RECENT DEVELOPMENTS IN INDIANA TORT LAW

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This Article discusses developments in tort law in Indiana during the survey period, October 1, 2006, through September 30, 2007. The subject of this Article is such that the Article does not attempt to contain either a comprehensive or exhaustive examination of all tort cases decided during the survey period.

I. NEGLIGENCE[1]

A. Duty of Care

The Indiana Court of Appeals explained the modern rule, or foreseeability doctrine, used with regard to negligence claims and the work of contractors in *Bond v. Walsh & Kelly, Inc.*[2] In *Bond*, Rory Bond ("Bond") was seriously injured while riding as a passenger in a Jeep Wrangler when the Jeep's passenger side tires dropped off a pavement edge onto a shoulder.[3] Although the road had been recently paved, there was a drop off from the paved road to the shoulder.[4] The passenger side windshield hit a utility pole and the Jeep rolled over.[5] Bond sued the Town of Merrillville ("Town"), the Jeep's driver, and Walsh & Kelly, Inc. ("Walsh"), the contractor that paved the road.[6] The appeal only involved the trial court's summary judgment in favor of Walsh.[7]

The court of appeals explained that the former rule, the acceptance rule, no longer applies to claims of negligence and contractor work.[8] The acceptance rule provided "that contractors do not owe a duty to third parties after the owner has accepted the [contractor's] work."[9]

The current rule, referred to as the modern rule or the foreseeability doctrine,

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1. The Indiana Court of Appeals's decision in *Filip v. Block*, 858 N.E.2d 143 (Ind. Ct. App. 2006), decided during the survey period, was vacated by the Indiana Supreme Court's opinion in *Filip v. Block*, 879 N.E.2d 1076 (Ind. 2008). The Indiana Supreme Court's decision will not be addressed in detail herein because it is outside the current survey period. Nevertheless, the issues in the court's decision were related to: (1) a procedural question about the use of designated evidence, (2) the discovery rule and statute of limitations as applied in a negligence action arising out of a fire loss, and (3) whether an insurance agent breached her duty to advise in procurement of insurance and subsequent notification of inadequate coverage. *Filip*, 858 N.E.2d at 146, *rev'd*, 879 N.E.2d 1076 (Ind. 2008).

2. 869 N.E.2d 1264, 1266 (Ind. Ct. App. 2007).

3. *Id.* at 1265.

4. *Id.*

5. *Id.* at 1265-66.

6. *Id.* at 1266.

7. *Id.*

8. *Id.*

9. *Id.* (citing Blake v. Calumet Constr. Corp., 674 N.E.2d 167, 170 (1996)).

set forth by the Indiana Supreme Court in *Peters v. Forster*,[10] "provides that a contractor is liable for injuries or death of third persons after acceptance by the owner where the work is reasonably certain to endanger third parties if negligently completed."[11] The modern rule does not create absolute liability for the contractor and does not abrogate the elements of negligence: duty, breach of duty, and proximate cause.[12] Furthermore, "[t]here is no breach of duty, and consequently no negligence, where a contractor merely follows the plans or specification given to him by the owner so long as the plans are not so obviously dangerous or defective that no reasonable contractor would follow them."[13]

In *Bond*, the court of appeals affirmed the trial court's grant of summary judgment in favor of Walsh[14] and reasoned first that there was no assertion that the repaving plans followed by Walsh were "on their face, obviously dangerous or defective."[15] Furthermore, there was never an assertion that Walsh paved the roadway in a negligent manner.[16] The designated evidence provided that Walsh completed the work expected from it, and the Town had the striping and shoulder stone placement responsibilities.[17] Therefore, the court concluded that "the designated evidence does not create a genuine issue of material fact as to whether the plans were so obviously dangerous or defective that no reasonable contractor would follow them."[18]

Another court of appeals case decided during the survey period was *Precedent Partners I, L.P. v. Hulen*.[19] The facts of this case are likely not uncommon as neighborhoods develop and residential areas become more densely populated. Michelle Hulen ("Hulen") was riding her bicycle along a road in her neighborhood, "The Meadows, when she turned onto a cross street and collided with a pickup truck driven by Jose Guardado," a contractor hired to do drywall work at a residence in The Meadows.[20] Hulen suffered serious and permanent physical injuries.[21]

Hulen filed suit against several organizations, private and government, and individuals, but the appeal discussed herein involved only a summary judgment grant in favor of defendants Precedent Partners I, L.P. ("Precedent") and The

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10. 804 N.E.2d 736, 742 (Ind. 2004).

11. *Bond*, 869 N.E.2d at 1266 (citing *Peters*, 804 N.E.2d at 742). In adopting this modern rule, the Indiana Supreme Court "embraced the trend reflected in the Restatement (Second) of Torts and stated that the new approach is 'consistent with traditional principles of negligence upon which Indiana's scheme of negligence law is based.'" *Id.* (quoting *Peters*, 804 N.E.2d at 742).

12. *Id.*

13. *Id.* (citing *Peters*, 804 N.E.2d 742).

14. *Id.* at 1267.

15. *Id.* at 1266.

16. *Id.* at 1266-67.

17. *Id.* at 1267.

18. *Id.*

19. 863 N.E.2d 328 (Ind. Ct. App. 2007).

20. *Id.* at 330.

21. *Id.*

Meadows homeowners' association (the "Association").[22] Hulen argued on appeal that there were "genuine issues of material fact whether Precedent and the Association were negligent in the design and maintenance of the median at the location of the accident and in failing to post signs 'directing or warning of construction traffic.'"[23] The court of appeals disagreed.

The court first found that the case was not a premises liability matter because there was no designated evidence showing that Precedent or the Association did anything on the property they owned that created a hazardous condition that caused Hulen's accident.[24] The court reasoned that Hulen was riding on a public street, she was not an invitee or licensee of Precedent or the Association, and neither of the two defendants had control over the truck's driver or the company for which he worked.[25]

The court also found that neither Precedent nor the Association had a duty to redirect construction traffic or post warning signs because there was "simply no evidence of a danger posed to residents from construction traffic."[26] In conclusion, the court of appeals held, "[t]he law does not impose a duty on a business to guard against injury to the public from the negligent acts of someone over whom the business has no control and which injury occurs off the business' premises."[27] The trial court's denial of Precedent's and the Association's motion for summary judgment was reversed and the case remanded.[28]

B. Res Ipsa Loquitor

In *Cincinnati Insurance Co. v. Davis*,[29] the Indiana Court of Appeals faced an appeal from a trial court's grant of summary judgment in favor of three defendants on the plaintiffs' negligence claim.[30] The plaintiffs were Cincinnati Insurance Company and Indiana Insurance Company (collectively, "the Insurers").[31] The defendants were "Dr. T. Brandon Davis ("Davis"), Arbor Neuropsychological Assessment Clinics, Inc. ("Arbor"), and Culligan United State Filter ("Culligan")."[32] The court of appeals reversed the trial court and found that summary judgment was not appropriate as to any of the three

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22. *Id.*

23. *Id.* at 331 (quoting Brief for Appellant at 30).

24. *Id.* at 332 (citing St. Casimir Church v. Frankiewicz, 563 N.E.2d 1331, 1333 (Ind. Ct. App. 1990)).

25. *Id.* The court stated in dicta, "Regardless, the undisputed designated evidence shows that the vegetation and light fixtures in the median did not obscure either [the driver's] or [Hulen's] view as they approached the intersection." *Id.*

26. *Id.* at 333.

27. *Id.* (citing Snyder Elevators, Inc. v. Baker, 529 N.E.2d 855, 859 (Ind. Ct. App. 1988)).

28. *Id.*

29. 860 N.E.2d 915 (Ind. Ct. App. 2007).

30. *Id.* at 917.

