SURVEY OF TORT LAW DEVELOPMENTS IN 1994: THE GOOD, THE BAD AND THE UGLY

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As has been the trend for the past several years, a great deal of change occurred during the 1994 Survey period in Indiana's tort law. Much of that change involved expanding existing areas of tort law and recognizing new causes of action. Application of the Tort Claims Act[1] and its immunities also changed. Finally, a new statute[2] and a clarification of the meaning of Trial Rule 56[3] present some issues practitioners must keep in mind when litigating cases.

I. GOVERNMENTAL LIABILITY

A. Law Enforcement Immunity

The past year was not good for governmental entities or their employees attempting to escape civil liability. On October 25, 1993, the Indiana Supreme Court handed down four decisions interpreting section 3(7) of the Indiana Tort Claims Act ("section 3(7)").[4] The linchpin of these decisions was the case of *Quakenbush v. Lackey*.[5] In *Quackenbush*, the Indiana Supreme Court essentially repealed section 3(7). This statutory provision provides that: "A governmental entity or employee acting within the scope of his employment is not liable if a loss results from: . . . (7) the adoption and enforcement of

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1. IND. CODE § 34-4-14.5-1 (1993).
2. The Residential Real Estate Sales Disclosure Act, IND. CODE § 24-4.6-2-1 to -13 (1993).
3. IND. R. TRIAL P. 56.
4. IND. CODE § 34-4-16.5-3(7) (1993).
5. 622 N.E.2d 1284 (Ind. 1993). The other decisions were Belding v. Town of Whiteland, 622 N.E.2d 1291 (Ind. 1993); Fries v. Fincher, 622 N.E.2d 1294 (Ind. 1993); and Kemezy v. Peters, 622 N.E.2d 1296 (Ind. 1993). Both *Belding* and *Fries* were also traffic accident cases involving law enforcement officers. In *Belding*, the Indiana Supreme Court reaffirmed the rule of *Quackenbush* that the test for the applicability of law enforcement immunity was whether the police officer owed a private duty to the plaintiff. 622 N.E.2d at 1293. The court in *Fries* concluded that while the officer's duty to enforce the law in responding to a call of illegal activity was subject to law enforcement immunity, the officers simultaneous duty "to use ordinary care under the circumstances while traveling on a public roadway" was not entitled to law enforcement immunity. 622 N.E.2d at 1295 (citing IND. CODE ANN. § 9-21-1-8 (West 1992)). Finally, in *Kemezy* the plaintiff alleged the use of excessive force by a police officer. The court stated that since under Indiana law police officers owe a private duty to refrain from using excessive force in the course of making arrests, law enforcement immunity did not apply to such claims. Further, the court stated that such acts by a police officer may be within the scope of his employment. That determination is fact-sensitive. 622 N.E.2d at 1297-98.

or failure to adopt or enforce a law (including rules and regulations) unless the act of enforcement constitutes false arrest or false imprisonment."[6]

This statute was first interpreted in the case of *Seymour National Bank v. State*.[7] In *Seymour*, the court stated that the statute was clear and unambiguous, requiring the court to follow its plain meaning.[8] Thus the court held that a state trooper involved in a fatal automobile collision during a high speed chase of a criminal suspect was engaged in the enforcement of a law and immune from liability under section 3(7).[9] On rehearing, the supreme court clarified its opinion but did not change its core finding that "all acts of enforcement save false arrest and imprisonment now render the State immune."[10] The court excluded from immunity those acts so incompatible with the performance of the duties of law enforcement that they are outside the course and scope of a police officer's duties.[11] The court also rejected plaintiffs' contentions that having liability insurance coverage waived law enforcement immunity, as well as a claim that the law enforcement immunity statute violates Article I, Section 12 of the Indiana Constitution.[12]

In 1991, the law enforcement immunity provision was re-examined by the Indiana Supreme Court in the case of *Tittle v. Mahan*.[13] *Tittle* was a consolidated case that arose out of the suicide deaths of two jail detainees. The trial courts and courts of appeals held that jail officials were shielded from claims that they had negligently failed to prevent the suicides under section 3(7).[14] The Indiana Supreme Court found that the acts were not within section 3(7). The court redefined law enforcement immunity by stating that such immunity applies only when the action giving rise to liability was "attendant to effecting the arrest of those who may have broken the law."[15]

In *Quackenbush*, the court stated that its previous decisions relating to section 3(7) had produced an unworkable rule of law.[16] In its analysis, the court traced the common law through the enactment of the Indiana Tort Claims Act to support its conclusion that section 3(7) was intended "to codify the common law as it existed at the time the [Indiana Tort Claims] Act was passed."[17] The common law provided that "governments and their employees were subject to liability for the breach of private duties owed to individuals but were immune from liability for the breach of public duties owed to the public at large."[18]

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6. IND. CODE § 34-4-16.5-3 (1993).
7. 422 N.E.2d 1223 (Ind. 1981), *modified on reh'g*, 428 N.E.2d 203 (Ind. 1981).
8. *Id.* at 1226.
9. *Id.* The court specifically stated that in its view, "an officer engaged in effecting an arrest is enforcing a law." *Id.*
10. *Id.*
11. *Seymour Nat'l Bank*, 428 N.E.2d at 204.
12. *Id.* at 205.
13. 582 N.E.2d 796 (Ind. 1991).
14. *Id.* at 797-98.
15. *Id.* at 801. *See also* City of Wakarusa v. Holdeman, 582 N.E.2d 802 (Ind. 1991).
16. 622 N.E.2d 1284, 1287 (Ind. 1993).
17. *Id.* at 1290-91.
18. *Id.* at 1291.

The court reversed the lower courts, holding that because the plaintiff alleged breach of private duty, section 3(7) did not provide immunity to the defendants.[19]

The authors believe that the court's reliance on the public-private duty distinction is fundamentally flawed and is not supported by the rules of statutory construction nor by precedent.[20] The court's statutory interpretation violates the plain meaning of section 3(7). Breaches of public duties necessarily involve only acts of omission. If, for example, the statute provided immunity only for the failure to adopt or enforce laws, rules or regulations, the supreme court's interpretation would be logical on its face, since breaches of public duties almost always involve the failure to prevent occurrences such as crimes, fires, or other damaging acts caused by forces beyond the control of governmental actors.[21]

Justice Givan, joined by Chief Justice Shepard, wrote a brief but accurate dissent.[22] Policy reasons militate against providing immunity to law enforcement officers involved in automobile collisions. Granting immunity would, in the view of the majority, "sanction negligent and reckless conduct, and result in hardship to the individual injured by the enforcement."[23] But, as Justice Givan noted, this argument should "be used in the legislature to bring about a change in the language of the statute,"[24] and should not be used to change the meaning of a clear and unambiguous statute.[25] Moreover, whatever ambiguities exist in section 3(7), for which historical analysis would provide clarification, do not lead to the interpretation reached by the majority of the court.

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19. *Id.*

20. In interpreting and reviewing a statute, the supreme court's objective is to determine and effect legislative intent. Stanek v. State, 603 N.E.2d 152 (Ind. 1992); Superior Constr. Co. v. Carr, 564 N.E.2d 281 (Ind. 1990). Where the statute is susceptible to reasonable and intelligible construction, the court has the duty to construe it so as to give effect and validity to each provision of the statute. Tinder v. Music Operating, Inc., 142 N.E.2d 610 (Ind. 1957). Where the legislature makes a plain provision without making any exceptions, the courts can make none. French's Lessee v. Spencer, 62 U.S. 228 (1858).

21. *See infra* note 34 and accompanying text. Ironically, the cases cited by the *Quackenbush* court in footnote 3 illustrate the *in*appropriateness, rather than the appropriateness, of the public-private distinction as the touchstone for the application of immunity. *Quackenbush*, 622 N.E.2d at 1287 n.3. The cases cited therein involving acts of commission, if championed by an even reasonably creative plaintiff's attorney, would likely result in a judicial finding of no immunity if the holding of *Quakenbush* is followed. For example, the court's reference to Indiana Dep't of Corrections v. Stagg, 556 N.E.2d 1338 (Ind. Ct. App. 1990), suggests the immunity of the Department of Corrections' investigation of an attorney's activities. Ms. Stagg, however, asserted a claim for defamation, a tort of commission. Because public employees have a private duty to avoid defaming individuals during the course and scope of their employment, how the law enforcement immunity defense would survive the public-private duty analysis is difficult to understand.

22. *Quackenbush*, 622 N.E.2d at 1294.

23. *Id.* at 1290.

24. *Id.* at 1291.

25. *Id.*

B. Notice of Tort Claim

One Indiana Supreme Court decision and two court of appeals decisions helped define the parameters of the 180-day notice of a tort claim. This notice is a prerequisite to bringing an action based in tort against a governmental entity or its employee.

