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. PRODUCT LIABILITY[1]

A. Misuse

In *Campbell Hausfeld/Scott Fetzer Co. v. Johnson*,[2] the Indiana Supreme Court addressed how comparative fault principles affect the defense of misuse in product liability actions, holding that a plaintiff's misuse of a product is a complete bar to recovery if misuse of the product was the cause of the harm and was not reasonably expected by the seller.[3]

Paul Johnson was seriously injured while using a grinder power tool designed and manufactured by Campbell Hausfeld/Scott Fetzer Co.[4] The grinder's instructions included a warning that "[s]afety glasses and ear protection must be worn during operation" and "[f]ailure to comply with instructions could result in personal injury."[5] Johnson read the instructions and attached a cut-off disc to the grinder.[6] Johnson was wearing prescription eyeglasses, which he believed were sufficient safety glasses.[7] While Johnson was using the grinder, a part broke off, striking him in the face and breaking his glasses, causing serious injuries to his

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1. The cases discussed in this section are also discussed more fully in J. Joseph Tanner & Lexi C. Fuson, *Survey of Recent Developments in Indiana Product Liability Law*, 52 IND. L. REV. 793 (2019), published simultaneously with this article.

2. 109 N.E.3d 953 (Ind. 2018).

3. *Id.* at 954, 958.

4. *Id.* at 955.

5. *Id.*

6. *Id.*

7. *Id.*

cheek and eye, and ultimately causing the loss of his left eye.[8]

Johnson sued, alleging design-defect and failure-to-warn claims under the Indiana Products Liability Act ("IPLA").[9] Campbell Hausfeld asserted the defenses of misuse, alteration, and incurred risk, and filed a motion for summary judgment.[10] The trial granted summary judgment to Campbell Hausfeld on Johnson's defective-design claim, finding Johnson misused the grinder by not wearing safety glasses and was at least 51% responsible for his injuries.[11] The trial court denied Campbell Hausfeld's motion with respect to Johnson's failure-to-warn claim.[12] The court of appeals affirmed in part and reversed in part, concluding that Campbell Hausfeld's motion for summary judgment should have been denied in its entirety.[13]

The Indiana Supreme Court affirmed the trial court and addressed whether misuse was a complete bar to recovery in products liability actions in light of the 1995 amendments to IPLA that incorporated comparative-fault principles.[14] Before 1995, product misuse barred recovery because misuse was "considered an intervening cause that relieves the manufacturer of liability where the intervening act could not have been reasonably foreseen by the manufacturer."[15] After the 1995 amendment, Indiana courts were divided on whether misuse remained a complete bar to recovery or merely reduced the plaintiff's recovery.[16]

The court determined that misuse remains a complete bar to recovery in product liability actions, even after incorporating comparative fault principles.[17] After the 1995 IPLA amendment, the other IPLA affirmative defenses of incurred risk and alteration were a complete bar to recovery.[18] The court reasoned that treating the defense of misuse differently would violate the doctrine of *in pari materia*.[19] Also, misuse is a statutory defense that was not modified or eliminated by the general assembly as part of the comparative fault provision.[20]

However, to successfully assert the misuse defense, the defendant must show the product caused the harm and misuse was not reasonably expected by the

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8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 956.
15. *Id.* at 957 (quoting Hubbard Mfg. Co. v. Greeson, 515 N.E.2d 1071, 1073 (Ind. 1987)).
16. *See, e.g.*, Barnard v. Saturn Corp., 790 N.E.2d 1023 (Ind. Ct. App. 2003), *trans. denied* (product misuse was not a complete bar to recovery); *cf.* Indianapolis Athletic Club, Inc. v. Alco Standard Corp., 709 N.E.2d 1070, 1072 (Ind. Ct. App. 1999), *trans. denied* (product misuse is a complete defense).
17. *Johnson*, 109 N.E.3d at 957-58.
18. *Id.* at 958.
19. *Id.*
20. *Id.*

defendant.[21] The court determined Johnson disregarded the grinder's safety instructions in three ways and Campbell Hauser would not reasonably expect a user to disregard the instructions in all three ways.[22] Because Johnson's failures to comply with safety instructions caused his injuries and the misuse could not be reasonably expected by Campbell Hausfeld, the Indiana Supreme Court affirmed the trial court's entry of summary judgment in favor of Campbell Hausfeld.[23]

B. Liability for Manufacturer's Employee

In *Davis v. Lippert Components Manufacturing, Inc.*,[24] the Court of Appeals of Indiana held that an injured employee was not entitled to relief under the Indiana Product Liability Act (IPLA) because he did not meet the definition of "user" or "consumer".[25]

Lippert is a manufacturer of wall "slide-outs," a sliding mechanism used to expand the interior space of a recreational vehicle when it is parked.[26] Matthew Davis worked for Lippert installing slide-outs and was injured when a slide-out fell out of the trailer onto his lower back, paralyzing him from the waist down.[27] Davis sued Lippert alleging strict liability for a design defect in the sliding mechanism.[28] Lippert argued Davis could not state a claim under the IPLA because he was not a "user" or "consumer".[29] The trial court granted summary judgment in favor of Lippert.[30]

The court of appeals considered the statutory definitions of "user" and "consumer" under the IPLA and affirmed the trial court.[31] Davis argued he was a consumer because Lippert sold its mechanism in an uninstalled, unassembled form.[32] Lippert argued that Davis was not a user or consumer because his injury occurred before the assembled recreational vehicle was delivered to the initial consumer.[33] Both parties relied upon the Indiana Supreme Court's decision in *Vaughn v. Daniels Company (West Virginia)*,[34] in which the supreme court explained that use of a product may sometimes include installation or assembly.[35]

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21. *Id.* at 959.
22. *Id.* at 960.
23. *Id.*
24. 95 N.E.3d 200 (Ind. Ct. App. 2018).
25. *Id.* at 200-01.
26. *Id.* at 201.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 204.
32. *Id.* at 202.
33. *Id.*
34. 841 N.E.2d 1133 (Ind. 2006).
35. *Id.* at 1139-43.

