RECENT DEVELOPMENTS IN INDIANA TORT LAW

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INTRODUCTION

From October 1995 to October 1996, federal courts and state appellate courts of Indiana handed down a number of significant decisions in the area of tort law. These decisions have clarified existing rules of law, recognized new causes of action, and expanded the scope of existing tort law in Indiana.

I. NEGLIGENCE

A. Defining the Scope of the Duty Owed

Although no issue of first impression was addressed in *State v. Eaton,*[1] the court was confronted with an inventive and interesting argument concerning whether a motorcyclist had a duty to wear a helmet or protective eyewear when it may have been reasonably foreseeable that the motorcyclist's vision might become impaired by dust and cause a collision. In *Eaton*, the plaintiff was a minor who was injured in a collision occurring on a state highway. A state highway crew had been working on the shoulder of a state highway "clipping" the shoulder. This involved pulling up dirt, gravel, and other materials along the edge of the road which created dust on the highway. Warning signs were posted in the area. However, the evidence conflicted on the amount of dust present and whether the accident occurred in the construction zone.[2]

Plaintiff was driving his motorcycle home from school on the highway and noticed dirt and dust present. As he came upon a slight rise in the road, he slowed. A semi truck was traveling in front of the plaintiff, and the plaintiff collided with the rear of the trailer.[3] The plaintiff and his parents brought suit against the State of Indiana and the highway department.

The *Eaton* court was confronted with the issue of whether the failure to use a helmet and protective eye wear could be considered by the jury as contributory negligence. In concluding that it could not, the court recognized that there was no question that motorists have a duty to keep and maintain a proper lookout. That duty includes "the duty to see that which is clearly visible or which in the exercise of due care would be visible."[4] Because there was no authority to support the proposition that a motorcyclist had a duty to wear a helmet or protective eye wear, the court evaluated the question by employing the *Webb* balancing test.[5] In this

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1. 659 N.E.2d 232 (Ind. Ct. App. 1995), *trans. denied.*
2. *Id.* at 234.
3. *Id.*
4. *Id.* at 236.
5. Webb v. Jarvis, 575 N.E.2d 992, 995 (Ind. 1991). Another decision employing the *Webb* balancing test is *Cram v. Howell*, 662 N.E.2d 678, 681 (Ind. Ct. App. 1996).

test, three factors are examined: "the relationship between the parties, 2) the reasonable foreseeability of harm, and 3) public policy concerns."[6] The court found that two of the factors militated against the finding of a duty. The court concluded that it was not foreseeable that plaintiff's vision would be impaired by dust causing him to collide with a truck. "A motorist is not required to be constantly prepared for every conceivable circumstance . . . ."[7] Secondly, the court found that public policy concerns suggested that a duty should not be imposed.[8] The legislature had spoken; at the time of the accident, the statute which had required minors to wear a helmet and protective eye wear had been repealed.[9] Because there was no duty to wear the equipment, the trial court did not commit error by excluding evidence on that issue. At present, minors riding motorcycles are required to use protective gear.[10] The State's proffer of evidence on this issue was a creative attempt to suggest a duty on the part of the plaintiff. It is similar to other attempts to interject evidence of a plaintiff's failure to wear a seat belt.[11]

One troubling aspect of the court's analysis is its use of an abuse of discretion standard of review.[12] The question of the admissibility of this particular evidence was a question of law. If the plaintiff had a duty to wear the protective gear, the evidence would have been improperly excluded as a matter of law. The proper standard of review for a question of law is de novo.

The *Webb* balancing test was applied in another Indiana Court of Appeals case during the survey period that addressed an issue of first impression in Indiana. In *Campbell v. Eckman/Freeman & Associates*,[13] the court considered whether "a private entity hired by an employer's worker's compensation carrier to provide rehabilitation services to the injured employee owes a duty of care to the injured employee."[14]

The court applied the *Webb* balancing test and examined the relationship between the parties, the foreseeability of harm, and public policy considerations.[15] On the issue of relationship, the court considered whether the relationship between the private entity hired by the worker's compensation carrier to provide rehabilitation services and the injured employee could support the conclusion that the former owed a duty to the latter.[16] The court noted that the rehabilitation coordinator hired by the insurance company was obligated to protect the interests of the injured employee, and the injured worker relied upon the professional skill

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6. *Eaton*, 659 N.E.2d at 236.
7. *Id.* (quoting Brock v. Walton, 456 N.E.2d 1087, 1091 (Ind. Ct. App. 1993).
8. *Id.*
9. *Id.*
10. *See* IND. CODE § 9-19-7-1 (1993).
11. *See id.* § 9-19-10-7.
12. *Eaton*, 659 N.E.2d at 236.
13. 670 N.E.2d 925 (Ind. Ct. App. 1996), *trans. denied.*
14. *Id.* at 931.
15. *Id.* at 933-35.
16. *Id.* at 933.

and judgment of the coordinator.[17] However, the court recognized that the insurance carrier instructs the rehabilitation company concerning its services.[18] Further, the rehabilitation coordinator did not provide any medical care or treatment to the injured employee but was merely assigned to monitor the employee's medical treatment.[19] It was thus unclear whether the injured employee perceived that the coordinator was acting on his behalf or whether he was relying on the coordinator to comply with presurgical requisites.[20] Weighing all of the considerations, the court found that the rehabilitation coordinator did not have a relationship with the injured employee which would support a duty in negligence.[21] Thus, the first factor in the *Webb* balancing test was not met.[22]

The court then considered the second *Webb* factor of whether the injured employee was "a reasonably foreseeable victim injured by a reasonably foreseeable harm."[23] The court found that, although a rehabilitation company's failure to properly coordinate and communicate could create an unreasonable risk of harm to an injured employee, the court did not find such a causal connection in the case to give rise to a duty.[24] Thus, the second *Webb* factor was not met.[25]

Finally, the court turned to public policy considerations and noted several competing issues. The court found that the rehabilitation coordinator was hired by the insurer with the goal of containing costs.[26] On the other hand, the injured worker could not be considered and treated as a party possessing equal bargaining power.[27] In any event, the court found that the balancing of these competing public policy issues should be reserved for the legislature.[28]

In conclusion, in considering the relationship between the parties, the foreseeability of the harm, and public policy concerns, the court found that no duty should be recognized by the private entity hired by the worker's compensation carrier to the injured employee under the particular facts of the case.[29] As more employers and insurance companies attempt to minimize health care costs, it is conceivable that more injured employees dissatisfied with their care may look to the overseers hired by the employer or worker's compensation carrier for compensation when they believe they have been wronged. Because the *Campbell* court limited its holding to the facts of the case presented, the court left open the possibility that, in a proper case, a claim by the injured employee might be viable

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17. *Id.*
18. *Id.*
19. *See id.* at 933-34.
20. *See id.* at 934.
21. *Id.*
22. *See id.*
23. *Id.*
24. *Id.* at 935.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*

against the private entity hired by the worker's compensation carrier.

B. Proximate Cause—Superseding/Intervening Third Party Criminal Acts

Pacific Employer's Insurance Co. v. Austgen's Electric, Inc.[30] presented a question of first impression in Indiana: "whether there is a causal nexus between the negligent installation of a fire alarm system and fire damages resulting from arson."[31] The court concluded that plaintiffs were not precluded from attempting to prove that there was a causal nexus between the negligent installation of a fire alarm system and the losses occasioned by third party criminal acts; the issues of proximate cause and foreseeability of the criminal acts were for the jury to decide.[32]

In *Pacific Employer's*, plaintiffs were insurance companies who, as subrogees of their insureds, a school corporation, brought suit against Austgen, a company which installed a fire alarm system in the school. Plaintiffs brought a subrogation action for breach of contract, breach of implied and express warranty, products liability and negligence.[33]

In 1985, the school entered into a written contract with Austgen for installation of a fire alarm system that included an automatic telephone dialer designed to engage when the fire alarm activated. The dialer was to call the emergency dispatcher at the police department and play a taped message concerning an active fire alarm at the school. In January 1988, Austgen was advised that the automatic dialer was not functioning properly. Austgen investigated and concluded that there was a problem with the school's dedicated phone line. Later, in early February 1988, the school notified Austgen that the dialer was still malfunctioning.[34]

In the early morning hours of February 23, 1988, three young men broke into the school and set a fire in the Industrial Arts room. The fire then spread to other areas of the school. The automatic dialer did not engage, and the fire went undetected until a school employee arrived for work.[35] The trial court granted Austgen a judgment on the evidence.

The sole issue on appeal was whether there existed a causal connection between Austgen's negligent installation of the fire alarm system and the fire damages resulting from arson. The court reviewed Indiana's general rules concerning proximate cause and intervening cause:

> In an action for negligence, an injury will be proximately caused by either a negligent act or the omission of a duty to act. The injury must be the natural and probable consequence, in light of the circumstances, that should have been reasonably foreseen or anticipated . . . . The

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30. 661 N.E.2d 1227 (Ind. Ct. App. 1996), *trans. denied.*
31. *Id.* at 1229.
32. *Id.*
33. *Id.* at 1228.
34. *Id.*
35. *Id.*

> requirement that the injury was foreseeable is directly related to the rule that an intervening cause may serve to sever the liability of one whose original acts sets in motion the chain of events leading to the injury. A superseding intervening cause sufficient to break the causal chain between wrongful conduct and injury must be one that is not "foreseeable" at the time of the wrongful conduct.[36]

The court also acknowledged the general rule concerning third party criminal acts which may serve to break the chain of causation, i.e., when the wilful, malicious, and criminal acts of a third party take place between the alleged act of negligence and the injury and such could not reasonably have been foreseen by the allegedly negligent party, the causal chain between the negligence and the injury is broken.[37] The court noted that the issue of proximate cause, including the foreseeability of third party criminal acts, was a question for the trier of fact.[38]

In analyzing whether arson was foreseeable and served to break the chain of causation, the court distinguished those cases relied upon by Austgen and the trial court involving the negligent installation of burglary systems. Those cases, which were not cited by the trial or appellate courts, held, as a matter of law, that the installer of a burglar alarm will not be liable despite negligent installation, when the acts of third party criminals intervene.[39] The court of appeals noted the intended difference between fire alarm systems and burglary systems: fire alarm systems are generally not installed to prevent fires but are instead designed to detect and warn in order to minimize damage, while burglary systems may be installed to not only warn, but to detect and prevent theft.[40] The court noted that the automatic dialer was crucial and, if operating properly, could have curtailed the time elapsed between the detection of a fire and the arrival of the fire department, thus limiting damages.[41] Based upon that purpose, the court of

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36. *Id.* at 1229 (citations omitted).

37. *Id.* at 1230.

38. "A duty to anticipate and to take steps to protect against a criminal act arises only when the *facts of a particular case* make it reasonably foreseeable that a criminal act is likely to occur." Welch v. Railroad Crossing, Inc., 488 N.E.2d 383, 388 (Ind. Ct. App. 1986). The *Welch* court required a proprietor to have specific knowledge of the actor's behavior. *Id.* at 388-89. Recently, the *Welch* holding was reaffirmed in *Vernon v. Kroger Co.*, 654 N.E.2d 24, 28 (Ind. Ct. App. 1995). *Vernon* involved a man who was severely beaten by four unknown assailants in a Kroger parking lot. Because Kroger had no specific knowledge of the likelihood of Vernon's injury, it had no duty to protect against it. *See id.* at 28-29. The court refused to extend the common-law duty to a duty to foresee injury in an "abstract and generalized way." *Id.* at 29.

39. The trial and appellate court gave no citation to the authority relied upon by Austgen and the trial court other than a citation to Michael J. McMahon, Annotation, *Liability of Person Furnishing, Installing, or Servicing Burglary or Fire Alarm System for Burglary or Fire Loss*, 37 A.L.R. 4TH 47 (1983).

40. *Pacific Employer's*, 661 N.E.2d at 1230 n.2. The court did not discuss the fact that burglary alarms may also minimize damage by alerting the police.