In *South Bend Community Schools v. Widawski*,[26] the Indiana Supreme Court held that the status of minority qualifies a claimant as "incapacitated."[27] Therefore, the deadline for giving notice of a tort claim is 180 days after the minor reached majority.[28]

In *Ammerman v. State*,[29] the Indiana Court of Appeals concluded that although the plaintiffs had failed to strictly comply with the notice requirements by sending their notice to the Indiana Attorney General rather than the state agency, they had substantially complied with the requirement since the notice would not have served any purpose had it been sent to the state agency. The state agency would not have investigated nor defended against the claim, but would only have forwarded it to the Attorney General.[30] In contrast, the court in *Madden v. Erie Insurance Group*[31] concluded that substantial compliance had not been shown when the plaintiff failed to prove that "the State had received full and timely information regarding the occurrence, as well as formal notification of Erie's intent to assert a claim."[32] The court reaffirmed the long-standing principle that actual knowledge of the incident, coupled with a routine investigation by the governmental entity is not substantial compliance; the governmental entity must have actual knowledge that the incident forms the basis of an active claim by the potential plaintiff.[33]

C. Private v. Public Duties

In *Quakenbush* and the three other law enforcement immunity cases, the Indiana Supreme Court based its decision on whether government employees owed a public or private duty to individuals. Clear cases of a violation of only a public duty include claims against police, fire, welfare or other public service municipal departments for failure to provide protective or other services.[34] Generally, once a defendant can show that the

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26. 622 N.E.2d 160 (Ind. 1993).

27. *Id.* at 162.

28. *Id.* at 161-62. Chief Justice Shepard dissented, reasoning that because a former version of the statute that specifically extended the tolling period to minority status was repealed, the General Assembly intended that children be required to file, through their next friend, notice of tort claims within the standard 180-day period. *Id.* at 162.

29. 627 N.E.2d 836 (Ind. Ct. App. 1994).

30. *Id.* at 839-40. This result is an extension of the Indiana Supreme Court's ruling in Indiana State Highway Comm'n v. Morris, which found substantial compliance where the highway commission was served with a tort claim notice and in turn gave the notice to the Attorney General within the 180-day period. 528 N.E.2d 468 (Ind. 1988).

31. 634 N.E.2d 791 (Ind. Ct. App. 1994).

32. *Id.* at 794.

33. *Id.*

34. *See* DeShaney v. Winnebago County Dep't of Social Svcs., 489 U.S. 189 (1989) (duty to provide welfare); State v. Flanigan, 489 N.E.2d 1216 (Ind. Ct. App. 1986) (duty to control traffic); City of Hammond

plaintiff has alleged only the violation of a public duty, the plaintiff's case will fail.[35] Creative plaintiff's attorneys, however, try to avoid this result by alleging that a "special relationship" existed sufficient to create a private duty in addition to a public duty. This approach was used in *J.A.W. v. Roberts*[36] with mixed results.

In *J.A.W.*, the Indiana Court of Appeals addressed the requirements of a special relationship in the context of reporting child abuse. J.A.W., a minor, alleged that after he was made a ward of the juvenile court and placed with a foster family, his foster father and numerous other persons sexually molested or physically assaulted him. He then sued the sister of his foster father, three clergy members and several other persons whom he claimed had knowledge of the molestations, materially assisted in covering up the molestations, and failed to report the abuse to the appropriate local authorities.[37]

The key to the appellate court's decision was whether the defendants owed an actionable duty to the plaintiff. The court determined whether a common law duty exists by balancing "three competing factors": the relationship between J.A.W. and each of the appellees; the reasonable foreseeability of harm to J.A.W.; and public policy concerns.[38]

1. Relationship.—As to the relationship between the sister of his foster father and J.A.W., the court found the interaction between them was not sufficient to give rise to a special relationship.[39] Plaintiff's admission that he never sought the advise and counsel of the sister of his foster father regarding the molestations, or even told her about them, was important in the court's decision. The fact that the sister knew of the molestations because of correspondence from the foster father was not considered relevant, since it was outside of the relationship between J.A.W. and the sister.[40]

Regarding the three members of the clergy, the court rejected plaintiff's contention that their status as counselors or clergy, in itself, was sufficient to create a special relationship.[41] The court stated that "whether a special relationship exists is fact sensitive

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v. Cataldi, 449 N.E.2d 1184 (Ind. Ct. App. 1983) (duty to fight fires); Crouch v. Hall, 406 N.E.2d 1184 (Ind. Ct. App. 1980) (duty to arrest criminal suspect).

35. There are, however, exceptions to this rule. The exceptions usually arise when the attempted object of liability has created the danger that ultimately caused the plaintiff's injury. *See, e.g.*, Reed v. Gardner, 986 F.2d 1122 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 389 (1993) (defendant's actions of arresting designated driver and leaving car and car keys in the custody of drunk passenger who officers knew or should have known was intoxicated state a claim for plaintiff and his decedents, whom the drunk driver struck); Wood v. Ostrander, 879 F.2d 583, 583 (9th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990) (triable issue of fact where plaintiff alleges that the defendant "affirmatively placed [her] in a position of danger" when defendant arrested driver and left female plaintiff passenger in a high crime area where she was subsequently raped); Maroon v. State, 411 N.E.2d 404 (Ind. Ct. App. 1980) (arguable state liability based upon alleged negligence in allowing the escape of prisoner who traveled to a different state and assaulted plaintiff).

36. 627 N.E.2d 802 (Ind. Ct. App. 1994).

37. *Id.* at 806.

38. *Id.* at 809 (citing Webb v. Jarvis, 575 N.E.2d 992, 995 (Ind. 1991)).

39. *Id.*

40. *Id.*

41. *Id.*

and dependent on the level of interaction or dependency between the parties that surpasses what is common or usual."[42]

Relative to Bottorff, one of the clergy, the court noted that although he provided marital counseling for the foster father and mother, was aware of the sexual relationship between J.A.W. and the foster father, and J.A.W. attended three marriage counseling sessions, his relationship with J.A.W. did not "reveal a level of interaction or dependency which can be characterized as a special relationship."[43] The fact that Bottorff did not counsel J.A.W. regarding the molestations and did not advise the plaintiff was important to the court.[44]

As to another pastoral counselor, Chastain, although J.A.W. alleged that during a six-month period he spoke to Chastain about his sexual relationship with the foster father and that three of these conversations were in the church, the court found that these allegations were not sufficient to create a special relationship.[45] The court stated that the allegations showed that Chastain had knowledge of the criminal activity, but that knowledge alone was insufficient to create a special relationship.[46]

Regarding the other clergy, Francis, the court found that J.A.W.'s allegations were sufficient to create a genuine issue of material fact about whether a special relationship existed.[47] Specifically, J.A.W. alleged that Francis met with him more than fifty times and, more importantly, when J.A.W. sought help from Francis concerning the abuse, the clergy advised him that in the future he could move out of the foster home, but in the meantime he "should pray to make sure his soul is saved."[48] The court said that if these allegations were true, a special relationship existed.[49]

2. Foreseeability.—The defendants argued that the injuries of continued abuse were not "foreseeable" because a prior reporting to the Marion County Department of Public Welfare was an intervening cause.[50] The court rejected this argument on the grounds that proximate cause is normally a question of fact decided by the jury unless only one inference or conclusion can be drawn from the undisputed facts. In addition, the factors to determine foreseeability are not the same as those used to determine proximate cause. The court stated that, in analyzing the foreseeability component in determining the existence of a duty, "we must examine what forces and human conduct should have appeared on the scene, and we weigh the dangers likely to flow from the challenged conduct in light of these forces and conduct."[51] The court concluded that once the

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42. *Id.* at 810 (citing Burrell v. Meads, 569 N.E.2d 637 (Ind. 1991); Cowe v. Forum Group, Inc., 575 N.E.2d 630 (Ind. 1991); Miller v. Griesel, 308 N.E.2d 701 (Ind. 1974); Johnson v. Pettigrew, 595 N.E.2d 747 (Ind. Ct. App. 1992), *trans. denied*, Dec. 16, 1992; and Welch v. Railroad Crossing, Inc., 488 N.E.2d 383 (Ind. Ct. App. 1986)).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 811.

49. *Id.*

50. *Id.* at 812.

51. *Id.* (citing Webb v. Jarvis, 575 N.E.2d 992, 997 (Ind. 1991)).

defendants knew of the abuse, it was foreseeable that their failure to report it "created an unreasonable risk that the abuse would continue."[52]

3. Public Policy.—Although the court had "no quarrel" with plaintiff's argument that the effect of not reporting child abuse has a devastating effect on its victims, it nonetheless concluded that absent legislative action, it was not convinced that creating a civil cause of action for failing to report child abuse was "good public policy."[53] Specifically, the court noted that the Indiana General Assembly had already provided for a criminal penalty for failing to make a report.[54] The court also pointed out that only seven states had codified such a private right of action.[55] Finally, the court mentioned the case of *Borne v. Northwest Allen County School Corp.*, which had made a comprehensive analysis of the criminal reporting statute as well as the common law.[56]

Based on its analysis of these three factors, the court concluded that the plaintiff had sufficiently alleged the existence of a special duty only as to defendant Francis.[57] Therefore, the court reversed the summary judgment granted to defendant Francis and affirmed summary judgment granted to the other defendants.[58]

Judge Barteau wrote an opinion concurring only in the result. She concluded that once a court has determined that a special relationship does not exist, there is no reason to analyze the other factors articulated in *Webb* to determine whether a duty exists.[59] Judge Barteau stated a simple, logical and pragmatic rule: "[W]here the negligent action is for nonfeasance, absent a special relationship, no duty, and therefore no liability, will attach."[60]

Judge Sullivan authored an opinion concurring in part and dissenting in part in which he concluded that no actionable claim had been asserted against defendant Francis.[61] He stated that the existence of a duty did not depend upon the finding of a special relationship between the parties, and objected to the distinction between misfeasance and nonfeasance in the analysis of the existence of a duty.[62] He further found that the alleged failure to report did not, as a matter of law, proximately cause any injury to J.A.W.[63]

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52. *Id.*

53. *Id.* at 813.

