RECENT DEVELOPMENTS IN INDIANA TORT LAW

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

I. DUTY

A. Foreseeability—Premises Liability for Social Hosts

In *Rogers v. Martin*,[1] the Indiana Supreme Court held that a social host does not owe a duty to protect a guest from an unforeseeable fist fight. However, after a guest is harmed on the host's premises, the host owes a duty to protect the guest from exacerbation of the injury.

Angela Martin and Brian Brothers co-hosted a party at their house.[2] As the party was winding down, Brian Brothers, Paul Michalik, and another guest, Jerry Chambers, got into a fist fight.[3] Shortly thereafter, Martin found Michalik lying motionless on her basement floor, but went back to bed instead of taking any affirmative action, like seeking help for Michalik.[4] Police arrived a short time later and found Michalik dead outside Martin's home.[5]

The personal representative of Michalik's estate and Chamber's bankruptcy trustee brought an action against Martin for violation of the Dram Shop Act[6] and for failure to render aid after Michalik was injured during a fist fight.[7] The trial court entered summary judgment in favor of Martin, finding she was not negligent as a social host and that she could not be deemed to have furnished beer to Brothers, who in turn may have provided beer to Michalik, because Martin and

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1. *See generally* 63 N.E.3d 316 (Ind. 2016).
2. *Id.* at 317.
3. *Id.* at 319.
4. *Id.*
5. *Id.*
6. IND. CODE § 7.1-5-10-15.5 (2017).
7. *Rogers*, 63 N.E.3d at 319.

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Brothers had joint control over the beer.[8] The court of appeals reversed, finding that Martin did have a duty as a social host to render aid to Michalik after he was injured and that questions of fact existed as to whether Martin furnished beer to Brothers.[9]

On transfer, the supreme court did not consider the *Webb v. Jarvis*[10] three-part balancing test, but rather looked to Indiana law on premises liability.[11] The court noted that, as pertaining to activities on the premises (as opposed to a dangerous condition on the land), the critical element for premises liability is whether the landowner can foresee the harm.[12] This is a determination of law to be made by the court.[13] In considering the circumstances, the court held it was unforeseeable that Martin's co-host would have a fist fight with Michalik and thus, Martin was not liable for those actions.[14] However, Martin owed a duty to protect her guest from the exacerbation of his injuries that occurred in her home.[15] Because questions of fact remained on the negligence claim, the supreme court concluded the trial court erred in granting summary judgment for Martin.[16] In so doing, the court established the following principles with respect to foreseeability:

> When foreseeability is part of the duty analysis, as in landowner-invitee cases, it is evaluated in a different manner than foreseeability in the context of proximate cause. Specifically, in the duty arena, foreseeability is a general threshold determination that involves an evaluation of (1) the broad type of plaintiff and (2) the broad type of harm. In other words, this foreseeability analysis should focus on the general class of persons of which the plaintiff was a member and whether the harm suffered was of a kind normally to be expected—without addressing the specific facts of the occurrence.[17]

The definition of "furnish" in the Dram Shop Act utilizes the terms "sell" and "provide," which connote a transfer of possession.[18] Thus, the court held that Martin could not "furnish" beer to Brothers because they jointly possessed the beer.[19] The court held that Martin could not be liable for injuries under the plaintiff's dram shop claim.[20]

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8. *Id.*
9. *Id.* (citing Rogers v. Martin, 48 N.E.3d 318 (Ind. Ct. App. 2015), *vacated*, 63 N.E.3d 316).
10. 575 N.E.2d 992 (Ind. 1991).
11. *Rogers*, 63 N.E.3d at 321 (citing Burrell v. Meads, 569 N.E.2d 637 (Ind. 1991)).
12. *Id.* at 321-23.
13. *Id.* at 324.
14. *Id.* at 326.
15. *Id.* at 327.
16. *Id.*
17. *Id.* at 325.
18. *Id.* at 328 (citing IND. CODE § 7.1-5-10-15.5).
19. *Id.*
20. *Id.*

B. Foreseeability—Premises Liability for Businesses

In *Goodwin v. Yeakle's Sports Bar & Grill, Inc.*,[21] the Indiana Supreme Court held that only a foreseeable duty is owed, that the foreseeability component of duty is broader than the foreseeability component of proximate cause, and that foreseeability in this context is determined without regard to the facts of the actual occurrence.

Patrons of Yeakle's Sports Bar were injured in a shooting at the Bar and sued the Bar for negligence in not providing security, not searching patrons, and not warning them that the shooter was armed and dangerous.[22] The trial court granted summary judgment in favor of the Bar, concluding the shooting was not foreseeable, therefore the Bar owed no duty to the patrons as a matter of law.[23] The court of appeals reversed, upon its conclusion that foreseeability was not part of the duty analysis.[24] The supreme court granted transfer and affirmed the trial court's decision.[25]

To prevail on a negligence claim, a plaintiff must show (1) a duty owed to the plaintiff by the defendant, (2) breach of that duty, and (3) a compensable injury proximately caused by the defendant's breach.[26] The court acknowledged that "at least over the past two decades or so our case law has been less than perfectly lucid in explaining how a court determines whether a duty exists in the context of a negligence claim."[27] The court reviewed Indiana precedent, beginning with the three-part balancing test used in *Webb v. Jarvis*, which included an element of foreseeability of harm in determining whether a duty exists.[28] Ultimately, the court "expressly disapprove[d]" the *Webb* approach to defining duty, reasoning that *Webb* was applied inconsistently in lower courts and created confusion as to the proper duty analysis.[29]

The court held that foreseeability is a component of duty and is to be determined by the court and opted to follow the framework outlined in *Goldsberry v. Grubbs*.[30] *Goldsberry* provided that "the foreseeability component of proximate cause requires an evaluation of the facts of the actual occurrence, while the foreseeability component of duty requires a more general analysis of the broad type of plaintiff and harm involved, without regard to the facts of the actual

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21. 62 N.E.3d 384 (Ind. 2016).

22. *Id.* at 385-86.

23. *Id.* at 386.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 387.

28. *Id.*; *see generally* Webb v. Jarvis, 575 N.E.2d 992 (Ind. 1991).

29. *Goodwin*, 62 N.E.3d at 387, 391. The court also disapproved of the approach used to define duty in Estate of Heck *ex rel.* Heck v. Stoffer, 786 N.E.2d 265 (Ind. 2003).

30. *Goodwin*, 62 N.E.3d at 389, 391; *see also* 672 N.E.2d 475 (Ind. Ct. App. 1996).

occurrence."[31] The court also noted that the foreseeability component of the duty analysis is a lesser inquiry than the foreseeability analysis used by the trier of fact for purposes of determining proximate cause.[32]

C. Foreseeability of Duty Owed by Hired Business

In *Polet v. ESG Security, Inc.*,[33] the court of appeals determined that a security company providing services during the stage collapse at the 2011 State Fair did not owe a duty to the victims because the stage collapse was not foreseeable.

This case stemmed from a stage collapse at the 2011 Indiana State Fair.[34] ESG Security was hired by the State Fair to secure the area around the stage, as well as the artists and their property.[35] Polet and others sued numerous parties, including ESG Security, for their actions and inactions contributing to the injuries or deaths of the victims of the stage collapse.[36] ESG filed a motion for summary judgment, which the trial court granted.[37]

In order to state a claim for negligence, it must be shown that the defendant owes a duty to the plaintiff.[38] Foreseeability is a component of duty, which is a question of law to be decided by the court.[39] The court noted there was nothing in the ESG Security's contract giving rise to a duty and that generally, a security firm would have no reason to consider that the stage might collapse under any given weather conditions.[40] The court concluded the stage collapse was, as a matter of law, unforeseeable; thus, ESG Security owed no duty to the plaintiffs and summary judgment in ESG's favor was affirmed.[41]

D. Duty Owed when Aiding Stranded Motorist

In *Neal v. IAB Financial Bank*,[42] the court of appeals held that bank employees did not establish a duty to third parties by helping a motorist change his tire, because it was not reasonably foreseeable that the motorist would subsequently injure others while operating the vehicle.

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31. *Goodwin*, 62 N.E.3d at 391 (quoting *Goldsberry*, 672 N.E.2d at 479).

32. *Id.* at 391.