However, this only occurs when "a manufacturer expects a product to reach the ultimate user or consumer in an unassembled or uninstalled form."[36] The court of appeals concluded Davis was not a user or consumer under IPLA because Davis was assembling part of the trailer before it reached the consumer.[37]

II. RESPONDEAT SUPERIOR

A. Immunity for Teacher Discipline of Student

In *Fort Wayne Community Schools v. Haney*,[38] a teacher's actions of touching a student's behind to get the student to sit down fell within the scope of the teacher's statutory qualified immunity, so the teacher and school corporation were entitled to summary judgment.[39]

A parent sued her child's first-grade teacher and the school corporation for battery and a Fourth Amendment violation under 42 U.S.C. § 1983 after the teacher touched the child's behind to try to get the child to sit back down in her seat.[40] The school corporation and teacher filed a motion for summary judgment which the trial court granted in part and denied in part.[41] The trial court concluded the teacher was entitled to summary judgment on the battery claim but not the § 1983 claim, whereas the school corporation was entitled to summary judgment on the § 1983 claim but not the battery claim.[42]

The court of appeals reversed the trial court, finding the teacher and school corporation were entitled to summary judgment on all counts.[43] The state-law battery claims against the teacher and school corporation were barred because the teacher's actions were protected by qualified immunity under Indiana Code section 20-33-8-8.[44] The purpose of the teacher's conduct was to keep the student seated during class, which fell within the teacher's statutory right to take necessary actions "to promote student conduct that conforms with an orderly and effective educational system."[45] Also, the teacher's conduct fell within the statutory provision that holds teachers in the position of parents.[46] Because the child's mother spanked the child at home, the teacher could not be civilly liable for allegedly spanking the child at school.[47] The teacher and school corporation were also entitled to summary judgment on the § 1983 claim because the alleged

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36. *Id*. at 1141.
37. *Davis*, 94 N.E.3d at 203.
38. 94 N.E.3d 325 (Ind. Ct. App. 2018).
39. *Id.* at 329-30.
40. *Id.* at 326-27.
41. *Id.* at 326.
42. *Id.* at 325.
43. *Id.* at 332-33.
44. *Id.* at 328-30.
45. *Id.* at 330 (citing IND. CODE § 20-33-8-8(b)(2) (2018)).
46. *Id.* at 330.
47. *Id.*

violation of the student's constitutional rights was not clearly established.[48]

B. Sovereign Immunity for Whistleblower Violations

In *Esserman v. Indiana Department of Environmental Management*,[49] the Indiana Supreme Court held that while Indiana has abrogated sovereign immunity almost entirely for tort claims, Indiana has not abrogated sovereign immunity for non-tort claims alleging a statutory violation.[50] As such, an employee could not bring a claim against the State for an alleged violation of statutory whistleblower protections.[51]

Suzanne Esserman worked at the Indiana Department of Environmental Management (IDEM) for nearly twenty-five years.[52] She noticed irregularities in disbursements from IDEM's excess-liability trust fund and reported them to her employer, who ultimately fired her.[53] Esserman filed a wrongful termination complaint, alleging IDEM violated the whistleblower provision of the Indiana False Claims and Whistleblower Protection Act (the "Act").[54] IDEM argued it was entitled to sovereign immunity and the trial court granted IDEM's motion to dismiss.[55]

The supreme court agreed, concluding that Indiana has almost entirely abrogated sovereign immunity for tort claims, but has not done so for non-tort claims alleging statutory violations.[56] The court noted only the legislature can waive the State's sovereign immunity by clearly showing an intent to do so in the language of the statute.[57] The court found the Act does not clearly evince an intent to waive the State's sovereign immunity because the statute does not name the State as a possible whistleblower defendant.[58] Thus, the employee could not bring a claim against IDEM for violating the whistleblower statute.[59]

III. PREMISES LIABILITY

A. Foreseeability – Victim Confronting Assailants

In *Powell v. Stuber*,[60] the court of appeals held that a bar owner did not owe a duty to protect a patron who confronted an assailant and thereby placed himself

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48. *Id.* at 332-33.
49. 84 N.E.3d 1185 (Ind. 2017).
50. *Id.* at 1188.
51. *Id.* at 1192-93.
52. *Id.* at 1187.
53. *Id.*
54. *Id.*
55. *Id.* at 1188.
56. *Id.*
57. *Id.* at 1189.
58. *Id.* at 1192.
59. *Id.* at 1187, 1193.
60. 89 N.E.3d 430 (Ind. Ct. App. 2017), *reh'g denied, trans. denied*.

at risk for further injury.[61]

DaShawn Powell was a patron of Bleachers Pub and was attacked in the parking lot outside the bar.[62] Powell pursued the assailants, grabbed onto their vehicle, and sustained his worst injuries when he was struck by the mirror and then run over when the assailant drove away.[63] Powell sued the bar and the trial court granted summary judgment in favor of the bar, finding the bar did not owe a duty to Powell.[64]

The court of appeals affirmed the trial court and in doing so, considered the supreme court's recent decision in *Goodwin v. Yeakle's Sports Bar and Grill, Inc.*[65] *Goodwin* clarified that the foreseeability of a duty is determined by considering the broad type of plaintiff and the harm, not the facts of what actually occurred.[66] The court determined the broad type of plaintiff was a bar patron, and the broad type of harm is the "likelihood of a criminal attack being extended when the victim confronts his assailants, placing himself at risk of further injury."[67] The court concluded the bar did not owe Powell a duty here because bar owners do not routinely contemplate that a victim would pursue his assailant after being attacked in the bar parking lot.[68]

B. Foreseeability – Known Threat of Injury

In *Hamilton v. Steak 'n Shake Operations, Inc.*,[69] the court of appeals determined a restaurant owed a duty to a patron to take reasonable steps to provide for patron safety once the restaurant was aware of the threat of injury to a restaurant patron.[70]

Amber Hamilton and friends were patrons at Steak 'n Shake when another group of patrons began to threaten and verbally abuse Hamilton and her brother.[71] The situation escalated over a period of approximately thirty minutes, and while the restaurant's employees were aware of the insults, they did nothing to deescalate the situation.[72] When a physical altercation seemed imminent, an employee asked the groups to leave; moments later, a physical altercation began and Hamilton was shot in the face, sustaining serious injuries.[73] Hamilton sued,

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61. *Id.* at 434.