54. *Id.*; IND. CODE § 31-6-11-20 (1993).

55. *J.A.W.*, 627 N.E.2d at 813 (citing ARK. CODE § 12-12-503(b) (1987); COLO. REV. STAT. § 19-3-304(4)(b) (1990 Supp.); IOWA CODE § 232.75 (1994); MICH. COMP. LAWS § 722.633 (1993); MONT. CODE § 41-3-207 (1993); N.Y. SOC. SERV. LAW § 420 (1992); and R.I. GEN. LAWS § 40-11-6.1 (1990)).

56. 532 N.E.2d 1196 (Ind. Ct. App. 1989), *trans. denied*, 558 N.E.2d 828 (Ind. 1990). Because the plaintiff on appeal conceded that the statute itself did not create a private right of action for non-reporting, the court did not rely heavily on *Borne*.

57. *J.A.W.*, 627 N.E.2d at 813.

58. *Id.*

59. *Id.* at 814.

60. *Id.*

61. *Id.* at 815.

62. *Id.*

63. *Id.*

D. 911 Cases

Two 911 emergency dispatcher cases arose in the past year that also illustrate the nature of duties allegedly breached by acts of nonfeasance. *Mullin v. Municipal City of South Bend*[64] involved a claim brought by a parent who alleged that the city of South Bend negligently failed to immediately dispatch an ambulance to the Mullin household, which was on fire. One of the plaintiff's minor children died and another was injured in the fire. Plaintiff claimed that the dispatcher should have known to immediately send an ambulance when a neighbor told the dispatcher that she thought people were inside the house.[65] After disposing of the city's claims of immunity under Indiana Code section 34-4-16.5-3(6) and (7),[66] the court concluded that the plaintiff did not show the existence of a private duty.[67] The court examined the tests used in New York[68] and Georgia[69] to determine the existence of a special duty, and concluded that Georgia's test was the better-reasoned rule of law.[70] The court concluded that a special duty existed upon the following showing: an explicit assurance of action by the municipality to the plaintiff for his or her benefit, the municipality's knowledge that a failure to act could result in harm, and justified and detrimental reliance by the plaintiff on the municipalities' assurance.[71] In applying this test to the claims of Mullin, the court concluded that the plaintiff had failed to establish the existence of a special duty because no evidence of either an assurance or detrimental reliance existed.[72]

The Indiana Court of Appeals found a breach of a special duty in the case of *City of Gary v. Odie*.[73] The court in *Odie* applied the four-part test set out in *Cuffy v. City of New York*[74] and concluded that the jury's decision that a special relationship existed and had been breached was supported by the facts and the law applicable to the case.[75] The court specifically found that the assurance given to the plaintiff that an ambulance "was on its way" had "lulled [her] into inaction" and, thus, proximately caused the death of her husband.[76] It is interesting to note that the court found the "direct contact" requirement

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64. 639 N.E.2d 278 (Ind. 1994).

65. *Id.* at 280.

66. The fire, which occurred on November 5, 1985, preceded the effective date of IND. CODE § 34-4-16.5-3(17) (1993).

67. *Mullin*, 639 N.E.2d at 281-83.

68. *See* Cuffy v. City of New York, 505 N.E.2d 937, 940 (N.Y. 1987).

69. *See* Rome v. Gordan, 426 S.E.2d 861, 863 (Ga. 1993).

70. *Mullin*, 639 N.E.2d at 284. The test in *Rome* does not require direct contact between the injured person and the municipality.

71. *Id.*

72. *Id.* at 285.

73. 638 N.E.2d 1326 (Ind. Ct. App. 1994). Although this incident occurred after the enactment of IND. CODE § 34-4-16-5-3(17) (1993), the city of Gary failed to assert this statute as an affirmative defense. Had it done so, the result would likely have been different. Judge Baker, in his concurring opinion, specifically stated that his ruling would have been different had the city asserted this affirmative defense.

74. *See* 505 N.E.2d 937, 940 (N.Y. 1987).

75. *Odie*, 638 N.E.2d at 1334.

76. *Id.*

satisfied by the repeated contact between the wife-administratrix and the municipality, whereas the direct contact element in *Cuffy* requires the contact to be between the *injured party*—which, in *Odie*, would have been the decedent-husband—and the municipality. No evidence showed any communication between the decedent-husband and the municipality. Nevertheless, *Mullin* effectively obviates the rather harsh "direct contact" element articulated in *Cuffy*.

E. Recreational Use Immunity

Indiana's recreational use statute was visited in *Kelly v. Lakewood Apartments*.[77] In *Kelly*, the plaintiff, a six-year-old child, was injured when his sled struck a raised, snow-covered manhole cover while the child was sledding on a hill in the defendant's apartment complex.[78] After applying the rules of statutory construction, the court of appeals concluded that Indiana Code section 14-2-6-3[79] provided immunity from liability to landowners.[80] The court concluded that:

> The only reasonable interpretation of the statute is that subject to the exceptions listed in the statute (attractive nuisance and malicious or illegal acts), the statute excuses an owner from liability to persons (other than business invitees and invited guests) using the property for recreational purposes without pay of monetary consideration, whether injury is cause by the condition of the land or by another recreational user.[81]

F. Fireman's Rule

In *Heck v. Robey*,[82] the court of appeals extended the fireman's rule to paramedics who are injured while rescuing accident victims because of the negligence of the victim.[83]

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77. 622 N.E.2d 1044 (Ind. Ct. App. 1993).

78. *Id.* at 1045-46.

79. IND. CODE § 14-2-6-3 (1993) provides:

> Any person who goes upon or through the premises including, but not as a limitation, lands, caves, waters, and private ways of another with or without permission to hunt, fish, swim, trap, camp, hike, sightsee, or for any other purposes, without the payment of monetary consideration, or with the payment of monetary consideration directly or indirectly on his behalf by an agency of the state or federal government, is not thereby entitled to any assurance that the premises are safe for such purpose. The owner of such premises does not assume responsibility for nor incur liability for any injury to person or property caused by an act or failure to act of other persons using such premises. The provisions of this section shall not be construed as affecting the existing case law of Indiana of liability of owners or possessors of premises with respect to business invitees in commercial establishments nor to invited guests nor shall this section be construed as to affect the attractive nuisance doctrine. Nothing in this section contained shall excuse the owner or occupant of premises from liability for injury to persons or property caused by the malicious or illegal acts of the owner or occupant.

80. *Kelly*, 622 N.E.2d at 1048-49.

81. *Id.* at 1047.

82. 630 N.E.2d 1361 (Ind. Ct. App. 1994).

83. *Id.* at 1364.

Indiana's "rescue doctrine" provides that one who has negligently endangered the safety of another may be held liable for the injuries sustained by the third person attempting rescue.[84] The fireman's rule is an exception to this doctrine that holds the defendant to the lesser standard of care of abstaining from any positive wrongful act that may result in injury.[85] After balancing the three factors articulated in *Webb v. Jarvis*[86] to determine whether a duty existed, the court stated that "the reasons behind the fireman's rule support an extension to a paramedic such as Robey."[87] After finding that Heck's conduct was neither a "positive wrong" nor a "willful and wanton" act purposefully directed at Robey, and that the statute in question was not for the benefit of public safety officers, the court concluded that the fireman's rule precluded liability since no duty was owed to Robey.[88]

G. Impact Rule

Two court of appeals decisions have provided some insight into the modified impact rule established by the Indiana Supreme Court in *Shuamber v. Henderson*.[89] In *J.L. v. Mortell*,[90] the court discussed when a person could recover damages for negligent infliction of emotional distress. In this case, the plaintiff asserted that her physical therapist had performed inappropriate and unnecessary vaginal massages from which she suffered severe physical and emotional distress when she learned the massages were inappropriate.[91]

The court of appeals found that this case could not be distinguished from *Shuamber* since the plaintiff sustained a direct impact from the vaginal massages that caused her serious emotional trauma "of a kind and extent normally expected to occur in a reasonable person."[92] The court concluded the plaintiff stated a claim for emotional distress "without regard to whether the emotional trauma arose out of or accompanied any physical injury."[93]

In *Gorman v. I & M Electric Co.*,[94] the court of appeals rejected a claim for emotional distress by a woman who watched her family home burn down. At one point, the Gorman's thought that one of their minor children was still in the house, so Mr. Gorman went into the burning house to find the child. After determining the child was not in the house, and while he was leaving, Mr. Gorman fell and injured himself.[95] It was undisputed that Mrs. Gorman sustained no impact during the events in question.[96]

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84. *Id.* at 1363 (citing Lambert v. Parish, 492 N.E.2d 289, 291 (Ind. 1986)).

85. *Id.*

86. *See* 575 N.E.2d 992 (Ind. 1991).