33. *See generally* 66 N.E.3d 972 (Ind. Ct. App. 2016), *trans. denied*, Snowberger v. ESG Sec., Inc., 86 N.E.3d 170 (Ind. 2017).

34. *Polet*, 66 N.E.3d at 974.

35. *Id.*

36. *Id.* at 976.

37. *Id.* at 976-77.

38. *Id.* at 977.

39. *Id.* at 978.

40. *Id.* at 981.

41. *Id.* at 983.

42. *See generally* 68 N.E.3d 1114 (Ind. Ct. App.), *trans. denied*, Neal v. IAB Fin. Bank, 88 N.E.3d 1075 (Ind. 2017).

Gabriel Biddle drove into the Bank's parking lot with a flat tire.[43] Bank employees suggested Biddle move his car to a different area of the parking lot and then helped him change his tire.[44] The employees noticed that Biddle seemed "somewhat unaware and unsettled," but assumed he was frustrated with the tire situation.[45] After the employees helped Biddle change his tire, they noticed him stagger when getting into his car, but at the time did not suspect Biddle was intoxicated and did not take possession of his keys or exert control over his car.[46] It was only after Biddle drove away that the employees considered the possibility that Biddle might have been intoxicated. They eventually called 911 and alerted authorities that Biddle "might be driving drunk."[47] Biddle was later involved in a traffic accident that injured Neal. Neal sued the Bank, asserting that she would not have been injured if the Bank's employees had not helped Biddle.[48] She argued that the Bank assumed a duty of care by helping Biddle change his tire. The trial court granted summary judgment in favor of the Bank and the court of appeals affirmed.[49]

The court of appeals considered the three-part *Webb v. Jarvis*[50] test and determined the Bank neither owed nor assumed a duty to Neal.[51] The court concluded there was no special relationship between the Bank and Biddle or Neal.[52] Further, the Bank did not assume a duty by changing Biddle's tire because its employees did not help Biddle drive and had no right to control or supervise his actions.[53] The court further noted it is not reasonably foreseeable to a third person that helping a stranded motorist will enable the stranded motorist to later injure others.[54]

Finally, the court reasoned that public policy weighed heavily against imposing a duty on good Samaritans because it encourages the public to assist stranded motorists and call 911 if they suspect a motorist might be intoxicated.[55]

E. Foreseeability of Duty Owed to Park-Goers

In *Daviess-Martin County Joint Parks & Recreation Department v. Estate of Abel*,[56] the court of appeals held the defendant entities owed no duty to a park-

43. *Id.* at 1116.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 1117.
49. *Id.* at 1117, 1123.
50. Webb v. Jarvis, 575 N.E.2d 992, 995-98 (Ind. 1991).
51. *Neal*, 68 N.E.3d at 1121.
52. *Id.*
53. *Id.* at 1118-21.
54. *Id.* at 1121-22.
55. *Id.* at 1122-23.
56. 77 N.E.3d 1280 (Ind. Ct. App.), *trans. denied*, 2017 Ind. LEXIS 843 (Ind. 2017).

goer, because it was not reasonably foreseeable that he would contract a deadly and rare infection while swimming in the lake.

Waylon Abel visited a park that is jointly owned by Daviess and Martin counties, and governed through the Parks Board.[57] While visiting the park, Abel swam in a lake and contracted primary amoebic meningoencephalitis (PAM), an extremely rare brain infection caused by an amoeba that leads to destruction of brain tissue.[58] Abel died as a result and his estate filed a complaint, alleging negligence against the defendants, including Daviess County as the landowner, the Parks Board as the operator of the park, and the Health Department for failing to protect the public from injury.[59] The alleged negligence included failing to maintain the lake so as to permit safe swimming and failing to warn the public of a dangerous condition (i.e., the existence of the amoeba in the water).[60] The trial court denied the defendants' motions for summary judgment and certified the matter for interlocutory appeal.[61]

The court of appeals first determined that the Daviess County Parks Board did not owe a duty to invitees based upon the condition of the land (i.e., the amoeba) because it was unaware of the amoeba's existence, there was no routine manner of testing water for the amoeba, and contracting PAM is extremely rare.[62] The court also looked to the Indiana Supreme Court's recent pronouncements in *Rogers v. Martin*[63] and *Goodwin v. Yeakle's Sports Bar and Grill*[64] and, for the aforementioned reasons, concluded it was not reasonably foreseeable that Abel would contract a PAM infection by swimming in the lake.[65] Likewise, the court concluded the Health Department did not owe a duty to Abel because it was not foreseeable that he would contract a PAM infection by swimming in the lake.[66] The court of appeals reversed the opinion of the trial court and instructed it to enter summary judgment in favor of Daviess County, the Parks Board, and the Health Department.[67]

F. Foreseeability of Criminal Attacks

In *Jones v. Wilson*,[68] the court of appeals held that an event promoter owed no duty to an assault victim, because it was not reasonably foreseeable that she would be criminally assaulted in a parking lot.

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57. *Id.* at 1283.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* at 1284.
62. *Id.* at 1288-89.
63. *See generally* 63 N.E.3d 316 (Ind. 2016); *see also supra* text accompanying notes 1-16.
64. 62 N.E.3d 384 (Ind. 2016).
65. *Daviess-Martin*, 77 N.E.3d at 1289-90.
66. *Id.* at 1290.
67. *Id.*
68. 81 N.E.3d 688 (Ind. Ct. App. 2017).

Jerry Wilson, d/b/a Hoosier Pro Wrestling, promoted and presented a wrestling event that was held in a building at the Bartholomew County Fairgrounds.[69] Jones attended the event, and as she walked through the parking lot to her car at night, she was assaulted by an unknown assailant.[70] Jones sued, alleging Wilson owed her a duty with respect to the maintenance, repair, and condition of the facility with regarding the safety of attendees of his event.[71] The trial court granted Wilson's motion for summary judgment and the court of appeals affirmed.[72] The court determined this was not a "condition of the land" case because it involved the conduct of a third person (the assailant).[73] As such, the court applied the *Rogers/Goodwin*[74] duty analysis (discussed *supra*) and concluded that it was not reasonably foreseeable that Jones would be attacked in the parking lot, so Wilson owed no duty to Jones.[75]

G. Non-delegable Duty Assumed by General Contractor

In *Ryan v. TCI Architects/Engineers/Contractors, Inc.*,[76] the Indiana Supreme Court held that, based upon the language of a construction contract, a general contractor assumed a non-delegable duty of care relating to worksite safety for a subcontractor's employee.

Ryan, an employee of a subcontractor, sued TCI, the general contractor, alleging TCI was negligent in failing to provide him with a safe workplace by providing him with a ladder that was too short for the task he was assigned to do (remove duct work).[77] While working at the construction site, Ryan was injured after allegedly falling from atop an eight-foot ladder; Ryan alleged he was told the eight-foot ladder was the only one available, although it was too short to use.[78] The trial court granted summary judgment in favor of TCI, finding that TCI owed Ryan no duty.[79] The court of appeals affirmed, holding that the contract between TCI and the subcontractor did not create a duty.[80] The Indiana Supreme Court reversed, holding that the contract language imposed upon TCI a non-delegable duty of care to Ryan.[81]

The supreme court began by discussing the long-standing rule in Indiana that "a principal will not be held liable for the negligence of an independent

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69. *Id.* at 690.
70. *Id.*
71. *Id.* at 690-91.
72. *Id.* at 691, 695.
73. *Id.* at 695.
74. *See supra* text accompanying notes 22-32.
75. *Jones,* 81 N.E.3d at 694-95.
76. 72 N.E.3d 908 (Ind. 2017).
77. *Id.* at 911-12.
78. *Id.*
79. *Id.* at 912.
80. *Id.*
81. *Id.* at 917.

contractor."[82] Thus, ordinarily, a general contractor such as TCI owes no outright duty of care to a subcontractor's employees, much less to employees of a sub-subcontractor.[83] However, there are five exceptions to this rule, one being that a contractor may assume a duty through contract.[84] As such, the court considered the contractual obligations of the parties. Gander Mountain, a retailer, entered into a contract with TCI as the general contractor for the project.[85] TCI subsequently hired several subcontractors, including BMH Enterprises, Inc., d/b/a Craft Mechanical, which subcontracted with Ryan's employer, B.A. Romines Sheet Metal, to provide heating and ventilation work for the project.[86]

The agreement between TCI and Gander Mountain directed TCI to "assume[] responsibility for implementing and monitoring all safety precautions and programs related to the performance of the work," which the court determined demonstrated TCI's intent to assume the duty to keep the worksite reasonably safe.[87] The contract between TCI and Craft placed the onus of ensuring employee safety on Craft.[88] The contract between Craft and Romines was similar to the TCI-Craft contract, including requiring Romines to implement safety precautions.[89] In addition to concluding that TCI assumed a duty of care, the court further held that TCI's contract with Craft had no effect on TCI's assumed duty of care under its contract with Gander Mountain.[90]

H. Scope of Assumed Duty

In *Gleaves v. Messer Construction Co.*,[91] the court of appeals held that a construction management company did not assume a duty to another contractor's employee because it did not act beyond the scope of the contract with Indiana University (I.U.) in enforcing safety measures.