62. *Id.* at 431.

63. *Id.*

64. *Id.* at 431-32.

65. *Id.* at 431; *see also* Goodwin v. Yeakle's Sports Bar & Grill, Inc., 62 N.E.3d 384 (Ind. 2016).

66. *Powell*, 89 N.E.3d at 433.

67. *Id.* at 434.

68. *Id.*

69. 92 N.E.3d 1166 (Ind. Ct. App. 2018), *trans. denied.*

70. *Id.* at 1173-74.

71. *Id.* at 1167.

72. *Id.* at 1167-68.

73. *Id.* at 1168.

alleging the restaurant was negligent in failing to protect her from another person's wrongful act.[74] The trial court granted summary judgment in favor of the restaurant, finding it owed no duty to Hamilton.[75]

The court of appeals applied the supreme court's analytical framework in *Goodwin v. Yeakle's Sports Bar and Grill, Inc.*[76] and *Rogers v. Martin*[77] and reversed the trial court decision.[78] Foreseeability in the context of duty is determined as a matter of law, considering the broad type of plaintiff and the harm involved, without regard to the specific facts of the case.[79] The court found the facts of this case were similar to the facts in *Rogers*, in which the landowner's knowledge of a guest's injury was "crucial to assessing foreseeability" and whether a duty was owed to the guest.[80] In this case, the restaurant was aware that the patron was subjected to escalating threats and it was foreseeable that a patron could be seriously harmed.[81] The court concluded the restaurant had a duty to take reasonable steps to protect patron safety when it became aware of the raucous behavior, even though the precise type of harm was unknown.[82]

B. Foreseeability – Known Threat of Injury

In *Certa v. Steak 'n Shake Operations, Inc.*,[83] the court of appeals determined a restaurant owed a duty to protect a patron from being injured by another patron because the restaurant was aware of a prior altercation and aware of the potential for escalation of the conflict.[84]

Jeffery Certa was walking toward a restaurant with friends when they observed an altercation taking place.[85] Certa verbally intervened and spoke to one of the individuals involved before proceeding into the restaurant and reporting the altercation to an employee.[86] That individual entered the restaurant and told her aunt, an employee, to make Certa and his friends leave because they would start a fight.[87] The employee told the groups to calm down and asked her manager to monitor the tables.[88] When Certa left the restaurant, saw a physical altercation

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74. *Id.*
75. *Id.*
76. 62 N.E.3d 384 (Ind. 2016).
77. 63 N.E.3d 316 (Ind. 2016).
78. *Hamilton,* 92 N.E.3d at 1169, 1174.
79. *Id.* at 1169.
80. *Id.* at 1172. .
81. *Id.* at 1173.
82. *Id.* at 1173-74.
83. 102 N.E.3d 336, 336 (Ind. Ct. App. 2018).
84. *Id.* at 341.
85. *Id.* at 337.
86. *Id.*
87. *Id.*
88. *Id.*

occurring and asked employees to call the police.[89] While Certa was trying to write down the license plate number of one of the vehicles, a passenger put the car in reverse and backed over Certa, injuring him.[90] Certa sued the restaurant and others and the trial court granted the restaurant's motion for summary judgment.[91]

The court of appeals again applied the supreme court's analytical framework in *Goodwin*[92] and *Rogers*[93] and considered "what the landowner knew or had reason to know" concerning the injured party in determining foreseeability.[94] The broad type of plaintiff in this case was a restaurant patron and the broad type of harm was injury caused by a third party.[95] In determining foreseeability, the restaurant did not have to know the precise type of harm—rather, foreseeability arises when there is a likelihood of harm serious enough that a reasonable person would take precautions to avoid it.[96] In this case, the restaurant's knowledge of the events on its premises gave rise to a duty to provide for Certa's safety as a restaurant patron and the court of appeals reversed the trial court.[97]

D. Foreseeability of Warehouse Causing Harm to Motorists

In *Estate of Staggs v. ADS Logistics Co.*,[98] the Court of Appeals of Indiana determined a warehouse tasked with storing a steel coil and loading it onto a truck for transport elsewhere owed no duty to motorists because it was not foreseeable that the warehouse's conduct would result in harm to motorists.[99]

ADS Logistics is a warehouse facility that contracted to warehouse a large steel coil for a steel company.[100] The steel company agreed to sell or ship the coil to another company that hired a transportation company to haul it.[101] ADS Logistics placed the coil onto a flatbed truck and the driver secured it onto the truck.[102] The driver miscalculated the load capacity for the chains he used to secure the coil and en route from the ADS Logistics warehouse to the customer, the steel coil became unsecured and rolled off of the flatbed, killing or seriously injuring multiple people.[103] The plaintiffs sued multiple defendants including ADS Logistics, and the trial court granted ADS Logistics' motion for summary

89. *Id.* at 338.
90. *Id.*
91. *Id.*
92. 62 N.E.3d 384 (Ind. 2016).
93. 63 N.E.3d 316 (Ind. 2016).
94. *Id.* at 341.
95. *Id.*
96. *Id.*
97. *Id.*
98. 102 N.E.3d 319 (Ind. Ct. App. 2018), *trans. denied*.
99. *Id.* at 326.
100. *Id.* at 322.
101. *Id.*
102. *Id.*
103. *Id.* at 322-23.