87. *Kelly*, 622 N.E.2d at 1367.

88. *Id.* at 1368. *See* Thompson v. Murat Shrine Club, Inc., 639 N.E.2d 1039 (Ind. Ct. App. 1994) (denying request to court of appeals to distinguish or abandon fireman's rule).

89. 579 N.E.2d 452 (Ind. 1991).

90. 633 N.E.2d 300 (Ind. Ct. App. 1994).

91. *Id.* at 301.

92. *Id.* at 304.

93. *Id.*

94. 641 N.E.2d 1288 (Ind. Ct. App. 1994).

95. *Id.* at 1289.

96. *Id.* at 1290.

The court of appeals rejected plaintiff's request that the impact rule be abolished and replaced with the "zone of danger" rule or, alternatively, that the court recognize an exception to the impact rule when a person suffers a traumatic experience that causes emotional injury whether or not there is impact or physical harm.[97] The court concluded that Mrs. Gorman would not have benefited from such an expansion of the tort law, because she did not witness the injury of her husband.[98] Moreover, allowing her to recover for her mistaken fear that her child was inside the burning building would effectively abolish the impact rule, and remove the injury requirement.[99]

II. TORTS INVOLVING INSURANCE CONTRACTS

A. Breach of Insurance Contracts as a Separate Tort

In 1993, the Indiana Supreme Court issued its decision in *Miller Brewing Co. v. Best Beers of Bloomington, Inc.*,[100] which allowed punitive damages in an action for breach of contract if an independent tort, for which punitive damages could be awarded, was also proven.[101] In *Erie Insurance Co. v. Hickman*,[102] the supreme court applied the *Miller Brewing Co.* analysis to insurance contracts and further explained the prerequisites for an award of punitive damages. In *Erie*, the plaintiffs sought to recover from the defendant insurance company for breach of an insurance contract, and also for punitive damages.[103] The claim arose from an automobile collision in which Hickman was making a left turn from 34th Street onto Sherman Drive in Indianapolis when she was struck by a car driven by Gregory Davis. The car driven by Hickman was owned by her mother, Smith, who had both liability and uninsured motorist coverage. There was some dispute as to the color of the stoplight at the time the accident occurred. The original police report showed Davis as being "primarily at fault for the collision."[104] However, that report was later amended to show that Hickman was at fault for the collision. In addition, confusion arose over the status of Davis's automobile insurance at the time of the accident. Initially, Erie Insurance believed that Davis was insured at the time of the accident, which would have precluded Hickman from recovering from Erie Insurance under the uninsured motorist coverage. More than a year later, Erie Insurance determined that Davis was actually uninsured at the time of the collision. By that time, Erie Insurance had completed its investigation and determined that Hickman was more than fifty percent at fault for the

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97. California, for example, has a "zone of danger" rule that considers whether the plaintiff was near the scene of the accident, whether the shock resulted from a direct observance of the accident, and the relationship between the plaintiff and the victim in determining liability. *See* Dillon v. Legg, 441 P.2d 912 (Cal. 1968).

98. *Gorman*, 641 N.E.2d at 1291.

99. *Id.* at 1290.

100. 608 N.E.2d 975 (Ind. 1993).

101. *Id.* at 984. For a detailed discussion of this decision and its impact, see Judy L. Woods & Brad A. Galbraith, *Recent Developments in Contract and Commercial Law*, 27 IND. L. REV. 769 (1994).

102. 622 N.E.2d 515 (Ind. 1993).

103. *Id.* at 517.

104. *Id.* at 521.

accident and, thus, ineligible to make a claim under the uninsured motorist provision of the insurance policy.[105]

Smith and Hickman filed suit against Davis for personal injury and property damage resulting from the collision, and against Erie Insurance for breach of the insurance contract.[106] Plaintiffs also "alleged that Erie acted in bad faith and requested punitive damages."[107] The jury awarded both plaintiffs the full amount of compensatory damages they sought as well as punitive damages.[108]

In analyzing the claim for punitive damages, the court noted that in *Miller Brewing Co.*[109] it had held that "to recover punitive damages in a lawsuit founded upon a breach of contract, the plaintiff must plead and prove the existence of an independent tort of the kind for which Indiana law recognizes that punitive damages may be awarded."[110] The intent of that decision "was to prohibit the recovery of punitive damages, which is a tort remedy, where no tort has been established."[111]

Prior Indiana decisions had suggested that an insured could "recover punitive damages from an insurer when the insurer's breach of the insurance contract was accompanied by a serious wrong, tortious in nature."[112] Since this "substantial equivalent" was available, "courts declined to recognize the existence of a separate tort remedy" for the failure of an insurer to act in good faith.[113] However, the decision in *Miller Brewing Co.* overturned prior case law to the extent that it held that a breach of contract could not be the basis of an award of punitive damages unless the plaintiff pleaded and proved the "existence of an independent tort of the kind [for] which Indiana law recognizes punitive damages."[114] However, the court noted that "the contract at issue in *Miller Brewing Co.* did not involve insurance and, as a result, we did not address the question of whether a tort remedy was available to an insured when the insurer fails to fulfill duties imposed upon it by law."[115]

The *Erie* court then analyzed the relationship between the insurer and the insured to determine if a tort obligation arose from that relationship. Implicit in all insurance contracts is a duty "that the insurer deal in good faith with its insured."[116] To determine if a tort results from a breach of a duty, the court must balance three factors: "the relationship between the parties, the reasonable foreseeability of harm to the person injured, and public policy concerns."[117] The court found that although a contract alone

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105. *Id.* at 521-22.

106. *Id.* at 522.

107. *Id.*

108. *Id.*

109. 608 N.E.2d 975 (Ind. 1993).

110. *Erie*, 622 N.E.2d at 518.

111. *Id.*

112. *Id.* (citing Vernon Fire & Casualty Ins. Co. v. Sharp, 349 N.E.2d 173, 180 (Ind. 1976)).

113. *Id.* (citing Liberty Mut. Ins. Co. v. Parkinson, 487 N.E.2d 162, 165 (Ind. Ct. App. 1985)).

114. *Id.*

115. *Id.*

116. *Id.* (citing Wedzeb Enter. v. Aetna Life & Casualty Co., 570 N.E.2d 60, 63 (Ind. Ct. App. 1991); *Liberty Mut. Ins. Co.*, 487 N.E.2d at 164; *Vernon Fire & Casualty Ins. Co.*, 349 N.E.2d at 181).

117. *Id.* (citing Webb v. Jarvis, 575 N.E.2d 992, 995 (Ind. 1991)).

does not create the "special relationship" necessary for a tort duty to arise, "the unique character of the insurance contract" gives rise to a "special relationship."[118] Further, the harm that results when an insured's valid claim is denied in good faith is easily foreseeable.[119] Finally, the court stated that public policy favored the imposition of a duty of good faith between the insurer and the insured.[120]

The court did not find it necessary to fully define the scope of the duty the insurance company owed to the insured. It generally observed that the duty included "the obligation to refrain from making an unfounded refusal to pay policy proceeds, causing an unfounded delay in making payment, deceiving the insured, and exercising any unfair advantage to pressure an insured into settlement of his claim."[121] A breach of the obligation to deal in good faith with the insured does not arise every time an insurance company wrongly denies a claim. If there was a good faith basis for the denial, then there should be no tort.[122] The breach occurs when an insurer denies a claim when "no rational, principled basis [exists] for doing so."[123]

However, in the present case, the court did not follow that rationale. It upheld the jury's award of compensatory damages even though it noted that the only dispute was whether Hickman was primarily at fault for the accident.[124] Although the jury disagreed with Erie Insurance on that fact, the record reflected that "there was a rational, principled basis for the denial of the claim."[125] In addition, the court noted that the denial was made in good faith.[126] Even though these facts appear to meet the test promulgated by the court for the lack of a breach of the duty to deal in good faith, the court nevertheless upheld the award of compensatory damages.[127]

The second part of the *Erie* decision concerns punitive damage awards for breach of this special duty. The court held that "proof that a tort was committed is not sufficient to establish the right to punitive damages."[128] Rather, an award of punitive damages is only proper when

> there is clear and convincing evidence that the defendant "acted with malice, fraud, gross negligence, or oppressiveness which was not the result of a mistake of fact or law, honest error or judgment, overzealousness, mere negligence, or other human failing, in the sum [that the jury believes] will serve to punish the defendant and to deter it and others from like conduct in the future."[129]

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118. *Id.*

119. *Id.*

120. *Id.* at 519.

121. *Id.*

122. *Id.* at 520. Rather, "[t]hat insurance companies may, in good faith, dispute claims, has long been the rule in Indiana." *Id.* (citations omitted).

123. *Id.* (citations omitted).

124. *Id.* at 523.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 520.

129. *Id.* (citing Bud Wolf Chevrolet, Inc. v. Robertson, 519 N.E.2d 135, 137-38 (Ind. 1988)).