Messer Construction Company contracted with I.U. to perform construction management services in connection with the construction of the Neuroscience Building in Indianapolis.[92] Mark Gleaves was employed by Whittenberg Construction, which contracted with I.U. to perform concrete work on the building.[93] While Gleaves was working at the construction site, a sixteen-foot-long 2x4 lumber infill struck him in the head, causing serious injuries.[94] Gleaves

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82. *Id.* at 913.
83. *Id.*
84. *Id.* at 913-14.
85. *Id.* at 911, 914.
86. *Id.* at 911.
87. *Id.* at 914-15.
88. *Id.* at 911.
89. *Id.*
90. *Id.* at 916-17.
91. 77 N.E.3d 1244 (Ind. Ct. App.), *trans. denied*, 2017 Ind. LEXIS 721 (Ind. 2017).
92. *Id.* at 1246-47.
93. *Id.*
94. *Id.* at 1246.

sued Messer, alleging it breached an assumed a duty of reasonable care for his safety on the jobsite.[95] He also sued PERI, the manufacturer of the formwork used to form the walls, alleging PERI failed to provide adequate warnings and instructions and that the danger presented was not open and obvious.[96] The trial court granted summary judgment in favor of both Messer and PERI, and the court of appeals affirmed.[97]

With regard to PERI, the court of appeals determined that the danger was open and obvious because the evidence showed Gleaves knew and understood the danger associated with the work he was doing.[98] With regard to Messer, the court analyzed the contract between Messer and I.U., finding that "Messer's duties were owed to I.U. and not to any contractors or other third parties."[99] Messer's actions pertaining to safety at the construction site fell within the scope of its contractual obligations to IU, so Messer did not assume a duty to Gleaves.[100] The court also noted this case was "easily distinguishable" from *Ryan v. TCI Architects/Engineers/Contractors, Inc.*[101] because in *Ryan*, "the general contractor assumed a duty of care through its contractual obligations to the business entity that hired it; here, Gleaves does not argue that Messer's *contract* created a duty, but rather that Messer went *beyond* the scope of its contract to assume a duty."[102]

II. RESPONDEAT SUPERIOR

A. Applicability to Claims for Negligent Training

In *Sedam v. 2JR Pizza Enterprises, LLC*,[103] the Indiana Supreme Court held that an employer's admission that an employee was acting in the course and scope of employment gives rise to a respondeat superior claim but precludes a claim for negligent hiring.

A Pizza Hut delivery driver was delivering pizzas when she struck the back of a scooter, causing the operator of the scooter to be thrown from the scooter and into the roadway, where he was run over and killed by another motorist.[104] The decedent's estate filed a wrongful death action against Pizza Hut, among others, alleging Pizza Hut was liable for the decedent's death under the doctrine of respondeat superior and for its negligent hiring, training, and/or supervision of its delivery driver.[105] The trial court dismissed the estate's claims for negligent

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95. *Id.* at 1249.
96. *Id.* at 1246.
97. *Id.* at 1246-47.
98. *Id.* at 1251.
99. *Id.* at 1248.
100. *Id.* at 1253.
101. 72 N.E.3d 908 (Ind. 2017).
102. *Gleaves*, 77 N.E.3d at 1251 n.2 (emphasis in original).
103. 84 N.E.3d 1174 (Ind. 2017).
104. *Id.* at 1176.
105. *Id.*

hiring, training, and/or supervision in light of Pizza Hut's admission that the delivery driver was acting within the course and scope of her employment.[106] The court of appeals reversed.[107]

The supreme court affirmed the trial court and examined two prior opinions, *Broadstreet v. Hall*[108] and *Tindall v. Enderle*,[109] and ultimately reaffirmed the holding in *Tindall* that "an employer's admission that an employee was acting within the course and scope of his employment precludes negligent hiring claims."[110] As noted by the court, respondeat superior and negligent-hiring claims both seek the same result—holding the employer liable for the actions of an employee.[111] Allowing the plaintiff to pursue a negligent hiring claim when an employer admits respondeat superior applies would "prejudice the employer, confuse the jury, and waste judicial resources" because the employer has already stipulated that it is liable for the employee's actions.[112]

B. Applicability to Actions Taken in Private Capacity

In *Harrison County Sheriff's Department v. Ayers*,[113] the court of appeals held that respondeat superior liability did not apply to the Sheriff for the actions his deputy sheriff undertook solely in a private capacity.

John, a deputy sheriff, got into an argument with his wife, during which his wife made suicidal comments.[114] John laid his service weapon on the couple's bed and was walking toward the front door when the wife shot and killed herself.[115] The personal representative of the wife's estate (the Estate) sued John and the Harrison County Sheriff's Department, asserting the Sheriff was vicariously liable for his deputy sheriff's actions under the doctrine of respondeat superior.[116] The trial court denied the Sheriff's motion for a judgment on the evidence and the jury returned a verdict in favor of the Estate.[117] The Sheriff appealed on grounds that John was not acting within the scope of his employment when his wife shot herself.[118]

The court of appeals analyzed the doctrine of respondeat superior, under which vicarious liability is imposed upon an employer if an employee has

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106. *Id.*
107. *Id.*
108. 80 N.E. 145 (Ind. 1907).
109. 320 N.E.2d 764 (Ind. Ct. App. 1974).
110. *Sedam*, 84 N.E.3d at 1177-78.
111. *Id.* at 1178.
112. *Id.* at 1178-79.
113. 70 N.E.3d 414 (Ind. Ct. App.), *trans. denied,* 88 N.E.3d 1076 (Ind. 2017).
114. *Id.* at 416.
115. *Id.*
116. *Id.* at 417.
117. *Id.*
118. *Id.*

inflicted harm while acting "within the scope of his employment."[119] An act is within the scope of employment if it is "incidental to the conduct authorized by an employer, or if, to an appreciable extent, it furthers the employer's business."[120] An employee who acts in "an independent course of conduct not intended by the employee to serve any purpose of the employer" is not considered to be within the course and scope of employment.[121] The Estate argued that a sheriff's deputy is always on duty.[122] The court rejected this, reasoning that in all actions relevant to this case, John was acting as a husband, not as a sheriff's deputy.[123] Also, the Sheriff did not authorize any of John's acts.[124] Because John's conduct could not be attributed to his employer, the Sheriff could not be vicariously liable under the doctrine of respondeat superior.[125]

C. Non-Delegable Duty Owed to Police Assault Victims

In *Cox v. Evansville Police Department*,[126] the court of appeals consolidated two unrelated cases in which women were sexually assaulted by on-duty police officers. The court held that municipalities and police departments owed a non-delegable duty of care to women assaulted by on-duty police officers.[127]

In *Cox*, a male officer was sent to the residence of Cox's girlfriend to investigate a reported domestic disturbance between Cox and her girlfriend.[128] The officer drove Cox home, followed her into her apartment, and sexually assaulted her.[129] In the second case consolidated in this action, *Beyer v. City of Fort Wayne*, officers found Beyer intoxicated and apparently asleep at the wheel.[130] Beyer was taken to the local jail, then the hospital, and finally released into one officer's custody for observation.[131] The officer drove to a secluded area, pulled Beyer out of the back of his police car, and sexually assaulted her.[132]

Each woman sued the respective municipality, alleging the municipality's liability under the doctrine of respondeat superior and the non-delegable-duty exception.[133] Generally, an employee must be acting in the course and scope of

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119. *Id.*

120. *Id.*

121. *Id.* (citing Barnett v. Clark, 889 N.E.2d 281, 284 (Ind. 2008)).