41. *Id.* at 1230.

appeals held that it could not say, as a matter of law, that if the fire alarm system was functioning correctly, the school would not have suffered less damage.[42] Pacific was therefore not precluded from attempting to show a causal nexus between the negligent installation of the fire alarm and the unmitigated damages caused losses by the criminal acts of third parties. Instead, the issues of proximate cause and foreseeability of the criminal acts were proper issues for the trier of fact.[43] The court further found that Pacific had presented sufficient evidence to support its claim so as to present the issue to the jury.[44]

Pacific Employer's appears to open the door for further arguments that criminal acts of third parties may not constitute intervening causes. The court's distinction between the purpose of burglar alarms and fire alarms seems artificial. Is it not true that if a burglar alarm malfunctions, it is reasonably foreseeable that the police may not be alerted in time to find the burglary in progress so as to mitigate potential property loss? In the case of burglary and fire alarms, the crime or the fire is not likely reasonably foreseeable. However, it is arguably reasonably foreseeable that additional damage may occur if either are not functioning properly. Thus, depending on the facts of each case, the distinction between the two alarms could be irrelevant.

Pacific Employer's, in essence, changes the focus from whether the criminal acts are reasonably foreseeable to whether some of the damages resulting from the criminal acts are reasonably foreseeable. The focus has historically been whether the act itself is foreseeable, i.e., is it foreseeable that someone could be lurking in a dimly lit parking lot in a high crime area and attack a store patron? Is it foreseeable that a masked gunman would come through the front door of a department store at noontime and start shooting? If the focus is on whether the criminal act itself is reasonably foreseeable, whether or not certain resulting damages could be foreseeable should be irrelevant.

In *Pacific Employer's*, there was no evidence that it could have been foreseeable that an arsonist would break into the school and set fire. Therefore, as a matter of law, the intervening acts of the arsonists should have broken the chain of causation. Instead, the court focused on whether the resulting damages could be reasonably foreseeable. If such logic is expanded to other situations, one could argue that, even though it is not reasonably foreseeable that a crime could occur, it is reasonably foreseeable that additional damage could result should that crime occur. For example, a shopper is attacked in a well-lit parking lot not monitored by security guards, but that is the first such incident in the area. The attack is not reasonably foreseeable. However, under the logic of *Pacific Employer's*, it could be argued that it was reasonably foreseeable that the damages from the attack could have been mitigated had a security guard been present. Is the difference the fact that there was no need to have a security guard as opposed to a situation where it is recognized that there is such a need and the security guard then improperly performs his functions (i.e., like a malfunctioning alarm)? The

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42. *Id.*
43. *Id.* at 1231.
44. *Id.*

Indiana Court of Appeals' decision in *Pacific Employer's* may have raised more questions than it answered.

II. COMPARATIVE FAULT

A. Fireman's Rule/Rescue Doctrine

In *Heck v. Robey*,[45] a paramedic injured while attempting to rescue a motor vehicle accident victim brought a negligence claim against the victim and his employer. The defendants moved for summary judgment, arguing that the fireman's rule barred the plaintiff's recovery. The trial court denied the motion, and the court of appeals accepted jurisdiction over the interlocutory appeal. The court of appeals reversed the trial court, holding that the fireman's rule applies to paramedics and barred the plaintiff's claim.[46] On petition to transfer, the Indiana Supreme Court disagreed and concluded that the fireman's rule did not, as a matter of law, bar the plaintiff's recovery. Furthermore, the Indiana Supreme Court held that, under the "rescue doctrine," the defendants owed a duty to the plaintiff to abstain from positive wrongful acts. Therefore, the trial court properly found that a genuine issue of material fact existed as to whether the defendant engaged in positive wrongful acts and thus did not err in rejecting the summary judgment motions.[47]

In *Heck*, the Indiana Supreme Court examined the fireman's rule and the rescue doctrine after over a century of silence on the topic.[48] Historically, the Indiana Supreme Court recognized the rescue doctrine only in situations where one had endangered the safety of another through his or her negligence and was being subject to liability for injuries sustained by a third person in attempting to save another person from injury. Therefore, the *Heck* defendant argued that "the rescue doctrine applies only when there are three parties: a tortfeasor, a party injured as a result of the tortfeasor's negligence, and a rescuer of the party injured."[49] However, in examining the scope of duty under the rescue doctrine, the Indiana Supreme Court sided with the Supreme Court of Missouri in holding that "a person who injures himself while acting in a careless or reckless manner may owe a duty to his or her own rescuer" and that such duty "stems from an implied invitation to rescue."[50]

> [T]here is no logical basis for distinguishing between the situation in which recovery is sought against a defendant whose negligence imperiled some third party, and a situation in which recovery is sought against a defendant who negligently imperiled himself. A person with reasonable

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45. 659 N.E.2d 498 (Ind. 1995).

46. Heck v. Robey, 630 N.E.2d 1361 (Ind. Ct. App. 1994), *vacated and rev'd*, 659 N.E.2d 498 (1995).

47. *See Heck*, 659 N.E.2d at 500.

48. *Id.* at 501.

49. *Id.*

50. *Id.* at 502 (citing Lowrey v. Horvath, 689 S.W.2d 625, 628 (Mo. 1985)).

> foresight who negligently imperils another or who negligently imperils himself will normally contemplate the probability of an attempted rescue, in the course of which the rescuer may sustain injury. . . . [A] person who carelessly exposes himself to danger or who attempts to take his life in a place where others may be expected to be, does commit a wrongful act towards them in that it exposes them to a recognizable risk of injury.[51]

In *Heck*, the plaintiff responded to an accident in his capacity as a paramedic pursuant to a "911" emergency call. He conceded that his actions were not voluntary because he was acting under a duty imposed upon him as an employee.[52] Ordinarily, this would suffice to defeat his argument that the defendants owed him a duty under the rescue doctrine. "[A] professional rescue attempt stemming from a '911' call simply lacks the spontaneous and impulsive character that the rescue doctrine was designed to protect."[53] Moreover, "only those who have a close proximity in time and distance to the party requiring assistance are within the class of potential rescuers."[54] The court was not required to decide whether the injured rescuer must have had actual sensory perception of the injury or accident for a duty to arise under the rescue doctrine.[55] The Indiana Supreme Court held that the rescue doctrine "will not ordinarily create, for professional rescuers responding to emergency calls within the course of their employment, the same level of duty owed to lay rescuers present at or near the scene of an accident."[56]

Nonetheless, the plaintiff in *Heck* presented evidence that created a genuine issue of material fact as to whether the defendant engaged in flailing and kicking in a combative manner during the rescue attempt, making extrication more dangerous.[57] Thus, the duty arose not under the rescue doctrine, but from the relationship between the parties following the commencement of the rescue attempt.[58]

In commenting on the fireman's rule, the Indiana Supreme Court observed that public policy disfavors providing defendants with complete immunity based solely upon the plaintiff's occupation.[59] The court also held that the fireman's rule can no longer be based upon an assumption of the risk rationale because any rule that purports to effect an absolute defense based upon incurred risk is contrary to Indiana's comparative fault scheme.[60]

> [W]e reject the Court of Appeals' conclusion that because [the plaintiff] 'implicitly agreed' to the risks of working as a professional rescuer, he

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51. *Id.* (quoting *Lowrey*, 689 S.W.2d at 628).
52. *Id.* at 504.
53. *Id.*
54. *Id.* at 502 (citing Lambert v. Parrish, 492 N.E.2d 289, 291 (Ind. 1986)).
55. *Id.* at 502-03.
56. *Id.* at 503.
57. *Id.*
58. *Id.*
59. *Id.* at 504.
60. *Id.* at 504-05.

> was barred as a matter of law from recovering under the fireman's rule. While the fact-finder may determine that [the plaintiff] incurred risk, the fact-finder must consider any incurred risk as fault for apportionment purposes under the Act.[61]

"The question of whether there is continued viability for the fireman's rule limiting the duty of care owed by the owner of urban premises . . . is not directly presented in this case, and we decline to address it at this time."[62] The court found further support for its position in the most recent amendment to the pattern jury instructions, "which is almost verbatim as the given instruction in this case."[63]

B. Governmental Entities as Non-Parties

In *Shand Mining, Inc. v. Clay County Board of Commissioners*,[64] a plaintiff, who was involved in a single vehicle accident brought a personal injury action against the county and Shand Mining, the independent contractor with whom the county had its road maintenance agreement. In response to the complaint that the defendants breached their duty to maintain the road upon which the plaintiffs were injured, the county filed a cross-claim against Shand alleging that it was contractually obligated to maintain the road pursuant to a maintenance agreement.[65] Further, the county alleged that Shand had agreed to indemnify the county against any claims arising out of the use of the roadway. The county also contended that it was immune.[66]

One of the questions facing the court of appeals was whether Shand had standing to challenge the trial court's finding of immunity. "The issue of standing focuses on whether the complaining party is the proper person to invoke the court's power. To have standing, a party must demonstrate a personal stake in the outcome of the lawsuit and must show, at a minimum, it was in immediate danger of sustaining some direct injury as a result of the conduct at issue."[67] In correctly concluding that Shand Mining had standing, the court noted that a dismissal of the county would have "preclude[d] the jury from assessing any fault against [the county]" and would have left Shand Mining in the position of being liable for the county's portion of fault.[68]

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61. *Id.* at 505.

62. *Id.*

63. *Id.* at 237 (citing INDIANA PATTERN JURY INSTRUCTIONS, CIVIL INSTRUCTION NO. 6.03 (Supp. 1994)).

64. 671 N.E.2d 477 (Ind. Ct. App. 1996), *trans. denied.*

65. *Id.* at 478.

66. *See* IND. CODE § 34-4-16.5-3 (Supp. 1996).

67. *Shand Mining*, 671 N.E.2d at 478 (citing Shourek v. Stirling, 621 N.E.2d 1107, 1109 (Ind. 1993)).

68. *Id.* at 480. The court also stated, "A dismissed party may not be a non-party for purposes of fault allocation." *Id.* at 479 (citing Handrow v. Cox, 575 N.E.2d 611, 613 n.1 (Ind. 1991)). This statement may be a little broad. A dismissal of a party for a failure to prosecute should not operate to preclude a co-defendant from naming that party as a non-party for purposes

Next, the court rejected the county's argument that it was entitled to summary judgment due to its governmental immunity.[69] The court reasoned that "[d]uties that are imposed by law or contract are considered non-delegable because they are deemed so important to the community that the principal should not be permitted to transfer these duties to another."[70] In Indiana, the legislature has specifically charged the county supervisor with the supervision of the maintenance and repair of all highways within the county.[71] Further, Indiana judicial decisions have recognized that governmental entities have a specific obligation with respect to public travel.[72] Although the county is free to delegate its responsibility for maintaining roads to a private entity, the court held that such a delegation does not relieve the county of liability.[73] The trial court, therefore, erred in granting summary judgment in favor of the county on the basis of governmental immunity.[74]

Despite the rejection of the immunity argument, the Indiana Court of Appeals nonetheless affirmed the trial court because the plaintiffs failed to demonstrate that the independent contractor was negligent in its maintenance or repair of the road and that the county negligently failed to supervise such repair or maintenance.[75] The record was devoid of testimony, affidavits, depositions, or other proof establishing that Shand Mining negligently repaired or maintained the highway or that the county negligently supervised such maintenance.[76]

Shand Mining was placed in an awkward position in this case—it was asked to argue its own negligence to prevent the appellate court's affirmation of the summary judgment in favor of the county.[77] Shand Mining was left in a position where it was unable to name the county as a non-party (because a dismissed party may not be a non-party for purposes of fault allocation),[78] yet the court found the duty to maintain the highway to be a non-delegable duty on the part of the county.[79]

C. Comparative Fault as a Matter of Law

In *Thiele v. Norfolk & Western Railway Co.*,[80] the guardian of a motorist who was severely injured in a collision with a train at a railroad crossing where a

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of fault allocation.

69. *Id.* at 481.

70. *Id.* (citing Bagley v. Insight Communications Co., 658 N.E.2d 584, 586 (Ind. 1995)).