The court reversed the award of punitive damages because a reasonable jury could not find that Erie's conduct met that standard.[130]

This case has had and will continue to have a great impact on decision-making by insurance companies and their counsel because the court upheld the award of compensatory damages even though it found a "rationale, principled basis" for Erie's decision to deny plaintiffs coverage. When faced with a claim by an insured that is probably not covered by the insurance policy, the insurance company now has a difficult decision to make. Should it ignore the coverage questions and defend the insured against the suit? In doing so, the insurer insulates itself against a later claim by the insured for breach of duty, but may end up paying funds to a plaintiff even though there is a good faith dispute concerning coverage. The insurer's other option is to deny coverage. If the insured decides to file suit against the insurer, however, the insurer must withstand the scrutiny of a jury who will second-guess the insurer's decision to deny coverage. Apparently, the jury can then award damages to the insured for breach of a duty to deal in good faith even if there was a good faith basis for the denial of coverage. The insurance company is left with a Hobson's choice.

A few cases have applied this new standard in Indiana insurance cases. One is *McLaughlin v. State Farm Mutual Automobile Insurance Co.*[131] In *McLaughlin*, State Farm denied coverage to McLaughlin when his truck was destroyed in a fire. The denial was based on evidence that the fire was intentionally set by McLaughlin. State Farm based its decision on a number of facts, including the following: the truck was locked at the time the fire occurred; McLaughlin could not accurately account for his whereabouts at the time of the fire; he was behind in truck payments; he was behind in payments on his trailer; and the radio and battery had been removed from the truck prior to the fire.[132] The court, following the rationale in *Erie*, held that there was no clear and convincing evidence of malice, oppressiveness, and so forth that would support an award of punitive damages.[133] However, the evidence could support a finding "that the denial of coverage was unreasonable and therefore tortious or, in any event, a breach of contract."[134]

B. Bad Faith for Failing to Settle a Claim

The Indiana Court of Appeals attempted to answer the question of the measure of damages when a breach of contract by an insurance company results in a judgment in excess of the policy limits. In *Economy Fire & Casualty Co. v. Collins*,[135] Economy issued an automobile insurance policy to John Terry. Terry was involved in an automobile accident with Collins in which he was killed and Collins was injured.[136] Collins's final settlement demand prior to trial was considerably less than the $50,000 policy limit, but Economy rejected it.[137] After a trial, the jury awarded Collins

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130. *Id.*
131. 30 F.3d 861 (7th Cir. 1994).
132. *Id.* at 863-65.
133. *Id.* at 870.
134. *Id.*
135. 643 N.E.2d 382 (Ind. Ct. App. 1994).
136. *Id.* at 383.
137. *Id.* at 384.

$386,155.01.[138] After Economy paid the limits of coverage provided by the policy, a judgment of $336,155.01 remained against Terry's estate.[139] Since the estate was insolvent, Terry's personal representative assigned the estate's rights against Economy to Collins in exchange for a release from an execution of judgment.[140] When Collins brought suit against Economy, the insurance company filed a motion for summary judgment requesting that any damages "be limited to the actual value of the assets in the injured's estate."[141]

Since Indiana had not yet adopted a measure of damages, the court looked at the two approaches taken by other states. The majority approach is the "judgment rule."[142] Under this rule, the insurer is "liable for the entire excess judgment in instances of bad faith."[143] The minority approach is the "payment rule," which "dictates that an insurer may be held liable for a judgment in excess of policy limits only if part or all of the judgment has been paid by the insured."[144] The court decided that the judgment rule was a better rule because it did not allow the insurer to "hide behind the financial status of its insured."[145] If an insured did not have financial resources to pay an excess judgment, an insurer would be tempted to refuse to settle the claim because, if the result was an excess judgment, the insurer would only be liable for the full policy amount since the insured could not pay the excess judgment. In addition, even though the insured would not be damaged monetarily by not being reimbursed for amounts he had to pay, the insured's credit would be damaged and there would be clouds on the titles of his property. Because Indiana "discourages insurance companies from rendering disparate treatment to insureds based upon their financial status," the court chose to adopt the judgment rule.[146]

If this rule is used in conjunction with *Erie's* low standard for bad faith, the result could be even more damaging to insurance companies and more advantageous for plaintiffs. For example, an insurance company could determine that an insured's policy does not cover a particular incident. If the insurance company chooses not to defend the insured in a suit brought against him, it takes a risk that the insured's attorney could defend him poorly resulting in a judgment far in excess of the policy limits. The insured can then bring suit against the insurer for breaching its duty to deal in good faith. If a jury agrees that the insurance company should have accepted the claim, it may then be liable for the total amount of the excess judgment. The end result is that insurance companies may have to begin defending suits where coverage is questionable or nonexistent, simply to avoid the risk of a larger payout later. These larger settlements and payments when there is no coverage will increase the cost of insurance for everyone.

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138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* at 385.
144. *Id.*
145. *Id.*
146. *Id.*

III. New Causes of Action/Cases of First Impression

A. Pharmacist Liability

During the 1994 Survey period, the Indiana Supreme Court held that a pharmacist who allows a customer to refill a prescription at a rate faster than normal is negligent. In *Hooks-SuperX, Inc. v. McLaughlin*,[147] a customer became addicted to painkillers that had been prescribed for back pain. At times, the prescriptions were being used two and one half times faster than the prescribed rate. However, each of the prescriptions had been either a written prescription telephoned in to the pharmacy by the doctor's office, or were refills authorized by the doctor. The doctor realized that the prescriptions were being used much too quickly and refused to prescribe any more medication. However, by this time, the plaintiff had been taking the painkillers for over one and one-half years. After the plaintiff underwent drug treatment, he brought suit against Hook's alleging it owed a duty to refrain from filling the prescriptions because the pharmacists knew or should have known of his drug addiction.[148]

The Indiana Court of Appeals refused to hold that the pharmacists owed a duty to the customer.[149] One rationale was that pharmacists should not second-guess the doctor's judgment.[150] Although pharmacists are prohibited from dispensing prescriptions in bad faith, there was no showing in the present case that the pharmacists acted in bad faith.[151] In addition, even though pharmacists cannot be held civilly liable for refusing to refill a prescription based upon a belief that it is illegal, not in the best interest of the patient, aids an addiction, or is not beneficial to the customer's health or safety, the statute does not impose a duty to refuse to refill the prescription.[152] The court's final rationale for refusing to impose a duty on the pharmacist was that doing so would cause the pharmacist to be inserted into the physician-patient relationship. The court stated:

> The decision of weighing the benefits of a medication against potential dangers that are associated with it requires an individualized medical judgment. This individualized treatment is available in the context of a physician-patient relationship which has the benefits of medical history and extensive medical examinations. It is not present, however, in the context of a pharmacist filling a prescription for a retail customer. The injection of a third-party . . . into the physician-patient relationship could undercut the effectiveness of the ongoing medical treatment.[153]

In the present case, one of the pharmacists even spoke with the doctor about how quickly the prescriptions were being used and was instructed by the doctor to refill the

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147. 642 N.E.2d 514 (Ind. 1994) [hereinafter *Hooks II*].

148. *Id.* at 516.

149. Hooks-SuperX, Inc. v. McLaughlin, 632 N.E.2d 365, 369 (Ind. Ct. App. 1994) [hereinafter *Hooks I*].

150. *Id.* at 368.

151. *Id.* (citing Ind. Admin. Code tit. 856 r. 1-20-1(g) (1992)).

152. *Id.* (citing Ind. Code § 25-26-13-16(b) (1993)).

153. *Hooks I*, 632 N.E.2d at 368 (quoting Ingram v. Hook's Drugs, Inc., 476 N.E.2d 881, 886-87 (Ind. Ct. App. 1985)).

prescription.[154] The court determined that, not only should a pharmacist not be inserted into the doctor-patient relationship, the pharmacist should be able "to rely on the physician's instructions in good faith as a matter of law."[155]

The supreme court employed a different rationale than the court of appeals. It analyzed the case in terms of whether the three aspects of a duty, relationship, foreseeability and public policy, were present.[156] The court recognized that a relationship giving rise to a duty existed between the pharmacist and customer in other circumstances.[157] That relationship is based in contract law, and courts have long recognized that contracts can give rise to relationships sufficiently close to justify the imposition of a duty.[158] In addition, a customer relies upon the pharmacist's expertise and judgment in filling prescriptions.[159] Therefore, the court found that a sufficient relationship existed to justify imposing a duty upon pharmacists to refuse to fill prescriptions.[160]

The injury to a customer when a pharmacist acquiesces to filling prescriptions at a faster rate than normal is foreseeable when the prescription is for an addictive drug.[161] Therefore, the foreseeability aspect of the test was also fulfilled.

