RECENT DEVELOPMENTS IN INDIANA TORT LAW

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

I. PROCEDURE

A. Abusive Litigation Practices

Because there is no right to engage in abusive litigation and the State has a legitimate interest in the preservation of valuable judicial and administrative resources, the Indiana Supreme Court in *Zavodnik v. Harper*[1] set out procedures for trial courts to use in curtailing abusive litigation practices.

In *Zavodnik*, the supreme court described the appellant as "a prolific, abusive litigant,"[2] who had filed at least 123 cases in Indiana trial courts, all but three of which were filed on or after January 2008.[3] In addition, the appellant was also a party in thirty-four cases before the court of appeals and the Indiana Supreme Court, and in conjunction with those cases had filed twenty-three special judge requests.[4] In this case, the appellant had filed numerous motions and other filings that were defective, repetitive, and lacking in merit. These filings often contained "bewilderingly legal lengthy titles,"[5] with one example being:

> Appellant's Verified Motion to Compel the Clerk of the Trial Court to Provide the Entire Record as Opposed to the Partial Record and to Extend Time for Brief to Be Filed Due to the Fact that the Appellant Does Not Have the Full Certified Record and the Record Needs to Be Complete and Fixed (Which Will Require Time) Because of the Clerk's Error in Providing Only a Partial Record or Alternatively to Relinquish Jurisdiction Back to the Trial Court by Mandating It to Fix the Record

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1. 17 N.E.3d 259 (Ind. 2014).
2. *Id.* at 262.
3. *Id.*
4. *Id.*
5. *Id.*

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> (the CCS) and to Provide the Court of Appeals and the Parties with the Corrected Full and Complete Fixed Record or Alternatively to Order the Clerk of this Court to Fix the CCS and to Provide the Complete Record or Alternatively to Allow the Appellant to Use His Own CCS Printed out by Him from the Odyssey Website.[6]

The court held after due consideration of the litigant's history of abuse, a trial court may be justified in imposing restrictions such as the following:

> • Require the litigant to accompany future pleadings with an affidavit certifying under penalty of perjury that the allegations are true to the best of the litigant's knowledge, information, and belief.
> • Direct the litigant to attach to future complaints a list of all cases previously filed involving the same, similar, or related cause of action.
> • Direct that future pleadings will be stricken if they do not meet the requirements that a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief" and that "[e]ach averment of a pleading shall be simple, concise, and direct." T.R. 8(A)(1) and (E)(1).
> • Require the litigant to state clearly and concisely at the beginning of a motion the relief requested.
> • Require the litigant to provide specific page citations to documents alleged by the litigant to support an argument or position.
> • Limit the litigant's ability to request reconsideration and to file repetitive motions.
> • Limit the number of pages or words of pleadings, motions, and other filings.
> • Limit the length of the title that may be used for a filing.
> • Limit the amount or length of exhibits or attachments that may accompany a filing.
> • Instruct the clerk to reject without return for correction future filings that do not strictly comply with applicable rules of procedure and conditions ordered by the court.[7]

The court also instructed trial courts not to bow to "baseless, abusive attempts to obtain a change of judge."[8]

B. Indiana Tort Claims Act

In *Lyons v. Richmond Community School Corp.*,[9] the Indiana Supreme Court determined where the question of whether a plaintiff has complied with the requirements of the ITCA[10] is one of law, but the answer may depend upon the

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6. *Id.*
7. *Id.* at 268-69.
8. *Id.* at 270.
9. 19 N.E.3d 254 (Ind. 2014).
10. IND. CODE §§ 34-13-3-0.1 to -25 (2015).

resolution of disputed facts, the issue should be handled by a carefully drafted jury instruction.

Megan, a severely disabled high school student, had difficulty eating and sometimes failed to chew her food sufficiently or took too many bites before swallowing.[11] As a result, staff members at her high school were tasked to monitor Megan while she ate and prompt her to slow down when necessary.[12] One day, Megan choked while eating a sandwich in the high school cafeteria after the monitor failed to cut Megan's sandwich into small pieces, as per the plan.[13] Several staff members pounded on Megan's back, but no one attempted the Heimlich maneuver or CPR, nor did anyone call 911 immediately.[14] Three or four minutes after Megan began to choke, someone finally contacted the nurse's station.[15] Assuming the call was for a minor problem, the nurse did not arrive until ten minutes after receiving the call.[16] She removed food from Megan's mouth but was unable to clear Megan's airway.[17] Only then was 911 called.[18] Emergency responders arrived three minutes later and restored Megan's airway before taking her to the hospital, where she died on January 10, 2009.[19]

School officials told Megan's mother Megan had been without oxygen for only "a very short period of time."[20] Also, the school's assistant principal continually put off meetings with Megan's mother, who persisted in attempting to meet with him and discuss what happened.[21] On October 1, 2009, a cafeteria worker contacted Megan's father and informed him that "things were not done properly" during the emergency.[22] On January 11, 2010, the Lyonses filed a Notice of Tort claim.[23] Six months later, they filed a complaint against the school and individual employees of the school involved in the incident.[24]

The defendants moved for summary judgment on grounds the Lyonses failed to comply with the notice provisions of the ITCA, and the trial court granted that motion.[25] The supreme court reversed, holding the question of whether the Lyonses complied with the requirements of the ITCA is one of law, but the answer may depend upon the resolution of disputed facts.[26] The court further held

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11. *Lyons*, 19 N.E.3d at 262.
12. *Id.* at 257.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at 257-58.
17. *Id.* at 258.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 258-59.
26. *Id.* at 262.

mixed questions of law and fact are best handled through carefully drafted jury instructions addressing the relevant considerations.[27]

C. Commencement of an Action

In *Smith, Harris, & Carter v. Haggard*,[28] the Indiana Court of Appeals held under the bright-line rule established by the Indiana Supreme Court in *Boostrom v. Bach*,[29] a plaintiff must submit all three requisites for the commencement of an action (i.e., a complaint, a filing fee, and a summons) before the statute of limitations expires; the filing of only two of the three prior to the expiration of the limitations period will not suffice.[30]

On November 3, 2011, the three individual plaintiffs were passengers in a vehicle being driven by the defendant when the vehicle was involved in an accident.[31] The plaintiffs were injured and their attorney prepared three separate complaints on their behalf against the defendant.[32] On November 2, 2013, the attorney mailed the three complaints to the appropriate county clerk via certified mail, enclosing the filing fees in the mailing, but not the attorney's appearances and summonses.[33] On November 6, 2013, the attorney faxed appearances and summonses for the all three cases.[34] The defendant moved to dismiss all three complaints upon grounds they were filed after the two-year statute of limitations had expired.[35] The plaintiffs argued they had substantially complied with Rule 3 of the Indiana Rules of Trial Procedure and the defendant could not establish prejudice resulting from the fact the summonses were filed four days after the complaints.[36] The trial court granted the motion for summary judgment, and the court of appeals affirmed, concluding because the summonses were filed two days after the statute of limitations expired, they failed to meet the requirements under Trial Rule 3 for timely commencement of their causes of action.[37]

D. Medical Malpractice Act and Third Parties

The Indiana Court of Appeals held in *Preferred Professional Ins. Co. v. West*[38] that the Medical Malpractice Act ("MMA")[39] was not intended to cover claims by third parties having absolutely no relationship to the patient or medical

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27. *Id.*
28. 22 N.E.3d 801 (Ind. Ct. App. 2014).
29. 622 N.E.2d 175 (Ind. 1993).
30. *Haggard*, 22 N.E.3d at 804.
31. *Id.* at 802.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 803.
38. 23 N.E.3d 716 (Ind. Ct. App. 2014), *trans. denied*, 29 N.E.3d 1273 (Ind. 2015).
39. IND. CODE §§ 34-18-1-1 to -18-2 (2014).

provider.[40]

In *West*, a woman was injured in a workplace accident when her coworker, while operating heavy machinery, hit the cherry-picker truck in which the woman was riding, causing her to fall twenty-nine feet and sustain catastrophic and permanent injuries.[41] The woman and her husband filed a complaint for declaratory judgment against two insurance companies, the Indiana Department of Insurance, and the Patient's Compensation Fund, seeking a declaration that the MMA did not apply to their claims of negligence, which the woman and her husband were pursuing against the coworker's health care providers.[42] The allegations of negligence against the health care providers centered upon the fact the providers had prescribed a narcotic pain reliever and allegedly failed to warn the coworker he should not operate heavy equipment, and had cleared him for work.[43]

The trial court granted the motion for summary judgment, determining the plaintiffs' claims asserted common-law negligence and not medical malpractice.[44] The court of appeals affirmed, holding the MMA does not cover claims by a third-party who was not a part of the patient-provider relationship at issue.[45]

