acts 'committed outside the presence of the court which nevertheless tend to interrupt, obstruct, embarrass or prevent the due administration of justice.'"[408] Also, while contemptuous conduct is generally categorized as either civil or criminal, a contempt proceeding is technically neither.[409] The court said that "[c]riminal contempt actions are punitive and are carried out in response to 'an act directed against the dignity and authority of the court which obstructs the administration of justice and which tends to bring the court into disrepute or disrespect.'"[410] Civil contempt proceedings arise "from a violation of a court order which results in a proceeding for the benefit of the aggrieved party."[411] The court further said that "[h]ere, the trial court found [Complainant] to be in indirect civil contempt."[412] While "[t]here are several potential statutory bases for such a finding . . . the trial court expressly found [Complainant] in indirect contempt."[413] This was "pursuant to [a provision which] . . . provides that 'a person who willfully resists, hinders, or delays the execution of any lawful process, or order of any court of record is guilty of an indirect contempt of court.'"[414] Because Complainant's behavior initiated the proceedings, she could not have resisted, hindered, or delayed the proceedings.[415] The trial court, thus, exceeded its "statutory authority in finding [Complainant] in indirect contempt and its judgment to that effect is reversed."[416]

The court next turned to the propriety of the sanctions imposed by the trial court.[417] It specifically noted that courts have an inherent power to impose sanctions for the purpose of enforcing "'obedience to its lawful orders against parties who have been subjected properly to its jurisdiction in the first

---

403. *Id.*
404. *Id.*
405. *Id.* at 131-32.
406. *Id.* at 131.
407. *Id.* at 132.
408. *Id.* (internal punctuation omitted).
409. *Id.*
410. *Id.* (internal punctuation omitted).
411. *Id.*
412. *Id.*
413. *Id.*
414. *Id.*
415. *Id.*
416. *Id.* at 132-33.
417. *Id.* at 133.

instance.'"[418] The court then analogized Complainant to a "911 caller who reports a person on the street acting dangerously."[419] If the call is later revealed to be false, the State could pursue a charge of false reporting.[420] The charged individual might seek redress in tort, but "in such a circumstance it is not the trial court's role within our system of justice to independently investigate the validity of reports that initiate legal proceedings, compel witnesses to appear before it, and mete out punishment when it finds those reports to be unsubstantiated."[421]

The court then concluded:

> The inherent power of the judiciary to impose sanctions, while flexible and significant, begins and ends with the courtroom and the judicial process. Thus, because we conclude that the trial court here lacked authority for the contempt finding, and because [Complainant] otherwise committed no misconduct once the legal proceedings were initiated, she is outside the trial court's inherent power to impose sanctions.[422]

418. *Id.*
419. *Id.*
420. *Id.* at 134.
421. *Id.*
422. *Id.*