judgment, concluding it owed no duty to the plaintiffs.[104]

The court of appeals affirmed the trial court's determination that ADS Logistics did not owe a duty to the plaintiffs.[105] ADS Logistics did not assume a duty because its contract was to warehouse the coil, not transport it.[106] Additionally, it did not owe the plaintiffs a common-law duty because there was no relationship between the parties, and, because ADS Logistics was not involved in securing the cargo, it was not foreseeable that ADS Logistics' acts of storing or loading the cargo onto a truck would result in harm to motorists.[107] Considering public policy factors, the court determined ADS Logistics had a limited role in what occurred and would have had little to no ability to prevent it.[108]

E. Foreseeability of Insurance Broker Causing Harm to Motorists

In *ONB Insurance Group, Inc. v. Estate of Megel*,[109] the court of appeals determined an insurance broker and its agent did not owe a duty to motorists because the broker was responsible for answering questions about insurance coverage and had no role in putting the insured vehicle on the road in a faulty condition.[110]

With knowledge that a semi-truck was overweight and that the brakes were not working properly, the owner of a trucking company drove the truck from Ohio to Indiana along a route with no weigh stations.[111] During the drive, the truck driver was unable to stop and collided with two vehicles, killing one person and injuring three others.[112] Two lawsuits were filed against multiple defendants, including the trucking company's insurance carrier.[113] The insurance carrier filed a third-party complaint against the insurance broker and its agent (collectively, "ONI"), which prompted the plaintiffs to amend their complaints and name ONI as defendants.[114] The trial court granted ONI's motions for summary judgment with regard to the insurance carrier's third-party complaint but denied ONI's motions for summary judgment against the plaintiffs.[115] ONI filed a renewed motion for summary judgment in light of the supreme court's decision in

104. *Id.* at 323.
105. *Id.* at 326.
106. *Id.* at 324.
107. *Id.* at 325-26.
108. *Id.* at 326.
109. 107 N.E.3d 484 (Ind. Ct. App. 2018), *trans. denied*.
110. *Id.* at 493-94.
111. *Id.* at 487.
112. *Id.*
113. *Id.* at 488.
114. *Id.* at 487-88.
115. *Id.* at 488-89.

Goodwin,[116] which the trial court also denied.[117]

The court of appeals noted that while many of the cases interpreting *Goodwin* involved premises liability actions, a recently decided case was factually similar to this one.[118] As in *Estate of Staggs*, there was no direct relationship between ONI and the plaintiffs, ONI could not foresee its actions would result in injury to a motorist, because ONI did not decide to put the truck on the road in a faulty condition, and public policy did not favor finding that ONI owed a duty because ONI had no control over the means by which the accident occurred.[119] As such, the court of appeals determined ONI owed no duty to the plaintiffs and reversed the trial court's decision.[120]

F. Foreseeability of Criminal Attack by Unknown Assailant

In *Cosgray v. French Lick Resort & Casino*,[121] the court of appeals held that a hotel did not owe an invitee a duty to protect her from criminal attack by an unknown assailant.[122]

Amber Cosgray attended a work-related Christmas party at French Lick Resort & Casino ("French Lick").[123] At the end of the evening, Cosgray went back to her hotel room and propped the door open by flipping the rasp lock because a co-worker intended to join her.[124] Cosgray fell asleep while waiting for her coworker and awoke to an unknown man raping her.[125] After the assailant left the room, Cosgray locked the door and called the police.[126] The criminal investigation revealed that a French Lick employee met the assailant at a bar and invited him into the hotel with her, but then rebuked the assailant's advances and left him alone near Cosgray's room.[127]

Cosgray sued French Lick and the trial court granted French Lick's motion for summary judgment, finding the attack on Cosgrave was unforeseeable and it would be unreasonable to require French Lick to take further precautions to avoid an attack.[128] The court of appeals agreed that French Lick did not owe Cosgrave a duty.[129] It was not foreseeable for French Lick to expect that an invitee would

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116. Goodwin v. Yeakle's Sports Bar & Grill, Inc., 62 N.E.3d 384 (Ind. 2016).

117. *Estate of Megel*, 107 N.E.3d at 489.

118. *Id.* at 490; *see also* Estate of Staggs v. ADS Logistics Co., LLC, 102 N.E.3d 319 (Ind. Ct. App. 2018).

119. *Estate of Megel*, 107 N.E.3d at 493-94.

120. *Id.* at 496.

121. 102 N.E.3d 895 (Ind. Ct. App. 2018).

122. *Id.* at 897.

123. *Id.* at 898.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 901.

be sexually assaulted after intentionally leaving her hotel door unlocked and open.[130] In so holding, the court declined Cosgray's request to consider the totality of the circumstances, explaining that analysis no longer applies since the supreme court decided *Goodwin* and *Rogers*.[131]

IV. WRONGFUL DEATH

A. Standing in Child Wrongful Death Cases

In *Parsley v. MGA Family Group, Inc.*,[132] the court of appeals held that a grandmother—who was the de facto guardian of her grandson—could not bring a child wrongful death claim because she was not her grandson's legal guardian.[133]

Linsey Parley and her son, Robert, died in an apartment fire.[134] Following their deaths, Linsey's mother, Lillian, was appointed personal representative of Linsey's estate and brought an adult wrongful death action for Linsey's death and a child wrongful death action for Robert's death as his "Guardian, Grandparent and Next Friend."[135] The defendants filed a motion to dismiss Lillian's child wrongful death action on the ground that she lacked standing because she was not Robert's parent or guardian at the time of his death.[136] The trial court dismissed Lillian's child wrongful death claim.[137]