E. Relation Back and Unknown Parties

In *Miller v. Danz*,[46] the Indiana Supreme Court held the trial rule limiting when a pleading amendment relates back to the original pleading does not supersede the trial rule allowing an unknown party's true name to be inserted into a pleading by amendment at any time. Thus, the court held the "John Doe" defendant in the original defamation complaint was not an "unknown defendant," such as would allow the plaintiff to amend original complaint to insert true name of defendant at any time.[47]

The facts were that Jeffrey M. Miller, former president and CEO of Junior Achievement of Central Indiana, filed multiple amended complaints alleging, among other things, several individuals and organizations defamed him.[48] Miller's Fourth Amended Complaint added "JOHN DOE # 8, a partner, employee or agent of Ice Miller, LLP" as a defendant.[49] Miller asked to file his Fifth Amended Complaint to substitute Kristine Danz as a substitute for "John Doe # 8," claiming the identity of Danz as John Doe # 8 was only recently

40. *West*, 23 N.E.3d at 730.
41. *Id.* at 718.
42. *Id.* at 719.
43. *Id.*
44. *Id.* at 724.
45. *Id.* at 732.
46. 36 N.E.3d 455 (Ind. 2015).
47. *Id.* at 458.
48. *Id.* at 456.
49. *Id.*

discovered during a deposition.[50]

Danz moved for summary judgment on grounds Miller's attempt to add her as a named party was barred by the two-year statute of limitations.[51] The trial court granted Danz's motion.[52] The supreme court affirmed.[53]

Indiana Trial Rule 17(F) provides: "When the name or existence of a person is unknown, he may be named as an unknown party, and when his true name is discovered his name may be inserted by amendment at any time."[54] Indiana Trial Rule 15(C), which governs the amendment of pleadings, states:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within one hundred and twenty (120) days of commencement of the action, the party to be brought in by amendment: . . . (2) knew or should have known that but for a mistake concerning the identity of the proper party, the action would have been brought against him.[55]

Miller argued Trial Rule 17(F) allows the true name of a John Doe to be "inserted by amendment at any time,"[56] and his lack of knowledge of Danz's identity qualified as a "mistake" for purposes of relation back under Trial Rule 15(C).[57] The supreme court determined lack of knowledge of a defendant's identity is not the same as a "mistake" under T.R.15(C).[58]

Both parties argued in part that Trial Rule 17(F) is limited by Trial Rule 15(C).[59] The supreme court disagreed, concluding Trial Rule 15(C) does not supersede Trial Rule 17(F), nor does it apply to the "John Doe" situation before the court.[60] Trial Rule 15(C) requires the individual be brought in by amendment if a party "knew or should have known that but for a mistake concerning the identity of the proper party, the action would have been brought against him."[61] In contrast, by its own terms, Trial Rule 17 applies where "the name or existence of a person is unknown."[62] "Adding a new party because there has been a mistake

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50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 459.
54. *Id.* at 457.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* at 458.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*

concerning the identity of the proper defendant, i.e.[,] a misnomer, is not akin to inserting a name for a previously unknown 'John Doe' defendant."[63] Because there was no "mistake," Trial Rule 15(C) had no application in this case.[64] The court agreed the plain language of Trial Rule 17(F) permits amendment to insert the name of a previously unknown defendant "at any time"—without any limitation.[65] But Miller knew of Danz's existence and probable identity before he initiated the action.[66] Neither her existence nor her identity were "unknown" to Miller, as required by Trial Rule 17(F), therefore Miller could not insert her name "at any time."[67]

II. NEGLIGENCE

A. Tenant Liability to Landlord's Insurer

In *LBM Realty, LLC v. Mannia*,[68] the court of appeals held a tenant's liability to the landlord's insurer for damage-causing negligence depends on the reasonable expectations of the parties to the lease, as ascertained from the lease as a whole and any other admissible evidence, and determined on a case-by-case basis.[69]

Following a fire in an apartment building, the landlord's insurer filed an insurance subrogation action in the landlord's name against the tenant.[70] The tenant filed for summary judgment, asking the trial court to adopt a no-subrogation rule, citing in support Sutton v. Jondahl,[71] and its progeny.[72] The trial court granted summary judgment in favor of the tenant and the landlord appealed.[73] The court of appeals concluded although the case-by-case approach might provide less predictability than either of the pro-or no-subrogation approaches, it nevertheless best effectuated the intent of the parties by simply enforcing the terms of their lease.[74] The court held in determining the expectations of the parties as reflected in the lease, courts should look for evidence indicating which party agreed to bear the risk of loss for a particular type of damage.[75]

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63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. 19 N.E.3d 379 (Ind. Ct. App. 2014).
69. *Id.* at 393-94.
70. *Id.* at 381.
71. 532 P.2d 478 (Okla. Ct. App. 1975).
72. *Mannia*, 19 N.E.3d at 381.
73. *Id.*
74. *Id.* at 394.
75. *Id.* at 396.

B. Volunteer Doctrine

In *Hunckler v. Air Source-1, Inc.*,[76] the court of appeals held the volunteer doctrine—concerning the duty of care owed to a person who voluntarily undertakes an activity and is injured in the course thereof—no longer applies in Indiana; instead, ordinary negligence principles will be applied to determine whether the elements of a negligence action exist.[77]

The plaintiff in *Hunckler* was injured while helping a deliveryman move a new furnace down a flight of stairs at the home in which the plaintiff lived.[78] He sued the deliveryman and the furnace company for which the deliveryman worked.[79] The defendants moved for summary judgment, arguing the plaintiff at the time was a volunteer and that pursuant to the volunteer doctrine, a volunteer cannot recover unless there is proof of willful injury.[80] The trial court granted summary judgment and the plaintiff appealed.[81] The court of appeals reversed, explicitly abandoning the volunteer doctrine and holding that henceforth, Indiana will return this area of law to traditional agency and tort principles.[82]

C. Seatbelt Evidence

The court of appeals held in *City of Fort Wayne v. Parrish*[83] evidence that a motorist was not wearing a seatbelt was not admissible to prove she was guilty of contributory negligence.[84]

Parrish was involved in an automobile accident with a Fort Wayne police officer.[85] The trial court granted her motion to exclude evidence she was not wearing a seatbelt.[86] The City wanted to admit the evidence to show she was guilty of contributory negligence for her injuries.[87] It claimed Parrish was negligent per se for violating the Seatbelt Act.[88] Her tort claim against the City was subject to the common law principle of contributory negligence because Indiana's Comparative Fault Act does not apply to such entities.[89]

At the time of the collision, the Seatbelt Act required each front-seat occupant (Parrish was one) to have a safety belt properly fastened across the

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76. 26 N.E.3d 65 (Ind. Ct. App.), *trans. denied*, 30 N.E.3d 1229 (Ind. 2015).
77. *Id.* at 68.
78. *Id.* at 66.
79. *Id.* at 67.
80. *Id.*
81. *Id.*
82. *Id.* at 68.
83. 32 N.E.3d 275 (Ind. Ct. App.), *trans. denied*, 37 N.E.3d 960 (Ind. 2015).
84. *Id.* at 280.
85. *Id.* at 276.
86. *Id.* at 277.
87. *Id.*
88. *Id.* at 276-77.
89. *Id.* at 277.

occupant's body at all times when the vehicle is in forward motion.[90] But it also provided failure to comply was not fault under the Indiana Comparative Fault Act and does not limit the liability of an insurer.[91] Nor could evidence of the failure to comply be admitted in a civil action to mitigate damages.[92] The statute did not address common-law contributory negligence.[93]

The *Parrish* court followed dictum from *Hopper v. Carey*,[94] which held the Seatbelt Act did not apply in that case because the vehicle involved in the accident was not a "passenger motor vehicle" as defined in the Act.[95] The *Hopper* court noted the Seatbelt Act could not be used to determine comparative fault, and the Indiana Supreme Court had held before there was a Seatbelt Act that no common-law duty to wear a seatbelt would be recognized absent "a clear mandate from the legislature."[96] The *Parrish* court noted the Seatbelt Act did not expressly establish its provisions could be used to establish fault outside of the Comparative Fault Act, so "there has not been a clear mandate from the legislature stating that seatbelt usage may be used to prove fault under the common law."[97] Ultimately, the court concluded the legislature has not altered the common law in this respect.[98] Parrish's failure to use her seatbelt could not be used to prove her contributory negligence.[99]