31. *Id.*

32. *Id.*

defendants.[33]

Davis used an office space insured by the Insurers on Wednesdays only.[34] The office had a water filtration system, which was serviced by Culligan.[35] After flooding was discovered in the office building, a water leak was "traced to the Culligan filtration system in Davis's office."[36] The Insurers paid over $100,000 in claims related to the flooding, and sued the defendants for negligence.[37]

At separate times, the trial court granted motions for summary judgment in favor of each defendant that basically stated the same reason for the ruling: "Insurers had 'designated no evidence tending to show negligence on the part of [Davis]' and had failed to establish the applicability of res ipsa loquitor."[38] After first establishing jurisdiction over the appeals, the court of appeals addressed each defendant's summary judgment.

First, with regard to Davis's summary judgment, the court examined the res ipsa loquitor doctrine, which is a qualified exception to the rule that "'the mere fact that an injury occurred will not give rise to a presumption of negligence.'"[39] Res ipsa loquitor means "'the thing speaks for itself.'"[40] The doctrine

> is premised upon the assumption that in certain instances an occurrence is so unusual that, absent a reasonable justification or explanation, those persons in control of the situation should be held responsible. While the occurrence oftentimes is "unusual" in the sense of being rare or bizarre, that is not a prerequisite to the application of the doctrine.[41]

The court restated the rule that, in summary judgment, it is the moving party who must first establish a lack of genuine issue of material fact, and the respondent who then must come forward with contrary evidence.[42] The court concluded that Davis was not entitled to summary judgment because the evidence designated by both Davis and the Insurers indicates that the water leak was caused by "acts that suggest a failure to exercise reasonable care" and "the incident more probably resulted from negligence as opposed to another cause."[43]

The court also concluded, based upon the designated evidence, that the res ipsa loquitor doctrine might just apply to this case, and therefore a genuine issue

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33. *Id.* at 925-26.

34. *Id.* at 918.

35. *Id.*

36. *Id.*

37. *Id.* The Insurers complaint originally named Davis and Culligan as defendants. *Id.* at 919. The complaint was amended later to include Arbor. *Id.* This case involved numerous pleadings to the trial court. *Id.*

38. *Id.* (quoting Brief for Appellant at 71).

39. *Id.* at 923 (quoting Gold v. Ishak, 720 N.E.2d 1175, 1180 (Ind. Ct. App. 1999)).

40. *Id.* (quoting Rector v. Oliver, 809 N.E.2d 887, 889 (Ind. Ct. App. 2004)).

41. *Id.* (quoting Shull v. B.F. Goodrich Co., 477 N.E.2d 924, 926 (Ind. Ct. App. 1985)).

42. *Id.* at 924 (citing Jarboe v. Landmark Cmty. Newspapers of Ind., 644 N.E.2d 118, 123 (Ind. 1994)).

43. *Id.*

of material fact remained as to the applicability of the res ipsa loquitor doctrine.[44] The court found that res ipsa loquitor can apply even when there are multiple defendants and multiple causes because it "'is not a rule which fixes the proximate cause of an injury, but only a rule of evidence allowing a permissible inference of negligence under a certain set of facts.'"[45]

As to defendant Arbor, the court of appeals swiftly reversed the trial court's entry of summary judgment in its favor.[46] Arbor did not file an appellate brief, and the trial court's basis for granting Arbor's summary judgment was the same as the basis for granting Davis's summary judgment.[47] The court reasoned that because Davis's arguments failed on appeal, reversal was likewise appropriate for Arbor's appeal.[48]

The court of appeals lastly addressed Culligan's motion for summary judgment. Both Culligan and the Insurers agreed on appeal that res ipsa loquitor did not apply to Culligan.[49] However, the Insurers argued on appeal that because Culligan failed to designate any evidence in support of its motion for summary judgment, it thereby "failed to designate evidence negating [the Insurers'] 'theory of ordinary negligence.'"[50] The court of appeals agreed and reversed the summary judgment in Culligan's favor because "Culligan failed to demonstrate the absence of a genuine issue of material fact as to its causation of the insureds' damages."[51]

C. Infliction of Emotional Distress

During the survey period, Indiana appellate courts decided a few notable cases regarding negligent infliction of emotional distress. The Indiana Supreme Court answered certified questions from the United States District Court for the Southern District of Indiana in a case involving the death of a fiancée[52] and decided on appeal a case involving passengers on an airline flight during which a French citizen on the flight smoked a cigarette and behaved erratically.[53] The Indiana Court of Appeals decided a case involving a collision between a truck and motorcycle, when the husband of the victim on the motorcycle witnessed the

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44. *Id.* at 924-25.

45. *Id.* (quoting N.Y., Chi. & St. Louis R.R. Co. v. Henderson, 146 N.E.2d 531, 541 (Ind. 1958)). Davis's last argument on appeal was basically that the Insurers had not carried their burden of proof at trial. *Id.* at 925. The court concluded that the only issue on appeal was whether there was a genuine issue of material fact as to whether Davis caused the leak that caused the damage. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 926.

50. *Id.* (quoting Brief for Appellant at 16).

51. *Id.*

52. Smith v. Toney, 862 N.E.2d 656, 663 (Ind. 2007).

53. Atl. Coast Airlines v. Cook, 857 N.E.2d 989, 1000 (Ind. 2006).

collision.[54] The court of appeals also decided a case involving insurance coverage for negligent infliction of emotional distress, but its opinion was vacated by the Indiana Supreme Court after this survey period and will therefore be discussed in detail in the next Survey issue.[55]

In *Smith v. Toney*,[56] the United States District Court for the Southern District of Indiana certified the following questions to the Indiana Supreme Court:

1. Under the test elaborated in *Groves v. Taylor* for bringing a bystander claim of negligent infliction of emotional distress, are the temporal and relationship determinations regarding whether a plaintiff 'actually witnessed or came on the scene soon after the death of a loved one with a relationship to the plaintiff analogous to a spouse, parent, child, grandparent, grandchild, or sibling' issues of law or fact, or are they mixed questions of law and fact?
2. If an issue of law, is a fiancée an 'analogous' relationship as used in *Groves* and is 'soon after the death of a loved one' a matter of time alone or also of circumstances?[57]

The court concluded "that (1) the temporal and relationship determinations under *Groves* are questions of law; (2) a fiancée is not 'analogous to a spouse' under *Groves*; and (3) 'soon after the death of a loved one' is a matter of both time and circumstances."[58] The court held that although a spouse may assert claims for negligent infliction of emotional distress even when he or she did not suffer physical injury or impact, a fiancée may not assert such a claim.[59] Furthermore, the spouse must "have learned of the incident by having witnessed the injury or the immediate gruesome aftermath."[60]

In *Smith*, Amy Smith ("Smith") drove by an auto collision that caused the death of her fiancée, Eli Welch ("Welch").[61] Welch's vehicle collided with a tractor-trailer driven by James Toney ("Toney"), and owned by John Christner Trucking Company ("Trucking Company").[62] Smith did not stop at the scene, but she claimed that she saw Welch's hand.[63] However, there was evidence that Welch's body was placed in a body bag and the coroner's vehicle prior to Smith

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54. Clancy v. Good, 858 N.E.2d 653, 655 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 457 (Ind. 2007).

55. State Farm Mut. Auto. Ins. Co. v. Jakupko, 856 N.E.2d 778 (Ind. Ct. App. 2006), *aff'd*, 881 N.E.2d 654 (Ind. 2008).

56. 862 N.E.2d 656.

57. *Id.* at 657. The Indiana Supreme Court was referring to the test elaboration in *Groves v. Taylor*, 729 N.E.2d 569 (Ind. 2000).

58. *Smith*, 862 N.E.2d at 663.

59. *Id.* at 657.

60. *Id.*

61. *Id.* at 658.