122. *Id.*

123. *Id.* at 418.

124. *Id.*

125. *Id.* at 418-19.

126. 84 N.E.3d 678 (Ind. Ct. App. 2017). The other case consolidated in this appeal was *Beyer v. City of Fort Wayne*.

127. *Id.*

128. *Id.* at 680-81.

129. *Id.* at 681.

130. *Id.*

131. *Id.* at 682.

132. *Id.*

133. *Id.* at 681-82.

employment when committing the alleged tort in order to hold the employer liable under respondeat superior.[134] However, an employer is also liable under respondeat superior if the employer has assumed a non-delegable duty of care to the tort victim.[135] Each woman argued that this exception applied. In each case, the trial court rejected this argument and granted summary judgment in favor of the municipality.[136]

The court of appeals reversed in both cases.[137] The court held that "an entity assumes a non-delegable duty of care to its patrons when the patrons must surrender their control and autonomy to the entity while they are in its care."[138] In considering whether an entity assumed a non-delegable duty of care, which is a question of law, a court considers a number of factors, focusing on the nature of the relationship between the tort victim and the entity when the tort was committed.[139] In both of these cases, the municipalities assumed a non-delegable duty of care to the assaulted women.[140] The court determined that the encounter between Cox and the officer was a continuous encounter that did not end until after he sexually assaulted Cox; during the entire encounter, Cox surrendered her autonomy and control to the officer, who retained responsibility for Cox's safety.[141] Beyer's case was "far more easily decided."[142] Based upon the facts that Beyer was under arrest, extremely intoxicated, had no ability to protect herself from harm, and was dependent on the officer for her safety, Beyer had surrendered control and autonomy to the officer.[143]

Also, the *Beyer* trial court denied the City's motion for summary judgment on the issue of respondeat superior liability.[144] The court of appeals affirmed, finding that some of the officer's acts "were at least initially authorized" by the City, and whether he was acting within the course and scope of employment was a question for the jury.[145]

III. CONTRIBUTORY NEGLIGENCE

A. Contributory Negligence of Minor Pedestrian

In *Lee v. Bartholomew Consolidated School Corp.*,[146] the court of appeals

134. *Id.* at 680.
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* at 687.
139. *Id.*
140. *Id.* at 691.
141. *Id.* at 689.
142. *Id.* at 690.
143. *Id.*
144. *Id.* at 680.
145. *Id.* at 682.
146. 75 N.E.3d 518 (Ind. Ct. App. 2017).

determined there were questions of fact as to whether a thirteen-year-old was contributorily negligent after he was struck as a pedestrian.

Jalen Lee, a thirteen-year-old boy, and his friend were walking to the local high school to board a school bus to their middle school when Lee was struck by a vehicle and injured as he crossed the street in a crosswalk.[147] Lee walked the route every day for the preceding two school years and had a habit of stopping and looking both ways before crossing the road and ensuring cars had stopped.[148] Lee saw the truck that ultimately struck him but misjudged how fast it was traveling. The truck's driver did not see Lee until impact.[149] Lee's friend was not in the crosswalk when the impact occurred because he stopped to pick up a coin.[150]

Lee sued several entities, including the City of Columbus, alleging the City was negligent in performing duties owed to students who use school buses for transport to the middle school and that the City failed to take reasonable measures to warn pedestrians of the known dangers of the crosswalk.[151] The trial court determined that Lee was contributorily negligent as a matter of law and granted summary judgment in favor of the City.[152] A majority of the court of appeals reversed, concluding the question of contributory negligence should be left to the jury.[153]

The majority discussed the rebuttable presumption "that children between the ages of seven and [fourteen] are incapable of contributory negligence."[154] Because the City was a governmental entity, the principles of contributory negligence applied, rather than the Comparative Fault Act.[155] The majority concluded there was a genuine issue of material fact as to whether Lee was contributorily negligent because he looked both ways before crossing the street and believed he had enough time to safely cross the road. The court also noted his friend's testimony that he, too, would have felt safe crossing the street had he not stopped to pick up a coin.[156] For the same reasons, the majority concluded Lee's conduct was not a per se violation of Indiana Code section 9-21-17-5.[157]

The court determined the City was entitled to discretionary-function immunity because it was planning to improve that crosswalk by providing additional warnings, but the project was delayed because of the process required

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147. *Id.* at 520-21.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 521.

152. *Id.* at 522.

153. *Id.* at 524.

154. *Id.* (citation omitted).

155. *Id.* at 523.

156. *Id.* at 524-25.

157. *Id.* at 525. IND. CODE § 9-21-17-5 (2017) provides, "A pedestrian may not suddenly leave a curb or other place of safety and walk or run into the path of a vehicle that is so close as to constitute an immediate hazard."

to obtain federal and state funds.[158] Likewise, the City had immunity for failing to use crossing guards at the crosswalk under the enforcement provisions of the Indiana Tort Claims Act, because crossing guards were controlled by the Columbus Police Department.[159] However, although the City had immunity for failure to include additional warnings, failure to erect additional stop signs, and failure to use crossing guards, there was a genuine issue of material fact as to whether the City was liable for negligence for its placement of two different speed-limit signs near the crosswalk.[160] On this basis, the majority reversed a grant of summary judgment in favor of the City, leaving to the jury the questions of breach and proximate cause based upon the placement of dual speed limit signs.[161]

In dissent, Judge Crone opined that the City rebutted the presumption that Lee was not contributorily negligent by presenting evidence that Lee used the crosswalk twice each day for two years and saw the approaching vehicle, but nevertheless walked into the crosswalk and into the path of the oncoming vehicle.[162] Additionally, Judge Crone concluded, as a matter of law, that the City did not proximately cause Lee's injuries based on the speed-limit signs because the driver did not know how fast he was going when he struck Lee, "and the notion that he would have driven more slowly and not hit Lee if the posted speed limit had been twenty miles per hour is mere speculation, which cannot create a question of fact on summary judgment."[163]

B. Contributory Negligence of Student After Schoolyard Fight

In *Severance v. New Castle Community School Corp.*,[164] the court of appeals held there were genuine issues of material fact as to whether a student injured in an altercation with another student was contributorily negligent and whether the school breached its duty to provide adequate supervision.

Teenagers Wyatt Severance and Turner Melton attended a vocational education program that took place at a residential home construction site and was administered through the New Castle Community School Corporation (the School).[165] Melton had a reputation for having anger issues and picking fights with others.[166] One day prior to class, Melton stole Severance's bag of sunflower seeds.[167] Thereafter, Severance and Melton were assigned to clean the basement

158. *Lee*, 75 N.E.3d at 527, 530.
159. *Id.* at 531-32; *see also* IND. CODE § 34-13-3-3(8) (2017).
160. *Lee*, 75 N.E.3d at 532-33.
161. *Id.* at 534-35.
162. *Id.* at 535-36.
163. *Id.* at 536.
164. 75 N.E.3d 541 (Ind. Ct. App.), *trans. denied*, 89 N.E.3d 405 (Ind. 2017).
165. *Id.* at 543-44.
166. *Id.* at 544.
167. *Id.*

of the worksite.[168] Severance confronted Melton, and a physical altercation ensued, resulting in Severance sustaining a serious leg injury.[169] Severance sued Melton and the School for negligence. The School moved for summary judgment, arguing it did not breach its duty and that Severance was contributorily negligent.[170] The trial court granted summary judgment in favor of the School after striking Severance's expert's affidavit, which contained statements on the culture of bullying and how the altercation could have been prevented.[171]

The court of appeals reversed.[172] First, the court found that the expert's affidavit was relevant to the issue of whether the School failed to provide adequate supervision.[173] The expert's affidavit was relevant because it presented fifteen actions the School could have taken to adequately supervise the students and prevent Severance's injury.[174] Second, the evidence presented genuine issues of material fact as to whether the School adequately supervised the students.[175] Finally, the School was a governmental entity entitled to the defense of contributory negligence, and Severance's claim would be barred if he contributed to his injuries.[176] However, there was a question of fact as to whether Severance was contributorily negligent because a reasonable juror could find that Severance acted as a similarly-situated reasonable person would act, or that Severance was not the aggressor.[177]

IV. MEDICAL MALPRACTICE

A. Theory of Liability Presented to Trial Court

In *McKeen v. Turner*,[178] the Indiana Supreme Court issued a per curiam opinion, holding that a claimant in a medical malpractice action may raise any theory of malpractice to the trial court, even a theory not presented to the Medical Review Panel (the MRP), so long as the proposed complaint encompassed the theories and the MRP was presented evidence relating to the theory.