III. AGENCY

A. Personal Use of Medical Records

In *Walgreen Co. v. Hinchy*,[100] the court of appeals determined a pharmacy was liable for its pharmacist's act of reviewing the medical records of a customer for the pharmacist's personal use.[101]

A pharmacist involved in a relationship with a man viewed the prescription records of a customer who had previously been involved in a relationship with the same man, and who had become pregnant as a result.[102] The pharmacist learned from the records the customer had not filled her birth control prescriptions during the relevant months.[103] The pharmacist sent emails to the

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90. *Id.* at 278 (citing IND. CODE § 9-19-10-2 (2005)).
91. *Id.* (citing IND. CODE § 9-19-10-7).
92. *Id.* (citing IND. CODE § 9-19-10-7).
93. *See id.*
94. 716 N.E.2d 566, 570 (Ind. Ct. App. 1999).
95. *Parrish*, 32 N.E.3d at 279 (citing *Hopper*, 716 N.E.2d at 574).
96. *Id.* (quoting *Hopper*, 716 N.E.2d at 574-75).
97. *Id.* at 280.
98. *Id.*
99. *Id.*
100. 21 N.E.3d 99 (Ind. Ct. App. 2014), *trans. denied*, 29 N.E.3d 1274 (Ind. 2015).
101. *Id.* at 110.
102. *Id.* at 104.
103. *Id.*

customer chiding her for failing to take the birth control pills, accusing her of lying to her (the pharmacist) about the matter, and admonishing the customer she "really should think about that FACT before you call me another name."[104] The customer responded it was illegal for the pharmacist to obtain that information about the customer under those circumstances.[105] The pharmacist countered it was indeed legal for her, as a pharmacist, to obtain such information.[106] Ultimately, the customer sued the pharmacist and Walgreen claiming negligence/professional malpractice, invasion of privacy/public disclosure of private facts, and invasion of privacy/intrusion.[107] The jury found in favor of the customer, awarding $1.8 million in damages, and Walgreen appealed.[108]

The court of appeals affirmed, holding where liability is based upon the actions of an employee that were of the same general nature as those authorized by the employer, or incidental to the authorized actions, then the question of whether the employee was acting within the scope of employment (and thus not liable) is properly determined by a jury rather than by the court as a matter of law.[109]

B. Employer Liability

In *Rodriguez v. U.S. Steel Corp.*,[110] the court of appeals held a company did not have a duty to the plaintiff when its employee fell asleep driving on his way home after his shift had ended, crashing his car into the plaintiff.[111]

After working an eleven-hour shift, a U.S. Steel employee presumably fell asleep while driving and drove his personal car across the centerline and collided head-on with the plaintiff.[112] The plaintiff filed a complaint against the employee and U.S. Steel, alleging against the latter that it allowed the employee to drive home after permitting him to work excessive hours on consecutive days when it knew or should have known such schedule would render the employee overly tired and unable to drive home safely.[113] The trial court granted U.S. Steel's motion for summary judgment and the plaintiff appealed.[114] The court of appeals affirmed, holding the plaintiff had no relationship with U.S. Steel and public policy counsels against the imposition of a duty on employers to monitor worker fatigue.[115]

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104. *Id.*
105. *Id.*
106. *Id.* at 105.
107. *Id.*
108. *Id.* at 106.
109. *Id.* at 108.
110. 24 N.E.3d 474 (Ind. Ct. App. 2014), *trans. denied*, 29 N.E.3d 125 (Ind. 2015).
111. *Id.* at 479.
112. *Id.* at 475-76.
113. *Id.* at 476.
114. *Id.*
115. *Id.* at 479.

C. Independent Contractor

In *Barnard v. Menard, Inc.*,[116] the Indiana Court of Appeals held as a general matter, "it is not reasonably foreseeable to a business entity that an independently contracted loss prevention officer would physically attack a customer, causing injury to that customer."[117]

The plaintiff in *Barnard* went to a Menard's store right after being released from a hospital following surgery.[118] After shopping, the plaintiff and his fiancée purchased certain items and exited the store.[119] As they headed for their van in the parking lot, a loss-prevention officer allegedly grabbed the plaintiff by the arm, slammed him into the van, and threw him on the ground.[120] The loss prevention officer then forced the plaintiff back into the store, accusing the plaintiff of stealing a hasp worth $1.99.[121] The plaintiff claimed he was detained in the store for an unreasonable amount of time, he was slandered, and he was injured as a result of the incident.[122]

The plaintiff filed a complaint for damages against Menard and Blue Line, the security company that was the employer of the loss-prevention officer involved.[123] Menard's filed a motion for summary judgment, contending in part that because Blue Line was an independent contractor, Menard owed no duty of care to Barnard.[124] The trial court granted Menard's motion and the plaintiff appealed.[125]

The court of appeals affirmed the trial court's grant of summary judgment in favor of Menard's on the plaintiff's claims against it.[126] The court first concluded Blue Line was indeed an independent contractor, and then concluded it generally is not "reasonably foreseeable to a business entity that an independently contracted loss prevention officer would physically attack a customer, causing injury."[127] In support of this, the court noted, prior to this incident, there were no similar incidents involving a Blue Line employee and a Menard's patron.[128]

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116. 25 N.E.3d 750 (Ind. Ct. App. 2015).
117. *Id.* at 758.
118. *Id.* at 752.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* at 753.
124. *Id.*
125. *Id.* at 753-54.
126. *Id.* at 761.
127. *Id.* at 758.
128. *Id.*

IV. SUMMARY JUDGMENT

A. Hughley Standard

The Indiana Court of Appeals held in *Perry v. Anonymous Physician 1*[129] the *Hughley v. State*[130] summary judgment standard does not apply to the medical malpractice requirement that expert evidence be presented.[131]
Perry, pro se, filed a proposed medical malpractice complaint.[132] Defendants were granted summary judgment.[133]

> In a medical malpractice action based on negligence, the plaintiff must establish 1) a duty on the part of the defendant in relation to the plaintiff; 2) failure on the part of defendant to conform its conduct to the requisite standard of care required by the relationship; and 3) an injury to the plaintiff resulting from that failure.[134]

After "the defending parties designate the opinion of the medical review panel finding they exercised the applicable standard of care, the plaintiff must generally present expert opinion testimony to demonstrate there is a genuine issue of material fact."[135]

The court of appeals addressed the recent articulation of the summary judgment standard by the Indiana Supreme Court in *Hughley*.[136] In *Hughley*, the supreme court held "a non-movant may meet [the] obligation to raise a genuine issue of material fact and therefore defeat summary judgment [merely] by designating an affidavit—even 'a perfunctory and self-serving one'—if it 'specifically controvert[s]' the moving party's *prima facie* case."[137] The *Perry* court determined the *Hughley* reasoning does not apply to summary judgment motions in medical malpractice cases.[138]

In *Hughley*, Hughley, in his affidavit in a civil forfeiture case, denied under oath his cash or car were proceeds of or used in furtherance of drug crimes, and stated the money seized from him was "not the proceeds from criminal activity nor was it intended for a violation of any criminal statute. I did not intend to use that money for anything other [than] legal activities."[139] He stated his automobile "was never used to transport controlled substances and it is not the proceeds from

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129. 25 N.E.3d 103 (Ind. Ct. App. 2014), *trans. denied*, 29 N.E.3d 124 (Ind. 2015), *cert. denied*, 136 S. Ct. 227 (2015).

130. 15 N.E.3d 1000 (Ind. 2014).

131. *Perry*, 25 N.E.3d at 107.

132. *Id.* at 105.

133. *Id.*

134. *Id.* at 106.

135. *Id.*

136. *Id.* at 106-07.

137. *Id.* at 106 (quoting Hughley v. State, 15 N.E.3d 1000, 1004 (Ind. 2014)).