62. *Id.*

63. *Id.*

driving by the scene.[64]

The court found that the requirements of the parties' relationship and proximity of the plaintiff to the scene, as set forth in the *Groves* test for bystander recovery under negligent infliction of emotional distress, are questions of law.[65] The court first included a brief history of how this tort claim has evolved, starting with the impact rule, the modified impact rule, and the direct involvement rule from *Groves*.[66] The court then restated the three factors of the direct impact rule: "the severity of the victim's injury, the relationship of the plaintiff to the victim, and [the] circumstances surrounding the plaintiff's discovery of the victim's injury."[67]

To support its conclusion, the court reasoned that these factors come from public policy considerations and are utilized to distinguish legitimate claims of emotional distress from illegitimate ones.[68] Therefore, the court concluded that they are issues of law for a court to resolve.[69]

The court next concluded that a fiancée is not analogous to a spouse under the *Groves* test.[70] The court relied on policy reasons as set forth in out-of-state cases because it had not had the chance to consider the question previously.[71] The court agreed with those courts' results, but fashioned its own rationales.[72] First, the court found that "marriage affords a bright line and is often adopted by the legislature in defining permissible tort recovery."[73] Second, the court reasoned that "drawing the line at marriage for 'bystander' claims of negligent infliction of emotional distress avoids the need to explore the intimate details of a relationship that a claimant asserts is 'analogous' to marriage."[74] Third, the court reasoned that "limiting defendants' liability to spouses addresses the need to limit the array of persons to whom a negligent defendant is potentially liable."[75]

Lastly, the court concluded "that the proximity requirement under *Groves* is both a matter of time and circumstances."[76] It had not previously addressed this issue and therefore looked to other cases that had for guidance.[77] In the end, the

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64. *Id.*

65. *Id.*

66. *See id.* at 659-60. "*Groves* followed *Bowen v. Lumbermens Mutual Casualty Co.*, . . . , 517 N.W.2d 432 (Wis. 1994) in adopting this test." *Id.* (citing Groves v. Taylor, 729 N.E.2d 569, 572 (Ind. 2000)).

67. *Id.* at 660.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 660-61 & n.2.

72. *Id.* at 661.

73. *Id.*

74. *Id.*

75. *Id.* at 662.

76. *Id.*

77. *Id.* at 662-63 & n.3.

court held that in addition to the requirement that a plaintiff witness "at or immediately following the incident," the plaintiff must also view the scene "essentially as it was at the time of the incident, the victim must be in essentially the same condition as immediately following the incident, and the claimant must not have been informed of the incident before coming upon the scene."[78] This rule furthers two of the policy concerns of bystander claims, that the claim must be genuine and recovery must not be unduly burdensome on the defendant.[79]

The Indiana Supreme Court utilized the modified impact rule when it decided another case about negligent infliction of emotional distress during the survey period, *Atlantic Coast Airlines v. Cook*.[80] In *Atlantic Coast Airlines*, the plaintiffs, Bryan and Jennifer Cook (the "Cooks"), alleged that they suffered from emotional distress due to circumstances occurring on their non-stop flight from Indianapolis to New York on a thirty-two passenger plane.[81] Their flight was on February 8, 2002, five months after the tragedies of September 11, 2001, and less than two months after Richard Reid attempted to detonate explosives hidden in his shoe on a flight from Paris to Miami.[82] Tickets were handled by Delta Airlines ("Delta"), Atlantic Coast Airlines ("Atlantic") operated the flight, and Globe Security Services ("Globe") provided security for the airport.[83] During their flight, a French citizen, Frederic Girard ("Girard") acted erratically, smoked cigarettes, shouted in French, moved from seats often, stomped his feet, approached the cockpit of the plane, and exhibited other odd behaviors.[84]

Bryan Cook ("Bryan") enlisted the assistance of other passengers to help protect the flight and passengers from Girard.[85] Bryan never had physical contact with Girard, although he approached Girard more than once, ordering him to sit down.[86] The issues on this appeal were limited to three claims in Atlantic's petition for transfer: "(1) the Cooks' claim for emotional distress damages is precluded by Indiana's modified impact rule; (2) the [c]ourt of [a]ppeals erred in reversing summary judgment in favor of Atlantic Coast on the Cooks' breach of contract claim[,] . . . and (3) the Cooks' negligence claim is preempted by federal law."[87]

The court affirmed the court of appeals's decision with regard to the breach of contract and preemption claims, but did not agree with the court of appeals on "whether the trial court erred in denying Atlantic['s] motion for summary judgment on the Cooks' claim for [negligent infliction] of emotional

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78. *Id.* at 662-63.

79. *Id.* (citing Finnegan *ex rel.* Skoglind v. Wis. Patients Comp. Fund, 666 N.W.2d 797, 802-03 (Wis. 2003); Rosin v. Fort Howard Corp., 588 N.W.2d 58, 61 (Wis. Ct. App. 1998)).

80. 857 N.E.2d 989 (Ind. 2006).

81. *Id.* at 991-92.

82. *Id.* at 991.

83. *Id.*

84. *Id.* at 992.

85. *Id.*

86. *Id.*

87. *Id.* at 993.

distress."[88] The supreme court applied Indiana's modified impact rule and concluded that the trial court erred in denying Atlantic summary judgment on the claim.[89] The modified impact rule is as follows:

> When . . . a plaintiff sustains a direct impact by the negligence of another and, by virtue of that direct involvement sustains an emotional trauma which is serious in nature and of a kind and extent normally expected to occur in a reasonable person, . . . such a plaintiff is entitled to maintain an action to recover for that emotional trauma without regard to whether the emotional trauma arises out of or accompanies any physical injury to the plaintiff.[90]

The court found that the modified impact rule retains the requirement that a direct physical impact occur, but that impact does not need to cause physical injury to the plaintiff.[91] Furthermore, "the emotional trauma suffered by the plaintiff does not need to result from a physical injury caused by the impact."[92] The court also answered the question of what degree of impact is required:

> [W]hen the courts have been satisfied that the facts of a particular case are such that the alleged mental anguish was not likely speculative, exaggerated, fictitious, or unforeseeable, then the claimant has been allowed to proceed with an emotional distress claim for damages even though the physical impact was slight, or the evidence of physical impact seemed to have been rather tenuous.[93]

In this case, the Cooks argued that actual and constructive physical impacts occurred.[94] The Cooks listed "'increased breathing, sweating, pulse, heart rate, adrenaline, and acuteness of the senses'" as the constructive physical impacts.[95] The court, however, declined to adopt the "constructive impact" theory proposed by the Cooks.[96] The Cooks listed breathing cigarette smoke and feeling vibrations from Girard's stomping feet as actual physical impacts.[97] The court observed that to hold that these alleged actual physical impacts satisfy the direct physical impact requirement of the rule would "at the very least . . . stretch[] the outer limits of the impact requirement."[98] The court also found, assuming that breathing cigarette smoke and feeling vibrations are direct physical impacts, that

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88. *Id.* at 994.

89. *Id.* at 1000.

90. *Id.* at 995-96 (quoting Shuamber v. Henderson, 579 N.E.2d 452, 456 (Ind. 1991)).

91. *Id.* at 996 (citing Ross v. Chema, 716 N.E.2d 435, 437 (Ind. 1999); Conder v. Wood, 716 N.E.2d 432, 435 (Ind. 1999); *Shuamber*, 579 N.E.2d at 452).

92. *Id.*

93. *Id.* (alteration in original) (citing Bader v. Johnson, 732 N.E.2d 1212, 1221 (Ind. 2000)).

94. *Id.* at 998.

95. *Id.* at 998-99 (quoting Brief for Opposition to Petition for Transfer at 4).

96. *Id.* at 999.

97. *Id.* at 998.