The Child Wrongful Death Statute[138] ("CWDS") specifies who may bring a child wrongful death action.[139] Lillian claimed she could bring an action under Indiana Code subsection 34-23-2-1(c)(3) as "a guardian, for the injury or death of a protected person" because she was Robert's de facto custodian and provided for his financial and physical needs.[140] The court of appeals examined the meaning of the term "guardian" in the CWDS and determined Lillian did not qualify as a guardian.[141] "Guardian" is not defined in Indiana Code chapter 34-23 but is defined elsewhere in the Indiana Code,[142] and the dictionary definition of "guardian" is similar to the statutory definitions.[143] The court found that statutory

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130. *Id.*
131. *Id.*
132. 103 N.E.3d 651 (Ind. Ct. App. 2018), *reh'g denied*.
133. *Id.* at 657.
134. *Id.* at 653.
135. *Id.*
136. *Id.*
137. *Id.*
138. IND. CODE § 34-23-2-1 (2018).
139. *Parsley*, 103 N.E.3d at 654.
140. *Id.* at 655.
141. *Id.* at 656-57.
142. *See* IND. CODE § 29-3-1-6 (2018) (pertaining to guardianships and protective proceedings) and IND. CODE § 31-9-2-49 (2018) (pertaining to family and juvenile law).
143. *Parsley*, 103 N.E.3d at 656.

and dictionary definitions of "guardian" "consistently contemplate a relationship between two people with one person having the authority or responsibility to care for the other."[144] Because the General Assembly intended for a guardian to be someone appointed by the court and Lillian was not Robert's court-appointed guardian, she could not bring a child wrongful death action for Robert's death.[145]

B. Standing in Wrongful Death Cases

In *Horejs v. Milford*,[146] the supreme court held that after a wrongful death action is properly commenced, the action can proceed to judgment even if the person bringing the action dies without heirs while the action is pending.[147]

David Shaner filed a wrongful death action following the death of his wife, Laura, seeking final expense damages and survivor damages.[148] David died intestate while the action was still pending; David had no known heirs and his estate escheated to the State of Indiana.[149] Laura's father and brothers were appointed successor co-administrators of her estate and continued to claim final expense and survivor damages in the wrongful death claim.[150] The trial court granted the defendants' motion for partial summary judgment on the survivor damages claim, finding there was no evidence to support the claim because David died without heirs and also that the co-administrators lacked standing to pursue the claim.[151] The court of appeals affirmed, finding survivor damages were not available because they would escheat to the State.[152]

The supreme court analyzed the wrongful death[153] and survival statutes[154] and ultimately disagreed with the trial court and court of appeals.[155] The court reasoned that the claim, once properly asserted, did not abate just because David died.[156] While the court held that David did not need to have an heir for his claim to continue, the identity of the proper party to continue pursuit of the claim was unclear.[157] The co-administrators of Laura's estate were pursuing the claim, but the survival statute provided that David's legal representative could continue the action after David's death.[158] The supreme court agreed that the co-administrators

144. *Id.*
145. *Id.* at 656-57.
146. 117 N.E.3d 559 (Ind. 2019).
147. *Id.* at 565.
148. *Id.* at 561.
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *See* IND. CODE § 34-23-1-1 (2019).
154. *See id.* § 34-9-3-1.
155. *Horejs*, 117 N.E.3d at 565.
156. *Id.* at 563-64.
157. *Id.* at 564-65.
158. *Id.*

of Laura's estate did not have standing to pursue the claim but remanded to the trial court to determine whether there was a proper party to pursue the case on behalf of David's estate.[159]

V. NEGLIGENCE

A. Negligence per se

In *Stachowski v. Estate of Radman*,[160] the court of appeals held that the violation of a statute or ordinance may satisfy the breach element of a negligence case under the doctrine of negligence per se, but only if there is an existing common-law duty or the statute or ordinance confers a private right of action.[161]

Brenda Stachowski was injured when she fell through a rotten handrail on the deck of the home she was renting from Radman.[162] She sued her landlord, substituting his estate as the defendant after learning he had died.[163] Radman's estate filed a motion for summary judgment, arguing the landlord did not have a duty to maintain the handrail.[164]

The trial court granted the landlord's motion and the court of appeals affirmed. The parties agreed there was no common-law duty to maintain the rental home in a safe condition after the tenant took possession.[165] Stachowski argued that a city ordinance required the landlord to maintain the handrail, and his failure to do so constituted negligence per se.[166] The court explained that negligence per se assumes the existence of a common-law duty.[167] The statute or ordinance provides the standard of care required, and proof of a violation of the statute satisfies the breach element of a negligence case.[168] If there is no common-law duty, however, the plaintiff must prove that the statute or ordinance imposes a statutory duty, creating a private right of action.[169] Because Stachowski agreed there was no common-law duty and did not argue the ordinance conferred a private right of action, summary judgment in favor of the landlord was affirmed.[170]

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159. *Id.* at 565.
160. 95 N.E.3d 542 (Ind. Ct. App. 2018).
161. *Id.* at 545.
162. *Id.* at 543-44.
163. *Id.* at 544.
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.* at 545.
170. *Id.* at 545-46.