138. *Id.*

139. *Id.* at 106-07 (quoting *Hughley*, 15 N.E.3d at 1004).

any unlawful activity."[140] That evidence was "sufficient, though minimally so, to raise a factual issue to be resolved at trial, and thus to defeat the State's summary-judgment motion."[141] The *Perry* court indicated *Hughley* cannot be read to eliminate the requirement in medical malpractice cases that a plaintiff must provide expert opinion evidence to defeat summary judgment against a health care provider when the medical review panel has determined there was no breach of the duty of care or that any breach was not the cause of a plaintiff's injury.[142] The court explained:

> In the usual negligence action the defendant's conduct is judged against what a reasonable man would do under the circumstances. But the determination in a medical malpractice case whether a physician's conduct fell below the legally prescribed standard of care involves questions of science and professional judgment that are outside the realm of the layperson. That is why, in an action for medical malpractice, whether the defendant used suitable professional skill must generally be proven by expert testimony, usually that of other physicians. We therefore do not believe a medical malpractice plaintiff may defeat summary judgment with nothing more than a "perfunctory and self-serving" affidavit that specifically controverts the moving party's *prima facie* case.[143]

B. "Confused" Testimony

In *Stafford v. Szymanowski*,[144] the Indiana Supreme Court held a medical expert's affidavit was sufficient to avoid summary judgment even though the testimony was characterized as "confused," statements were couched in general terms without associating any of the healthcare providers with the claimed breaches of the standard of care, and the expert qualified some of his earlier opinions.[145]

In this case, Stafford brought a medical malpractice action alleging negligence in her care and treatment during pregnancy.[146] She received prenatal medical care from physicians at GYN, a medical clinic, and her son was stillborn.[147] Stafford filed a proposed complaint for medical malpractice with the Indiana Department of Insurance, alleging two doctors and GYN provided healthcare and medical treatment that did not comply with the appropriate

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140. *Id.* at 107 (quoting *Hughley*, 15 N.E.3d at 1004).
141. *Id.*
142. *Id.*
143. *Id.*
144. 31 N.E.3d 959 (Ind. 2015).
145. *Id.* at 963.
146. *Id.* at 960.
147. *Id.*

standards of medical care and treatment.[148] A medical review panel issued its unanimous expert opinion that the evidence did not support the conclusion the healthcare providers failed to meet the applicable standard of care and their conduct was not a factor in the damages.[149]

Stafford filed her complaint for medical malpractice and the healthcare providers moved for summary judgment, designating the medical review panel's opinion and asserting Stafford had not established a genuine issue of material fact with respect to whether the healthcare providers breached the standard of care and caused injury.[150] Stafford designated an affidavit by Dr. Brickner, who reviewed the records and materials tendered to the review panel and concluded the medical care by the doctors and GYN did not comply with appropriate medical standards of care for a number of reasons.[151] The trial court granted the healthcare providers' motions for summary judgment.[152] The supreme court reversed with respect to the doctors and affirmed with respect to GYN.[153]

In medical malpractice cases, "a unanimous opinion of the medical review panel that the physician did not breach the applicable standard of care is ordinarily . . . prima facie evidence negating the existence of a genuine issue of material fact and entitling the physician to summary judgment."[154] "[I]n such situations, the burden shifts to the plaintiff, who may rebut with expert medical testimony."[155]

The healthcare providers contended Dr. Brickner's affidavit did not establish a genuine issue of material fact as to the allegation against Dr. Szymanowski because the allegations in the affidavit were not directed toward any defendant in particular, but were couched in general terms without associating any of the healthcare providers with the claimed breaches of the standard of care.[156] They challenged Dr. Brickner's attribution of alleged breaches of the standard of care and pointed out instances where Dr. Brickner qualified his earlier opinions.[157]

The court found the affidavit sufficient to present an issue of fact as to the doctors.[158] Although the record was less conclusive on which physician personally performed the disputed biophysical, reasonable inferences from Dr. Brickner's deposition suggested Dr. Szymanowski was the admitting physician in charge of supervising Stafford's care that day.[159] There was equivocation only

148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.* at 961.
152. *Id.*
153. *Id.* at 964.
154. *Id.* at 961.
155. *Id.*
156. *Id.* at 962.
157. *Id.*
158. *Id.*
159. *Id.*

about whether Dr. Szymanowski personally performed certain procedures.[160]

The healthcare providers pointed to instances where Dr. Brickner qualified earlier statements, but the court indicated that "[a]s long as competent evidence has been designated in response to a summary judgment motion, . . . 'weighing the evidence—no matter how decisively the scales may seem to tip—is a matter for trial, not summary judgment.'"[161] The defendants argued, "Dr. Brickner's own confused testimony cannot create a genuine issue of material fact," asserting that "[a] witness cannot create a genuine issue of material fact by providing his own contradictory testimony."[162] But the court noted the alleged contradictory testimony was from Dr. Brickner, not from the plaintiff, as the non-moving party seeking to create an issue of fact.[163]

Interestingly, with respect to GYN's vicarious liability, the court found Stafford's designated evidence insufficient to establish a genuine issue of fact regarding an agency relationship between GYN and either doctor.[164] "Unsworn statements and unverified exhibits do not qualify as proper [Indiana Trial] Rule 56 evidence,"[165] and some of Stafford's exhibits were struck as "unsworn, uncertified, and unauthenticated," which was a decision that was not appealed.[166] None of her other evidence supported the existence of an agency relationship.[167]

After *Hughley* and in light of *Stafford*, one might conclude that summary judgment would be a rarity. But in the following case, the court of appeals upheld summary judgment on evidence seemingly no less compelling than that in *Stafford*.

C. Avoiding Summary Judgment

The court held in *Whitlock v. Steel Dynamics, Inc.*[168] that to avoid summary judgment, evidence must give details "sufficient to support the conclusory statements."[169]

While working for Steel Dynamics, Whitlock was injured when a crane hit him in the face.[170] He filed a lawsuit eight days after the limitations period expired and claimed he was mentally incompetent when the cause of action accrued.[171] Indiana Code section 34-11-6-1 provides that "[a] person who is under legal disabilities when the cause of action accrues may bring the action within

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160. *Id.*
161. *Id.* at 963 (quoting Hughley v. State, 15 N.E.3d 1000, 1005-06 (Ind. 2014)).
162. *Id.* at 962 n.3.
163. *Id.*
164. *Id.* at 964.
165. *Id.* (quoting Ind. Univ. Med. Ctr. v. Logan, 728 N.E.2d 855, 858 (Ind. 2000)).
166. *Id.*
167. *Id.*
168. 35 N.E.3d 265 (Ind. Ct. App.), *trans. denied*, 37 N.E.3d 960 (Ind. 2015).
169. *Id.* at 266.
170. *Id.*
171. *Id.* at 267.

two (2) years after the disability is removed."[172] Legal disability includes mental incompetence.[173] The trial court granted summary judgment in favor of Steel Dynamics,[174] and the court of appeals affirmed.[175]

After the accident, Whitlock went to a hospital emergency room.[176] He was alert and oriented and reported no loss of consciousness.[177] He used "'correct words with no slurring' and had no problems talking to the doctors or understanding what they said to him."[178] Whitlock was transferred to another emergency room for stitches to his eyelid.[179] He signed consent forms authorizing the procedure on his eyelid.[180] He was "[a]wake, alert, and appropriate" at the second hospital.[181] He scored a fifteen on the Glasgow Coma Scale, which is the highest level of functioning and indicates no deficiency in neurological activity.[182] Whitlock was not admitted to either hospital and went home that same day.[183]

In response to Steel Dynamics's summary judgment motion, Whitlock designated affidavits from his wife and his mother-in-law.[184] The affidavits addressed both his physical and mental condition.[185] As to his mental state, his wife stated:

> He was disoriented, when he would wake up you would try to talk to him and he would have to think a long time about what he was saying before he said it, like he was forgetting, and this went on for probably 15 to 20 days before he actually started kinda [sic] acting more like himself. Even now at this point, when you are talking to him, in the middle of a conversation he'll forget what he is talking about and he never done [sic] that before. He was down for two weeks he didn't get up and do anything, he was still disoriented and incoherent, after that couple of weeks he started moving around on his own . . . He was talking but you could tell that he was not all there, he would change the subject in the middle of what you were talking about and forget what you were talking about and just quit talking . . . [E]ven now, sometimes he will be in the

172. *Id.* at 270 (quoting IND. CODE § 34-11-6-1 (1998)).
173. *Id.* (citing IND. CODE § 1-1-4-5(24) (2002)).
174. *Id.* at 268.
175. *Id.* at 273.
176. *Id.* at 266.
177. *Id.* at 267.
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*

middle of a conversation and he will forget what he is talking about.[186]

His mother-in-law described her interaction with Whitlock when she removed his stitches nine days after the accident.[187] She said:

> [He] was not yet able to speak coherently, his balance was such that he had to be assisted from the bed to the couch and to his bathroom. If he was awakened and required to move around he would then immediately doze off again. He did not recognize me at first, and at that time he was not fit to care for himself or to understand what was going on around him.[188]

She indicated even four days later "his speech was still slurred and he could not concentrate for very long."[189]

Affidavits must comply with Indiana Evidence Rule 701, which provides that "if a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is rationally based on the witness's perception; and helpful to a clear understanding of the witness's testimony or to a determination of a fact in issue."[190]