71. *See id.* (citing IND. CODE § 8-17-3-2 (1993)).

72. *See id.* (citing City of Indianapolis v. Cauley, 73 N.E. 691, 693-94 (Ind. 1905)).

73. *Id.*

74. *Id.*

75. *Id.* at 482.

76. *Id.*

77. *Id.* at 482 n.4.

78. *See id.* at 479 (citing Handrow v. Cox, 575 N.E.2d 611, 613 n.1 (Ind. 1991)).

79. A party should not be allowed to reduce liability for its negligence by arguing that a non-party negligently failed to supervise him.

80. 68 F.3d 179 (7th Cir. 1995).

federally funded crossing upgrade was being performed brought an action against the railroad. In affirming the trial court's grant of summary judgment to the railroad, the Seventh Circuit found that the Federal Railway Safety Act[81] (FRSA) did not preempt state law adequacy of warnings claims until the warning devices were installed and fully operational.[82] However, the court upheld the grant of summary judgment because it found that, as a matter of law, the Indiana Comparative Fault Act barred the plaintiff's recovery.[83] The court concluded that the evidence led to only one conclusion: that the plaintiff was more than fifty percent at fault for his injury. Consequently, under the Act, the plaintiff was precluded from recovery.

The court noted that "while the degree of comparative fault is normally a question of the fact finder, a court may apportion fault 'when there is no dispute in the evidence and the fact finder is able to come to only one logical conclusion.'"[84] The court held:

> No reasonable jury could find otherwise than that [the plaintiff] was more than fifty percent responsible for his accident. [The plaintiff] was familiar with the crossing: He admits he knew it was there and that he had crossed it before. Uncontradicted eye witnesses testified that [the plaintiff] drove onto the tracks in daylight without stopping at the stop sign and then stopped once he was on the tracks. His failure to stop violated his statutory duty to stop and exercise due care before proceeding . . . . Furthermore, the train crew repeatedly sounded the whistle while [the plaintiff] stayed on the tracks. . . . [T]here is no genuine dispute that while [the plaintiff] was on the tracks, the approaching train was both clearly visible and audible. [The plaintiff's] car was found in the "park" gear position after the accident. No reasonable jury could find otherwise then that [the plaintiff] violated his duty to exercise reasonable care for his own safety and his statutory duty to stop, and that his negligence was more than fifty percent responsible for his injuries.[85]

D. Intervening Cause Subsumed By Comparative Fault Act

In *L.K.I. Holdings, Inc. v. Tyner*,[86] the defendant contended that the trial court erred when it concluded that the question of whether the co-defendants' failure to yield was an intervening cause was not susceptible to summary judgment.[87] The

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81. Pub. L. No. 91-458, §§ 201-212, 84 Stat. 971, 971-77 (1970) (codified as amended at scattered sections of 45 U.S.C.).

82. *Thiele*, 68 F.3d at 183.

83. *Id.* at 185.

84. *Id.* (citing McKinney v. Public Serv. Co., 597 N.E.2d 1001, 1008 (Ind. Ct. App. 1992)).

85. *Id.* (citing IND. CODE § 9-21-4-16 (1993)).

86. 658 N.E.2d 111 (Ind. Ct. App. 1995).

87. *Id.* at 119.

trial court ruled that the issue of whether the collision was a foreseeable result of the moving defendant's allegedly negligent use of its property was a question for the jury.

The Indiana Court of Appeals noted that the effect of Indiana's Comparative Fault Act on the doctrine of intervening cause was an issue of first impression in Indiana.[88] According to the court, an intervening cause is one which comes into active operation in producing a result after the negligence of the defendant.[89] "Intervening cause, therefore, acknowledges a defendant's negligence, yet absolves the defendant of liability when the negligence is deemed remote. The adoption of comparative negligence, with its apportionment of fault, *renders the protection of a remote actor unnecessary.*"[90]

> Cases in which, prior to the adoption of comparative negligence, plaintiff might have lost under proximate cause rules, because the act of plaintiff or third parties was regarded as a "supervening cause," might be reconsidered because the court can now reach a fair decision by apportioning some of the blame to the defendant and some to third parties or to the plaintiff himself.[91]

The court therefore held that if the co-defendant's negligence was a proximate cause of the accident, such would not immunize the moving defendant from liability for damages proximately caused by its negligence.[92] Rather, the co-defendant's negligent conduct triggers the apportionment principles of comparative fault, and the foreseeability of her negligence is simply a matter for the fact finder to consider in allocating fault.[93] The Indiana Court of Appeals found that the trial court properly reserved this issue for the jury because "the comparison of fault inherent in the doctrine of intervening cause has been incorporated into our comparative fault system."[94]

L.K.I. Holdings serves to clarify the effect of Indiana's Comparative Fault Act on the defense of intervening cause. At the same time, however, the decision potentially renders a commonly used "defense" less potent.

E. Comparative Fault Jury Instruction

In *Utley v. Healy*,[95] the court examined the verdict forms in a case arising under the Comparative Fault Act. At trial, the jury was instructed in part, "[I]f you

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88. *Id.*

89. *Id.* (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 44 (5th ed. 1984 & Supp. 1988)).

90. *Id.* (emphasis added).

91. *Id.* at 119-20 (citing Michalak v. County of LaSalle, 459 N.E.2d 1131 (Ill. App. Ct. 1984)).

92. *Id.* at 120.

93. *Id.*

94. *Id.*

95. 663 N.E.2d 229 (Ind. Ct. App. 1996), *trans. denied.*

find the Defendant is not at fault or that the Plaintiffs have failed to meet their burden of proof, then your verdict should be for the defendant, you should sign Verdict Form C, and no further deliberation of the Jury is necessary."[96] The jury was given three verdict forms, including Verdict Form C, which simply stated: "We, the Jury, find for the defendant."[97] The plaintiffs argued that, by giving the instruction and using Verdict Form C, the trial court violated the then current section 34-4-33-5 of the Indiana Code which provided:

> In an action based on fault that is brought against one (1) defendant or two (2) or more defendants who may be treated as a single party, and that is tried to a jury the court . . . shall instruct the jury to determine its verdict in the following manner: (1) the jury shall determine the percentage of fault of the claimant, of the defendant, and of any person who is a non-party.[98]

This section requires the allocation of fault to the claimant, defendant, and any non-party. In addition, the statute includes specific rules about verdict forms.[99] The plaintiffs claimed that the statutes were violated because the jury was not required to first allocate the percentages of fault. They additionally contended that giving the instruction was equivalent to authorizing the jury to treat the collision as a "mere accident," which is impermissible.[100] The court noted that it had already addressed this issue in *Evans v. Schenk Cattle Co.*[101]

In *Evans*, the court upheld the trial court's action in giving a verdict form to the jury which required the jury to first determine whether the defendant was negligent before allocating fault. In upholding the use of the verdict form, the court stated, "If the jury finds no fault on the defendant's part, there is no need to address allocation of fault."[102] The plaintiffs maintained that *Evans* was wrongly decided because it disregarded the plain language of the statutes involved. The Indiana Court of Appeals disagreed, finding the rationale in *Evans* to be persuasive and applicable to the present case. "It is a 'time wasting effort' for the jury to first determine that [the defendant] was 0% at fault, apportion the remainder of the percentages between the [non-party] and the [claimant] and then conclude that [the defendant] was not negligent."[103] "This action is merely an exercise in futility since ultimately the jury found [the defendant] not negligent."[104] "Once the jury concluded that [the defendant] was not negligent, there was no

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96. *Id.* at 233.

97. *Id.*

98. *Id.* (citing IND. CODE § 34-4-33-5(a) (1993)). This section has recently been amended. However, the amendment became effective July 1, 1995 and was not relevant to the court of appeals review of the instant case.

99. *See* IND. CODE § 34-4-33-6 (1993).

100. *Utley*, 663 N.E.2d at 234.

101. 558 N.E.2d 892 (Ind. Ct. App. 1990).

102. *Utley*, 663 N.E.2d at 234 (citing *Evans*, 558 N.E.2d at 896).

103. *Id.*

104. *Id.*

reasonable purpose for the jury to engage in a further allocation of fault."[105]

III. PREMISES LIABILITY

Premises liability law in Indiana experienced no significant changes during the survey period. However, three cases in the area of premises liability were handed down by the Indiana Court of Appeals which are worthy of discussion. The first addressed the status of an entrant upon land and recognized, for the first time in Indiana, a license implied by custom. The second case of importance, although not deciding any issues of first impression in the state, addressed the comparative fault of the landowner and invitee and the defense of incurred risk. Finally, the court of appeals issued an opinion discussing artificial conditions on land—an issue which has received little attention in recent years by Indiana courts.

A. *Status of Entrant—Licence Implied by Custom*

In *Frye v. Trustees of the Rumbletown Free Methodist Church*,[106] the Indiana Court of Appeals not only discussed and clarified Indiana law on the status of entrants onto premises, but it also, in a case of first impression in Indiana, recognized a license implied by custom.

In *Frye*, the plaintiff experienced difficulties with his car when it stopped running near a church and its parsonage. The plaintiff left his car and approached the parsonage because it was the home nearest the place where his car stopped. The plaintiff's intent was to use a phone or borrow a gas can. Because the plaintiff could not find anyone outside to ask for assistance, he walked up the concrete steps of the parsonage and knocked on the door. No one answered. As he descended the steps, the top step moved causing him to fall and become injured. The plaintiff sued the church for negligence.[107]

The court faced the issue of the plaintiff's status upon the land and the attendant duty of care owed to him by the church. The court quickly concluded that he was not an invitee because the church was not held "open to the public for every type of need."[108] It is only "open to the public for church-related matters."[109] The court then evaluated whether the plaintiff was a trespasser or a licensee. In concluding that he was a licensee, the court found that he had a privilege implied by custom to enter church property to seek aid.[110] The court found that in the absence of an expression of possessor's unwillingness to allow entry, a person is entitled to assume a privilege to enter another's land to seek assistance.[111] The court then remanded the case for a trial on the issues of whether the steps were a

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105. *Id.*
106. 657 N.E.2d 745 (Ind. Ct. App. 1995).
107. *Id.* at 747.
108. *Id.* at 749.
109. *Id.*
110. *Id.* at 750 (citing RESTATEMENT (SECOND) OF TORTS § 330 cmt. e, h (1977)).
111. *Id.*

latent or hidden danger and the extent of the church's knowledge of the danger.[112]

B. Comparative Fault of Landowner and Invitee—Incurred Risk

The court in *Ooms v. USX Corp.*,[113] addressed the issues of restricted invitation, comparative fault of landowners and invitees, and the defense of incurred risk in premises liability cases. Although none of the issues were ones of first impression, *Ooms* contains a thorough discussion and provides clarification of the issues.

In *Ooms*, USX owned a steel mill where it maintained a bulk oil storage facility that received and stored fuel oil delivered to the site by tank truck. Ooms was employed by a trucking company that delivered bulk oil to USX. Ooms drove his truck to one of the unloading bays and hooked up the tanker. The ground was sloped and full of ruts. Oil spills were common, and oil was on the ground everywhere. The drivers were provided with an absorbent and instructed to throw it on the ground if oil spilled. While unloading, drivers were required to watch their trucks to ensure that hoses did not break and leak oil. The drivers were permitted to stand on a nearby hill to avoid standing in the oil. Drivers had complained many times about the conditions. Ooms' employer had told him that if he refused to deliver oil he would be fired. On the day of the incident, Ooms was standing on the hill while fueling because it was the only place to avoid standing in the oil. While stepping back down the hill, he slipped and fell. The next morning, USX leveled the hill, in part, because it was considered a tripping hazard.