98. *Id.* at 999.

such impacts are "'slight' and 'the evidence of physical impact seem[s] to have been rather tenuous.'"[99]

Because the direct physical impact was slight and the evidence tenuous, the court examined the Cooks' alleged mental anguish to make sure it was not "'speculative, exaggerated, fictitious, or unforeseeable.'"[100] After reviewing the evidence and testimony, the court determined that the Cooks' mental and emotional distress was basically transitory, occurring at the time of the events, and disappearing when the flight ended.[101] After the flight, the court found that the Cooks were generally "'bothered,' 'concerned,' and 'nervous,'" which the court found to be normal feelings in the world, and in particular, with regard to air travel since September 11, 2001.[102] The court found the Cooks' alleged mental anguish to be "speculative."[103]

The court held "allowing an emotional distress claim to proceed based on the Cooks' lingering mental anguish would essentially abrogate the requirements of Indiana's modified impact rule" because the direct impact was "slight to nonexistent" and the alleged mental anguish was "speculative."[104] The court then held that in this regard the trial court should have granted Atlantic Coast's motion for summary judgment.[105]

A couple of weeks after the Indiana Supreme Court's decision in *Atlantic Coast Airlines*, the court of appeals also decided a case involving the modified impact rule, *Clancy v. Goad*.[106] In *Clancy*, one of the issues was whether the trial court properly included a jury instruction on the modified impact rule.[107] Tim Clancy ("Clancy"), the defendant, argued that the modified impact rule did not apply to the case brought against him by Dianna and Robert Goad ("Dianna" and "Robert" individually, or the "Goads" collectively).[108] The court held that it was proper to instruct the jury about the rule because it could apply to the case.[109]

In this case, Clancy fell asleep while driving his truck, "crossed the center-line of State Road 231," and collided with Dianna, who was riding her motorcycle.[110] Dianna suffered numerous severe injuries, including a severed leg

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99. *Id.* (alteration in original) (quoting Bader v. Johnson, 732 N.E.2d 1212, 1221 (Ind. 2000)).

100. *Id.* (quoting *Bader*, 732 N.E.2d at 1221).

101. *Id.*

102. *Id.* at 1000.

103. *Id.*

104. *Id.*

105. *Id.*

106. 858 N.E.2d 653 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 957 (Ind. 2007).

107. *Id.* at 655. The other issues in *Clancy* involved whether the damages were excessive. *Id.* Dianna Goad was awarded $10 million, and Robert Goad was awarded $1 million. *Id.* The court ruled that they were not, but rather were "reasonable in light of the evidence presented at trial." *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

and a two-week long coma.[111] Robert was riding his own motorcycle, but swerved to avoid a collision with Clancy.[112] Robert nonetheless did an emergency maneuver to stop his motorcycle quickly so he could help his wife, and suffered minor scrapes and bruises on his leg that hit the pavement.[113] Clancy argued that the instruction should not have been given because the modified impact rule did not apply to Robert's claim of negligent infliction of emotional distress (for which a jury awarded him $1 million).[114] Clancy objected to the trial court and argued on appeal that Robert did not suffer an unintentional impact.[115] Additionally, in his appeal, Clancy argued that Robert failed to present evidence that Clancy was negligent to Robert "*personally*."[116]

The court of appeals first addressed Clancy's latter argument. It held that Clancy waived the argument because he did not object on this ground to the trial court.[117] Even if Clancy had not waived the argument, it would have failed because the jury found Clancy was negligent to Dianna, Clancy did not object to this finding, and the finding "provided Robert with proof of negligence in the tort *underlying* his negligent infliction claim and, consequently, with an adequate foundation upon which to base his recovery."[118]

Before ruling on Clancy's argument that Robert did not suffer an impact, the court examined Robert's involvement in the accident because

> "[D]irect impact" is properly understood as the requisite measure of "direct involvement" in the incident giving rise to the emotional trauma. Viewed in this context, we find that *it matters little how the physical impact occurs, so long as that impact arises from the plaintiff's direct involvement in the tortfeasor's negligent conduct.*[119]

Clancy argued that Robert's maneuver was deliberate, and the only impact on Robert was "'between his feet and the highway.'"[120] Therefore, Clancy argued, the impact on Robert was not a direct impact under the modified impact rule.[121] Robert, however, argued that even though he voluntarily stopped his motorcycle causing his leg to scrape the pavement, that impact was a result of his direct involvement in the collision between Clancy and Dianna and therefore meets the direct impact requirement of the modified impact rule.[122]

The court of appeals agreed with Robert and found that the evidence

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111. *Id.* at 655-56.
112. *Id.* at 655.
113. *Id.* at 656.
114. *Id.*
115. *Id.* at 660.
116. *Id.* at 660-61.
117. *Id.* at 661.
118. *Id.*
119. *Id.* at 662 (quoting Conder v. Wood, 716 N.E.2d 432, 435 (Ind. 1999)).
120. *Id.* (quoting Appellant's Reply Brief at 10).
121. *Id.*
122. *Id.* at 663.

presented "demonstrates a sufficient level of involvement in the tortfeasor's negligent conduct to support a trial court's instruction on the modified impact rule."[123] The court found "that it was proper for the trial court to instruct the jury on the modified impact rule as a potential avenue by which Robert could be entitled to recover from Clancy."[124]

II. Legal Malpractice

A. Legal Malpractice Claims Not Assignable

In *State Farm Mutual Automobile Insurance Co. v. Estep*,[125] the Indiana Supreme Court reaffirmed its previous holding that legal malpractice claims are not assignable.[126] This case involved a general assignment pursuant to which the assignee sued an attorney for "negligence and breach of duty to defend."[127] The court concluded that the assignment was invalid,[128] basing its decision upon the policy concerns of "'preserv[ing] the sanctity of the client-lawyer relationship" and avoiding ultimate "'disreputable public role reversal.'"[129]

B. Dual Representation

Another notable legal malpractice case during the survey period was *Van Kirk v. Miller*,[130] decided by the Indiana Court of Appeals. This case involved dual representation and a signed conflict waiver.[131]

> Under Indiana law, the elements of legal malpractice are: (1) employment of an attorney, which creates a duty to the client; (2) failure of the attorney to exercise ordinary skill and knowledge (breach of the duty); and (3) that such negligence was the proximate cause of (4) damage to the plaintiff.[132]

A defendant need only negate one element of a legal malpractice claim to avoid liability.[133]

The court of appeals affirmed the trial court's grant of summary judgment in favor of the defendants, Ward Miller and the law firm of More, Miller, Yates &

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123. *Id.*

124. *Id.*

125. 873 N.E.2d 1021 (Ind. 2007).

126. *Id.* at 1025-26 (citing Picadilly, Inc. v. Raikos, 582 N.E.2d 338 (Ind. 1991)).

127. *Id.* at 1026.

128. *Id.*

129. *Id.* at 1025 (quoting *Picadilly*, 582 N.E.2d at 342).

130. 869 N.E.2d 534 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 218 (Ind. 2007).

131. *Id.* at 536.

132. *Id.* at 540-41 (quoting Clary v. Lite Machs. Corp., 850 N.E.2d 423, 430 (Ind. Ct. App. 2006)).

133. *Id.* at 541 (citing Legacy Healthcare, Inc. v. Barnes & Thornburg, 837 N.E.2d 619, 624 (Ind. Ct. App. 2005)).