The *Whitlock* majority held the affidavits did not create a genuine issue of material fact that Whitlock was mentally incompetent, as they gave "general opinions without designating objective bases for the opinions."[191] Specifically, they indicated "Whitlock was disoriented and incoherent, without giving specific instances of how he was disoriented and incoherent," they claimed "[h]e did not understand what was going on around him, again without giving specific details," they asserted that "[h]e did not recognize his mother-in-law 'at first,' but without specifying when he did recognize her," and finally, they claimed "[h]e was not 'all there.'"[192] The court stated,

> Since these opinions addressed the central issue of Whitlock's mental competence, greater detail was required. In other words, the affiants—rather than merely setting forth conclusory statements—were required to give specific details which they perceived to be the basis for their conclusions that Whitlock was mentally incompetent. Instead, their opinions were only one step removed from simply saying that Whitlock was mentally incompetent.[193]

Judge May dissented.[194] She found objective bases for the opinions in the

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186. *Id.* at 268.
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.* at 269 (quoting IND. R. EVID. 701).
191. *Id.* at 273.
192. *Id.*
193. *Id.*
194. *Id.* at 274 (May, J., dissenting).

statements Whitlock "was disoriented, when he would wake up you would try to talk to him and he would have to think a long time about what he was saying before he said it,"[195] and "he was not all there, he would change the subject in the middle of what you were talking about and forget what you were talking about and just quit talking."[196] Judge May opined these were "specific details" to explain two of the affiant's "general opinions."[197] Judge May further explained,

> If injuries to a person's head and face cause him, for a two-week period, to be awake only when necessary to go to the bathroom and to be too dizzy to walk alone to that bathroom, I believe there is a genuine issue whether such person could be capable of 'managing or procuring the management of his or her ordinary affairs,' . . . or capable of "understanding the rights that he would otherwise be bound to know, or of managing his affairs, with respect to the institution and maintenance of a claim for relief."[198]

V. DUTY

A. Adoption Agencies

In *Kramer v. Catholic Charities of Diocese of Fort Wayne- S. Bend, Inc.*,[199] the supreme court held an adoption agency did not assume a duty to conduct a pre-placement check of the putative father registry and did not have an inherent duty to disclose its failure to do so, even though such violated its informal practice.[200]

The Kramers contacted Catholic Charities, seeking to adopt a child.[201] Catholic Charities warned the Kramers there was a possibility that "even if a mother put her child up for adoption, a father could still claim custody."[202] Potential fathers may claim parentage of a child beyond the mother's disclosure via the putative father registry, maintained by the Indiana Department of Health ("IDOH").[203] Putative fathers have up to thirty days after a child's birth to register.[204] The purpose of the putative father registry is to determine the name and address of a father of a child prior to adoption so notice of the adoption may be provided to the putative father.[205]

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195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.* at 275.
199. 32 N.E.3d 227 (Ind. 2015).
200. *See generally id.*
201. *Id.* at 229.
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*

After an adoption petition is filed, adoption agencies must request a check of the registry at least one day after the father's thirty-day deadline ends, but they may request a registry check at any time.[206] Catholic Charities had an unwritten practice of checking the putative father registry twice more before the statutory deadline: "once after intake of the birthmother as a client, and again right before placement of the child with the potential adoptive family."[207]

Catholic Charities did not tell the Kramers about the requirement or its informal practice; it just warned the Kramers a putative father could register any time before the thirty day, post-birth deadline.[208] M.S. contacted Catholic Charities about giving up her unborn child for adoption.[209] "Catholic Charities introduced M.S. to the Kramers."[210] On May 1, 2010, M.S. gave birth to E. and on May 2, M.S. signed the necessary paperwork agreeing to an adoption.[211] The Kramers were able to take E. home with them on May 3.[212]

"On May 25th and again on June 1st, Catholic Charities requested that the Indiana Department of Health check whether anyone had registered as the putative father of E."[213] The first search revealed no one, but the second search revealed R.M. had registered on April 27th.[214] IDOH could not explain why R.M.'s registration was not discovered in the first search.[215] The Kramers, despite learning of the discrepancy in R.M.'s registration, petitioned to adopt E., and R.M. contested the adoption.[216] He established paternity, receiving full custody of E. in early January 2011.[217] By that point the Kramers already had custody of E. for over eight months.[218]

"The Kramers sued Catholic Charities for negligence, alleging Catholic Charities should have checked and failed to notify them of its failure to check the putative father registry prior to placing E. with them."[219] Catholic Charities moved for and was granted summary judgment on the ground it satisfied any duty it owed to the Kramers by complying with the putative father registry statute.[220] The supreme court affirmed.[221]

Catholic Charities asserted it "'breached no duty' to the Kramers because it

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206. *Id.*
207. *Id.*
208. *Id.* at 229-30.
209. *Id.* at 230.
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.*
221. *See generally id.*

checked the putative father registry one day after the close of the registration deadline," which had been in compliance with the statute.[222] The court noted the "unjustified or unexcused" violation of a statutory duty may be negligence per se, but it does not mean that compliance with a statute or ordinance is the exercise of reasonable care.[223] Compliance with statutory standards is not conclusive per se lack of negligence, but it does constitute evidence of lack of negligence.[224] "[C]ompliance with statutory requirements is sufficient to award summary judgment on a negligence claim, in the absence of competent evidence designated by the non-movant which would demonstrate either non-compliance or the existence of a higher duty."[225]

Compliance with a statute "does not prevent a finding of negligence where a reasonable person would take additional precautions, but where there are no . . . special circumstances, the minimum standard prescribed by the legislation or regulation may be accepted" as sufficient for the occasion.[226] It was shown that "Catholic Charities complied with Indiana Code section 31-19-5-15 by checking the putative father registry on the 31st day after E.'s birth", which was the minimum statutory standard for adoption agencies.[227] This constituted a prima facie showing of the extent of Catholic Charities' duty with regard to the registry, as well as Catholic Charities' satisfaction of that duty.[228] Accordingly, it was incumbent upon the Kramers to set forth facts showing a genuine issue for trial on the elements of duty and breach.[229]

The Kramers argued "Catholic Charities had a duty to check the registry prior to E.'s placement[,] [b]ut cite[d] no authority or evidence beyond Catholic Charities' informal practice of conducting such pre-placement checks."[230] The court indicated that "such internal practices, standing alone, do not 'tend to show the degree of care recognized by [the defendant] as ordinary care' because they may be 'established for any number of reasons having nothing to do with . . . ordinary care."[231] The Kramers failed to raise a genuine issue of fact as to "whether Catholic Charities assumed a duty to conduct a pre-placement check of the registry on behalf of the Kramers."[232]

Kramers next argued, because the Kramers and Catholic Charities were in a fiduciary relationship, "Catholic Charities had a duty to disclose its failure to check the registry prior to E.'s placement."[233] "Whether the defendant must

222. *Id.* at 231.
223. *Id.*
224. *Id.*
225. *Id.* at 231-32.
226. *Id.* at 232.
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.*

conform his conduct to a certain standard for the plaintiffs' benefit is a question of law for the court to decide,"[234] which involves balancing three factors: (1) "the relationship between the parties," (2) "the reasonable foreseeability of harm to the injured party," and (3) "public policy concerns."[235]

With respect to the Kramers' potential adoption, Catholic Charities acted as an agent.[236] "The nature of an agency relationship is generally determined by the terms of the agreement between the parties."[237] "[T]he Kramers had the right to obtain information about the risks and benefits . . . of services they [would] receive."[238] The Kramers "agreed to provide 'honest and complete information to Catholic Charities,' while Catholic Charities agreed only to 'be honest and forthcoming in all phases of the adoption process.'"[239] The right to the revision of its policies and practices was reserved by Catholic Charities, which it could have done at any time.[240] "Catholic Charities had a duty to provide truthful and accurate information to the Kramers regarding the adoption process, and to disclose all of the information it was aware of at the time of E.'s placement."[241]

Nothing in the record indicated Catholic Charities: (a) promised "to conduct a pre-placement check of the putative father registry"; (b) disclosed to the Kramers its informal practice of conducting such pre-placement checks; (c) promised to provide complete information to the Kramers concerning Catholic Charities' adoption practices; (d) made a false statement concerning Catholic Charities' adoption practices; or (e) made a false statement concerning E.'s parentage during the adoption process.[242] The court observed, "[a]ny one of these would have supported an inference that Catholic Charities had a duty to disclose its failure to conduct a pre-placement check of the putative father registry. "But Catholic Charities did not assume any such duty under the terms of its agreement with the Kramers."[243]

With respect to the duty to disclose, the court determined it may be limited by the terms of the parties' agreement.[244] In this case, the agreement "limited any inherent duty of Catholic Charities to disclose its compliance or noncompliance with its own informal practices."[245] Accordingly, the court held the relationship between the parties weighed against finding a duty of disclosure.[246]