Finally, the court examined whether public policy supported the imposition of a duty on pharmacists. The court determined that three policy considerations were at issue—"preventing intentional and unintentional drug abuse, not jeopardizing the physician/patient relationship, and avoiding unnecessary health care costs."[162] Although various statutes regarding physicians, such as those noted in the court of appeals' opinion, are not the source of a duty for pharmacists, they do show the public concern for drug abuse.[163] Making the pharmacist responsible for monitoring the rate at which prescriptions are filled helps to prevent both drug addiction by the customer and also prevents the customer from providing the drugs to anyone else.[164] In addition, the court reasoned that placing this duty on pharmacists will not intrude upon the doctor-patient relationship because the pharmacist's role is different from the doctor's. A doctor is responsible for "properly prescribing medication" and "evaluat[ing] a patient's needs."[165] Finally, the court stated that imposing this duty upon pharmacists would not increase the costs of health care because many drug stores, including Hooks, already monitor prescriptions with computers and have access to the information necessary to fulfill the duty imposed.[166]

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154. *Id.*
155. *Id.* (footnote omitted).
156. *Hook's II*, 642 N.E.2d at 517-18.
157. *Id.* at 517.
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.* at 518.
163. *Id.*
164. *Id.*
165. *Id.* at 519.
166. *Id.*

Once the court determined that a duty existed under these circumstances, it had to determine the standard of care necessary.[167] The court adopted the traditional negligence standard and held that "pharmacists must exercise that degree of care that an ordinarily prudent pharmacist would under the same or similar circumstances."[168] Many factors will be considered in determining whether the proper degree of care was exercised, including:

> the frequency with which the pharmacist filled prescriptions for the customer, any representations made by the customer, the pharmacist's access to historical data about the customer, the manner in which the prescription was tendered to the pharmacists, and the like.[169]

The purpose of the decision was not to make the pharmacist an insurer of the customer's safety.[170] Customers must still exercise their own responsibility and use their own knowledge concerning the dangers of prescription drugs.[171]

The facts of the present case, however, do seem to place Hooks in the position of an insurer of McLaughlin's health. Prior to having the prescriptions at issue in this case filled, McLaughlin had been addicted to the drugs for at least six years and had received treatment for his addiction three times.[172] He knew of the addictive nature of the drugs. In addition, one pharmacist testified that he had telephoned the doctor to question the frequency of the prescriptions and was instructed by the doctor to dispense the prescription.[173] Refusing to refill the prescription would have caused the pharmacist to interfere in the doctor-patient relationship and replace the doctor's decision with his own.

An additional issue in this case is causation. Hooks argued that even if a duty existed, "McLaughlin's suicide attempt and his own wrongful conduct in consuming substances he knew were addictive constituted [an] independent intervening cause sufficient to cut off any liability of Hooks."[174] The court rejected this argument and stated:

> [I]f harm is a natural, probable, and foreseeable consequence of the first negligent act or omission, the original wrongdoer may be held liable even though other independent agencies intervene between his negligence and the ultimate result. Generally, where harmful consequences are brought about by intervening and independent forces, the operation of which might have been reasonably foreseen, then the chain of causation extending from the original wrongful act to the injury is not broken by the intervening and independent forces, and the original wrongful act will be treated as a proximate cause . . . .[175]

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167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.* at 519-20.
172. *Id.* at 516.
173. *Hooks I*, 632 N.E.2d at 368.
174. *Hooks II*, 642 N.E.2d at 520.
175. *Id.* (quoting 21 INDIANA LEGAL ENCYCLOPEDIA, *Negligence* § 67 (1959)).

Suicide is considered an intervening act if the person "is sane enough to realize the effect of his actions."[176] However, "suicide induced by mental illness" may not be an intervening act.[177] If the trial court determined that there was "a genuine issue of material fact" concerning whether the suicide attempt was voluntary or involuntary, it was correct in denying the motion for summary judgment.[178]

B. Wrongful Death Actions by Dependent Next of Kin

During this Survey period, the Indiana Court of Appeals considered the question of recovery for emotional damages by dependent next of kin under the Wrongful Death Statute[179] in *Ed Wiersma Trucking Co. v. Pfaff*.[180] This statute allows dependent next of kin, together with spouses and children, to recover pecuniary damages.[181] In addition, emotional damages are also recoverable by spouses and dependent children.[182] However, until *Wiersma Trucking*, the question of whether dependent next of kin were also entitled to receive emotional damages had not been decided.[183]

Dallis Pfaff was killed in an accident involving a truck driven by John Carter, an employee of Wiersma Trucking.[184] Dallis's mother claimed that she was unable to support herself and that twenty-year-old Dallis and her siblings were her sole source of support.[185] The wrongful death claim brought by Dallis's estate against Wiersma Trucking sought compensation for her mother's emotional damages.[186] Wiersma Trucking

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176. *Id.*

177. *Id.* at 521.

178. *Id.*

179. The Wrongful Death Statute is found at IND. CODE § 34-1-1-2 (1993). The relevant portions of it are as follows:

> When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefore against the latter . . . and the damages shall be in such an amount as may be determined by the court or jury, including, but not limited to, reasonable medical, hospital, funeral and burial expenses, and lost earnings of such deceased person resulting from said wrongful act or omission. That part of the damages which is recovered for reasonable medical, hospital, funeral and burial expense shall inure to the exclusive benefit of the decedent's estate for the payment thereof. The remainder of the damages, if any, shall, subject to the provisions of this article, inure to the exclusive benefit of the widow or widower, as the case may be, and to the dependent children, if any, or dependent next of kin, to be distributed in the same manner as the personal property of the deceased. . . . When such decedent leaves no such widow, widower, or dependent children, or dependent next of kin, surviving him or her, the measure of damages to be recovered shall be the total of the necessary and reasonable value of such hospitalization or hospital service, medical and surgical services, such funeral expenses, and such costs and expenses of administration, including attorney fees.

180. 643 N.E.2d 909 (Ind. Ct. App. 1994).

181. *Id.* at 910.

182. *Id.*

183. *Id.* at 913.

184. *Id.* at 910.

185. *Id.*

186. *Id.*

filed a motion for partial summary judgment on the basis that dependent next of kin were not eligible to recover emotional damages.[187] For purposes of the appeal, Wiersma Trucking conceded that Dallis's mother was a dependent next of kin.[188]

The court noted that because wrongful death actions had no basis in the common law and were purely statutory, such actions should be strictly construed.[189] In analyzing the Wrongful Death Statute, the court observed that the statute had three classes of beneficiaries.[190] "The first class includes spouses and dependent children, the second includes all other dependent next of kin, and the third includes death creditors."[191] Wiersma Trucking attempted to argue that the second class was not supposed to be treated the same as the first class.[192] In support of that position, it relied upon *Miller v. Mayberry*,[193] a case interpreting the Indiana Children's Wrongful Death Statute.[194] In *Miller*, the court held that emotional damages such as "loss of love and affection, mutual society and companionship were not proper damages" under the statute.[195] However, the *Wiersma Trucking* court noted that the General Assembly amended the statute to include such damages after the *Miller* decision.[196] In addition the *Wiersma Trucking* court did "not find *Miller* to be controlling because the two statutes contemplate different and distinct actions."[197] The basis of the Children's Wrongful Death Statute[198] is vested in property law.[199] The Wrongful Death Statute, however, is based "upon a pecuniary interest in the life of the decedent and not on a property right."[200]

The court also rejected Wiersma Trucking's argument that public policy dictated that the next of kin not be allowed to recover emotional damages in wrongful death actions.[201] The company argued that such awards "are intangible losses that can never be wholly compensated by money" and "the nature of the loss makes quantifying these damages difficult" for a jury.[202] In rejecting these arguments, the court noted that these hurdles are also faced by the first class of beneficiaries (spouses and dependent children) and were "artificial distinctions."[203] In addition, to recover under the Wrongful Death Statute, the next of kin had to prove their dependency on the decedent, which could be a difficult

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187. *Id.*

188. *Id.*

189. *Id.* at 911.

190. *Id.*

191. *Id.*

192. *Id.*

193. 506 N.E.2d 7 (Ind. 1987).

194. IND. CODE § 34-1-1-8 (1993).

195. *Wiersma Trucking*, 643 N.E.2d at 912 (citing *Miller*, 506 N.E.2d at 11).

196. *Id.*

197. *Id.*

198. IND. CODE § 34-1-1-2 (1993).

199. *Wiersma Trucking*, 643 N.E.2d at 912 (citing Siebeking v. Ford, 148 N.E.2d 194, 206 (Ind. Ct. App. 1958)).

200. *Id.* (citing *Siebeking*, 148 N.E.2d at 207).

201. *Id.*

202. *Id.*

203. *Id.*

proof.[204] Because the statute does not seem to differentiate between the first two classes, the court held that dependent next of kin could recover for emotional damages.[205]

C. Attorney Right of Reliance/Attorney Bad Faith

On November 28, 1994, in *Fire Insurance Exchange v. Bell*,[206] the Indiana Supreme Court addressed the issue of whether a party who is represented by counsel has the right to rely on representations allegedly made by opposing counsel and representatives of an insurance company during settlement negotiations, and whether such misrepresentations during settlement negotiations can create a private right of action. On May 28, 1985, a fire occurred at the home of Joseph Moore. Mr. Moore's grandson, Jason Bell, was seriously injured in this fire. Moore had a homeowner's insurance policy with a liability limit of $300,000. Jason's mother and guardian hired an attorney to represent their interests in a claim asserted against Moore. In the ensuing months, Jason's attorney communicated with defense counsel and the insurance company claims' adjuster regarding Moore's policy limits. According to Jason's counsel, they represented that the liability limit of Moore's policy was $100,000. Jason settled the claim for $100,000. Jason's counsel later learned that Moore's insurance policy actually had a liability limit of $300,000, and filed a complaint against the insurance company, the law firm representing the insured, and the attorney individually, on a theory of fraudulent misrepresentation.[207]

The defendants sought summary judgment on the grounds that the plaintiffs could not recover on a claim of fraud because they had no right to rely on any representations made, and the element of reliance is an essential component of any fraud claim.[208] They argued that because Bell was represented by counsel who was a trained and licensed professional engaged in adversarial settlement negotiations, and also had independent access to policy limits through other means such as discovery, she had no right to rely on any such alleged misrepresentations.[209]

The trial court denied the motion for summary judgment stating that the issue of reliance was a question of fact.[210] The defendants then filed an interlocutory appeal, which was certified by the trial and appellate courts.[211] The Indiana Court of Appeals affirmed the decision of the trial court and essentially adopted its reasoning. The court concluded that legal counsel for personal injury plaintiffs must exercise reasonable diligence in independently ascertaining information such as policy limits, but whether counsel has a right to rely on another's representation depends largely upon the facts of a particular case.[212]

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204. *Id.* at 913.