Tracey ("Miller"), and against the plaintiff, Thomas Van Kirk ("Van Kirk").[134] The court first addressed the conflict waiver. In this case, the parties agreed that Miller's dual representation of Van Kirk and Mark Summers ("Summers") (a buyer and seller) was "a concurrent conflict of interest that triggered Indiana Professional Conduct Rule 1.7."[135] The disagreement, however, was "whether that conflict was consentable . . . and whether Van Kirk gave informed consent when he signed the conflict waiver."[136]

The court of appeals concluded that the conflict of interest was consentable and Miller could represent both parties "if he obtained a valid conflict waiver for the dual representation because Van Kirk's and Summers's "interests [were] 'generally aligned . . . even though there [were] some difference[s],'"[137] and Miller was hired to merely "draft the agreement memorializing the terms that Summers and Van Kirk had independently negotiated."[138] The court also concluded that the conflict waiver was valid because Van Kirk was adequately informed by Miller of the dual representation and concurrent conflict of interest.[139]

The court next addressed Miller's alleged breach of duty, a requirement of a successful claim for legal malpractice.[140] "In Indiana, an attorney is generally required 'to exercise ordinary skill and knowledge.'"[141] Van Kirk alleged that Miller breached his duty by favoring Summers during his dual representation and also by representing Summers after Van Kirk terminated his attorney-client relationship with Miller.[142]

The court first found that the facts were not in dispute, thereby only questions of law remained.[143] The court also dismissed Van Kirk's argument that Miller breached his duty to Van Kirk by including a contingency provision in the agreement between Van Kirk and Summers, because in fact, Van Kirk requested the inclusion of that provision.[144] The court also dismissed Van Kirk's argument that Miller breached his duty by favoring Summers during the dual representation because there was no evidence presented to support the contention.[145]

Lastly, the court concluded that Miller did not breach his duty to Van Kirk despite his continued representation of Summers after Van Kirk ended his attorney-client relationship with Miller, even though Miller represented Summers

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134. *Id.* at 536.
135. *Id.* at 541.
136. *Id.*
137. *Id.* at 542 (quoting IND. PROF'L CONDUCT R. 1.7 cmt. 28).
138. *Id.*
139. *Id.* at 543-44.
140. *Id.* at 544 (citing Clary v. Lite Machs. Corp., 850 N.E.2d 423, 430 (Ind. Ct. App. 2006)).
141. *Id.* (quoting Rice v. Strunk, 670 N.E.2d 1280, 1283-84 (Ind. 1996)).
142. *Id.*
143. *Id.*
144. *Id.* at 545.
145. *Id.*

in the sale of the property at issue in the Van Kirk and Summers agreement.[146] The court reasoned that Miller was hired by Van Kirk and Summers "to represent them in 'the preparation of a proposed sale and closing documents'" and that it was not automatic legal malpractice on Miller's part because the deal was not closed.[147] The court affirmed the trial court's grant of summary judgment in favor of Miller.[148]

III. Medical Malpractice

Several medical malpractice cases other than those surveyed herein were decided during the survey period, and at least one case decided by the Indiana Court of Appeals during the survey period was affirmed in part and reversed in part by the Indiana Supreme Court outside of the period.[149] Those cases not surveyed in detail herein relate to the constitutionality of the statute of limitations in the Indiana Medical Malpractice Act[150] and to claims against Indiana's Patient Compensation Fund.[151]

A. Defendant Identity Confidentiality Statute

The Indiana Supreme Court decided a case of first impression in *Kho v. Pennington*,[152] when it concluded that the trial court erred in granting summary judgment to defendants Ruby Miller ("Miller"), Deborah Pennington, and Findling Garau Germano & Pennington, P.C. ("Pennington") on plaintiff Eusebio

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146. *Id.* at 546.

147. *Id.* The court declined to develop arguments for the parties related to Indiana Professional Conduct Rule 1.9, which provides that attorneys owe a continued duty to former clients because none were raised in the appeal. *Id.* at 546 n.8.

148. *Id.* at 546.

149. *See* Ho v. Frye, 865 N.E.2d 632 (Ind. Ct. App. 2007), *aff'd in part, rev'd in part*, 880 N.E.2d 1192 (Ind. 2008).

150. Herron v. Anigbo, 866 N.E.2d 842 (Ind. Ct. App. 2007) (holding that statute of limitations in the Indiana Medical Malpractice Act is unconstitutional as applied to plaintiff quadriplegic); Brinkman v. Bueter, 856 N.E.2d 1231 (Ind. Ct. App. 2006) (statute of limitations in the Indiana Medical Malpractice Act is unconstitutional as applied to plaintiff with preeclampsia and eclampsia), *rev'd on other grounds*, 879 N.E.2d 549 (Ind. 2008).

151. Two similar cases were handed down on March 16, 2007: *Indiana Patient's Compensation Fund v. Winkle*, 863 N.E.2d 1 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 212 (Ind. 2007) and *Indiana Patient's Compensation Fund v. Butcher*, 863 N.E.2d 11 (Ind. Ct. App. 2007). In *Winkle*, the court of appeals held that "the Winkles' unborn child is not a 'patient' pursuant to the [Medical Malpractice] Act and because [the Winkles] therefore have no one from whom their negligent infliction of emotional distress claims can derive, they are not entitled to separate statutory caps for their emotional damages." *Winkle*, 863 N.E.2d at 11. In *Butcher*, even though the Butchers' unborn child was a victim for purposes of the Medical Malpractice Act, the court held that because the Butchers' deceased child, Samuel, was the only actual victim of malpractice, the Butchers' "recovery is limited to one $1,250,000 cap." *Butcher*, 863 N.E.2d at 19-20.

152. 875 N.E.2d 208 (Ind. 2007).

Kho, M.D.'s ("Kho") claim of statutory negligence.[153] Kho's claim of statutory negligence was based upon the defendant identity confidentiality statute, part of the Indiana Medical Malpractice Act, found at Indiana Code section 34-18-8-7.[154] The court held "that the doctor's claim against the malpractice claimant and her attorneys for violation of the statutory defendant identity confidentiality provision presents a cognizable negligence action for violation of an express statutory duty."[155]

In *Kho*, Miller, as personal representative of the Estate of Tracy Merle Lee ("Lee"), filed a complaint for medical negligence with the Indiana Department of Insurance, as required by the Indiana Medical Malpractice Act.[156] However, prior to a determination by a medical review panel, Miller filed a complaint with the Scott Circuit Court.[157] Kho filed a motion for summary judgment, claiming he did not provide medical services to Lee, which prompted Miller and Pennington to voluntarily dismiss their state claim again Kho.[158] Kho then filed a complaint against Miller and Pennington for falsely naming him in the malpractice lawsuit.[159] The trial court granted summary judgment against Kho, which the Indiana Court of Appeals affirmed.[160] The Indiana Supreme Court granted transfer to address "whether violation of the defendant identity confidentiality provision of Indiana Code [section] 34-18-8-7 in the Indiana Medical Malpractice Act may give rise to an action for damages."[161]

The Indiana Medical Malpractice Act requires that certain claims be considered first by a medical review panel before an action should be filed in state court.[162] Nevertheless, Indiana Code section 34-18-8-7 provides an exception to the rule, which includes the following restriction: "[the] complaint filed in court *may not contain any information that would allow a third party to identify the defendant*[.]"[163] In *Kho*, the defendant was easily identifiable from Miller's state court complaint.[164]

To reach its conclusion that Kho filed an actionable claim against Miller and her attorneys for naming him in the state court malpractice action and its order that summary judgment was erroneously granted in favor of Miller and Pennington, the Indiana Supreme Court examined the "long and continuous history" in Indiana courts that "recogniz[es] negligence actions for statutory

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153. *Id.* at 216.
154. *Id.*
155. *Id.*
156. *Id.* at 209 & n.1 (citing IND. CODE §§ 34-18-8-4, 34-18-10-1 to -26 (1998)).
157. *Id.* at 209-10.
158. *Id.* at 210.
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.* at 211 (citing IND. CODE § 34-18-8-4 (2004)).
163. *Id.* (quoting IND. CODE § 34-18-8-7(a)(1) (2004)).
164. *Id.*

violations."[165] The court found additional support in Restatement Second of Torts sections 285 and 286 (1965), and "authoritative treatises."[166]