With respect to the reasonable foreseeability of harm, the court determined

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234. *Id.* (quoting Estate of Heck *ex rel.* Heck v. Stoffer, 786 N.E.2d 265, 268 (Ind. 2003)).
235. *Id.* at 233.
236. *Id.*
237. *Id.*
238. *Id.* (internal quotations omitted).
239. *Id.*
240. *Id.*
241. *Id.* at 234.
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.*

the injury to the Kramers was reasonably foreseeable based on Catholic Charities' conduct.[247] This, the court noted, favored the imposition of a duty.[248]

The court held the final element, i.e., public policy, cut both ways, as

> forcing adoption agencies in general to disclose every instance of compliance or non-compliance with their internal procedures could impose significant administrative costs and diminish adoption agencies' collective ability to perform this vital public service. Moreover, given the degree of regulation to which Catholic Charities is already subjected by statute, we are reticent to impose additional, heightened requirements as a matter of common law. . . On the other hand, it is plausible that such a disclosure in this case would have prevented the emotional harm suffered by the Kramers. And given that Catholic Charities already had an informal practice of conducting pre-placement registry checks, the burden of informing the Kramers of its non-compliance with that practice seems relatively minimal. Accordingly, public policy considerations neither favor nor weigh against the imposition of a duty of disclosure under these circumstances.[249]

In the final analysis, the court determined that the three-factor test was equally split.[250] However, because the Kramers bore the burden of persuasion, they did not demonstrate Catholic Charities owed "any duties with respect to the putative father registry in excess of statutory requirements."[251]

B. Attorney's Duty

In *Devereux v. Love*,[252] the court held an attorney did not breach his duty to former clients when he left his firm without notifying them of his concerns about actions by the firm's principal, because the attorney did not know of any specific wrongdoing by the firm's principal relating to clients.[253]

In August 2008, the Loves hired the Conour Law Firm to represent them in a personal injury lawsuit.[254] In 2012, Conour was charged with misappropriating client funds.[255] As it turned out, the Loves were victims of Conour's illegal acts.[256]

Devereux joined the firm in February 2008, and Conour assigned him to

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247. *Id.*
248. *Id.* at 234-35.
249. *Id.* at 235-36.
250. *Id.* at 236.
251. *Id.*
252. 30 N.E.3d 754 (Ind. Ct. App.), *trans. denied*, 40 N.E.3d 857 (Ind. 2015).
253. *See generally id.*
254. *Id.* at 757.
255. *Id.*
256. *Id.*

work with Conour on the Loves' case.[257] In December 2011, Devereux left the firm because Conour was not timely paying expenses and expert witness fees.[258] After deciding to leave the firm, Devereux became aware of other poor business practices.[259]

On December 27, 2011, Devereux contacted the Indiana Supreme Court Disciplinary Commission about Conour.[260] In January 2012, he learned the FBI was investigating Conour for failing to fund properly annuities for clients arising out of personal injury settlements.[261] In July 2012, the Loves' current counsel notified Devereux that Conour settled the Loves' case in February 2012, without the Loves' consent or knowledge.[262] Counsel asserted under the circumstances, Devereux had a duty to tell the Loves they were in peril of being victimized and that he breached this duty.[263] Counsel threatened to file a malpractice action against Devereux if Devereux did not pay the Loves the proceeds of the settlement they should have received.[264]

Devereux responded that when he left the firm, he was not aware, nor could he have known, that Conour would "settle a client's case without their knowledge and then keep the settlement proceeds for himself."[265] Devereux claimed he did not owe the duty to the Loves as they claimed because at the time he terminated his employment with the firm, he did not know Conour was doing things that would place the Loves at risk of being victimized.[266] Moreover, he claimed any duty he might have owed the Loves ended at the time he terminated his employment at the firm.[267]

In the ensuing malpractice lawsuit, the court of appeals noted an attorney owes his or her client a duty, when withdrawing from representation, to do so in the manner least harmful to the client to protect the client's interests.[268] With this in mind, the court determined Devereux's decision not to discuss his concerns regarding Conour with the Loves was not a breach of duty.[269] Devereux's concerns about Conour, when he left the firm, related only to what he considered poor business practices.[270] Devereux did not have access to the firm's financial records, and thus, did not know whether there was a reasonable explanation for

257. *Id.* at 757-58.
258. *Id.* at 758.
259. *Id.*
260. *Id.* at 760.
261. *Id.*
262. *Id.* at 761.
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.* at 764.
269. *Id.* at 764-65.
270. *Id.* at 765.

the delayed payments of settlement proceeds.[271] He had no specific knowledge that Conour: (1) was guilty of any wrongdoing relating to the Loves; (2) was at the time mishandling active cases; or (3) committed any wrongdoing other than delaying payments.[272]

Moreover, until February 24, 2012, Devereux had no knowledge Conour settled a client's claim without the client's permission or knowledge.[273] He did not learn until July 2012 that Conour settled the Loves' case without their knowledge.[274] In the final analysis, there was no issue of material fact concerning the question of whether Devereux knew or should have known when he left the firm that Conour would steal client funds.[275] The court of appeals determined the trial court erred in denying Devereux's motion for summary judgment.[276]

VI. ASSORTED OTHER MATERIALS

A. Crime Victim's Relief Act

In *Wysocki v. Johnson*,[277] the supreme court held not every intentional tort is necessarily "so heinous as to require exemplary damages,"[278] or as to warrant quasi-criminal liability under the Crime Victims Relief Act ("CVRA") because not every intentional tortfeasor is a criminal.[279] According to the court, "CVRA liability does not depend on whether the tortfeasor has been charged with or convicted of the CVRA predicate offense, nor even solely on the elements of the CVRA predicate offense."[280] Rather, "liability is also a matter of the factfinder's discretionary judgment of whether the defendant is *criminally* culpable."[281]

Appellees bought a brand-new home in 1973 and lived in it continuously until they sold it to Appellants in 2006.[282] During their occupancy, Appellees performed most of the renovation and maintenance work done on the home.[283] Among other things, they built a deck that was later enclosed and became a screened porch, and ran electrical wiring to an aboveground swimming pool.[284] Appellees did hire a contractor to extend the roof line over the front porch.[285]

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271. *Id.*
272. *Id.*
273. *Id.*
274. *Id.*
275. *Id.* at 766.
276. *Id.*
277. 18 N.E.3d 600 (Ind. 2014).
278. *Id.* at 606.
279. *Id.*
280. *Id.*
281. *Id.* (emphasis in original).
282. *Id.* at 602.
283. *Id.*
284. *Id.*
285. *Id.*

When they sold the home to Appellants, Appellees signed a "Seller's Residential Real Estate Sales Disclosure Form stating there were no building code violations, no work had been performed without any required permits, and there were no foundational, structural, moisture, water, or roof problems."[286] Shortly after moving in, however, Appellants discovered several serious structural problems with the house and sued Appellees, alleging fraudulent failure to disclose those defects on the disclosure form.[287] After a bench trial, the trial court awarded almost $14,000 in compensatory damages, but not attorney fees, costs, or exemplary damages under the CVRA.[288]

On petition to transfer, Appellants asked the supreme court to adopt a bright-line rule that "every knowing misrepresentation on a Sales Disclosure Form constitutes criminal deception, and thus gives rise to CVRA liability."[289] The court declined the invitation, holding when a court imposes CVRA liability, an award of costs and reasonable attorney fees is mandatory, but additional exemplary damages remain discretionary.[290] The court held when given a choice, the trial "court need not impose CVRA liability when it believes ordinary tort liability will do."[291]

B. Doctrine of Continuing Wrong

In *Anonymous Physician v. Rogers*,[292] the court held the doctrine of continuing wrong does not apply to a doctor's continued use of disinfectant that caused the plaintiff's allergic reaction.[293]

In this case, the plaintiff was diagnosed with bladder cancer on or about August 18, 2006.[294] From then until January 2009, the physician-defendant performed several cystoscopies, in each case disinfecting the neurology equipment with Cidex OPA.[295] The physician-defendant did not inform the plaintiff manufacturer warnings, Cidex OPA package warnings, and medical literature advised this product was contraindicated for patients with bladder cancer.[296] The plaintiff suffered "no ill effects from the use of Cidex OPA until March 2008."[297] However, after a March 10, 2008, cystoscopy, "the plaintiff experienced minor itching."[298] After a July 14, 2008, cystoscopy, the "plaintiff