The parties did not dispute that, under Indiana law, USX had a duty to keep the property in a reasonably safe condition. However, USX argued that Ooms had accepted a "restricted invitation" to enter its premises and, under that limited duty, there was no evidence of any breach.[114] The court, although acknowledging that a "restricted invitation" can limit an invitee's duty, found that the evidence did not show that Ooms expressly agreed to a limited invitation to enter USX's premises.[115] The court noted that "simply being aware of a condition does not translate into a restricted invitation or a corresponding limited duty."[116]

Finding that no restricted invitation or duty existed, the court's next inquiry was whether USX fulfilled its duty to Ooms to exercise reasonable care. The court cited section 343A of the Restatement (Second) of Torts: "A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the

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112. *Id.*

113. 661 N.E.2d 1250 (Ind. Ct. App. 1996), *trans. denied.*

114. *See* Hoosier Cardinal Corp. v. Brizius, 199 N.E.2d 481, 487 (Ind. App. 1964) (holding that the inviter's duty depends upon "the circumstances surrounding the invitation, including the character of the premises, the nature of the invitation, the conditions under which it is extended, and the use of the premises to be made by the invitee.").

115. *Ooms*, 661 N.E.2d at 1252.

116. *Id.* at 1253.

possessor should anticipate the harm despite such knowledge or obviousness."[117] The court stated that the comparative knowledge of the landowner and invitee is not a factor in determining whether the duty exists, but it is a factor in determining whether the duty was breached.[118] For guidance on the issue of comparative knowledge, the court referred to the comments to section 343A that can be summarized as:

- If the invitee knows the conditions and dangers, he is free to make a decision as to whether or not to incur the risk; and,

- an inviter can and should anticipate that in some cases a dangerous condition will cause harm to the invitee notwithstanding its known or obvious danger, and the inviter is not relieved of his duty.[119]

The court concluded that conflicting inferences rendered summary judgment improper.[120] Although Ooms was aware of the oily conditions, there was no safe place to stand; the only place for him to escape the oil was on the hill. Ooms did not take any unforeseeable or unauthorized actions. For these reasons, it would be reasonable to infer that USX should have anticipated that Ooms could not avoid the oil and the hill despite his knowledge of the condition.[121]

Finally, the court noted that it could not say that Ooms incurred the risk as a matter of law because there was no evidence that Ooms had actual acknowledge and an appreciation of the specific risk involved in slipping while going down the hill; rather, the evidence merely showed he was aware of the oily conditions.[122] Moreover, the court emphasized that there were conflicting inferences as to the voluntary nature of Ooms' actions because Ooms had been told he would be fired if he refused to deliver to USX.[123] Thus, a jury could conclude that acceptance of the risk was involuntary.[124]

Ooms did not address any issue of first impression in Indiana. However, it did narrow the application of the rules of law regarding restricted invitations, comparative fault of an invitee, and incurred risk in premises liability cases and is instructive on those issues.

C. Artificial Conditions on the Land

Although not a case of first impression in Indiana, the Indiana Court of Appeals in *Spears v. Blackwell*[125] discussed the issue of artificial versus natural

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117. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 343A (1965)).
118. *Id.* (citing Douglas v. Irvin, 549 N.E.2d 368, 370 (Ind. 1990)).
119. *Id.* at 1254.
120. *Id.*
121. *Id.* at 1255.
122. *Id.*
123. *Id.*
124. *Id.*
125. 666 N.E.2d 974 (Ind. Ct. App. 1996), *trans. denied.*

conditions on land—an issue which has received little attention in recent years by Indiana courts.

In *Spears*, the plaintiff was driving his car on a rural road when another car driven by Brier pulled out in front of him. Brier was leaving defendant's residence. At the end of the driveway, there was an elevated area of land close to the road with tall weeds growing upon it. Brier and plaintiff could not see each other's cars for the weeds. Brier pulled out in front of the plaintiff, and the cars collided. Plaintiff brought suit against the landowner who, in turn, moved for summary judgment, which was granted.[126]

After noting that an owner does not owe a duty to passersby on the road to protect them from natural conditions, the court reaffirmed that the law imposes a duty on the landowner if there is an artificial condition on the land about which the landowner knew or should have known.[127]

The *Spears* court found that summary judgment was improper because the question whether the vegetation was a natural or artificial condition was a disputed issue of fact.[128] Although weeds can be a natural condition, vegetation planted by humans is not. It is the human activity which makes the difference. However, the court noted that the passage of time may transform an artificial condition into a natural condition.[129]

Although not expressing any novel issues, *Spears* provides some guidance on natural versus artificial conditions of land and the duties owed by landowners.

IV. Liability of Independent Contractors

The rules governing liability of independent contractors did not change during the survey period. However, a couple of cases were decided which help clarify this sometimes confusing area of law.

Keith v. Van Hoy, Inc.[130] helped clarify an exception to the general rule that the owner's acceptance of the independent contractor's work relieves the latter from liability to third parties. In *Keith*, the plaintiff's employer, Foamcraft, contracted with the defendant, Van Hoy, for Van Hoy to rewire Foamcraft's foam crusher. Prior to the rewiring, foam could only be inserted through one end and, if it needed to be crushed further, it was removed and then reinserted through the same end; that end had a guard, but the "exit end" did not. After the rewiring, foam could be inserted from either end; however, an additional guard for the "exit end" was neither requested nor added. Foamcraft accepted Van Hoy's work, and Van Hoy never received any complaints. A year and a half later, plaintiff was injured while feeding foam through the end of the crusher which lacked a guard.[131]

In *Keith*, the court began its analysis by stating the general rule that "once an

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126. *Id.* at 976.
127. *Id.* at 977.
128. *Id.*
129. *Id.*
130. 656 N.E.2d 872 (Ind. Ct. App. 1995), *trans. denied.*
131. *Id.* at 872-73.

employer accepts an independent contractor's work, the contractor is not liable for injuries to third persons."[132] However, an independent contractor remains liable to third persons "where personal injury is caused by work which was left in a condition that was dangerously defective, inherently dangerous, or imminently dangerous such that it created a risk of imminent personal injury."[133] The court also noted the policy reason of the no duty rule: "[O]ne who lacks possession and control of property, . . . should not be held liable for injuries he is no longer in a position to prevent."[134]

In finding that Van Hoy was not liable to Keith, the court analogized *Keith* to a case where an independent contractor installed a pool with various design discrepancies. Because the equipment was in the sole control of the managers of the pool for two years after the installation and acceptance, the court found no duty.[135] In *Keith*, the injury occurred one and a half years after the acceptance. The wiring was done properly, and Van Hoy was not asked to install safety guards. Moreover, as in *Snider*, the independent contractor had done what the hiring party had directed.[136]

The court distinguished this case from *National Steel Erection v. Hinkle*[137] where a roofer had negligently installed roofing material. Later, the plaintiff, who had gone to repair a leak, fell through the roof and sustained serious injuries. The *Keith* court noted that the roof was left in an inherently dangerous condition (i.e., the materials were too thin) whereas there was nothing wrong with the wiring itself in the crusher at issue.[138] This distinction is a bit contrived. If the rewiring left the machine inherently dangerous, i.e., it left the machine with a "business" end that had no guard, then why should it matter that the rewiring was done properly?

However, the court's holding is clearly correct. Its analysis properly focused on the length of time between the acceptance and the injury. It also properly focused on whether the contractor had carried out the instructions of the hiring party. There are other factors which could have supported the court's decision. First, the roof in *National Steel* was a latent defect of which the hiring party probably had no notice. Second, in *National Steel*, the roofer used substandard material which was almost certainly contrary to the hiring party's expectations. Third, the roofer presumably had superior knowledge of roofing materials, and the hiring party was likely to rely on that superior knowledge. In *Keith*, the hiring party requested and received a rewired crusher. The hiring party had sole control of the crusher for one and a half years. If the crusher needed another guard, the hiring party should have known that fact. The duty to install the guard was therefore with the hiring party, not the independent contractor. Simply stated,

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132. *Id.* at 873.

133. *Id.* (quoting Snider v. Bob Heinlin Concrete Const. Co., 506 N.E.2d 77, 81 (Ind. Ct. App. 1987) (internal quotation marks omitted).

134. *Id.* at 874 (quoting *Snider*, 506 N.E.2d at 82).

135. *Id.* (citing *Snider*, 506 N.E.2d at 82).

136. *Id.*

137. 541 N.E.2d 288 (Ind. Ct. App. 1989).

138. *Keith*, 656 N.E.2d at 874.

where the contract or does that which he is requested to do and *his work* (i.e., the rewiring vs. the placement of a guard, or the construction of the pool vs. the design of a pool) is not what is inherently dangerous, the acceptance of the work relieves the contractor of liability to third parties subsequently injured.

The court of appeals briefly revisited this issue in *Hill v. Rieth-Riley Construction Co.*[139] where the plaintiff was injured when her vehicle struck a guardrail on a highway. The state had reconstructed the roadway and had hired Rieth to do the reconstruction. Rieth subcontracted with Hoosier to remove and reset the guardrail. The guardrail had been installed using a "buried end treatment" and was reinstalled by Hoosier in the same manner. The state accepted the work and released Rieth and Hoosier from further maintenance. Plaintiff claimed that the guardrail was dangerous when struck from the end. Rieth and Hoosier countered that their work had been accepted by the state thereby relieving them from liability. Plaintiff responded claiming that the exception to that rule applied because the work was left in a dangerous and defective condition. The issue became whether the guardrail when struck in one specific manner, which may cause a vehicle to vault on its side, is sufficiently dangerous to fall into the exception.[140]

The court of appeals in *Hill* further clarified what is meant by "inherently dangerous." "The term 'inherently dangerous' is more properly applied to activities or instrumentalities which are *by their nature, always dangerous*, i.e. blasting or wild animals."[141] The *Hill* court noted that the guardrail was a safety device and dangerous only when struck at the very end at a shallow angle.[142] Vehicles hitting the guardrail in areas other than where plaintiff hit would be saved. Thus, the guardrail is not always dangerous.[143] The court held that the "exception is meant to be used only for continuously dangerous activities and instrumentalities," which the guardrail was not.[144]

In addressing an independent contractor's liability, or lack thereof, to third parties, both of these cases served to limit the exception to the general rule and further bolster the defense of independent contractors to actions brought by third parties.

V. DRAM SHOP LIABILITY

The Indiana Court of Appeals addressed one case involving dram shop liability during the survey period and refused to expand liability beyond the

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139. 670 N.E.2d 940 (Ind. Ct. App. 1996).

140. *Id.* at 942-44.

141. *Id.* at 945 (quoting National Steel Erection v. Hinkle, 541 N.E.2d 288, 292 (Ind. Ct. App. 1989)).

142. *Id.*

143. *Id.*

144. *Id.*

confines of Indiana's dram shop liability statute.[145] In *Weida v. Dowden*,[146] the court addressed the knowledge requirement and what constitutes "furnishing" alcohol under the dram shop statute. The court also addressed, and rejected, attempts to expand liability beyond the statute for injuries resulting from providing alcoholic beverages, particularly to minors.