B. "Increased Risk of Harm" Standard

In *Wolfe v. Estate of Custer ex rel. Custer*,[167] the Indiana Court of Appeals affirmed the trial court's denial of defendant Richard Wolfe, D.O.'s ("Wolfe") motion to correct error, which he filed after the trial court denied his motion for judgment on the evidence.[168] The court of appeals entered judgment on the jury verdict in favor of the plaintiff, Estate of Custer ("Custer"), for $432,000.[169] Wolfe essentially argued on appeal that there was not sufficient evidence to support the jury's verdict or the damages awarded.[170]

More specifically, Wolfe argued that there was insufficient evidence of proximate cause

> because the alleged increased risk of harm was "unquantified" and was not shown to be a "substantial factor" in [plaintiff's] damages and that the evidence presented regarding damages did "not establish that those bills [we]re reasonable and necessary" or "that they were proximately caused by anything that Dr. Wolfe did or did not do."[171]

The court examined the history of the "increased risk of harm" standard as adopted by the Indiana Supreme Court from Restatement (Second) of Torts section 323 in *Mayhue v. Sparkman*[172] and as applied to certain medical malpractice cases.[173] Both parties agreed that the increased risk of harm standard applied in the case, which requires that a "plaintiff must demonstrate that: (1) the doctor was negligent; (2) the negligent act increased the risk of harm; and (3) the 'negligence was a substantial factor in causing the plaintiff's harm.'"[174]

The court rejected Wolfe's first argument that Custer failed to prove that the increased risk of harm caused by Wolfe was a substantial factor in causing the harm suffered by Custer.[175] The court quoted the Indiana Supreme Court's finding that "once the plaintiff proves negligence and an increase in the risk of harm, the jury is permitted to decide whether the medical malpractice was a

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165. *Id.* at 212 (citing, *e.g.*, City of Indianapolis v. Garman, 848 N.E.2d 1087, 1088 (Ind. 2006)).

166. *Id.* at 213 (citing DAN DOBBS, THE LAW OF TORTS §§ 133-142 (2001); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 190-205 (4th ed. 1971)).

167. 867 N.E.2d 589 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 212 (Ind. 2007).

168. *Id.* at 602.

169. *Id.*

170. *Id.* at 598.

171. *Id.* at 594-95 (quoting Transcript of Record at 629-30).

172. *Id.* at 596 (citing Mayhue v. Sparkman, 653 N.E.2d 1384, 1388 (Ind. 1995)).

173. *Id.*

174. *Id.* at 597 (quoting *Mayhue*, 653 N.E.2d at 1388).

175. *Id.* at 598.

substantial factor in causing the harm suffered by the plaintiff,"[176] and concluded that Custer presented sufficient evidence from which the jury could infer that Wolfe's negligence was a substantial factor in the harm.[177]

The court also rejected Wolfe's second argument that Custer's evidence was faulty because it failed to quantify the increased risk of harm.[178] The court found that Custer did in fact present evidence in the form of expert testimony quantifying the risk of harm[179] and stated in a footnote that "quantification of the increased risk is likely not required in order for a plaintiff to prove causation."[180]

Likewise, the court found in favor of Custer as to Wolfe's final arguments that the medical bills presented by Custer were not reasonable or necessary, nor causally related to Wolfe's acts or omissions.[181] The court reached its conclusion by reasoning that Wolfe was required to present evidence to dispute the expenses presented as evidence by Custer or risk the inference that the "medical bills are admissible to show that the medical services performed were necessary."[182] The court also found that Wolfe's argument as to causation failed "[b]ecause the application of [Restatement (Second) of Torts section] 323 replaces the requirement of showing a causal relationship under the traditional proximate cause analysis."[183]

C. Wrongful Death or Survival Act?

The court of appeals addressed another case of first impression in *Atterholt v. Robinson*,[184] in which it decided that the Indiana Patient Compensation Fund ("Fund") "should have been allowed to contest the theory of recovery . . . . And because recovery under the [wrongful death statute] or the Survival Act hinges on whether the victim dies as a direct result of the tortfeasor's actions, the Fund should have been allowed to present evidence regarding the cause of . . . death."[185] Claimants are allowed to plead a wrongful death action or, alternatively, a survival action, but tortfeasors can only be held liable for one, not both.[186]

The Fund argued that the Estate of Irene Gray ("Robinson") could only recover excess damages pursuant to the wrongful death statute ("AWDS"), but

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176. *Id.* (quoting *Mayhue*, 653 N.E.2d at 1388).

177. *Id.*

178. *Id.* at 599.

179. *Id.*

180. *Id.* at 599 n.10 (citing McKellips v. St. Francis Hosp., Inc., 741 P.2d 467, 475 (Okla. 1987)).

181. *Id.* at 601.

182. *Id.* (quoting Wilkinson v. Swafford, 811 N.E.2d 374, 387 (Ind. Ct. App. 2004)).

183. *Id.*

184. 872 N.E.2d 633 (Ind. Ct. App. 2007).

185. *Id.* at 643.

186. *Id.* at 640 (citing Best Homes, Inc. v. Rainwater, 714 N.E.2d 702, 705 (Ind. Ct. App. 1999)).

Robinson argued that she could recover "damages pursuant to the Survival Act."[187] Each of their arguments was based upon the amount of recovery, and each argued the theory most economically beneficial to themselves.[188]

The court first held that "because the underlying settlement [agreement between Robinson and the healthcare provider] did not specify whether it awarded damages pursuant to either the AWDS or the Survival Act, the Fund should have been allowed to advocate for the proper theory of recovery."[189] However, the court also found that despite the trial court's pretrial order precluding admission of cause of death to support its arguments about the proper recovery theory, "the Fund admitted at oral argument that it proffered all of its evidence regarding the proper theory of compensation."[190] Therefore, the trial court's error in issuing the pretrial order was harmless.[191] Lastly, the court held that there was sufficient evidence to support the trial court's findings of fact supporting its decision to award damages pursuant to the Survival Act,[192] and the amount of damages awarded was "within the scope of damages" and therefore not excessive.[193]

IV. Premises Liability

The premises liability cases decided during the survey period addressed issues related to visitor status[194] and falls.[195] The facts of these cases involve gravel,[196] snow and ice,[197] mail carriers,[198] and an unstable wooden step.[199] The first case in this section, decided by the Indiana Court of Appeals, addressed an issue of first impression, when it was faced with defining the duty of a real estate broker to a prospective buyer when the real estate broker shows a house.[200]

In *Masick v. McColly*, Christine Masick ("Masick") suffered injuries when she fell at a residential construction site, which residence and property was owned by Hollendale Builders ("Hollendale").[201] At the time of her fall, Masick

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187. *Id.* at 641.

188. *Id.*

189. *Id.* at 644.

190. *Id.* at 644-45.

191. *Id.* at 645.

192. *Id.*

193. *Id.* at 646-47.

194. Masick v. McColley Realtors, Inc., 858 N.E.2d 682 (Ind. Ct. App. 2006).

195. Gilpin v. Ivy Tech State Coll., 864 N.E.2d 399 (Ind. Ct. App. 2007); Denison Parking, Inc. v. Davis, 861 N.E.2d 1276 (Ind. Ct. App.), *trans. denied*, 869 N.E.2d 462 (Ind. 2007); *Masick*, 858 N.E.2d 682; Olds v. Noel, 857 N.E.2d 1041 (Ind. Ct. App. 2006).

196. *See Gilpin*, 864 N.E.2d 399.

197. *See Denison Parking, Inc.*, 861 N.E.2d 1276.

198. *See Olds*, 857 N.E.2d 1041.

199. *See Masick*, 858 N.E.2d 682.