B. Res Ipsa Loquitur

In *Johnson v. Blue Chip Casino, LLC*,[171] the doctrine of res ipsa loquitur did not apply when a hotel guest was bitten by bed bugs during his stay because the guest could not prove the presence of bed bugs more probably resulted from the hotel's negligence instead of some other cause.[172]

Maurice Johnson woke up in his hotel room and discovered bed bug bites on his arm.[173] He received medical treatment for the bites and sued the hotel in small claims court.[174] At trial, the hotel's loss prevention manager testified that the hotel had policies in place for inspecting and treating hotel rooms for bed bugs, and in fact had treated that room for bed bugs two months before the incident.[175] The small claims court entered judgment for the hotel, finding Johnson failed to meet his burden of proof.[176]

The court of appeals affirmed judgment in favor of the hotel.[177] The court rejected Johnson's argument that res ipsa loquitur applied because Johnson failed to prove the bed bugs more probably resulted from the hotel's negligence, as opposed to another cause.[178] Johnson's premises-liability claim also failed because Johnson did not prove the hotel had actual or constructive knowledge of the presence of bed bugs in his hotel room on the date of his stay.[179]

VI. LEGAL MALPRACTICE

A. Proximate Cause – Summary Judgment Denied

In *Roumbos v. Vazanellis*,[180] the Indiana Supreme Court held that a legal malpractice claim could proceed to trial because the attorney failed to establish as a matter of law that the client would not have prevailed in her underlying claim.[181]

Elizabeth Roumbos was injured when she tripped and fell on a cord while visiting her husband at the hospital.[182] Roumbos hired Samuel Vazanellis' law firm to pursue her personal injury case, but Vazanellis did not file suit within the statute of limitations.[183] Roumbos sued Vazanellis for malpractice and Vazanellis filed a motion for summary judgment, arguing Roumbos would not have

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171. 110 N.E.3d 375 (Ind. Ct. App. 2018), *trans. denied*.
172. *Id.* at 376-77.
173. *Id.* at 377.
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.* at 380.
178. *Id.* at 378.
179. *Id.* at 379.
180. 95 N.E.3d 63 (Ind. 2018).
181. *Id.* at 64.
182. *Id.*
183. *Id.* at 65.

prevailed in her underlying case.[184] The trial court granted Vazanellis' motion, but the court of appeals reversed, finding Vazanellis designated no evidence that the hospital reasonably would have anticipated Roumbos' harm.[185]

The supreme court reversed the trial court, finding there was a genuine issue of material fact as to whether the cord posed an obvious danger.[186] Under the "trial-within-a-trial" doctrine, a client alleging legal malpractice must prove she would have received a more favorable outcome had the lawyer not been negligent.[187] Under premises-liability law, the hospital would not be liable if the cord was an open and obvious hazard that the hospital had no reason to believe a reasonable person would fail to avoid.[188] As the summary judgment movant, Vazanellis had the burden of proving Roumbos' claim would fail.[189] The supreme court concluded there were genuine issues of material fact as to whether Roumbos knew about the cord and whether the risks posed by the cord would be apparent to a reasonable person, so Vazanellis failed to meet his burden on summary judgment.[190]

B. Proximate Cause – Summary Judgment Granted

In *Gates v. O'Connor*,[191] the court of appeals determined a client failed to establish proximate cause in his legal malpractice claim for loss of inheritance because the attorney could not have compelled a dissolution of the client's marriage.[192]

Jerry Gates was a successful businessman who acquired most of his assets after he and his wife, Susan, married in 1986.[193] The couple had a prenuptial agreement that included provisions for property division if they divorced or what Susan would inherit if they were married when Jerry died.[194] Years later, Jerry became incapacitated and his son, Whitney Gates, initiated guardianship proceedings.[195] That same day, Susan filed a petition for dissolution of marriage.[196] After nearly three years, the guardianship court appointed Whitney and an attorney to serve as co-guardians until the dissolution matter was completed.[197] The guardianship authorized the co-guardians to retain attorney

184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.* at 65-66.
188. *Id.* at 66.
189. *Id.* at 67.
190. *Id.* at 68-69.
191. 111 N.E.3d 215 (Ind. Ct. App. 2018), *trans. denied*.
192. *Id.* at 217.
193. *Id.* at 217-18.
194. *Id.* at 218.
195. *Id.*
196. *Id.* at 218.
197. *Id.* at 218-19.

O'Connor for the dissolution proceeding.[198] O'Connor's firm prepared a memorandum comparing how Jerry's estate would be divided depending on whether he was married or divorced when he died.[199] O'Connor discussed the dissolution with the co-guardians and proposed settlement and mediation to Susan. But months later, Susan dismissed her petition for dissolution.[200] O'Connor then filed a counter-petition for dissolution for Whitney as Jerry's guardian.[201] The court denied Susan's motion to dismiss Whitney's counter-petition for dissolution, but Jerry died before the dissolution was granted, rendering the dissolution action moot.[202]

Whitney sued O'Connor for legal malpractice, gross negligence, breach of contract, and breach of fiduciary duty.[203] Whitney argued that O'Connor committed legal malpractice because he did not obtain a decree of dissolution before Jerry died and Whitney and his siblings received a lesser inheritance.[204] The trial court granted O'Connor's motion for summary judgment, finding that if O'Connor breached his duty of care, it was not the proximate cause of Whitney's harm because Whitney lacked the authority to file a counter-petition for dissolution based on the guardianship laws in effect at that time and Susan's motion to dismiss should have been granted.[205]

Whitney appealed and the court of appeals applied the "trial within a trial" doctrine, under which the client must show the outcome of the representation would be different if the attorney had not been negligent.[206] The court determined that Susan was entitled to dismiss her dissolution petition, O'Connor could not compel Wife to settle in the dissolution action, and Whitney lacked the legal authority to file a dissolution petition as Jerry's guardian based upon guardianship laws in effect at that time.[207] Because O'Connor's actions did not affect the outcome of the case, O'Connor was entitled to summary judgment.[208]

VII. ASSORTED OTHER MATERIALS

A. Anti-Strategic Lawsuits Against Public Participation Statute

In *Gresk v. Demetris*,[209] the Indiana Supreme Court held that Indiana's anti-strategic lawsuits against public participation (anti-SLAPP) statute did not apply