In *Weida*, Michelle Weida and her parents brought suit against the Dowdens and others after Michelle was injured in an automobile accident in which she was a passenger. The driver, Firth, was a minor who became intoxicated after drinking free, self-served beer from a keg at a wedding reception he and Michelle attended. The reception was hosted by the parents of the young woman the Dowdens' son was marrying. Suit was also brought against the country club where the reception was held, the club house manager, the liquor permit applicant, and the Dowdens.[147]

The bride was employed by the country club; so she held her reception there without charge and without a written contract. Her parents organized the reception; however, her fiancé's mother paid the a deposit on a keg of beer for the reception at her fiancé's request. The groom's parents, the Dowdens, did not invite any guests or provide any decorations. The groom and a friend picked up the keg and delivered it to the country club. During the reception, the plaintiff, Michelle, noticed Firth drinking beer from the unattended keg. Firth did not appear intoxicated. At one time during the reception, Firth drank three to four beers in a forty-five minute period. The club manager also did not observe any underage drinking.[148]

During the reception, Firth and Michelle began arguing and later left together. While Firth was driving Michelle home, he crossed the center line and struck an oncoming vehicle injuring Michelle. His blood alcohol level was .12%.[149]

Plaintiffs brought suit against the defendants alleging that the free, self-serve beer had been provided by the Dowdens and consumed on premises owned and operated by the country club. Plaintiffs claimed that the negligent conduct of the defendants proximately caused Michelle's injuries.[150] The defendants filed motions for summary judgment. The trial court initially denied the motions finding that a material issue of fact existed; i.e., whether the person furnishing the alcohol had actual knowledge that the person to whom the alcohol was furnished was visibly intoxicated at the time it was furnished.[151] After the court denied the motions for summary judgment, the parties entered into and filed a stipulation that the person furnishing the alcoholic beverages to Firth did not have actual knowledge that Firth was visibly intoxicated at the time the alcohol was

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145. IND. CODE § 7.1-5-10-15.5 (Supp. 1996).
146. 664 N.E.2d 742 (Ind. Ct. App. 1996), *trans. granted*, (Ind. Oct. 31, 1996).
147. *Id.* at 745.
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*

furnished.[152] After the stipulation was filed, the court granted summary judgment in favor of the defendants. Plaintiffs then appealed.[153]

The court of appeals first addressed the liability of the club, club manager, and the holder of the liquor license. The court restated Indiana law interpreting the dram shop statute, holding that the statute does not limit its application to adults but includes minors.[154] Because the statute limits liability to those who have actual knowledge that the person to whom alcohol is furnished is visibly intoxicated, and the parties stipulated that the person furnishing the alcohol to Firth had no such knowledge, liability could not attach.[155]

The court went on to note, in dicta, that liability would not extend to the club in any event because it could not be shown that the club "furnished" alcohol to Firth. Again, the court reaffirmed Indiana law that to be held liable as one who supplies or "furnishes" the alcohol, that person must be the "active means" by and through which the liquor is placed into the custody of the intoxicated person.[156] The court noted that the club did not purchase the beer but that it was brought to the club by the groom. The court addressed this issue presumably to further clarify and restate Indiana law because the stipulation was conclusive as to the inapplicability of the Dram Shop Act.[157]

The court of appeals then addressed whether common law theories of negligence were viable. Despite the Dram Shop Act, the court noted that common law negligence claims could be pursued by plaintiffs.[158] However, based on the facts presented in *Weida*, the court rejected plaintiffs' common law claims. The court found that the club owed Firth no duty because there was no special relationship between the two parties; White did not assume responsibility to check identification or dispense or serve the beer. The mere fact that the reception was held at the club was insufficient to impose a duty on the club.[159]

The Dowden's potential common law liability reached a similar fate. The court found that the Dowdens did not furnish, possess, dispense, control, or supervise the beer; they merely furnished the money which purchased the beer. The court concluded that there was no special relationship between Firth and the Dowdens. The court refused, as it had on prior occasions, to extend liability to the pure social host for common law liquor liability; instead, the Dram Shop Act controlled.[160] The court noted that it was not reasonably foreseeable to the Dowdens that their contributing money for the keg would result in Firth becoming intoxicated and involved in an automobile accident.[161]

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152. *Id.* at 746.
153. *Id.* at 747.
154. *Id.* at 748.
155. *Id.*
156. *Id.* at 749.
157. *Id.*
158. *Id.* at 750.
159. *Id.* at 751.
160. *Id.* at 753.
161. *Id.*

Weida not only restated Indiana law on dram shop liability but, as Indiana has done in the past, refused to expand liability beyond the confines of the statute.

VI. PARENTS'/GRANDPARENTS' LIABILITY FOR ACTS OF CHILD

In *Wells v. Hickman*,[162] in a case of first impression, the court recognized a parent's failure to control a minor child as a viable cause of action.[163] The court evaluated this cause of action in light of an Indiana statute which limits a parent's liability for the knowing, intentional or reckless actions of a minor child.[164]

In *Wells*, a fifteen-year-old killed a twelve-year-old, and the twelve-year-old's mother sued the killer's parents and grandparents on a variety of negligence theories. The court first concluded that the statutory provision did not preclude a common law action against the parents for *their* negligence.[165] The statutory provision merely holds parents strictly liable up to $3000 for certain tortious acts committed by their child.[166]

In evaluating the common law negligence claims, the court found that there are four exceptions to the general rule that a parent is not liable for the tortious acts of the child.[167] Because this liability is grounded in negligence, a duty to control will only exist in "those circumstances where a reasonably foreseeable victim is injured by a reasonably foreseeable harm."[168] The court also held that a duty only attaches where "the parent must know or should have known that the child had a habit of engaging in the particular conduct which led to the plaintiff's injury."[169] Because neither the parents nor the grandparents knew or should have known "that the child has engaged in a particular act or course of conduct and it is reasonably foreseeable that this conduct would lead to the plaintiff's injuries," the court held, as a matter of law, that there was no duty in this case.[170]

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162. 657 N.E.2d 172 (Ind. Ct. App. 1995).

163. *Id.* at 177.

164. IND. CODE § 34-4-31-1 (1993).

165. *Wells*, 657 N.E.2d at 177.

166. *See id.* at 176-77.

167. *Id.* at 176. The exceptions are: 1) where the parent entrusts a child an instrumentality that, because of the child's lack of experience, may pose a danger to others, 2) where the child is acting as a servant or agent for the parents and commits a tort, 3) where the parent "consents, directs or sanctions" the tort, and 4) where the parent fails to exercise control over the child, if the parent knows or should have known that injury to another is foreseeable. *See id.* (quoting K.C. v. A.P., 577 So. 2d 669, 671 (Fla. Dist. Ct. App. 1991)).

168. *Id.* at 178 (citing Webb v. Jarvis, 575 N.E.2d 992, 997 (Ind. 1991)).

169. *Id.* (citing Parsons v. Smithey, 504 P.2d 1272, 1276 (Ariz. 1973); *K.C.*, 577 So. 2d at 671).

170. *Id.* at 179. The court also rejected a theory of negligent entrustment and premises liability. *Id.* at 179-80.

VII. GOVERNMENTAL LIABILITIES & IMMUNITIES

A. Discretionary Functions and Immunity

Within a month's time during the survey period, the Indiana Court of Appeals decided two cases dealing with the scope of a governmental entity's discretionary function immunity under the Indiana Tort Claims Act.[171]

In the first of these decisions, the court concluded that the City of Indianapolis was immune from liability. In *L.K.I. Holdings, Inc. v. Tyner*,[172] Tunney was driving northbound on Brokenhurst Road in Indianapolis. The road intersected with Fall Creek. L.K.I. constructed and maintained one section of the road in connection with its development of a residential neighborhood. On the date of the incident, that part of the road was a preferential street to Brokenhurst Road, which had not been accepted by the City of Indianapolis as a right of way or as part of the public street system. As Tunney passed through Fall Creek, she collided with Dickson who has been traveling in the other direction on Fall Creek. There were no traffic control signs at the intersection, and a dirt mound constructed by L.K.I. obstructed the view of the vehicles. L.K.I. and the City of Indianapolis were both named as defendants in complaints filed by Tunney and passengers in her car. L.K.I. moved for summary judgment which was denied. However, the court granted the city's motion for summary judgment. L.K.I. and Tunney's passenger maintained that the trial court erred when it granted summary judgment to the City of Indianapolis. The trial court had determined that the city had no statutory duty to erect a sign on L.K.I.'s property.[173]

The court of appeals concluded that the city was immune from liability. The court reviewed relevant Indiana cases which established that a governmental entity is not liable if the loss results from the performance of a discretionary function.[174] In deciding whether an act is discretionary, Indiana utilizes the planning-operational test.[175] Under that test, governmental entities are not held liable for alleged negligence arising from decisions which are made at a planning rather than an operational level. Such planning activities include "acts or omissions undertaken by an entity in the exercise of a legislative, judicial, executive, or planning function that involves formulation of basic policy decisions characterized by official judgment or discretion in weighing alternatives and choosing public policy."[176]

The court refused to accept L.K.I. and the passenger's argument that, by never considering whether to place a traffic control device at the intersection, the city never engaged in a conscious policy-oriented analysis required for immunity from liability. The court noted that "this characterization of the issue [is] overly

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171. IND. CODE § 34-4-16.5-3(6) (Supp. 1996).

172. 658 N.E.2d 111 (Ind. Ct. App. 1995), *trans. denied.*

173. *Id.* at 120.

174. *Id.*

175. *See id.*

176. *Id.* (citing Peavler v. Monroe Bd. of Comm'rs, 528 N.E.2d 40 (Ind. 1988)).

narrow."[177] The court found that an executive order issued by the Mayor of Indianapolis was sufficient to invoke the planning activities which then necessitates a finding that discretionary acts were performed and the city was immune from liability.[178] The executive order attempted to address the absence of traffic control devices in city subdivisions and additions to the city where the streets had not been accepted by the Department of Transportation. The order required that the traffic engineer of the city submit recommendations to the transportation board regarding the installation of traffic control devices in those subdivisions or additions when certain conditions were met. The court found that "the city's considered decision to entrust placement of traffic control devices to a traffic engineer is not reviewable under tort standards."[179] However, if the traffic engineer incorrectly performed the pre-determined procedures, then his or her decisions would be reviewable.[180]

The court noted that, at the time of the collision, the road did not meet the qualifications of the executive order and therefore did not require the traffic engineer to submit a report.[181] There was no allegation that the traffic engineer negligently implemented the executive order. Rather, L.K.I. and the passenger argued that the city's failure to engage in a decision-making process concerning the intersection necessitated a finding that the city was not immune from liability. The court noted that such an argument ignored the executive order which was issued in response to the problem of lack of traffic control devices in subdivisions and additions that were not fully complete.[182] The order prioritized new subdivisions so that additions with higher traffic flow and the greatest need for the installation of traffic control devices would be examined first. Because the court found that the mayor engaged in a policy-oriented decision-making process when he executed the Order,[183] it refused to second guess the mayor's judgment and held that the city was immune.[184]

An opposite result was reached in *Town of Highland v. Zerkel.*[185] In *Zerkel*, the plaintiff tripped and fell over an elevated portion of a cracked sidewalk while walking her dog. The plaintiff had lived in the neighborhood for thirty-three years and frequently walked the sidewalks. She alleged that the city was negligent in failing to keep its sidewalks in a reasonably safe condition for pedestrian travel. The city denied any negligence and raised several affirmative defenses, one of which was immunity under the Indiana Tort Claims Act. The city filed a motion for summary judgment asserting that it was entitled to discretionary function immunity. The court denied the motion. A jury trial was held, and a verdict for

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177. *Id.*
178. *Id.* at 121.
179. *Id.*
180. *See id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. 659 N.E.2d 1113 (Ind. Ct. App. 1995), *trans. denied.*

the plaintiff was entered. The city appealed, and the court of appeals affirmed the trial court's decision to deny the city's motion for summary judgment.[186]

The court noted that the city had an informal sidewalk replacement program in effect at the time of the plaintiff's accident. The Director of Public Works had testified regarding the program, which allowed concerned citizens, if they chose, to contact the city with their concern about a particular sidewalk. If the city found upon inspection that the sidewalk was in need of repair, it would remove the defective sidewalk and the homeowner would be responsible to pay for replacement of the sidewalk. The court concluded that the program did not amount to a policy-oriented decision-making process.[187]

Although there was no need for the city to demonstrate that it considered and rejected specific improvements, there was no evidence that the city implemented its program by way of a policy decision.[188] There was no ordinance on the subject or any formal writings putting residents on notice that it was their responsibility to alert the city to potential problems. The record was completely devoid of the elements necessary to create discretionary immunity, i.e., board deliberation, professional judgment, weighing of budgetary considerations, or risk assessment. Rather, any action with regard to the repair of sidewalks was incumbent solely upon residents. The city did not inspect the sidewalks or decide which sidewalks needed repair. If the city received a complaint, it would send the homeowner an application for the sidewalk replacement program. The court concluded that the city had "failed to demonstrate that it engaged in any type of systematic process for determining which sidewalks were in need of repair or that it implemented a policy weighing budgetary considerations to replace defective sidewalks."[189] Thus, the court found that the trial court correctly determined that the city was not entitled to discretionary function immunity.[190]

B. Statutory Cap

In *State v. Eaton*,[191] the court of appeals addressed the issue of whether a single statutory cap applying to governmental entities required the application of a single statutory cap to separate jury verdicts, one of which awarded the parents damages for loss of their child's services and the other of which awarded the child damages for personal injuries, when both damage awards together exceed the single statutory cap.