200. *See id.*

201. *Id.* at 684.

was with a real estate agent from McColly Realtors ("McColly"), which had been hired by Hollendale.[202] Masick fell when she stepped onto a wooden step in the garage.[203] The step was built and owned by Hollendale and was moved between houses during construction projects.[204] "[T]he step was not attached to anything."[205] Also present in the residence at the time of Masick's fall was an employee of Saxon Drywall ("Saxon").[206] Masick sued McColly and Saxon, claiming that both companies were negligent for not warning her of the dangerous step.[207]

The court of appeals first affirmed the trial court's grant of summary judgment in favor of Saxon.[208] The court reasoned that "Saxon did not have sufficient control over the step to subject it to liability for failure to warn Masick about it."[209] Saxon was merely present at the residence, and its employees merely used the step themselves.[210] "Saxon did not construct, design, own, or maintain the step."[211]

The court of appeals next concluded that McColly also did not have sufficient control over the premises, pursuant to premises liability standards, to give rise to a duty to warn Masick of the dangerous step.[212] However, the court reversed the trial court's grant of summary judgment in favor of McColly when it held that real estate brokers, like prospective landlords, have a duty to warn prospective buyers of hidden defects known to the broker, but not known to the tenant or buyer.[213]

The court of appeals found that the scope and nature of a real estate broker's duty to a prospective buyer under the facts of this case presented a case of first impression.[214] In reaching its decision, the court "decline[d] to impose a duty on real estate brokers unless they have control over the premises sufficient to independently give rise to a duty to warn under recognized premises liability principles."[215] This was the same reasoning the court used with regard to Saxon.[216]

However, the court then looked more specifically at policy arguments made

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202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.* at 684-85.
208. *Id.* at 687.
209. *Id.* at 685.
210. *Id.* at 686.
211. *Id.*
212. *Id.* at 692.
213. *Id.*
214. *Id.* at 687.
215. *Id.* at 688.
216. *See supra* notes 209, 211 and accompanying text.

by the parties and set forth in *Hopkins v. Fox & Lazo Realtors*.[217] The court of appeals agreed with the dissent in *Hopkins*:

> Because of the newly-created duty to inspect and warn, brokers forced to defray the cost of the additional liability insurance will simply add costs to the commission. Moreover, as the majority recognizes, the broker still would retain the right of either contribution or indemnification from the homeowner. Thus, in the end, the homeowner will pay even more to insure against injuries that might occur in the home, while the brokers will have no more incentive to inspect and warn than they did before today's decision.
>
> In addition, the smart homeowner, saddled with new costs will simply increase the asking price for the house. Therefore, the potential buyer will have to pay more for a house, which has had costs added to the purchase price, all in the name of the buyer's protection.
>
> Rather than serving the public, the majority's decision will add extra layers of litigation, paperwork, and cost to the already complex and expensive process of selling and buying a house.[218]

The court, while declining to impose a duty on the real estate broker to inspect the house before showing it, agreed that "a broker is obliged to warn a prospective buyer of a latent defect in the premises when the broker is aware of it."[219] The court reversed the trial court with regard to McColly because it found there was "a genuine issue of material fact as to whether such a duty arose and whether the [real estate broker] breached it."[220]

Earlier in 2007, the court of appeals decided the fairly straightforward premises liability case *Gilpin v. Ivy Tech State College*,[221] which involved a slip and fall due to gravel.[222] In *Gilpin*, the court affirmed the grant of summary judgment in favor of the defendant Ivy Tech State College ("Ivy Tech").[223] The court concluded that Paul Gilpin ("Gilpin") "was a licensee when he slipped on gravel and fell in the street while on the way to restrooms" at Ivy Tech.[224] Additionally, the court concluded that "Gilpin was aware of the gravel before he fell and, consequently, the gravel was not a latent danger about which Ivy Tech should have warned Gilpin."[225]

The court first examined Gilpin's status when he entered Ivy Tech's property because determining a person's visitor status is the first step in resolving a

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217. *Masick*, 858 N.E.2d at 689-91 (citing Hopkins v. Fox & Lazo Realtors, 625 A.2d 1110, 1119-20 (N.J. 1993)).

218. *Id.* at 690-91 (quoting *Hopkins*, 625 A.2d at 1123 (Garibaldi, J., dissenting)).

219. *Id.* at 691.

220. *Id.*

221. 864 N.E.2d 399 (Ind. Ct. App. 2007).

222. *Id.* at 400.

223. *Id.*

224. *Id.*

225. *Id.*

premises liability case.[226] When a person enters property of another, he is an invitee, licensee, or trespasser.[227] The duty owed to the visitor by the landowner is defined by the visitor's status.[228] "[A]n invitee is a person who is invited to enter or to remain on another's land whereas a licensee is privileged to enter or remain on the land by virtue of permission or sufferance."[229]

The court agreed with Ivy Tech and determined that Gilpin was a licensee when he entered Ivy Tech's land.[230] The court examined the evidence in a light favorable to Gilpin and determined that no reasonable person could conclude that Gilpin was invited to enter the land by Ivy Tech to use its public restrooms.[231] The court found no evidence that "Ivy Tech encouraged, desired, induced, or expected Gilpin . . . to use its restrooms[,] Gilpin . . . plann[ed] to pursue his own educational objectives," or that Gilpin entered the Ivy Tech building to speak with Ivy Tech personnel regarding his son for any reason.[232]

The duty owed to a licensee is "to refrain from willfully or wantonly injuring" the licensee "or acting in a manner to increase his peril."[233] This duty includes "the duty to warn a licensee of any latent danger on the premises of which the landowner has knowledge,"[234] with "latent defined as concealed or dormant."[235] The court found that Gilpin did not claim that Ivy Tech acted willfully or wantonly, and then concluded that Ivy Tech had no duty to warn Gilpin of the gravel because it was not a latent danger.[236] Gilpin knew of the gravel before he fell.[237]

Another "slip and fall" case decided by the Indiana Court of Appeals during the survey period was *Denison Parking, Inc. v. Davis*.[238] Also very straightforward, the issue in this case was whether an owner of property abutting a public sidewalk has a duty to a pedestrian to keep the sidewalks in a reasonably safe condition.[239] The court concluded that the property owner does not.[240] In *Denison Parking*, Barbara Davis was walking on a sidewalk abutting Market Square Arena when she slipped on ice and fell.[241]

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226. *Id.* at 401 (citing Rhoades v. Heritage Invs., LLC, 839 N.E.2d 788, 791 (Ind. Ct. App. 2005)).

227. *Id.* (citing *Rhoades*, 839 N.E.2d at 791).

228. *Id.* (citing *Rhoades*, 839 N.E.2d at 791).

229. *Id.* at 402 (alteration in original) (quoting *Rhoades*, 839 N.E.2d at 792).

230. *Id.* at 403.

231. *Id.* at 402.

232. *Id.*

233. *Id.* at 403 (citing *Rhoades*, 839 N.E.2d at 791).

234. *Id.* (quoting *Rhoades*, 839 N.E.2d at 791).

235. *Id.* (citing BLACK'S LAW DICTIONARY 887 (7th ed. 1999)).

236. *Id.*

237. *Id.*

238. 861 N.E.2d 1276 (Ind. Ct. App.), *trans. denied*, 869 N.E.2d 462 (Ind. 2007).

239. *Id.* at 1277.

240. *Id.*

241. *Id.* at 1277-78.