198. *Id.* at 219.
199. *Id.* at 219-20.
200. *Id.* at 220.
201. *Id.*
202. *Id.* at 220-21.
203. *Id.* at 221.
204. *Id.*
205. *Id.* at 223.
206. *Id.* at 224.
207. *Id.* at 225-26, 231.
208. *Id.* at 231-32.
209. 96 N.E.3d 564 (Ind. 2018).

to a doctor reporting suspected child abuse because the report was not made pursuant to the doctor's right to free speech and the lawsuit against the doctor was a medical malpractice suit.[210]

A doctor diagnosed a child as suffering from medical child abuse and reported her findings to a social worker, who notified DCS.[211] DCS removed the child and her sibling from their parents and filed a CHINS petition which was eventually dismissed, although DCS substantiated the neglect allegations.[212] The child's parents sued the doctor, arguing her diagnosis of medical child abuse fell below the standard of care.[213] The trial court dismissed the case, finding the doctor's report to DCS was protected speech under Indiana's anti-SLAPP statute.[214]

The court of appeals concluded the anti-SLAPP statute did not apply because the doctor had a duty to report and her report regarded a private matter, not a matter of public concern.[215] The supreme court analyzed the history of SLAPP lawsuits and Indiana's anti-SLAPP statute, noting the goal of SLAPP lawsuits was to silence political speech with the threat of lengthy and expensive lawsuits.[216] The anti-SLAPP statute was enacted to reduce abusive SLAPP litigation and applies when a person is sued for exercising her right to free speech in connection with a public issue "taken in good faith with a reasonable basis in law and fact."[217] The supreme court held the anti-SLAPP statute did not apply because the doctor's report to DCS was not pursuant to her right to free speech and was not made in connection with a public issue.[218] The doctor's report was a product of a statutory duty, not a constitutional right.[219] As such, the case against the doctor was allowed to proceed.[220]

B. Sudden Emergency

In *Yates v. Hites*,[221] the trial court erred by reading a sudden emergency instruction to the jury when there was no evidence in the record to support the instruction.[222]

Rebecca Hites was traveling to pick up a friend when she lost control of her

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210. *Id.* at 566.
211. *Id.*
212. *Id.* at 566-67.
213. *Id.* at 567.
214. *Id.*
215. *Id.*
216. *Id.* at 568.
217. *Id.* at 568-69 (quoting IND. CODE § 34-7-7-5 (2018)).
218. *Id.* at 569-70.
219. *Id.* at 570.
220. *Id.* at 571.
221. 102 N.E.3d 901 (Ind. Ct. App. 2018), *trans. denied*.
222. *Id.* at 910.

vehicle, causing it to strike Calvin Yates's vehicle.[223] Yates was injured and sued Hites.[224] Before trial, Hites requested a sudden-emergency jury instruction, but the court denied her request and granted a motion in limine in favor of Yates on that issue.[225] During the trial, one of Yates' witnesses testified there was ice on parts of the road that morning.[226] Based on this evidence, Hites renewed her request for a sudden emergency instruction, which the trial court granted.[227] The jury found in Hites' favor and Yates appealed.[228]

The court of appeals determined there was no evidence in the record of a sudden emergency.[229] Hites claimed the sudden emergency was black ice, but the only evidence regarding the existence of black ice was the state trooper's testimony that there was ice on some parts of the road, but the state trooper did not witness the accident and believed the cause of the accident was driving too fast for conditions.[230] The court found the instruction was reversible error because Hites' attorney extensively argued that the sudden emergency doctrine applied in closing arguments, and it was likely the jury considered the instruction in reaching its verdict.[231]

C. Medical Malpractice – Duty to Keep Adequate Medical Records

In *Henderson v. Kleinman*,[232] the court of appeals concluded there is no statutory duty for a doctor to maintain adequate records, but a doctor's records at a minimum should include enough information for the medical review panel to determine whether the doctor met the applicable standard of care.[233]

Rickie Henderson underwent three surgeries for his right foot and ankle over a five-year period as Dr. Kleinman's patient.[234] After the last surgery, Henderson had continued pain and sought a second opinion from Dr. DiPierro, who opined Henderson's pain was a direct result of the last surgery.[235] Henderson filed a malpractice complaint with the department of insurance, and the medical review panel concluded Dr. Kleinman's record-keeping deviated from the standard of care, and the lack of documentation made it impossible for the panel to decide whether the doctor deviated from the standard of care in treating the patient.[236]

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223. *Id.* at 904.
224. *Id.*
225. *Id.*
226. *Id.* at 905.
227. *Id.*
228. *Id.* at 906.
229. *Id.* at 907.
230. *Id.* at 907-08.
231. *Id.* at 909-10.
232. 103 N.E.3d 683 (Ind. Ct. App. 2018).
233. *Id.* at 687.
234. *Id.* at 685.
235. *Id.*
236. *Id.* at 685-86.

Dr. Kleinman filed a partial motion for summary judgment, arguing he was under no legal duty to keep a particular type of patient records.[237] The trial court agreed and granted Dr. Kleinman's motion; Henderson appealed.[238] The court of appeals noted this was an "extremely unusual case" because there is no statutory authority or case law regarding a duty to keep adequate records.[239] Assuming there was a duty to keep adequate records, whether Dr. Kleinman met the duty would be a question of fact.[240] Dr. Kleinman designated evidence in his summary judgment motion that he did not deviate from the standard of care, but in her response, Henderson did not designate evidence that could show Dr. Kleinman's treatment deviated from the standard of care.[241] Because Henderson did not designate evidence to show Dr. Kleinman deviated from the standard of care, summary judgment in favor of the doctor was proper.[242]

D. Medical Malpractice – Duty to Preserve Medical Records

In *Shirey v. Flenar*,[243] the court of appeals held that doctors have a duty to preserve a patient's medical records and are subject to a spoliation action if they do not preserve the records, at least in some circumstances.[244]