In *Eaton*, a minor was injured in a collision occurring on a state highway. His parents, acting as guardians, sued the State on his behalf and also sued on their own behalf for loss of services. The jury returned a verdict in the plaintiffs' favor. The jury awarded the parents, as legal guardians for the minor's personal injuries,

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186. *Id.* at 1116, 1119.
187. *Id.* at 1119.
188. *See id.*
189. *Id.*
190. *Id.*
191. 659 N.E.2d 232 (Ind. Ct. App. 1995), *trans. denied.*

$449,280 and awarded the parents, in their individual capacity, $101,178 for loss of the minor's services. The trial court reduced the larger award to $300,000 in accordance with the Indiana Tort Claims Act, but allowed the loss of services award to stand. The State appealed.[192]

The State argued that the trial court erred in refusing to apply a single statutory cap of $300,000 to the jury verdicts.[193] The Indiana Tort Claims Act provides as follows:

> The combined aggregate liability of all governmental entities and of all public employees acting within the scope of their employment and not excluded from liability under section 3 of this chapter, does not exceed three hundred thousand dollars ($300,000) for injury to or death of one (1) person in any one (1) occurrence and does not exceed five million dollars ($5,000,000) for injury to or death of all persons in that occurrence. A governmental entity is not liable for punitive damages.[194]

The State argued that the plaintiffs' claim for loss of services was derivative and, therefore, one statutory cap should be applied.[195]

The court of appeals noted that Indiana had never addressed the question of whether a single statutory cap is applicable to a derivative claim, the Seventh Circuit had addressed this precise issue, ruling that a single statutory cap was not applicable.[196] The Indiana Court of Appeals found that, even though the plaintiffs' claim for loss of services was derivative in the sense that they could not have prevailed if the jury had decided against the minor, the derivative nature of their claim was not dispositive of whether they were entitled to separate damages under the Tort Claims Act.[197] The court noted that "the wrongful act by which a minor child is injured gives rise to two causes of action: one in favor of the child for personal injuries, and the other in favor of a parent for loss of services."[198] The court concluded that a parents' claim for loss of services, although derivative, is a separate injury within the meaning of the Tort Claims Act and gives rise to a separate right of recovery.[199] The court of appeals found that "the trial court properly declined to apply a single statutory cap to the jury's award of damages."[200]

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192. *Id.* at 234.
193. *Id.* at 236.
194. *Id.* (quoting IND. CODE § 34-4-16.5-4 (1993)).
195. *Id.* at 237.
196. *Id.* (citing Myers v. Lake County, 30 F.3d 847 (7th Cir. 1994)).
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*

VIII. THE RECOGNITION OF A NEW TORT: INTENTIONAL INTERFERENCE WITH INHERITANCE

In *Minton v. Sackett*,[201] the plaintiff instituted an action alleging the defendant interfered with her expectancy under an individual's will by the use of fraud, duress, undue influence, and coercion and that the defendant was unjustly enriched by his actions. The defendant filed a Trial Rule 12(B)(6) motion to dismiss on the basis that "intentional interference with an inheritance" is not a recognized cause of action in Indiana.[202] The trial court granted the defendant's motion, and the plaintiff appealed contending that the trial court erred in failing to conclude that Indiana recognizes such a tort. The Indiana Court of Appeals noted that the plaintiff's appeal presented an issue of first impression in Indiana. Thus, the court looked to decisions of other jurisdictions for guidance.

"Several states have chosen to extend the concept of wrongful interference with a business advantage to the noncommercial context of interference with an inheritance," adopting the approach of the Restatement (Second) of Torts.[203] The Restatement provides that "one who by fraud or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to others for the loss of the inheritance or gift."[204]

In determining whether to adopt this approach, the court determined that it must "balance the competing goals of providing a remedy to injured parties and honoring the strictures of our probate code, which provides that a will contest is the exclusive means of challenging the validity of a will."[205] The majority of the states which have adopted the tort of interference with an inheritance have achieved this balance by "prohibiting a tort action to be brought where the remedy of a will contest is available and would provide the injured party with adequate relief."[206] The *Menton* court adopted this method.[207]

Although the plaintiff contended that her tort action should be permitted to proceed because the remedies available to her through the will contest were inadequate, the court concluded that the remedies available under the will contest adequately provided the plaintiff with the damages sought in her complaint. The will contest provided an opportunity for the plaintiff to receive both consequential damages and compensatory damages in the amount of one-half of the value of the estate.[208] "[T]he adequacy of a remedy is not dependent upon whether a will

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201. 671 N.E.2d 160 (Ind. Ct. App. 1996).

202. *Id.* at 161.

203. *Id.* at 162.

204. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 774B (1979)).

205. *Id.* (citing IND. CODE § 29-1-7-17 (1993); *In re* Estate of Niemiec, 435 N.E.2d 999 (Ind. Ct. App. 1982)).

206. *Id.* (citing DeWitt v. Duce, 408 So. 2d 1216 (Fla. 1981); *In re* Estate of Hoover, 515 N.E.2d 991 (Ill. App. Ct. 1987); Frohwein v. Haesemeyer, 264 N.W.2d 792) (Iowa 1978)).

207. *Id.* at 163.

208. *Id.*

contestant prevails, but upon whether the contestant has an opportunity to pursue the remedy."[209] The court refused to permit the plaintiff a "second bite at the apple" by allowing her to seek the same type of damages in a tort action that she was also attempting to recover in a will contest action filed just six days before her complaint for intentional interference with an inheritance.[210] In defining the new tort, the court concluded that "a plaintiff can only expect to receive the amount he or she would have received had it not been for another individual's interference."[211] Therefore, punitive damages are not recoverable.[212]

IX. Expanding a Dog Owner's Potential Liability: Negligent Entrustment of the Family Pet

In *Hardsaw v. Courtney*,[213] the defendants appealed a jury verdict for the plaintiffs where the defendants were found to have negligently entrusted their premises, including a dog, to their twelve-year-old daughter. The defendants contended that the evidence was insufficient to support the jury verdict and judgment.

To prove a claim for negligent entrustment, the court noted that "a plaintiff must prove: (1) an entrustment; (2) to an incapacitated person or one who is incapable of using due care; (3) with actual and specific knowledge that the person is incapacitated or incapable of using due care at the time of the entrustment; (4) proximate cause; and, (5) damages."[214] Furthermore, the court noted, that although application of the doctrine entrustment was once limited to situations involving automobiles and firearms, it no longer depends solely upon the instrumentality involved.[215] The theory does not hinge on the nature of the instrumentality, but focuses instead on the "supplying of the instrumentality for probable negligent use."[216]

Regarding the first element of the claim, the Indiana Court of Appeals concluded that the plaintiffs established an entrustment of the dog to the defendants' minor child.[217] The child was left home alone with the dog chained on the premises. The child recognized that she was responsible for the dog's well being: she immediately went to the dog's aid upon learning that it was tangled in its chain. Furthermore, the court noted "a domestic pet is not a wholly self-sufficient animal and requires human care and supervision under many circumstances . . . . It was reasonably foreseeable that [the minor] would have to

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209. *Id.*
210. *Id.*
211. *Id.*
212. *See id.*
213. 665 N.E.2d 603 (Ind. Ct. App. 1996).
214. *Id.* at 606 (citing Brewster v. Rankins, 600 N.E.2d 154, 158-59 (Ind. Ct. App. 1992)).
215. *Id.*
216. *Id.*
217. *Id.*

exercise some form of care or control of the dog during the course of the day."[218]

Next, the court found that the evidence supported the second element of the cause of action: the defendants' daughter was incapable of using due care in supervising and controlling the dog.[219] There was no evidence that the child was instructed by her parents on how to care and control the dog. The defendants admitted that the child had a complete lack of prior experience in supervising the dog. Additionally, there was testimony that the dog and the child were approximately the same physical size. Therefore, the court of appeals found sufficient evidence to support the jury's conclusion that the defendants' daughter was incapable of exercising due care in her custody and control of the dog.[220]

Finally, the court found sufficient evidence from which the jury could have inferred that the defendants had actual and specific knowledge that their daughter was incapable of using due care at the time they entrusted her with the dog.[221] In recognition of her young age, the defendants gave their daughter specific instructions to stay in the house while they were gone and to telephone them if she had any problems. She had no prior experience in supervising the dog and, on the day in question, did not receive any instructions on how to care for or control the dog in the absence of her parents. This evidence, coupled with the fact that the dog and the child were similar in size, supported a reasonable inference that the defendants had actual knowledge that the child would be unable to control the dog adequately.[222]

Still, the defendants maintained that they had no reason to know that their dog represented a risk of harm to others and, thus, were not negligent in entrusting the dog to their daughter. The court reiterated the general rule that all dogs, regardless of breed or size, are presumed to be harmless domestic animals.[223] Although this presumption is overcome only by evidence of a known dangerous propensity as shown by the specific acts of the animal,[224] the owner of the dog is

> bound to know the natural propensities of dogs, and if those propensities are of the kind which reasonably might be expected to cause injury, the owner must use reasonable care to prevent such injuries from occurring. Indeed, an owner is bound to know that a dog might become excited or confused under certain circumstances and must use reasonable care to prevent a mishap.[225]

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218. *Id.* at 606-07.

219. *Id.* at 607.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* (citing Royer v. Pryor, 427 N.E.2d 1112, 1117 (Ind. Ct. App. 1981)).

224. *Id.* A dangerous propensity is "a tendency of an animal to do any act which might endanger the safety of persons or property in a given situation." *Id.* When the animal's owner or keeper has knowledge of a dangerous propensity, he or she is obligated to use reasonable care to prevent the animal from causing injury. *See id.*

225. *Id.* (citing Alfano v. Stutsman, 471 N.E.2d 1143, 1145 (Ind. Ct. App. 1984)).

Even if the owner is unaware of any specific vicious propensity, the duty owed is the same—that of reasonable care under the circumstances:

> Reasonable care requires that the care employed and precautions used be commensurate with the danger involved under the circumstances of a particular case. The necessary precautions to be observed or foresight to be exercised are usually questions to be resolved by the jury. Any given method of restraining a dog may or may not be adequate under the particular facts of a particular case.[226]

In the case at hand, there was no evidence that the dog had exhibited viciousness in the past. Nevertheless, the court concluded that, even absent a known vicious propensity, "a dog is an instrumentality which may become a source of danger to others when entrusted to a young child who lacks age, judgment, and experience. . . . Whether an owner's entrustment of the control and restraint of a dog to a child was reasonable under the circumstances is a question for the jury."[227]

> Although restrained in the yard by a chain, [the defendants' dog] was left under the care and supervision of a twelve-year-old child who had no previous experience supervising him. Before [the child] came to [the dog's] aid to untangle him, [the dog] was in severe distress, yelping and foaming at the mouth. A child with no prior experience in supervising a dog is not likely to foresee or comprehend that a dog may become dangerous when in pain and distress. As a result of [the child's] inability to use due care and to recognize that propensity, [the child] unchained the dog, failed to keep a firm grasp on him, and allowed the distressed animal to attack and severely injure [the plaintiff].
>
> As we noted in *Ross*, chaining a dog and even confining it behind a fence is not, as a matter of law, necessarily sufficient. We emphasize here that [the defendants' dog] was not restrained in any way at the time of the attack but had escaped the hands of a child. Under the facts and circumstances of this case, it was reasonable for the jury to conclude that [the defendants'] entrustment of [the dog] to [their child] was a failure to exercise reasonable care in the manner of keeping and controlling their dog.[228]

In her concurring opinion, Judge Chezem disagreed that the presumption that all dogs are harmless domestic animals could be overcome by the fact of an unprovoked biting at issue in a case.[229] Likewise, Judge Chezem did not agree that, after making such a leap, the jury could then reasonably infer that the owner

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226. *Id.* at 607 (citing Ross v. Lowe, 619 N.E.2d 911, 914-915 (Ind. 1993)).