Turner filed a proposed medical malpractice complaint with the Indiana Department of Insurance alleging McKeen's treatment of Turner's wife in connection with her bone marrow cancer and associated blood clots failed to meet the appropriate standard of care.[179] Turner's submission to the MRP alleged his

168. *Id.*
169. *Id.*
170. *Id.* at 545.
171. *Id.*
172. *Id.* at 548.
173. *Id.* at 545.
174. *Id.* at 545-46.
175. *Id.* at 547.
176. *Id.* at 548.
177. *Id.*
178. 71 N.E.3d 833 (Ind. 2017).
179. *Id.* at 834.

wife died due to a delayed exploratory surgery after she was readmitted to the hospital.[180] The MRP unanimously determined that McKeen did not fail to meet the applicable standard of care.[181] Turner filed a complaint and enlisted an expert hematologist to testify that McKeen prescribed an improper dosage of anticoagulation medication, which caused Turner's wife's death.[182] McKeen filed a motion to strike the expert's opinion, arguing Turner's submission to the MRP did not allege McKeen's malpractice on the basis of anticoagulation medication.[183]

The trial court denied McKeen's motion to strike and the court of appeals affirmed, holding that "a plaintiff may raise any theories of alleged malpractice during litigation following the MRP process if (1) the proposed complaint encompasses the theories, and (2) the evidence relating to those theories was before the MRP."[184] The court of appeals determined that Turner met the two requirements and allowed his claim to proceed.[185] The Indiana Supreme Court adopted and incorporated the court of appeals opinion, and in so doing, expressly disapproved of *K.D. v. Chambers*.[186]

B. Provider Purchasing Medicine Falls Within MMA

In *Robertson v. Anonymous Clinic*,[187] the court of appeals held that a claim that a clinic was negligent in procuring medication from a compounding pharmacy is subject to the Medical Malpractice Act.

Beginning in 2012, a number of patients around the country suffered from meningitis after receiving steroid injections.[188] It was soon discovered that some lots of the steroid, produced by New England Compounding Pharmacy, Inc., were contaminated with fungus.[189] Injured Indiana patients sued the providers who treated them, alleging negligence in choosing to administer the steroid and failing to properly evaluate the supplier.[190] The plaintiffs in this consolidated appeal sued without following the procedures of the Medical Malpractice Act (the MMA)[191] and each trial court accordingly dismissed their claims.[192] The court of appeals was tasked with determining whether the plaintiffs' claims were subject to the

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180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* (quoting McKeen v. Turner, 61 N.E.3d 1251, 1262 (Ind. Ct. App. 2016), *vacated*, 71 N.E.3d 833 (Ind. 2017)).

185. *Id.* at 834.

186. *Id.*; *see generally* 951 N.E.2d 855 (Ind. Ct. App. 2011).

187. 63 N.E.3d 349 (Ind. Ct. App. 2016), *trans. denied*, 80 N.E.3d 180 (Ind. 2017).

188. *Id.* at 352.

189. *Id.*

190. *Id.*

191. *See* IND. CODE §§ 34-18-1-1 to 34-18-18-2 (2017).

192. *Robertson*, 63 N.E.3d at 352.

MMA.[193] If purchasing the steroid constituted "health care," the plaintiffs' claims fell under the MMA; otherwise, the claims sounded in general negligence and thus were not subject to the MMA.[194]

Ultimately, the court of appeals had "little trouble" concluding that selecting the steroid involved the exercise of professional medical skill and judgment, which qualifies as the practice of medicine covered by the MMA.[195] The court noted that the practice of medicine consists of three things—"judging the nature, character, and symptoms of the disease," "determining the proper remedy for the disease," and "giving or prescribing the application of the remedy to the disease."[196] Here, the decision to purchase the steroid from a particular pharmacy is "an integral part of the remedy-selection process" and therefore within the MMA.[197]

Lastly, the Commissioner of the Indiana Department of Insurance, which administers the Indiana Patient's Compensation Fund (the PCF), intervened and argued that the plaintiffs' claims were not subject to the MMA.[198] Because there were approximately 112 claims facing the defendant medical providers, the Commissioner believed it was likely there would be significant payouts from the PCF, which the Commissioner argued was not intended to insure the "safety of practically all products used in health care."[199] The court rejected the Commissioner's argument, holding that even if the case results in payouts that threaten the viability of the PCF, the court is "not free to ignore the law in an attempt to save [the PCF]."[200]

V. ASSORTED OTHER MATERIALS

A. Premises Liability for Governmental Entities

In *Hoosier Mountain Bike Ass'n, Inc. v. Kaler*,[201] the court of appeals held that the City of Indianapolis (the City) was not liable for injuries sustained by a bicyclist while riding on a trail because the cyclist did not satisfy the elements of the premises liability test, and because he was contributorily negligent.

Richard Kaler, an experienced mountain bicyclist, was injured after he fell while cycling in the Town Run Trail Park, which is owned and operated by the City.[202] A new technical feature (a banked wooden turn, called a berm) was added to the trail in the spring of 2011 and allowed cyclists, if they chose, to ride up on

193. *Id.* at 356.
194. *Id.* at 358.
195. *Id.* at 361.
196. *Id.*
197. *Id.*
198. *Id.* at 352.
199. *Id.* at 363.
200. *Id.*
201. 73 N.E.3d 712 (Ind. Ct. App. 2017).
202. *Id.* at 714-15.

the berm and jump off the berm back onto the trail.[203] Kaler fell when exiting the berm and sustained lacerations to his spleen and kidney.[204] He sued the City, alleging premises liability.[205] The trial court denied the City's motion for summary judgment; the court of appeals reversed, holding that Kaler did not satisfy the elements of the premises-liability test, and that his claim was barred because he was contributorily negligent.[206]

The court of appeals applied the *Burrell v. Meads*[207] three-part test, under which a landowner is liable for harm caused to an invitee only if the landowner:

> (a) Knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
> (b) Should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
> (c) Fails to exercise reasonable care to protect them against the danger.[208]

The court concluded Kaler did not satisfy the elements of the premises-liability test because it was objectively reasonable for the City to expect Kaler to appreciate the risks of riding the trail and take precautions—the City advertised the difficulty of the trail and Kaler described himself as an "experienced" bicyclist.[209] The court of appeals also held the City did not have actual or constructive notice of a condition on the trail that posed an unreasonable risk of harm to Kaler.[210] Finally, Kaler's claim was barred by his contributory negligence.[211] The City, as a governmental entity, is excluded from the Comparative Fault Act and can assert the defense of contributory negligence.[212] Kaler was contributorily negligent because he knew the precautions a reasonably prudent mountain biker should take, but failed to take them.[213]

B. Admissibility of Medical Expenses Paid by Government Payers

In *Patchett v. Lee*,[214] the Indiana Supreme Court held that the admissibility of payments made by health insurers also applied to payments made by

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203. *Id.* at 714.
204. *Id.* at 714-15.
205. *Id.* at 715.
206. *Id.* at 716, 720.
207. 569 N.E.2d 637 (Ind. 1991).
208. *Kaler*, 73 N.E.3d at 717 (citing *Burrell*, 569 N.E.2d at 639-40).
209. *Id.* at 718.
210. *Id.*
211. *Id.* at 719.
212. *Id.* at 718-19.
213. *Id.* at 719.
214. 60 N.E.3d 1025 (Ind. 2016).

government payers under the *Stanley v. Walker*[215] standard.