205. *Id.*

206. 643 N.E.2d 310 (Ind. 1994).

207. *Id.* at 311-12.

208. *Id.* at 312.

209. *Id.* at 312-13.

210. *Id.* at 311.

211. *Id.*

212. *Id. See* Fire Ins. Exch. v. Bell, 634 N.E.2d 517 (Ind. Ct. App. 1994), *aff'd in part, vacated in part*, 643 N.E.2d 310 (Ind. 1994).

The defendants then sought transfer to the Indiana Supreme Court.[213] The court granted transfer and affirmed the decisions of the trial and appellate courts, albeit on a broader ground. As to the contentions of the defendant insurance company, the supreme court summarily affirmed the decision of the Indiana Court of Appeals, citing with approval the cases discussed by the appellate court.[214] Regarding the claim against the opposing attorney and his law firm, the supreme court held that Jason's attorney had a right to rely on the representations of opposing counsel as a matter of law.[215] In reaching its decision, the court cited the ethical duties of a lawyer to tell the truth required by the Indiana Constitution, the Indiana Oath of Attorneys, the Indiana Rules of Professional Responsibility, the Preamble of the Standards for Professional Conduct Within the Seventh Judicial Circuit, the Indianapolis Bar Associations Tenants of Professional Courtesy and the International Association of Defense Counsel.[216]

This decision appears to be geared more toward improving the reputation of the legal community than insuring that settlements are fairly reached. Moreover, the broadness of the court's language may create a slippery slope by creating new causes of action. As noted by the defendants in this case, the plaintiff could certainly have requested the liability limits of the insurance policy through discovery.[217] It is hard to believe that any prudent attorney would settle a case based on an opposing counsel's representations of policy limits without verifying the limits under the insurance policy.

Moreover, this case could open the door to all types of subsequent challenges to settlement agreements, which would be detrimental to both plaintiffs and defendants. Nothing in the court's language specifically limits this cause of action under a theory of fraudulent misrepresentations of insurance policy limits. In fact, the Supreme Court specifically held that "Bell's attorney's right to rely upon *any material* misrepresentations that may have been made by opposing counsel is established as a matter of law.[218] Therefore, any type of "puffing" in the course of settlement negotiations may make a party susceptible to a subsequent cause of action based on fraud under the Indiana Supreme Court's ruling. The opinion does not even limit the actionable misrepresentation to settlements. Thus, presumably, any type of communication that occurs in the context of litigation could give rise to subsequent legal action. Such a theory could certainly be taken to absurd results, and may affect the finality of settlements.[219]

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213. *Bell*, 643 N.E.2d at 311.

214. *Id.* at 312. *See* Carrell v. Ellingwood, 423 N.E.2d 630 (Ind. Ct. App. 1981); Neff v. Indiana State Univ. Bd. of Trustees, 538 N.E.2d 255 (Ind. Ct. App. 1989).

215. *Bell*, 643 N.E.2d at 313.

216. *Id.* at 312-13.

217. *See* IND. R. TRIAL P. 26(B)(2).

218. *Bell*, 643 N.E.2d at 313 (emphasis added).

219. Both counsel for plaintiffs and defendants could (and, likely, would) be the subject of such ancillary litigation. For example, a defendant's counsel who represented that his client would pay no more than "X" amount to settle a claim could be subsequently sued if it were discovered that his or her client had not explicitly set such a settlement ceiling. Conversely, a plaintiff's attorney who represented that his or her client had received permanent injuries could be sued to recoup all or part of the settlement if the client later recovered, at least to some degree, from those injuries.

This case could potentially create a cottage industry of subsequent attorney bad faith claims, remove any hopes of finality of judgments or settlements, and lengthen, rather than streamline, an already lengthy civil litigation process. Hopefully, the Indiana Supreme Court will realize the potential adverse ramifications of such a broad interpretation, and will limit fraud theories to "hard"—easily proved or disproved—misrepresentations, such as policy limits.

D. Exclusive Remedy Provisions of the Worker's Compensation Act and the Occupational Diseases Act

During the current Survey period, the supreme court had the opportunity to clear the muddy waters surrounding the question of whether the exclusive remedy provisions of the Worker's Compensation Act (WCA)[220] and the Occupational Diseases Act (ODA)[221] applied to intentional torts. In *Baker v. Westinghouse Electric Corp.*,[222] the United States District Court for the Southern District of Indiana certified those questions to the supreme court.[223]

The court first addressed the WCA.

> The exclusivity section of the Indiana Worker's Compensation Act provides that the rights and remedies granted to the employee by the act on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representatives, dependents or next of kin, at common law or otherwise, on account of such injury or death . . . .[224]

Earlier case law had interpreted the term "by accident" to be a "mens rea requirement," rather than a causation element.[225] The supreme court held in a 1986 decision that "by accident" meant "an injury not intended or expected by the sufferer."[226] There was some confusion among the lower courts after this decision concerning the intentions of the employer.[227] Some courts resolved this confusion by applying "an 'intentional tort' exception to the exclusivity provision," which stated that the Act did not apply to situations where "an employer intentionally injures an employee."[228] Causing even further confusion among the courts, the Seventh Circuit determined that the Indiana Supreme Court would eventually reject this exception and prevented the district courts from applying the exception.[229] Thus, case results differed between the federal courts and state

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220. IND. CODE § 22-3-2-6 (1993).

221. *Id.* § 22-3-7-6.

222. 637 N.E.2d 1271 (Ind. 1994).

223. *Id.* at 1272.

224. *Id.* (quoting IND. CODE ANN. § 22-3-2-6 (West Supp. 1992)). The court noted that "[t]his section has been amended since this suit commenced in federal court. . . . The changes made since 1992 do not alter the statute's substance." *Id.*

225. *Id.* (referring to Indian Creek Coal & Mining v. Calvert, 119 N.E. 519, 528 (Ind. App. 1918) (Dausman, J., dissenting)).

226. *Id.* (citing Evans v. Yankeetown Dock, 491 N.E.2d 969, 974-75 (Ind. 1986)).

227. *Id.* at 1273.

228. *Id.* (quoting National Can Corp. v. Jovanovich, 503 N.E.2d 1224, 1232 (Ind. Ct. App. 1987)).

229. *Id.* at 1273 n.2 (citing Buford v. American Tel. & Tel. Co., 881 F.2d 432 (7th Cir. 1989)).

appellate courts.[230] The supreme court finally ended that dispute by rejecting the "intentional tort exception" and holding that intentional torts were outside the scope of the Act's coverage.[231] "Because we believe an injury occurs 'by accident' only when it is intended by neither the employee nor the employer, the intentional torts of an employer are necessarily beyond the pale of the act."[232]

This interpretation fits with the purposes and intent of the WCA.[233] One of the primary bases of the Act is the predictability of liability for the employer and the ability of the employer to factor that liability into its costs.[234] Excluding an employer's intentional torts does not undermine this system because "[a]n employer can avoid liability for intentional torts by refraining from egregious behavior—a decision over which it has complete control."[235]

Finally, with regard to the WCA, the court looked at the level of intent required for an "'intent' to harm" and who must have that intent.[236] The court determined that only a "deliberate intent to inflict an injury, or actual knowledge that an injury is certain to occur, will suffice."[237] To hold otherwise would present the risk that the Act and its regulatory scheme would be "swallowed up" by outside suits.[238] In addition, the intent must be the employer's intent rather than that of a supervisor or other employee.[239] Otherwise, the employer would be exposed to "uncertain liability for acts over which it has only tenuous control and, in doing so, would compromise the predictability so central to the act."[240]

The court next looked to the ODA and determined that it barred outside actions for intentional torts.[241] The major difference the court found between the ODA and the WCA was that the ODA substituted the terms "by occupational disease" for "by accident."[242] The court interpreted that language to relate "to the causal connection between employment and injury and not to state of mind as does the 'by accident' requirement."[243] The court concluded that the General Assembly intended that injuries falling under the ODA would only be compensated under its regulatory scheme, regardless of whether those injuries were intentionally inflicted or not.[244]

This decision appears to open a new avenue of recovery to plaintiffs injured at work. However, the exception is a narrow one, as it should be, considering the extensive

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230. *Id.*

231. *Id.* at 1273.

232. *Id.*

233. *Id.*

234. *Id.* at 1274.