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286. *Id.*
287. *Id.*
288. *Id.*
289. *Id.* at 606.
290. *Id.* at 607.
291. *Id.*
292. 20 N.E.3d 192 (Ind. Ct. App. 2014), *trans. denied*, 31 N.E.3d 976 (Ind. 2015).
293. *See generally id.*
294. *Id.* at 194.
295. *Id.*
296. *Id.*
297. *Id.*
298. *Id.*

experienced redness and swelling in both his face and lips."[299] After a January 7, 2009, cystoscopy, the plaintiff experienced swelling in his hands and developed a rash that caused him to be admitted to the hospital overnight for observation of his symptoms.[300] On January 22, 2009, an allergist performed tests confirming that the plaintiff was allergic to Cidex OPA.[301] The physician-defendant did not use Cidex OPA thereafter.[302]

On March 4, 2011, the plaintiff filed a proposed complaint with the Indiana Department of Insurance alleging the physician-defendant rendered substandard care from August 2006 through July 2009.[303] The physician-defendant moved for summary judgment on grounds the claim was barred by the Medical Malpractice Act's[304] two-year statute of limitations.[305] The trial court granted the motion and the plaintiff appealed.[306] The court of appeals rejected the plaintiff's argument that pursuant to the doctrine of continuing wrong, the statute did not begin to run until March 6, 2009, when the physician-defendant failed to investigate the cause of the plaintiff's allergic reactions.[307] The court of appeals held the physician-defendant last saw the plaintiff on January 7, 2009, which was the last opportunity for physician-defendant to diagnose the plaintiff's problem, thus triggering the running of the two-year statute of limitations.[308]

C. Medical Standard of Care

In *Thompson v. St. Joseph Regional Medical Center*,[309] the court of appeals held that "common sense and experience [are enough] to conclude that an arm board should not become detached, leaving a patient's arm dangling for such a period of time that the patient suffers nerve injury."[310]

The plaintiff underwent a procedure for which Dr. Borkowski provided anesthesia.[311] The plaintiff was lying on an operating table with her arms outstretched and strapped to padded arm boards that were attached to the table.[312] Approximately one hour into the procedure, Dr. Borkowski noticed that "the patient's right arm was dangling towards the floor because the right arm board

299. *Id.*
300. *Id.*
301. *Id.*
302. *Id.*
303. *Id.*
304. IND. CODE § 34-18-7-1 (2014).
305. *Rogers*, 20 N.E.3d at 194.
306. *Id.*
307. *Id.* at 199.
308. *Id.* at 200-01.
309. 26 N.E.3d 89 (Ind. Ct. App. 2015).
310. *Id.* at 95.
311. *Id.* at 91.
312. *Id.*

had become detached."[313] Dr. Borkowski, who did not know how or when the arm board had become detached, reattached the arm board and noted the issue in his record.[314] When the plaintiff awoke from surgery, she complained of pain in her right arm and was advised by Dr. Borkowski of what had occurred.[315] He indicated this could have resulted in nerve damage to her arm.[316] The plaintiff met with a neurologist, "who diagnosed her with a right radial nerve injury that had probably been caused by compression."[317]

The plaintiff filed a proposed complaint against the medical center and Dr. Borkowski.[318] A medical review panel found the defendants did not fail to meet the appropriate standard of care and their conduct was not a significant factor in any permanent injury the plaintiff may have suffered.[319] The plaintiff then filed a complaint in the trial court alleging the defendants failed to meet the appropriate standard of care.[320] In response to motions for summary judgment filed by the defendants (citing the opinion of the panel) the plaintiff designated as evidence the deposition testimony of an anesthesiologist who had been a member of the panel that originally found against the plaintiff.[321] Following a hearing, the trial court granted the motion for summary judgment upon its conclusion the designated evidence did not rebut the panel's conclusion that there was no causal relationship between the defendants' conduct and plaintiff's injury.[322]

The court of appeals reversed, noting to prove that the defendants breached the standard of care, the plaintiff needed to show that "the accident is such as in the ordinary course of things does not happen if those who have management of the injuring instrumentality use proper care."[323] The court concluded the plaintiff in this particular case was entitled to rely upon common sense and experience, and that a doctor's testimony to that effect was not required.[324]

D. Admission of Insurance Coverage Limit

In *State Farm v. Earl*,[325] the Indiana Supreme Court held the admission of evidence of a plaintiff's insurance coverage limit is not error if the probative

313. *Id.*
314. *Id.*
315. *Id.*
316. *Id.*
317. *Id.* at 92.
318. *Id.*
319. *Id.*
320. *Id.*
321. *Id.*
322. *Id.*
323. *Id.* at 95.
324. *Id.* at 94.
325. 33 N.E.3d 337 (Ind. 2015).

value, even if very low, is not outweighed by danger of unfair prejudice.[326]

Earl was injured in a motorcycle accident and sued State Farm to recover under the uninsured motorist provision in his policy.[327] After State Farm admitted liability, the case went to a jury on the question of damages.[328] State Farm moved to exclude any evidence of the coverage limit, arguing it was irrelevant to the issue of damages.[329] The trial court denied the motion.[330] The jury subsequently returned a total verdict of $250,000—the exact amount of the coverage limit.[331] State Farm appealed, advocating a bright-line rule that "coverage limits are irrelevant to the determination of tortious damages and are therefore inadmissible."[332] The Earls also urged a bright-line rule, but to the opposite effect, that "coverage limits are relevant to the underlying contract claim and therefore 'must' be admitted."[333] The supreme court reject both arguments.[334]

The court noted that under Indiana Evidence Rule 411, evidence of liability insurance may not be admitted to show fault, but it may be admitted for other purposes.[335] The rationale for this rule was reviewed, noting insurance is not logically related to fault, and jurors may be prejudiced in awarding damages if they know an insurance company, rather than the defendant, will be satisfying the judgment.[336]

The court observed, and indeed both sides acknowledged, Rule 411 did not apply in this situation because liability was not contested and State Farm was a defendant.[337] Accordingly, the jury was aware damages would be paid by an insurance company.[338] However, this was not to say the rationale underpinning Rule 411 was not instructive in considering the admissibility of coverage limits.[339] Citing Rule 401 of the Indiana Rules of Evidence, the court noted relevant evidence may include "facts that merely fill in helpful background information for the jury, even though they may only be tangentially related to the issues presented."[340]

The court noted suits to recover money damages pursuant to uninsured or underinsured motorist provisions involve aspects of both contract law and tort

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326. *Id.* at 344.
327. *Id.* at 338.
328. *Id.* at 339.
329. *Id.*
330. *Id.*
331. *Id.*
332. *Id.* at 340.
333. *Id.*
334. *Id.*
335. *Id.*
336. *Id.* at 340-41.
337. *Id.* at 341.
338. *Id.*
339. *Id.*
340. *Id.*

law.[341] "The underlying cause of action is based on the contractual relationship between the insured and the insurer, although the parties may principally litigate the measure of damages relying upon tort principles."[342] The Earls alleged State Farm issued an insurance policy and its liability in the present case arose under the contract, thus presenting an underlying breach of contract claim.[343] Indeed, the jury was instructed Earl made a claim for damages based on the terms of the insurance contract State Farm issued, and further that the terms of that coverage controlled the amount of recovery, if any, to which Earl was entitled.[344]

Thus, the jury was required to answer two questions: (1) was Earl entitled to recover from the unidentified motorist; and (2) if so, what amount could Earl recover from State Farm?[345] The court determined, under such circumstances, the insurance policy and its coverage limit were relevant, "even if only barely so," to help the jury understand the contractual relationship between Earl and State Farm and the underpinnings of the lawsuit itself.[346]

In analyzing the prejudice element, the court noted the coverage limit was not probative of the damages Earl suffered, and it was "sympathetic to litigants' concerns that a jury may improperly rely on that coverage limit as a frame of reference."[347] In the end, the court balanced the risk of prejudice with the value of the coverage limit as background information, and determined the evidence was admissible.[348]

Finally, the court cautioned against interpreting its decision as establishing a bright-line rule in such cases:

> Our decision today does not stand for the proposition that coverage limits are always admissible. We can foresee instances where the insured's injury is so minor and the coverage limit so large it gives rise to a legitimate concern that the jury will inflate its award. . . In this case, however, we do not have such a concern, and we conclude the trial court did not abuse its discretion in admitting the evidence.[349]

E. Volunteer Protection Act

In *Meyer v. Beta Tau House Corp.*,[350] the court held a letter from the president of the corporate owner of a fraternity house addressing a fraternity member's conduct following a fight with fraternity co-member and requesting