Ashley Lee was injured in an automobile collision and sued Patchett for her injuries.[216] Lee was enrolled in the Healthy Indiana Plan (HIP), which is a government-sponsored healthcare program.[217] Lee's medical bills totaled $87,706.36, but HIP paid $12,051.48 in full satisfaction of the charges.[218] Patchett admitted liability but disputed damages. Prior to a trial on damages, Lee filed a motion in limine seeking to prevent admission of testimony regarding the payments by HIP.[219] The trial court granted Lee's motion, concluding that HIP payments are subject to the collateral-source statute[220] and inadmissible under *Stanley*.[221] The court of appeals affirmed, determining that *Stanley* did not apply to government payers like HIP because government-sponsored healthcare payments are not based upon market negotiation, so evidence of the payments are "not probative of reasonable value."[222]

The Indiana Supreme Court reversed.[223] In *Stanley*,[224] the supreme court held that the proper measure of special damages (i.e., medical expenses), is the "reasonable value" of necessary medical services.[225] In *Patchett*, the court reaffirmed that "reasonable value" can be proven in a number of ways, including the amount billed for healthcare services or, where the parties contest the reasonableness of the charges, "the reduced amount that represents payment in full to a medical provider for services rendered."[226] To be consistent with the collateral-source statute,[227] the evidence of the reduced amount paid for medical services cannot reference insurance.[228] The court expanded *Stanley* to also apply to government payers, holding the important inquiry is not whether the reimbursement was negotiated but whether the medical provider agreed to accept the reduced payment as payment in full.[229] Justices Rucker and David joined in a separate concurrence, agreeing with the court's ultimate decision but opining that *Stanley* was wrongly decided.[230]

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215. 906 N.E.2d 852 (Ind. 2009).
216. *Patchett*, 60 N.E.3d at 1027-28.
217. *Id.* at 1028.
218. *Id.*
219. *Id.*
220. *See* IND. CODE § 34-44-1-2 (2017).
221. *Patchett*, 60 N.E.3d at 1028.
222. *Id.*
223. *Id.* at 1033.
224. Stanley v. Walker, 906 N.E.2d 852 (Ind. 2009).
225. *Patchett*, 60 N.E.3d at 1029 (citing *Stanley*, 906 N.E.2d at 858).
226. *Id.*
227. IND. CODE § 34-44-1-2(1) (2017).
228. *Patchett*, 60 N.E.3d at 1029.
229. *Id.* at 1030.
230. *Id.* at 1033-34.

C. Lost Earning Capacity—Relevancy of Immigration Status

In *Escamilla v. Shiel Sexton Co.*,[231] the Indiana Supreme Court held that unauthorized immigrants may make claims for decreased-earning-capacity damages, and evidence of immigration status is irrelevant and inadmissible unless it is more likely than not that the plaintiff will be deported.

Noe Escamilla was an undocumented immigrant working in the United States as a masonry laborer when he slipped on ice and was injured on the job.[232] Because of his injury, Escamilla suffered a permanent disability and could not continue working as a masonry laborer.[233] He sued Shiel Sexton, the general contractor for the construction project, seeking medical expenses, lost wages, and future lost income resulting from his decreased earning capacity.[234]

Escamilla enlisted two expert witnesses to testify regarding his lost wages and decreased earning capacity.[235] Shiel Sexton filed a pre-trial motion to exclude the expert testimony, arguing that Escamilla should not be allowed to assert a claim of decreased earning capacity because of his immigration status, that Escamilla's immigration status was admissible because he could be deported at any time, and that the expert economist's testimony should be excluded because he failed to account for Escamilla's immigration status in his calculations.[236] Escamilla filed a motion in limine seeking to prevent mention of his immigration status, which the trial court denied; the trial court also excluded the expert's testimony because they considered wages in the United States, where Escamilla "is not legally permitted to work."[237] In a divided opinion, the court of appeals affirmed, holding that immigration status is admissible if the plaintiff makes a claim for lost U.S. wages and faced "any risk" of deportation.[238]

The Indiana Supreme Court reversed the trial court and held that Escamilla's immigration status did not affect his ability to pursue a claim for decreased earning capacity because the Open Courts Clause of the Indiana Constitution[239] "does not permit us to close the courthouse door based solely on the plaintiff's immigration status" when Indiana law provides a remedy.[240] As to the admissibility of immigration status, the court looked to Rules 401, 402, and 403 of the Indiana Rules of Evidence, focusing primarily on Rule 403 and noting that in other jurisdictions, "[m]ost courts" applying Rule 403 exclude immigration status either because it is irrelevant or because any relevance is substantially

231. 73 N.E.3d 663 (Ind. 2017).
232. *Id.* at 665.
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.* at 666.
239. IND. CONST. art. I, § 12.
240. *Escamilla,* 73 N.E.3d at 667.

outweighed by certain dangers.[241] The court concluded that unauthorized immigration status is relevant to claims of decreased earning capacity but is overly prejudicial and inadmissible unless the plaintiff is more likely than not to be deported.[242] Lastly, the court concluded Escamilla's experts should have been allowed to testify because any failure to take Escamilla's immigration status into account, even if relevant, went to the weight of their testimony, not the admissibility.[243] As a practical point, the court also noted that "Indiana's tort trials should be about making injured parties whole—not about federal immigration policies and laws."[244]

D. Immunity from Damages Claims for Firearms Sellers

In *KS&E Sports v. Runnels*,[245] the Indiana Supreme Court held that firearms sellers are immune from damages claims arising from the use of firearms by a third party, but do not have immunity from claims seeking equitable relief.

Demetrius Martin and Tarus Blackburn went to KS&E to look at firearms.[246] The men left the store, but Blackburn later returned and purchased a handgun, which he sold to Martin in a "straw sale" in the parking lot.[247] Martin was a convicted felon who could not legally purchase or possess a firearm. Two months later, Martin used the handgun to shoot and seriously injure IMPD Officer Dwayne Runnels.[248]

Runnels sued Blackburn, KS&E, and KS&E's owner, alleging claims of negligence, negligent entrustment, negligence per se, negligent hiring/training/supervision, conspiracy, public nuisance, and piercing the corporate veil.[249] KS&E filed a motion for judgment on the pleadings, arguing that Indiana Code section 34-12-3-3(2) (2017) granted KS&E immunity.[250] The trial court denied the motion and a panel of the court of appeals affirmed in a split decision that generated three separate opinions. Ultimately, the panel determined KS&E failed to demonstrate that Runnels "cannot in any way succeed" in the trial court.[251]

The Indiana Supreme Court determined that Indiana Code section 34-12-3-3(2) is unambiguous in barring actions against firearms sellers for "recovery of damages resulting from the criminal or unlawful misuse of a firearm or

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241. *Id.* at 668-69.
242. *Id.* at 670.
243. *Id.* at 676-77.
244. *Id.* at 664.
245. 72 N.E.3d 892 (Ind. 2017).
246. *Id.* at 896.
247. *Id.* at 896-97.
248. *Id.* at 897.
249. *Id.* at 897, 901, 904.
250. *Id.* at 897.
251. *Id.* at 897-98 (citing KS&E Sports v. Runnels, 66 N.E.3d 940 (Ind. Ct. App. 2016)).

ammunition for a firearm by a third party."[252] However, the court concluded that firearms sellers are immune only from suits for damages, but not for suits seeking equitable relief.[253] As such, the court affirmed the trial court's dismissal of all of Runnels' claims against KS&E and its owner except as to the public nuisance claim, which sought equitable relief.[254] Justice Rucker concurred in the judgment but dissented from the majority's interpretation of the statute, opining that statutory immunity should apply only to "innocent and unknowing gun sellers."[255]

E. Mitigation of Damages

In *State ex. rel. Indiana DOT v. DeHaven*,[256] the court of appeals held that the Indiana Department of Transportation (INDOT), like any other tort plaintiff, is required to mitigate its damages.

INDOT filed a complaint against a truck driver and the driver's employer for costs to repair a bridge damaged when it was struck by a crane on the driver's truck.[257] Initially, INDOT sent DeHaven a repair invoice totaling $75,198.82, but adjusted its estimate to $58,712.38 after a specialist hired by DeHaven opined that the estimated damage to the bridge was between $15,000 and $20,000.[258] INDOT's engineers estimated the repair cost to be $64,000.[259] Thereafter, INDOT proceeded through the statutory bidding process[260] and received only one qualified bid, which was $132,200.80. The final repair cost was $131.421.80.[261]

INDOT filed a motion for summary judgment as to damages, arguing it was entitled to recover the actual cost of the repairs.[262] The trial court denied INDOT's motion and the court of appeals affirmed, agreeing that INDOT is entitled to reasonable damages but "is under a duty to mitigate damages."[263] The court went on to note that INDOT had accepted a bid that was more than twice the cost estimated by INDOT's engineers and INDOT's two repair estimates.[264] The court concluded that INDOT attempted "to insulate itself from having to mitigate its damages" by accepting a bid through the statutory bidding process without giving DeHaven an opportunity to dispute the reasonableness of the costs.[265]

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252. *Id.* at 897 (quoting IND. CODE § 34-12-3-3(2) (2017)).