235. *Id.*

236. *Id.*

237. *Id.* (footnote omitted).

238. *Id.* at 1275 (quoting National Can Corp. v. Jovanovich, 503 N.E.2d 1224, 1233 n.14 (Ind. Ct. App. 1987)).

239. *Id.* (footnote omitted).

240. *Id.*

241. *Id.* at 1272.

242. *Id.* at 1276.

243. *Id.*

244. *Id.*

regulatory scheme and intentions of the WCA. It does, however, keep an employer from hiding behind that regulatory shield for its own intentional acts.

E. Negligent Hiring of Independent Contractors

An issue still in dispute is whether Indiana recognizes the tort of negligent hiring of an independent contractor. In *Bagley v. Insight Communications Co.*,[245] the Indiana Court of Appeals attempted to answer this question. The results were unclear.

In 1988, Richard Bagley was installing cable television with Sam Friend when Friend fell from a ladder, causing Bagley's head to be "driven into a ground rod," causing permanent brain damage. Bagley was an employee of Friend, an independent contractor hired by Crawford, another independent contractor, to assist in installing cable for Insight Communications Co. ("Insight"). Bagley's guardian brought suit against Insight, Crawford and Friend, alleging in part that Insight and Crawford negligently hired Friend and, thus, were responsible for his negligence in using the ladder.[246]

The court stated that normally a contractor "is not responsible for injuries to employees of its negligent independent subcontractors."[247] While exceptions to that rule exist, Bagley argued the doctrine of negligent hiring of an independent contractor.[248] After noting that the doctrine had received approval in several states, the court also noted that the Seventh Circuit Court of Appeals had held that Indiana had also adopted the doctrine.[249] The basis of that holding was the court's decision in *Board of Commissioners of Wabash County v. Pearson*,[250] where the plaintiffs brought suit against the county for hiring "incompetent contractors" who failed to repair a bridge properly.[251] In *Wabash*, the supreme court held:

> If, as is here charged, the corporation knew when it employed persons to make the repairs that they were incompetent, it did not exercise ordinary care. A corporation charged with [a] duty . . . must select the proper means and persons to do the work, if by the exercise of ordinary care such a selection can be made. If, however, ordinary care is used in selecting suitable persons, and in requiring the persons selected to exercise their skill with reasonable prudence and diligence, the bridge still remains unsafe, there will be no liability.[252]

In further support of the proposition that Indiana had adopted the doctrine of negligent hiring of independent contractors, the court cited *Detrick v. Midwest Pipe & Steel, Inc.*,[253]

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245. 623 N.E.2d 440 (Ind. Ct. App. 1993).

246. *Id.* at 442.

247. *Id.* at 443.

248. *Id.*

249. *Id.* (citing Stone v. Pinkerton Farms, Inc., 741 F.2d 941 (7th Cir. 1984) and Hixon v. Sherwin-Williams Co., 671 F.2d 1005 (7th Cir. 1982)).

250. 22 N.E. 134 (Ind. 1889).

251. *Bagley*, 623 N.E.2d at 443.

252. *Id.* (quoting *Wabash*, 22 N.E.2d at 135 (citations omitted)).

253. 598 N.E.2d 1074 (Ind. Ct. App. 1992).

in which the court concluded that Indiana had recognized the doctrine but that the plaintiff had not made the requisite showing of proximate cause.[254]

Even though Indiana recognizes the doctrine, the court held that Bagley did not make a showing that he would be entitled to relief.[255] The doctrine is only applicable to injuries sustained by the general public and not to employees of either the contractor or an independent contractor.[256] In addition, Bagley did not make a showing that Friend was incompetent other than the one instance of negligence at issue in the case.[257] "[A] single incidence of negligence is insufficient to prove incompetence under the doctrine of the negligent hiring of an independent contractors."[258]

Judge Hoffman wrote a concurring opinion, in which Judge Shields joined. The opinion disagreed with the conclusion that Indiana had recognized "the doctrine of negligent hiring of an independent contractor"[259] and the characterization of the holding in *Wabash*[260] as being an adoption of the doctrine.[261] Instead, the concurrence reasoned that *Wabash* actually fell within one of the five recognized exceptions to holding a contractor liable for the acts of an independent contractor.[262]

Because two of the three appellate judges only concurred in the result, the strength of the *Bagley* decision is doubtful. This case has been fully briefed and argued before the Indiana Supreme Court who will, hopefully, clarify the matter.

IV. PRACTICE POINTERS

A. Trial Rule 56 and Designation of Evidence

Effective January 1, 1991, the Indiana Supreme Court amended Trial Rule 56 to state as follows:

> At the time of filing the motion or response, a party shall designate to the court all parts of pleadings, depositions, answers to interrogatories, admissions, matters of judicial notice, and any other matters on which it relies for purposes of the motion. A party opposing the motion shall also designate to the court each material issue of fact which that party asserts precludes entry of summary judgment and the evidence relevant thereto. The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.[263]

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254. *Bagley*, 623 N.E.2d at 443-44 (citing *Detrick*, 598 N.E.2d 1074)).

255. *Id.* at 444.

256. *Id.* (citing Ray v. Schneider, 548 A.2d 461 (Conn. App. Ct. 1988) and Payne v. Lee, 686 F. Supp. 677, 679 (E.D. Tenn. 1988)).

257. *Id.*

258. *Id.* (citing Sullivan v. St. Louis Station Assoc., 770 S.W.2d 352 (Mo. Ct. App. 1989)).

259. *Id.* at 445.

260. *See supra* notes 250-51 and accompanying text.

261. *Bagley*, 623 N.E.2d at 444.

262. *Id.*

263. IND. R. TRIAL P. 56(C).

The effect of those amendments was the subject of several appellate cases during the Survey period.[264] Because of those amendments, the courts can now consider *only* the evidence and facts specifically designated by the parties when ruling on a motion for summary judgment.[265] They cannot countenance any other evidence.[266] The *Kissell* court set out the following requirements of a proper designation: "[A] proper designation consists of: (1) a list of the factual matters which are or are not in dispute, (2) supported by a specific designation to their location in the record, and (3) a brief synopsis of why those facts are material."[267] Simply designating an entire pleading, deposition, etc. does not fulfill those requirements.[268]

The strict interpretation of the Trial Rule 56(C) requirements has been subject to some criticism.[269] However, as a matter of prudent practice, attorneys involved in summary judgment proceedings should designate all material as specifically as possible in their pleadings. Failing to do so could result in an adverse ruling despite the presence of evidence which would support a party's contentions because the courts "cannot look beyond whatever evidence has been designated."[270]

B. Residential Real Estate Sales Disclosure

In 1993 a new statute was enacted requiring the disclosure of property defects in transfers of residential real estate.[271] Real estate covered by this statute includes all residential real estate with four or less dwelling units.[272] The statute requires that an owner disclose the condition of the foundation, roof, structure, and other aspects of the house.[273] After such disclosure, a buyer has two days within which to rescind the contract without liability for breach of contract.[274] The owner of the property is then liable for any errors or failures to disclose that were within the owners actual knowledge or that were the result of the owner's negligence in obtaining the information.[275]

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264. Dzvonar v. Interstate Glass Co., 631 N.E.2d 516 (Ind. Ct. App. 1994); Kissell v. Vanes, 629 N.E.2d 878 (Ind. Ct. App. 1994); and Miller v. Monsanto Co., 626 N.E.2d 538 (Ind. Ct. App. 1993).

265. *Kissell*, 629 N.E.2d at 880 (citing Midwest Commerce Banking Co. v. Livings, 608 N.E.2d 1010, 1012 (Ind. Ct. App. 1993)).

266. *Id.*

267. *Id.* (citing Pierce v. Bank One-Franklin, NA, 618 N.E.2d 16, 19 (Ind. Ct. App. 1993)).

268. *Id.* (citing Intelogic Trace Texcom v. Merchants Nat'l Bank, 626 N.E.2d 839, 842 n.4 (Ind. Ct. App. 1993)).

269. *See Kissell*, 629 N.E.2d at 880-81 (Baker, J., concurring) ("[T]he majority erroneously holds form over substance in its application of Ind. Trial Rule 56(C).").

270. Miller v. Monsanto Co., 626 N.E.2d 538, 542 (Ind. Ct. App. 1993) (quoting Midwest Commerce Banking Co. v. Livings, 608 N.E.2d 1010, 1012 (Ind. Ct. App. 1993)). *See also* Dxvonar v. Interstate Glass Co., 631 N.E.2d 516, 518 (Ind. Ct. App. 1994) ("The existence of a genuine issue of material fact shall not be ground for reversal on appeal unless such fact was designated to the trial court.").

271. IND. CODE § 24-4.6-2-1 to -13 (1993).

272. IND. CODE § 24-4.6-2-1 (1993).

273. IND. CODE § 24-4.6-2-7 (1993).

274. IND. CODE § 24-4.6-2-13 (1993).

275. IND. CODE § 24-4.6-2-11 (1993).

To date, no cases have been reported concerning failures to disclose or negligence in disclosure. However, this statute could form the basis of future tort actions. Therefore, not only should attorneys who regularly deal in real estate transactions be familiar with this statute, any attorney involved in a case of defective property should consider whether this statute creates any liability on the part of the seller of the property.