227. *Id.*

228. *Id.* (citation omitted).

229. *Id.* at 609 (Chezem, J., concurring).

should have known of the previously undisclosed vicious propensity.[230] In the case at bar, there was no evidence that the defendants' dog had ever committed any specific prior act which would have indicated that he had a dangerous propensity.[231] According to Judge Chezem, although it is foreseeable that a dog may become entangled in its chain, the owner of a dog who has never before displayed any aggressive tendencies should not necessarily be bound to know that such a dog would attack when freed from this type of predicament.[232]

Furthermore, Judge Chezem disagreed that the defendants were negligent in leaving their dog in the care of their twelve-year-old daughter.[233] There was no evidence that she did not possess at least average intelligence and capabilities. Moreover, "even the most intelligent and capable adult would have responded by taking the same immediate measures when faced with what otherwise would result in the almost certain death of the family pet."[234] According to Judge Chezem, releasing the dog was not unreasonable.[235] "Perhaps, the negligence, if any, was in the original chaining of the dog to a tree without constant supervision."[236] Nonetheless, without knowing what specific act the jury considered negligent, Judge Chezem indicated that deference should be given to the fact finder.[237]

At first glance, the *Hardsaw* opinion appears to significantly expand an animal owner's potential liability even where there is no evidence of prior viciousness or where the facts illustrate an attack stemming from a situation in which the animal is distressed. However, given the procedural posture of the case—an appeal from a jury verdict—the holding of the case can be said to be limited; the court was required to uphold the verdict upon finding any supportive evidence or reasonable inferences therefrom to support.

X. Invasion of Privacy

Since the 1940s, Indiana has recognized the doctrine of the right of privacy as the basis of a cause of action.[238] One theory of recovery under the doctrine of the right of privacy is the tort of public disclosure of private facts. In *Nobles v. Cartwright*,[239] the Indiana Court of Appeals, for the first time, discussed in depth the "legitimate public interest" element of the public disclosure tort.

In *Nobles*, the plaintiff had a love affair with her boss, Crawford, then Indiana State Lottery Commission Director. The affair went sour, and the plaintiff

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230. *Id.*
231. *Id.*
232. *Id.* at 610.
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.*
238. *See* State *ex rel.* Mavity v. Tyndall, 66 N.E.2d 755 (Ind. 1946); Continental Optical Co. v. Reed, 86 N.E.2d 306 (Ind. App. 1949); Datton v. Jacobs, 78 N.E.2d 789 (Ind. App. 1948).
239. 659 N.E.2d 1064 (Ind. Ct. App. 1995).

complained to one of Governor Bayh's assistants and showed her some love letters Crawford had written to Cartwright. Eventually, Crawford was confronted with the allegations and resigned. Almost immediately, there was "widespread media attention" concerning the resignation and "speculation about what prompted it."[240] The media focused on the plaintiff and began reporting that she and Crawford had an affair. A few days later, the Governor's office released a statement acknowledging only that Crawford had resigned because of the plaintiff's allegations.

As media attention continued, polls indicated that the public believed that plaintiff ought to have been fired. Accordingly, plaintiff granted an interview with the press and made several inflammatory statements concerning members of the Lottery Commission and the Indiana State Police. She was fired for this, and the Governor's office released copies of documents that the plaintiff had provided which contained intimate details of her personal life.

In evaluating whether the defendant's disclosure[241] constituted an invasion of privacy, the court considered whether the private facts disclosed were related to a matter of legitimate public interest.[242] The court found that the proper test is whether there is an appropriate nexus or some sufficient degree of relatedness between the information disclosed and a matter which was newsworthy at the time.[243] In other words, it must be "substantially relevant and closely related to a matter or an event which was of legitimate public interest."[244]

In this case, the court found such a nexus. The details related not only to the charges leveled by the plaintiff, but also to the conduct of the Lottery Director and his fitness for office.[245] The court concluded, "[N]o reasonable juror could determine that the information . . . disclosed by [the defendants] is not both substantially relevant and closely related to Crawford's alleged sexual harassment and the ensuing investigation into his resignation, which was, at the time of the disclosure, a matter of legitimate public interest."[246]

Cartwright is a significant decision because it discusses, in depth, for the first time in Indiana, the "legitimate public interest" element of the tort of public disclosure of private facts and the standard to be applied in determining what is of legitimate public interest.

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240. *Id.* at 1067.

241. The tort of public disclosure of private facts consists of three elements: "(1) A public disclosure of private information concerning the plaintiff that would be highly offensive and objectionable to a reasonable person of ordinary sensibilities; (2) to persons who have no legitimate interest in the information; (3) in a manner that is coercive and oppressive." *Id.* at 1074 (footnotes omitted).

242. *Id.* at 1075.

243. *Id.* at 1076.

244. *Id.* at 1077 n.24.

245. *Id.* at 1077.

246. *Id.* at 1078.

XI. Tortious Interference With Contract or Business Relationship

The Indiana Court of Appeals, in *Computers Unlimited, Inc. v. Midwest Data Systems, Inc.*,[247] addressed whether competition is an improper interference with contractual relations. Liebhardt consolidated its business operations and hired Computers Unlimited to provide computer hardware and to integrate Liebhardt's software. Liebhardt experienced problems with the system from the beginning and blamed Computers Unlimited. Liebhardt contacted Alpha for a list of other hardware dealers and then contacted Midwest, who recommended GVS for the software work. Liebhardt met with Midwest and GVS and explained the problems. GVS presented to Liebhardt its standard terms and rates. Liebhardt decided to purchase a new hardware system from Midwest and hired GVS to provide software services. After the new system was installed and GVS was performing services, Liebhardt notified Computers Unlimited that their relationship was terminated.[248]

The court first concluded that there was no valid and enforceable contract, nor was there a business relationship at the time of the report.[249] This precluded a finding of either a tortious interference with either a contract or a business relationship.[250]

The court also considered the claim that the offering of terms and rates and the performance of services during the pendency of the business relationship and contract constituted a tortious interference. As a starting point, the court noted that an element of that claim is the absence of justification.[251] The court also referred to section 768 of the Restatement (Second) of Torts which is entitled, "Competition as Proper or Improper Influences." The court found 1) that the relation between GVS and Liebhardt concerned a matter involved in the competition between GVS and Computers Unlimited; 2) that there was no unlawful restraint of trade, and 3) that GVS had not employed any wrongful means in the its inference.[252] This result is clearly correct. In order to recover, Computers Unlimited had to demonstrate *tortious* interference, not just interference. It did not.

Computers Unlimited is a significant decision because it excludes from the tort of interference with contract or business relationships those cases where the alleged "interference" concerns a matter of competition and other improper means are not used to terminate a contract which is terminable at will. The decision, in effect, restricts the class of cases to which the torts of interference with contract or business relationships apply.

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247. 657 N.E.2d 165 (Ind. Ct. App. 1995).

248. *Id.* at 168.

249. *Id.*

250. *See id.*

251. *Id.* at 169 (citing Winkler v. V.G. Reed & Sons, Inc., 638 N.E.2d 1228, 1235 (Ind. Ct. App. 1994)).

252. *Id.* at 170.

XII. FRAUD

A. Proof of Fraud Does Not, Alone, Support an Award of Punitive Damages

In *Budget Car Sales v. Stott*,[253] sixty-two-year-old Ralph Stott went to Budget Car Sales and looked at a 1986 Chevrolet Cavalier. The car bore no indication of its price. Unaware of an advertisement which appeared in a local newspaper indicating that the Cavalier was specially priced at $4995, Mr. Stott made an offer of $5800 for the car. The sales person with whom Mr. Stott dealt was also unaware of the advertisement. Mr. Stott signed several documents that he did not read until later. Mr. Stott did not realize that he had purchased the car until later that evening when he and his wife read the documents he signed. When he signed the documents, Mr. Stott claimed that he thought he was merely completing an application for a loan. Two days later, the Stotts' attorney wrote a letter to Budget stating that he believed Stott to be incompetent when entering into the contract and suggested that the contract was void. Budget declined to rescind the contract, stating that there was absolutely no evidence that Stott was not fully competent and aware of his acts at the time of contracting with Budget. After a trial, the jury returned a verdict for the plaintiffs and against Budget assessing $4041.22 in compensatory damages and $150,000 in punitive damages. Budget appealed the jury verdict challenging the award of punitive damages and charging plaintiffs' counsel with misconduct in referring to a document during closing that was not admitted into evidence.

The court reversed the jury's award of punitive damages.[254] The court reiterated the evidentiary requirement for a punitive damages award that requires a "showing by 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."[255] A mere finding by preponderance of the evidence that a tort has been committed will not, standing alone, justify the imposition of punitive damages.[256] The court concluded that there was no clear and convincing evidence that a reasonable person could say was inconsistent with the hypothesis of a mistake or negligence on the part of Budget for being unaware of the advertised price.[257] A defendant against whom punitive damages are sought in a tort action is "cloaked with the presumption that his actions, though tortious, were nevertheless noninquitous human failings."[258] The court refused to find that the punitive damage award was justified by the mere finding that Budget acted

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253. 656 N.E.2d 261 (Ind. Ct. App. 1995), *trans. denied*, 662 N.E.2d 638 (Ind. 1996).
254. *Id.*
255. *Id.* (quoting Erie Ins. Co. v. Hickman, 622 N.E.2d 515, 520 (Ind. 1993)).
256. *Id.*
257. *Id.* at 266.
258. *Id.* (quoting Orkin Exterminating Co. v. Traina, 486 N.E.2d 1019 (Ind. 1986)).

with fraud.[259]

In a dissenting opinion, Judge Chezem opined that any finding of actual fraud supports the trier of fact's decision to award compensatory and punitive damages.[260] To Judge Chezem, "fraud is a unique tort in terms of punitive damages because the requisites for use of the 'clear and convincing' standard must have been met in obtaining a judgment of fraud in the first place."[261] The presumption created by the "clear and convincing" standard is necessarily overcome in proving the underlying tort because one cannot commit actual fraud without the intent to injure another.[262] When the elements of actual fraud have been proved, the presumptions created by use of the "clear and convincing" standard have already been overcome.[263] "When actual fraud has been proved, the trier of fact is free to, but is not required, to impose punitive damages without further evidentiary burden.[264]

In another dissenting opinion, Judge Sullivan disagreed with the majority's affirmation of the compensatory damage award. According to Judge Sullivan, there was no reliance on the part of the Stotts because they did not even know about the newspaper advertisement offering the car at a price less than $5800 until days after the sale had been fully consummated.[265] Judge Sullivan would find, as a matter of law, that there was no representation made by Budget upon which Stott justifiably and detrimentally relied.[266] Judge Sullivan also stated his disagreement with the position taken in Judge Chezem's dissent. According to Judge Sullivan, "not every fraud resulting in justified and detrimental reliance is infected with the degree of malice or oppressiveness necessary for punitive damages."[267] Furthermore, the burden to establish entitlement to punitive damages is more onerous than the burden to prove compensable fraud.[268] One must prove the right to punitive damages by clear and convincing evidence.[269] According to Judge Sullivan, Judge Chezem mistakenly assumed that a "clear and convincing" burden exists to prove common law fraud.[270]

The Indiana Court of Appeals revisited the issue of whether proof of fraud automatically entitles a plaintiff to punitive damages in *Hart v. Steel Products, Inc.*[271] There, the parties contracted for the purchase of a steel manufacturing business in Windfall, Indiana. After finding that the sellers committed fraud with

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259. *Id.* at 267.
260. *Id.* at 269 (Chezem, J., concurring in result and dissenting).
261. *Id.*
262. *See id.*
263. *See id.* at 269-70.
264. *Id.* at 271.
265. *Id.* at 272 (Sullivan, J., concurring in part and dissenting).
266. *Id.*
267. *Id.* (citing *Hickman*, 622 N.E.2d at 515).
268. *See id.* (citing Seibert v. Mock, 510 N.E.2d 1373 (Ind. Ct. App. 1987)).
269. *See id.* (citing *Hickman*, 622 N.E.2d at 520).
270. *Id.*
271. 666 N.E.2d 1270 (Ind. Ct. App. 1996), *trans. denied.*

respect to the business' income during a particular year, the purchasers sought reformation of the contract. After a bench trial, the trial court entered findings of fact and conclusions of law and judgment in favor of the purchasers. In addition, the contract for the sale of the business assets was ordered rescinded. The sellers contended on appeal that there was insufficient evidence to prove that they had committed fraud. In turn, the purchasers also challenged the trial court's failure to award punitive damages.