253. *Id.* at 901.

254. *Id.*

255. *Id.* at 908.

256. 62 N.E.3d 432 (Ind. Ct. App. 2016), *trans denied*, State v. DeHaven, 80 N.E.3d 179 (Ind. 2017).

257. *Id.* at 434.

258. *Id.* at 433.

259. *Id.*

260. *See* IND. CODE §§ 8-23-9-1 to 9-58 (2017).

261. *DeHaven*, 62 N.E.3d at 433.

262. *Id.*

263. *Id.* at 434-35.

264. *Id.* at 435.

265. *Id.* at 436.

F. Intentional Infliction of Emotional Distress—Extreme and Outrageous Conduct

In *McCullough v. Noblesville Schools*,[266] the court of appeals held that a high school basketball coach could not pursue a claim for intentional infliction of emotional distress because a school's alteration and publication of his statement and the school's failure to thoroughly investigate an incident was not extreme and outrageous conduct. The coach could, however, pursue a defamation claim. The court of appeals also determined that whether the school acted with malice by altering his statement was a question of fact.

David McCollough, the head boys basketball coach at Noblesville High School for twenty years, became frustrated with a player during practice and threw a ball in the player's direction more forcefully than appropriate; it is disputed whether the basketball hit the player.[267] After a brief investigation of the incident, McCollough was placed on administrative leave and worked with the school to prepare an agreed statement to be read to the public.[268] In his statement, McCollough admitted to throwing a ball, which "allegedly" hit a player.[269] The school removed the word "allegedly" and released the statement.[270] Thereafter, McCollough's coaching contract was not renewed, and he was unable to secure a coaching position with thirty-one other schools to which he applied.[271] McCollough sued Noblesville Schools and the principal for defamation, intentional infliction of emotional distress, negligence, breach of contract, and tortious interference with a contract/business relationship.[272] The trial court granted summary judgment in favor of the defendants on all claims except for defamation and the court of appeals affirmed.[273]

As to McCullough's claim for intentional infliction of emotional distress, the court found the defendants' conduct did not rise to the level of "extreme and outrageous conduct" as a matter of law, so summary judgment for the defendants was appropriate.[274] The court also affirmed the grant of summary judgment as to McCullough's claims of breach of contract and tortious interference with a business contract because his coaching contract expired before he was let go, and the contract contained no promise of continued employment.[275] McCullough did not allege illegal actions taken by the principal, which is required to state a claim

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266. 63 N.E.3d 334 (Ind. Ct. App. 2016), *trans. denied*, 80 N.E.3d 181 (Ind. 2017).
267. *Id.* at 339.
268. *Id.* at 340.
269. *Id.*
270. *Id.*
271. *Id.* at 340-41.
272. *Id.* at 341.
273. *Id.* at 339.
274. *Id.* at 342.
275. *Id.* at 344-45.

for tortious interference with a business relationship.[276] McCullough alleged the principal assumed a duty to investigate the incident because he informed the administration he would do so.[277] Noting that the assumption-of-duty doctrine applies only where there is a risk of physical harm, the court determined that McCullough's claim failed because he did not sustain physical harm.[278] Lastly, McCullough alleged a defamation claim based on publication of McCollough's statement without the word "allegedly."[279] The court concluded that whether the statement as published constituted defamatory imputation or malice was a question of fact.[280] The court also concluded the common-interest privilege did not afford a defense because "communication with the general public and media outlets was excessive."[281]

G. Punitive Damages—Admissibility of Prior Criminal Convictions

In *Sims v. Pappas*,[282] the Indiana Supreme Court held that prior alcohol-related convictions are admissible in a civil case if punitive damages are at issue.

Andrew Pappas was injured in a head-on vehicular collision with Danny Sims, who had a blood alcohol content of 0.18%.[283] Sims eventually pled guilty to a Class C misdemeanor of operating a vehicle while intoxicated.[284] Pappas and his wife sued Sims, alleging negligence, gross negligence, recklessness, and willful and wanton misconduct.[285] In responding to pre-trial requests for admissions, Sims admitted he operated the vehicle while intoxicated.[286] However, he objected, on grounds of relevance, to requests for admissions about a prior 1996 conviction for reckless driving and a 1983 suspension of his driver's license for leaving the scene of an accident and operating while intoxicated.[287] Over Sims's objection, the trial court allowed the admission of his prior convictions during a jury trial, and the jury awarded $2,000,000 in compensatory and punitive damages to Pappas and his wife.[288] The court of appeals reversed the trial court's denial of Sims's motion to correct error upon its conclusion that evidence of Sims's prior convictions was irrelevant.[289]

The Indiana Supreme Court agreed with the court of appeals that evidence of

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276. *Id.* at 345.
277. *Id.*
278. *Id.* at 345-46.
279. *Id.* at 346.
280. *Id.* at 347-48.
281. *Id.* at 349.
282. 73 N.E.3d 700 (Ind. 2017).
283. *Id.* at 704.
284. *Id.*
285. *Id.*
286. *Id.*
287. *Id.* at 704-05.
288. *Id.* at 705.
289. *Id.*

Sims's prior convictions was irrelevant with respect to compensatory damages and loss of consortium.[290] However, punitive damages are intended to punish and deter conduct, therefore Sims's prior alcohol-related driving offenses were relevant and admissible because they had a tendency to demonstrate whether Sims's was consciously and voluntarily reckless.[291] On this basis, the supreme court affirmed the judgment of the trial court, stressing that the evidence of Sims's prior convictions "was relevant only on the issue of punitive damages."[292]

H. Innkeeper's Statute

In *Smith v. Dunn Hospital Group Manager, Inc.*,[293] the court of appeals held that the Indiana Innkeeper's Statute[294] establishes a $200 cap on a hotel's liability for loss or damage to a guest's personal property.

Following a fire at their home, the Smith family became guests at a Comfort Inn.[295] The Smiths brought personal property with them, including an insurance draft, a coin collection, and sports memorabilia.[296] While staying at Comfort Inn, the Smiths were arrested and taken into custody for approximately two weeks.[297] While they were in jail, the Smiths' occupancy was not terminated, but Comfort Inn employees allowed an unauthorized person, Daniel Crawley, to enter their room.[298] Crawley took all of the Smiths' personal items from their room, and the Smiths subsequently sued Comfort Inn for negligence.[299] Comfort Inn moved for summary judgment, asserting that its maximum liability was $100 pursuant to the Innkeeper's Statute.[300] The trial court held that Comfort Inn's liability was capped at $200 under Indiana Code section 32-33-7-3.[301]

The court of appeals affirmed the trial court.[302] The Smiths argued that the Innkeeper's Statute did not apply because Comfort Inn "facilitated the theft of the Smiths' property."[303] The Court found that while Comfort Inn did allow Crawley access to the Smiths' room, there was no evidence that Comfort Inn employees conspired with Crawley to steal the Smiths' property.[304] By stating a claim for negligence, the Smiths' case was squarely addressed in Indiana Code section 32-

290. *Id.* at 706.
291. *Id.*
292. *Id.* at 706-07, 712.
293. 61 N.E.3d 1271 (Ind. Ct. App. 2016).
294. IND. CODE §§ 32-33-7-1 to 7-6 (2017).
295. *Smith*, 61 N.E.3d at 1272.
296. *Id.*
297. *Id.*
298. *Id.*
299. *Id.*
300. *Id.*
301. *Id.*
302. *Id.* at 1275.
303. *Id.* at 1274.
304. *Id.* at 1275.

33-7-3, which capped Comfort Inn's liability at $200.[305]

I. Ordinary Conduct in Sports Activities—Karate

In *Megenity v. Dunn*,[306] the Indiana Supreme Court held that what constitutes ordinary conduct in a sport is determined by considering the sport in general, not a specific activity within that sport or activity.