Mary Shirey was injured in a car accident and treated by Dr. Rex Flenar.[245] A few weeks later, Shirey's attorney requested the records from Dr. Flenar, who did not respond for several years.[246] Dr. Flenar finally informed Shirey that her medical records were destroyed by his medical-records software provider.[247] Shirey sued Dr. Flenar, claiming a private right of action under Indiana Code section 16-39-1-1,[248] which requires healthcare providers to supply a patient's medical records upon request.[249] Shirey also made a claim for third-party spoliation of evidence because without her medical records, she could not fully substantiate her personal injury claim.[250] The trial court granted Dr. Flenar summary judgment on both claims.[251]

The court of appeals agreed with the trial court that Indiana Code section 16-

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237. *Id.* at 686.
238. *Id.*
239. *Id.* at 687.
240. *Id.* at 687-88.
241. *Id.* at 688.
242. *Id.* at 689.
243. 89 N.E.3d 1102 (Ind. Ct. App. 2017).
244. *Id.* at 1103.
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.*
249. IND. CODE § 16-39-1-1 (2018).
250. *Shirey,* 89 N.E.3d at 1103.
251. *Id.*

39-1-1 did not give Shirey a private right of action.[252] However, the court of appeals reversed the trial court regarding the spoliation claim.[253] The court applied the three factors first outlined in *Webb v. Jarvis*[254] to determine whether Dr. Flenar had a duty to maintain her medical records.[255] First, Dr. Flenar had an important relationship with Shirey and was the person presumed to maintain her treatment records.[256] Second, it was foreseeable to a healthcare provider that a patient who requests her medical records will be harmed if she does not receive them, especially given the fact Shirey requested her medical records.[257] Third, public policy concerns favored Shirey,[258] although the court determined policy considerations such as worker's compensation, professional misconduct, and criminal sanctions were irrelevant to this case, and Dr. Flenar's concern regarding speculative damages was found to be a concern in every spoliation case.[259] Because all of the *Webb* factors favored Shirey, the court of appeals reversed the trial court.[260]

E. Damages – Amount in Controversy

In *Harr v. Hayes*,[261] the plaintiff's damages were not capped at $75,000 even though the cause was remanded to state court because the plaintiff claimed the amount in controversy was less than $75,000.[262]

Julian Hayes was injured in a semi-tractor trailer accident and sued William Harr and Harr's employer.[263] The defendants tried to remove the case to federal court under diversity jurisdiction, but the plaintiff objected, arguing that the amount in controversy did not exceed $75,000.[264] The district court remanded the case, concluding it lacked subject matter jurisdiction because the defendants did not meet their burden of proof that the amount in controversy requirement had been met.[265] The defendants asked the state court to limit any judgment to $75,000 under the doctrine of judicial estoppel.[266] Hayes argued that, after the case was remanded, he was diagnosed with an 8% permanent impairment, which

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252. *Id.* at 1105-07.
253. *Id.* at 1107.
254. 575 N.E.2d 992 (Ind. 1991).
255. *Shirey*, 89 N.E.3d at 1107.
256. *Id.* at 1108.
257. *Id.*
258. *Id.* at 1109.
259. *Id.*
260. *Id.* at 1111.
261. 106 N.E.3d 515 (Ind. Ct. App.), *mod. on reh'g*, 108 N.E.3d 405 (Ind. Ct. App. 2018).
262. *Id.* at 518-19.
263. *Id.*
264. *Id.* at 519.
265. *Id.* at 520.
266. *Id.*

made the case value substantially higher.[267]

The trial court denied the defendants' motion to limit judgment to $75,000 and the jury rendered a $187,500 verdict in favor of Hayes.[268] The trial court denied the defendants' subsequent motions to correct error and to modify the jury's verdict to $75,000.[269] The court of appeals determined judicial estoppel did not apply because Hayes's statement regarding the amount in controversy was not a material misrepresentation at the time of removal.[270] At the time of removal, Hayes's medical bills were only $3,500; it was only after the case was remanded that Hayes learned of his 8% permanent impairment.[271] The court cautioned plaintiffs from proclaiming that an amount in controversy does not exceed $75,000 to defeat diversity jurisdiction and then claiming damages in excess of $75,000, noting that under circumstances not present in this case, the objecting party could be held to their word as to damages.[272] The court of appeals also found that Hayes did not waive his right to claim damages exceeding $75,000 and that Hayes did not make a judicial admission regarding the amount of damages.[273] Given the timing and context of the Hayes' declaration, the court held that Hayes did not intend to cap the amount in controversy.[274]

F. Damages for Loss of Pet

In *Liddle v. Clark*,[275] the court of appeals held that damages for loss of a pet are limited to the fair market value of the pet and do not include sentimental value.[276]

Melodie Liddle's dog died at a state park after getting caught inside a concealed raccoon trap.[277] Liddle sued several individuals and the parties filed cross-motions for summary judgment.[278] The trial court granted Liddle's motion for summary judgment on the negligence claim but limited her damages to $477, reflecting the fair market value of the dog.[279] Liddle appealed, arguing the sentimental value of the dog should be included in her damages.[280] The court of

267. *Id.*
268. *Id.*
269. *Id.* at 520-21.
270. *Id.* at 523.
271. *Id.*
272. *Id.* at 523-24.
273. *Id.* at 526-27.
274. *Id.* at 527.
275. 107 N.E.3d 478 (Ind. Ct. App. 2018), *trans. denied*.
276. *Id.* at 484.
277. *Id.* at 480.
278. *Id.* at 480-81.
279. *Id.* at 481.
280. *Id.* at 482.

appeals disagreed, noting that animals are personal property and the fair market value of the animal at the time of the loss is the appropriate basis for calculating damages.[281] The court reasoned that it would be difficult to draw a line if sentimental damages or damages for emotional distress for loss of a pet were recoverable.[282]

281. *Id.* at 483.
282. *Id.*