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341. *Id.*
342. *Id.*
343. *Id.*
344. *Id.* at 341-42.
345. *Id.* at 342.
346. *Id.*
347. *Id.*
348. *Id.* at 342-43.
349. *Id.* at 343.
350. 31 N.E.3d 501 (Ind. Ct. App. 2015).

that member to remain off fraternity premises was actionable defamation, but Volunteer Protection Act barred the claim.[351] The court reasoned the corporate owner was a nonprofit entity, the president was a volunteer acting within the scope of his responsibilities, and the president's care and lack of ill will in deciding to send the letter demonstrated he did not act with gross negligence, reckless misconduct, or a flagrant indifference to member's rights.[352]

The incident giving rise to the lawsuit occurred in May 2008, when Andrew Meyer poured urine on the windshield of Daniel Meals's truck.[353] Meals responded by punching Meyer in the nose.[354] On March 20, 2009, an intoxicated Meyer fought with Meals, and was injured.[355] Quentin Calder was an alumnus of the same fraternity, Beta Tau.[356] He served as volunteer president of Beta Tau House Corporation, which owned houses for Beta Tau members.[357] Calder learned about the fight and that Meyer filed a police report.[358] Meyer continued to visit the house where Meals lived, and the visits were causing tension among the Beta Tau membership.[359]

Calder wrote a letter to Meyer, sending copies to the Beta Tau president, as well as other officers of the corporation.[360] In the letter, Calder indicated the filing of a police report and Meyer's concern for retribution demonstrated disregard for the fraternity.[361] Accordingly, he asked Meyer to stay away from the fraternity property.[362] Meyer continued to visit the house and was eventually banned from doing so.[363] Meyer sued, alleging Calder and the Corporation defamed him.[364] Summary judgment was granted in favor of the defendants and Meyer appealed.[365]

The court of appeals rejected Calder's contention the statements in the letter constituted merely subjective statements of opinion and thus were not actionable.[366] Nonetheless, the court determined even if genuine issues of material fact existed with respect to the defamatory nature of the letter, it must consider the common interest qualified privilege, which "applies to communications made in good faith on any subject matter in which the party

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351. *Id*. at 515-16; *see also* 42 U.S.C. §§ 14501-14505 (2012).
352. *Meyer*, 31 N.E.3d at 515-16.
353. *Id.* at 506.
354. *Id.*
355. *Id.*
356. *Id.*
357. *Id.* at 505-06.
358. *Id.* at 506.
359. *Id.*
360. *Id.* at 507.
361. *Id.*
362. *Id.*
363. *Id.*
364. *Id.*
365. *Id.* at 508.
366. *Id.* at 515.

making the communication has an interest or duty, if made to a person having a corresponding interest or duty."[367] The court held all of the elements of common interest qualified privilege had been met, explaining:

> Calder was acting in good faith to attempt to resolve tensions at Beta Tau. First, he made a non-binding request for Meyer to stay away from the houses, and then, when Meyer refused to comply, Calder formally banned him from the premises. Calder did so after consulting with multiple people within the local and national fraternities as well as employees affiliated with the University. Calder took these actions with care and consideration, and we find nothing in the record tending to establish that he acted with ill will. As a result, he is protected by the common interest privilege as a matter of law, and the trial court properly entered summary judgment in favor of both Calder and the House Corporation on this issue.[368]

As a final matter, the court noted, regardless of the common interest privilege, the Volunteer Protection Act also barred the defamation claim.[369] The purpose of the Act is to "provide certain protections from liability abuses related to volunteers serving nonprofit organizations and governmental entities."[370] Under the Volunteer Protection Act,

> A person who is protected by the Act cannot be held liable for harm caused by him in the scope of his responsibilities unless the harm is caused by "willful or criminal misconduct, gross negligence, reckless misconduct or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer.[371]

Under this rationale, the owner of the fraternity's premises was a nonprofit organization and Calder was a volunteer within the meaning of the Volunteer Protection Act.[372] Calder was acting in the scope of his responsibilities as president when he drafted and mailed the letter to Meyer.[373]

F. Landowner Liability for Unowned Dog

In *Byers v. Moredock*,[374] the Indiana Court of Appeals held landowners will not be liable for the acts of a dog they do not own unless they have actual knowledge the dog had dangerous propensities. [375]

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367. *Id.*
368. *Id.* at 515-16.
369. *Id.* at 516.
370. *Id.*
371. *Id.* (quoting 42 U.S.C. § 14503 (2012)).
372. *Id.*
373. *Id.*
374. 31 N.E.3d 1016 (Ind. Ct. App. 2015).
375. *Id.*

The underlying occurrence was Byers was riding his motorcycle on a county road when a dog, Brutus, ran into the road.[376] Byers struck Brutus and the motorcycle flipped several times, ejecting Byers.[377] Brutus belonged to the Moredocks' lessee, who lived in a house on the property.[378] Byers alleged the Moredocks used a barn on the property on a fairly regular basis and knew Brutus ran loose on the property and left the yard on occasion.[379] In his complaint, Byers further alleged the Moredocks did not comply with an ordinance that allegedly imposed a duty upon persons who have knowledge a dog was not restrained by a leash and not under complete control, to restrain the dog.[380] The trial court granted summary judgment in favor of the Moredocks and Byers appealed.[381]

The ordinance in question made it unlawful "for any owner to allow, suffer, or permit an animal to be at large."[382] Meyers argued the Ordinance imposed a duty upon the Moredocks to confine Brutus, by virtue of their status as owners of the property upon which he lived at the time of this occurrence.[383] The court rejected this contention, relying on precedent "that it would be unreasonable to impose a duty on landlords to regulate the tenants' animals where the owners clearly are in the best position to do so."[384] The court explained the Moredocks designated evidence they did not own or have care, custody, or control of Brutus.[385] Thus, they had no duty to confine or otherwise restrain a dog owned by their tenant.[386] Moreover, the fact the Moredocks owned the property and leased it to Brutus's owner did not impose a duty on them to ensure Brutus was adequately confined or otherwise under the control of the tenants.[387] "There is generally not a high degree of foreseeability that leasing property to an owner or keeper of a dog, even where the dog may generally need to be restrained, will result in injury to third parties."[388]

G. Dangerous Propensity of Animal

In *Gruber v. YMCA of Greater Indianapolis*,[389] the court of appeals held a summer camp was not responsible for injuries a camper, Gruber, sustained when a pig that had never injured anyone or exhibited any dangerous propensities stuck

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376. *Id.* at 1017.
377. *Id.*
378. *Id.*
379. *Id.*
380. *Id.*
381. *Id.*
382. *Id.* at 1018.
383. *Id.* at 1019-20.
384. *Id.* at 1022 (citing Morehead v. Deitrich, 932 N.E.2d 1272, 1280 (Ind. Ct. App. 2010)).
385. *Id.*
386. *Id.*
387. *Id.*
388. *Id.*
389. 34 N.E.3d 264 (Ind. Ct. App. 2015).

its head between the bars of its pen and grabbed Gruber's hand.[390]

The YMCA camp naturalist owned a pig that lived at the camp nine months of the year.[391] In the six years he had owned the pig, it had never injured anyone or demonstrated any dangerous propensities.[392] The pig was regularly allowed to roam freely with no issue.[393] The naturalist took a group of children, including Gruber, into the pig's pen.[394] While inside the pen, the naturalist dumped food out of a bucket so the children could pet the pig and watch it eat.[395] After the pig ate, the children left the pen while the naturalist locked the gate.[396] Gruber continued to watch the pig from outside the pen.[397] While Gruber was standing close to the pen, the pig stuck its head between the bars and grabbed Gruber's hand.[398] Gruber sued the camp.[399] The camp submitted a motion for summary judgment, which the trial court granted.[400] Gruber appealed.[401]

Gruber conceded "that pigs are domestic animals and that the general rule is that owners of domestic animals are liable . . . only if owner knows or has reason to know that the animal has dangerous propensities."[402] Gruber asked the court to change the rule "to impose a strict-liability standard on owners of domestic animals that are not cats or dogs."[403] The court declined, explaining:

> Our Supreme Court has made clear that this rule applies to all domestic animals, not just cats and dogs . . . Because the plaintiffs have put forth no convincing reason to impose strict liability on owners of domestic animals that are not cats or dogs, we affirm the trial court's grant of summary judgment in favor of the YMCA defendants.[404]

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390. *Id.*
391. *Id.* at 265.
392. *Id.*
393. *Id.*
394. *Id.*
395. *Id.*
396. *Id.*
397. *Id.*
398. *Id.*
399. *Id.*
400. *Id.*
401. *Id.* at 266.
402. *Id.* at 267.
403. *Id.* at 268.
404. *Id.*