Tresa Megenity held a black belt in karate and attended karate classes for two years.[307] During one class, Megenity volunteered to hold the flying-kick bag while students practiced a flying kick, which involves kicking with one foot while keeping the other foot on the ground.[308] David Dunn, a lower-ranked green-belt, properly performed two flying kicks, but performed a jump kick at Megenity's bag, kicking with both feet off of the ground.[309] The kick did not hit Megenity, but the impact with the bag sent her flying and caused a knee injury.[310]

Megenity sued Dunn, alleging negligence, and Dunn moved for summary judgment, arguing he did not breach a duty because jump kicks are, in general, ordinary behavior in the sport of karate.[311] The trial court granted Dunn's motion and a divided panel of the court of appeals reversed, concluding there was a question of fact as to what constituted reasonable conduct during a karate practice drill.[312]

The Indiana Supreme Court affirmed the trial court in granting summary judgment in favor of Dunn, and in so doing clarified its opinion in *Pfenning v. Lineman*,[313] where the court held that recovery for sports injuries is limited if the conduct is ordinary in that sport.[314] The court found that the phrase "in the sport" refers to the sport generally, not the injury-producing activity specifically.[315] The supreme court determined that although a jump kick may have been inappropriate to the specific drill in which Megenity was injured, jump kicks are generally ordinary to the sport of karate and do not constitute reckless behavior.[316] Because Megenity failed to present evidence that Dunn acted recklessly, the court concluded he could not be liable for her injuries, and it was appropriate for the trial court to grant his motion for summary judgment.[317]

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305. *Id.*
306. 68 N.E.3d 1080 (Ind. 2017).
307. *Id.* at 1082.
308. *Id.*
309. *Id.*
310. *Id.*
311. *Id.*
312. *Id.* at 1082-83.
313. 947 N.E.2d 392 (Ind. 2011).
314. *Megenity*, 68 N.E.3d at 1082.
315. *Id.* at 1084.
316. *Id.*
317. *Id.* at 1084-85.

J. Ordinary Conduct in Sports Activities—Golf

In *Wooten v. Caesars Riverboat Casino, LLC*,[318] the court of appeals held that driving a golf cart and striking another golf cart did not support a claim for negligence because it fell within the range of the ordinary behavior of golf participants.

David Wooten and Bernard Chamernik participated in a charity golf scramble at a golf course owned by Caesars Riverboat Casino.[319] Wooten and Chamernik were in the same foursome and rode in golf carts by Caesars.[320] Wooten was a passenger on one of the golf carts. As he was leaning up to get out of the golf cart, the golf cart was struck from behind at a low rate of speed by the golf cart driven by Chamernik.[321] Wooten was thrown backwards and sustained a neck injury.[322] Wooten sued Caesars, Chamernik, and James Malles, the driver of the golf cart he was riding in.[323] Malles was dismissed from the action, Caesars settled, and the trial court granted summary judgment in favor of Chamernik.[324]

The court of appeals affirmed the trial court, following the analysis set forth in *Pfenning v. Lineman*[325] regarding the duty of care owed to participants in athletic events.[326] The focus of this analysis is "whether the conduct of the defendant is within the range of ordinary behavior of participants in the sport."[327] Wooten argued that golf-cart activities cannot be considered ordinary in the sport of golf because golf carts are unnecessary to play golf.[328] The court disagreed, noting that the use of golf carts is "ubiquitous" and "mundane" in the sport of golf, and also referencing a U.S. Supreme Court case in which the Court discussed how the golf cart use is encouraged to speed up the game.[329] The court held, "it has become common and expected for golf carts to bump into each other;"[330] as such, absent intentional or reckless conduct, operating a golf cart during golf-related activities does not give rise to a negligence claim.[331]

K. Negligence Per Se

In *Brown v. City of Valparaiso*,[332] the court of appeals held that property

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318. 63 N.E.3d 1069 (Ind. Ct. App. 2016).
319. *Id.* at 1071.
320. *Id.*
321. *Id.* at 1071-72.
322. *Id.* at 1072.
323. *Id.*
324. *Id.*
325. 947 N.E.2d 392 (Ind. 2011).
326. *Wooten*, 63 N.E.3d at 1073, 1077.
327. *Id.* at 1075 (quoting Welch v. Young, 950 N.E.2d 1283 (Ind. Ct. App. 2011)).
328. *Id.*
329. *Id.* at 1075-76; *see also* PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001).
330. *Wooten*, 63 N.E.3d at 1076.
331. *Id.*
332. 67 N.E.3d 652 (Ind. Ct. App. 2016), *trans. denied,* 86 N.E.3d 171 (Ind. 2017).

owners could not pursue claims of negligence per se against the City of Valparaiso (the City) for a statutory violation because the General Assembly did not intend to create a private cause of action for violating the statute.

Richard and Janet Brown owned property adjacent to a water retention/detention facility run by the City.[333] In the 1970s, the City developed a project to connect storm drainage from the City to drain into the Kankakee River, and acquired the property adjacent to the Browns' property to install a levee to retain storm water.[334] Over the course of several decades, drainage issues and flooding occurred in the area of the Browns' property and elsewhere around the City.[335] In September 2008, the City experienced significant rain events that were determined to be, depending on the specific locale, between a 200-year storm and a 500-year storm. The water detention facility was designed for a 100-year storm and could not handle water beyond that.[336] Despite sandbagging efforts, approximately eighteen inches of water entered the Browns' property, causing significant damage.[337] Only the Browns' property was flooded with water from the water detention facility.[338]

The Browns sued the City to recover damages, arguing the City was negligent per se in violating the Flood Control Act (the Act),[339] which provides it is unlawful to erect structures in or on a floodway that will constitute "an unreasonable hazard to the safety of life or property."[340] The trial court granted summary judgment in favor of the City, and the court of appeals affirmed.[341] The court reasoned that the Act is designed to protect the general public because the commission may bring actions to enjoin violations of the Act.[342] Because the Act did not create a private cause of action against the City, the Browns could not pursue a claim for negligence per se.[343]

Additionally, the court held the Browns' claim for public nuisance failed because a private party does not have a cause of action for public nuisance unless that party "demonstrates a special and peculiar injury apart from the injury suffered by the public."[344] The Browns argued they had a special and peculiar injury because only their property sustained flooding from the retention facility.[345] The court of appeals concluded the Browns' damages were neither special nor peculiar because major flooding occurred throughout the city when the Browns'

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333. *Id.* at 653.
334. *Id.*
335. *Id.*
336. *Id.* at 655.
337. *Id.*
338. *Id.*
339. IND. CODE §§ 14-28-1-1 to 1-36 (2017).
340. *Brown,* 67 N.E.3d at 657.
341. *Id.* at 656.
342. *Id.* at 657, 659.
343. *Id.* at 659.
344. *Id.* at 660.
345. *Id.*

property flooded.[346]

L. Interference with Employment Relationship

In *City of Lawrence Utility Service Board v. Curry*,[347] the Indiana Supreme Court held that summary judgment was not appropriate in a superintendent's claim for intentional interference with an employment relationship.

Carlton Curry was appointed superintendent of Lawrence Utilities in 2009 by the City of Lawrence Utility Service Board. Two years later, a newly elected mayor terminated Curry.[348] Curry sued the City for wrongful discharge under the Utility Superintendent Statute,[349] back pay under the Wage Payment Statute,[350] and for tortious interference with his employment contract.[351]

The Indiana Supreme Court determined that Curry was wrongfully discharged because only the Utility Service Board had the authority to remove him, and then only after he was provided notice and a hearing.[352] Therefore, the mayor lacked statutory authority to terminate him. On the other hand, the court held that Curry was not entitled to wages under the Wage Payment Statute because he did not work after his termination and, thus, the City did not profit from unpaid labor.[353] Lastly, as to Curry's tortious-interference claim, the court agreed with the trial court's conclusion that genuine issues of material fact remained that precluded summary judgment in favor of the City.[354]

346. *Id.* at 661.
347. 68 N.E.3d 581 (Ind. 2017).
348. *Id.* at 583.
349. IND. CODE § 8-1.5-3-5(d) (2017).
350. *Id.* §§ 22-2-5-0.3 to 5-3.
351. *Curry*, 68 N.E.3d at 583.
352. *Id.* at 586-87.
353. *Id.* at 587.
354. *Id.* at 588.