The court found that there was sufficient evidence to demonstrate that the purchaser had reasonably relied upon the financial information submitted to him in making his offer to purchase the business.[272] In addition, the court found that punitive damages are appropriate "only where it is proved by clear and convincing evidence that a party acted with malice, fraud, gross negligence or oppressiveness which was not the result of mistake of fact or law, honest error of judgment, overzealousness, mere negligence or other human failing."[273] Furthermore, the court held:

> Upon a finding of civil fraud, it is within the discretion of the fact finder to award punitive damages. *An award of punitive damages is not mandatory upon a finding of civil fraud.* The purpose of punitive damages is to punish the wrongdoer and thereby deter others from engaging in similar conduct. The public interest must be served by the imposition of punitive damages.[274]

B. Broken Promises of Future Conduct May Constitute Constructive Fraud

Indiana has long recognized the general rule that actionable fraud arises from false representations of past or existing facts and cannot be based on broken promises or statements of existing intent which are not executed. However, *Farrington v. Allsop*[275] illustrates that constructive fraud may sometimes be based upon mere oral promises.

Farrington involved a suit on a promissory note barred by the statute of limitations. The Farringtons had lent Allsop $30,000 for a real estate deal. Allsop had promised to repay the debt quickly, but he did not. When the corporation that Allsop owned filed for bankruptcy, the Farringtons visited Allsop at this office to seek repayment. Allsop produced a promissory note evidencing the original loan. The note named Allsop's corporation rather than Allsop as the maker. Allsop, however, told the Farringtons that they need not worry because Allsop felt morally obligated to repay the loan. The loan was never repaid, despite Allsop's continuing representations that he would repay it, and the Farringtons brought suit after the statute of limitations had expired.

The court found that genuine issues of material fact precluded summary

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272. *Id.* at 1274-75.

273. *Id.* at 1277 (citing Budget Car Sales v. Stott, 662 N.E.2d 638 (Ind. 1996)).

274. *Id.* (emphasis added).

275. 670 N.E.2d 106, 109 (Ind. Ct. App. 1996).

judgment for Allsop based on the expiration of the limitations period.[276] In arriving at its conclusion, the court distinguished actual fraud which requires, inter alia, a material misrepresentation of existing material fact and constructive fraud which does not.[277] Constructive fraud alone may be a basis for an equitable estoppel.[278] However, the court made it clear that the doctrine's "application is limited."[279] The party asserting an equitable estoppel must prove a fiduciary relationship or some unequal footing in the transaction or "conduct of a character to lead [him] to inaction."[280]

C. An Attorney's Silence Regarding Changes Made to Documents May Constitute Fraud

The Indiana Court Appeals announced during this survey period that an attorney may subject him or herself to an action for fraud where he or she remains silent in the face of a duty to speak. In *Wright v. Pennamped*,[281] a borrower brought an action against his lender's attorney who drafted the loan documents asserting claims under theories of quasi-contract, actual fraud, and constructive fraud. The borrower alleged that, after his attorney had approved the loan documents, the drafting attorney altered them then failed to disclose the alterations at the closing attended only by the borrower without his attorney.

In evaluating the fraud claim, the court noted that "absent a duty to speak or disclose facts," there can be no fraud.[282] However, in this case, the court found a duty to disclose on the part of the attorney.[283] The court stated that this "duty is supported by common sense and notions of fair dealing."[284] Otherwise, "counsel would be required to scrutinize every term of each document at the moment of execution."[285] Additionally, the court noted that attorneys are held to a demanding standard and that "[a] lawyer's representations have long been accorded a particular expectation of honesty and trustworthiness."[286]

The court also rejected the contention that the plaintiff had no right to rely on the attorney's representation. "A person relying upon the representations of another is found to exercise ordinary care and diligence against fraud."[287]

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276. *Id.* at 110 (The court refused to limit the application of the doctrine to settlement negotiations.). *Id.* at 109.

277. *Id.* at 109. *See also* Abbott v. Bates, 670 N.E.2d 916, 923 n.4 (Ind. Ct. App. 1996) (comparing constructive fraud with actual fraud).

278. *See id.* at 110.

279. *Id.*

280. *Id.* (quoting Paramo v. Edwards, 563 N.E.2d 595, 599 (Ind. 1970)).

281. 657 N.E.2d 1223 (Ind. Ct. App. 1995).

282. *Id.* at 1231.

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.* (quoting Fire Ins. Exch. v. Bell, 643 N.E.2d 310, 312 (Ind. 1994)).

287. *Id.*

However, courts will not "ignore an intentional fraud practiced on the unwary."[288] The court concluded that the borrower exercised reasonable care by having his attorney review the loan documents in the first place and that the borrower had a right to rely on the alleged representation made by the lender's attorney as a matter of law.[289]

Lastly, the court concluded that there was a genuine issue of material fact concerning the attorney's scienter. Intent may be proven by circumstances and is generally for the fact-finder.[290] The court also reinstated the constructive fraud claim. The absence of a special relationship between the borrower and the lender's attorney was not controlling. "In Indiana, constructive fraud also includes what other jurisdictions have termed 'legal fraud' or 'fraud in law'. . . . *This species of constructive fraud recognizes that certain conduct should be prohibited because it is inherently likely to create an injustice.*"[291] This is so even in the absence of an intent to deceive. The material alteration of loan documents after their review and approval by opposing counsel and the presentation of the revised documents for execution with no indication that changes that have been made is just that sort of conduct.

XIII. PROFESSIONAL NEGLIGENCE

In *Hughes v. Glaese*,[292] the Indiana Supreme Court clarified the doctrine of fraudulent concealment and tolling of the statute of limitations. In *Hughes*, the plaintiff was examined by the defendant doctor for some abdominal repair surgery. A routine chest x-ray was ordered which revealed a rounded density; the radiologist recommended a lateral x-ray as a follow-up. The doctor performed the surgery and then released the plaintiff to her family physician stating that she was "ok." Three years later, she was diagnosed with Hodgkin's Disease. In addressing whether the statute of limitations was equitably tolled, the court considered the effect of the doctrines of active fraudulent concealment and constructive fraudulent concealment. Active fraudulent concealment tolls the statute of limitations "until actual or reasonably possible discovery of malpractice";[293] constructive concealment tolls the statute of limitations until the "termination of the physician-patient relationship."[294] The court then refused to abolish the distinction between the two.[295] It noted the difference in culpability and that

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288. *Id.* (quoting Plymale v. Upright, 419 N.E.2d 756, 762 (Ind. Ct. App. 1981)).

289. *Id.*

290. *See id.* at 1232. "Because no one badge of fraud constitutes a per se showing of fraudulent intent the facts must be taken together to determine how many badges of fraud exist and if together they constitute a pattern of fraudulent intent." *Id.* (quoting Jones v. Central Nat'l Bank, 547 N.E.2d 887, 890 (Ind. Ct. App. 1989)).

291. *Id.* at 1233 (quoting Scott v. Bodor, Inc., 571 N.E.2d 313, 323-24 (Ind. Ct. App. 1991)).

292. 659 N.E.2d 516 (Ind. 1995).

293. *Id.* at 521.

294. *Id.*

295. *Id.*

distinctions based upon the likelihood of particular misrepresentations to lead plaintiffs astray are not a just way of determining which physicians should be precluded from asserting the limitations defense.[296] The court then found that by merely stating that the plaintiff was "ok" and releasing her to her family physician, no reasonable fact-finder could conclude that the defendant actively concealed the plaintiff's condition.[297] Therefore, the action was time barred.[298]

XIV. OTHER DECISIONS

A. Member's Lawsuits Against Unincorporated Associations

In *MacDonald v. Maxwell*,[299] the plaintiff, a member of the Chapel Hill United Methodist Church, brought a negligence action against the church and the janitor of the church after she slipped and fell on the church's floor. The janitor filed a motion for summary judgment arguing that he did not owe a duty to the plaintiff and, in the alternative, that he did not breach any duty owed. The trial court granted the motion, and the plaintiff appealed.[300]

The Indiana Court of Appeals noted the general common-law rule in Indiana that prohibits members of an unincorporated association from suing the association for the tortious acts of one or more of its members.[301] Because the plaintiff was a member of the church, and the church was an unincorporated association, she was barred from suing the church. Thus, her sole remedy was to sue the non-member janitor, who, because of the general rule, was "left without the usual employee protections of respondeat superior or joint and several liability".[302]

The rule protecting an unincorporated association from a suit by its own members was originally adopted in an attempt to prevent collusive lawsuits between the members of an association.[303] However, the court found it "hard to believe" that the rule was also intended to allow a part-time employee of an association to shoulder the sole responsibility for a member's accident.[304] The court wrote:

Because we find it hard to accept that a non-member employee of an

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296. *Id.*

297. *Id.* at 522.

298. The court did not evaluate the constitutionality of the occurrence-based statute of limitations. *See* Harris v. Raymond, 680 N.E.2d 551, 552-53 (Ind. Ct. App. 1997) (occurrence-based statute violated Indiana Constitution); Martin v. Richey, 674 N.E.2d 1015, 1027 (Ind. Ct. App. 1997) (same). *But see* Johnson v. Gupta, No. 64A03-9611-CV-401, 1997 WL 403702 (Ind. Ct. App. July 21, 1997) (disagreeing with *Martin*).

299. 655 N.E.2d 1249 (Ind. Ct. App. 1995).

300. *Id.* at 1250.

301. *Id.* at 1250 n.1 (citing Calvary Baptist Church v. Joseph, 522 N.E.2d 371, 374 (Ind. 1988)).

302. *Id.*

303. *See id.*

304. *Id.*

> unincorporated association should be exposed to such liability or that an injured plaintiff could only look to the pockets of a non-member employee, *we believe that it may be time to take another look at the rule and particularly the rule's impact on the employees of an unincorporated association and injured plaintiffs*. . . . However, because this issue was not raised in this appeal, we must leave its determination for another day.[305]

Despite the harshness of the rule, the court found that the janitor had a duty to use reasonable care in waxing the church's floor. Because the question whether the defendant breached this duty presented a question of fact, the trial court's entry of summary judgment in favor of the defendant was reversed.[306]

B. Release of Servant Releases Master

In *United Farm Bureau Mutual Insurance Co. v. Blossom Chevrolet*,[307] the Indiana Court of Appeals held that the release of a servant releases the master where the master's liability is vicariously imposed. The court reasoned that, in the case of vicarious liability, only one tortfeasor caused the injury, and the master and servant should be treated as a single unit for the purpose of distributing the loss.[308] The court noted that "the reason for the employer's liability is that the damages are taken from a deep pocket."[309] "And, once the servant has been discharged from liability, there is no negligence which can be imputed to the master."[310] The court reached this conclusion even though prior case law suggested that releasing one joint tortfeasor does not release all joint tortfeasors, by distinguishing between joint tortfeasors and vicariously imposed liability.[311]

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305. *Id.* (citations omitted) (emphasis added).
306. *See id.* at 1251.
307. 668 N.E.2d 1289 (Ind. Ct. App. 1996), *trans. denied*, 679 N.E.2d 1327 (Ind. 1997).
308. *Id.* at 1292.
309. *Id.* at 1292-93.
310. *Id.* at 1293.
311. *Id.* at 1292.