The court found generally that defendant property owners can be held liable only if they create more dangerous conditions on abutting public sidewalks and "if [the] plaintiff's injuries are 'directly attributable to that condition,'" or if the property owner creates artificial conditions "that increase risk and proximately cause injury to persons using those sidewalks."[242]

The court continued and determined that even if it had analyzed the case and facts under the Restatement (Second) of Torts section 342(A), which was used by the court in *Webb v. Jarvis*,[243] to determine whether Denison Parking owed a duty to Davis, Denison Parking would still not be liable.[244] Pursuant to *Webb*, a court looks to three factors, the third of which is a public policy balancing test.[245] The *Denison Parking* court found that a separate analysis "would fail the 'balancing' test set forth in *Webb*, in favor of the third 'public policy' prong."[246] The court found that society favors encouraging private parties to conduct snow removal.[247]

In the end, the *Denison Parking* court held that Denison Parking owed no common law duty to Davis, by assumption or otherwise, and Denison Parking did not owe Davis a statutory duty because municipal codes are not enacted to protect individuals, but rather, municipalities.[248] The trial court's denial of Denison Parking's motion for summary judgment was reversed, and the case remanded.[249]

In *Olds v. Noel*,[250] the court of appeals addressed issues related to injuries sustained after a mail carrier slipped and fell on snow and ice along a private sidewalk of a single-family residential dwelling that was being rented at the time.[251] The court of appeals affirmed the trial court's grant of summary judgment in favor of the defendants, Steven and Rita Noel ("Noels"), and against the plaintiff, James H.S. Olds, III ("Olds").[252]

Olds argued that summary judgment was inappropriate because the Noels, as the homeowners and landlords, owed Olds a duty to clear the sidewalk upon which Olds fell.[253] The court cited the general rule regarding maintenance and conditions of real property: "'whether a duty is owed depends primarily upon whether the defendant was in control of the premises when the accident

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242. *Id.* at 1280-81 (quoting Lawson v. Lafayette Home Hosp., Inc. 760 N.E.2d 1126, 1130 (Ind. Ct. App. 2002)).

243. 575 N.E.2d 992, 995 (Ind. 1991).

244. *Denison Parking*, 861 N.E.2d at 1280.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* at 1280-81.

249. *Id.* at 1281-82.

250. 857 N.E.2d 1041 (Ind. Ct. App. 2006).

251. *Id.* at 1042.

252. *Id.*

253. *Id.*

occurred.'"[254] In the landlord-tenant context, Indiana courts have held: "'As a general rule, in the absence of statute, covenant, fraud or concealment, a landlord who gives a tenant full control and possession of the leased property will not be liable for personal injuries sustained by the tenant or other persons lawfully upon the leased property.'"[255]

Olds argued that a "well-recognized exception" to the general rule should apply to his case, that landlords have a duty of reasonable care to maintain common areas over which the landlord has retained control.[256] The court found, however, that "Indiana courts to date have recognized common areas on rental properties only in apartment complexes, duplexes, or other multi-unit properties where tenants lease property subject to leases specific to each individual rental unit."[257] This case involved "an undivided, single-family dwelling."[258]

Furthermore, the Noels specifically did not retain control over the sidewalks, pursuant to their lease agreement with the tenants, and there was one common lease signed on the same date by the tenants.[259] The court declined to accept Olds's argument that because the Noels reserved a right of entry to the property (a common lease provision), they never transferred complete control of the premises to the tenants.[260] The court lastly declined to accept Olds's argument that public policy warrants expanding the exception to the general rule to the facts of his case.[261] The court reminded Olds that he did not pursue the legal remedy available to him in this case, to sue the tenants who were in control and possession of the premises at the time of the fall.[262]

V. INDIANA TORT CLAIMS ACT

There were at least two notable Indiana Tort Claims Act ("ITCA") cases decided during the survey period. One from each of the appellate courts will be surveyed below. The Indiana Supreme Court decided a case based upon a section of the ITCA that provides immunity based upon losses resulting from temporary conditions caused by weather.[263] The Indiana Court of Appeals decided a case

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254. *Id.* at 1043-44 (quoting Rhodes v. Wright, 805 N.E.2d 382, 385 (Ind. 2004)).

255. *Id.* at 1044 (quoting Pitcock v. Worldwide Recycling, Inc., 582 N.E.2d 412, 414 (Ind. Ct. App. 1991)).

256. *Id.* (citing Rossow v. Jones, 404 N.E.2d 12, 14 (Ind. Ct. App. 1980)).

257. *Id.* (citing Aberdeen Apartments v. Cary Campbell Realty Alliance, Inc., 820 N.E.2d 158 (Ind. Ct. App. 2005) (apartment complexes); Dawson v. Long, 546 N.E.2d 1265 (Ind. Ct. App. 1998) (duplex); Flott v. Cates, 528 N.E.2d 847 (Ind. Ct. App. 1998) (home divided into three apartments)).

258. *Id.*

259. *Id.* at 1044-45.

260. *Id.* at 1045-46.

261. *Id.* at 1046-57.

262. *Id.* at 1047.

263. *See* Hochstetler v. Elkhart County Highway Dep't, 868 N.E.2d 425 (Ind. 2007).

involving a claim of an incarcerated defendant against prison officers.[264]

In *Hochstetler v. Elkhart County Highway Department*,[265] the Indiana Supreme Court affirmed a trial court ruling that granted summary judgment for various county entities on plaintiff Marvin Hochstetler's ("Hochstetler") negligence suit.[266] Hochstetler sued the highway department, county commissioners, and county sheriff claiming the entities negligently and carelessly maintained the county road upon which Hochstetler wrecked his motorcycle into a tree that had fallen into a county road after a storm the night before.[267]

The Indiana Supreme Court found that even though "more recent law established through the Indiana Tort Claims Act recognizes that state and local governments may have tort responsibility for damages flowing from negligence," state and local governments may be immune from the negligence under certain circumstances.[268] The applicable provision of the ITCA in *Hochstetler* was Indiana Code section 34-13-3-3(3), which "creates immunity for losses resulting from '[t]he temporary condition of a public thoroughfare . . . that results from weather.'"[269]

The court examined previous case law construing the applicable provision of the ITCA and found that it previously determined that "immunity under this section contains two key concepts[.]"[270] The first concept is that the condition must have truly been "caused [by] weather" as distinguished from "poor inspection, design, or maintenance."[271] The second concept is that the condition must be "'temporary.'"[272] In affirming the trial court and thereby dismissing the negligence claims against the county entities based upon the ITCA, the Indiana Supreme Court reasoned that in this situation, the storm caused many trees to fall onto roadways and the highway crews worked to clear the trees for hours.[273]

In *Smith v. Indiana Department of Correction*,[274] Eric Smith ("Smith"), the incarcerated plaintiff, filed a negligence claim against prison officers based upon the manner in which the officers allegedly treated Smith during a cell extraction.[275] The cell extraction was ordered because Smith refused to obey orders of the officers at the same time that other prisoners were purposefully

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264. *See* Smith v. Ind. Dep't of Corr., 871 N.E.2d 975 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 220 (Ind. 2007), *cert. denied*, 128 S. Ct. 1493 (2008).

265. 868 N.E.2d 425.

266. *Id.* at 426.

267. *Id.*

268. *Id.* (citing IND. CODE ANN. §§ 34-13-3-1 to -25 (West 2007)).

269. *Id.* (alteration and omission in original) (quoting IND. CODE ANN. § 34-13-3-3(3)).

270. *Id.* (citing Catt v. Bd. of Comm'rs of Knox County, 779 N.E.2d 1, 4-6 (Ind. 2002)).

271. *Id.* at 426-27 (citing *Catt*, 779 N.E.2d at 4).

272. *Id.* at 427 (citing *Catt*, 779 N.E.2d at 6).

273. *Id.*

274. 871 N.E.2d 975 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 220 (Ind. 2007), *cert. denied*, 128 S. Ct. 1493 (2008).

275. *Id.* at 980-81.

flooding their cells.[276] The court held that because "[e]nforcing discipline and maintaining prison security is clearly within the prison officers' scope of employment,"[277] Smith cannot prevail against the officers individually because they "are shielded from liability in their official capacity under the Indiana Tort Claims Act."[278]

VI. Business Torts

A. Fraud and Misrepresentation

The case of *Benge v. Miller*,[279] decided by the Indiana Court of Appeals during the survey period, stands for the proposition that the causes of action for fraud, constructive fraud, and home improvement fraud are distinct causes of action and one may recover for home improvement fraud while losing its claim for fraud or constructive fraud.[280] In this case, the defendant argued that the trial court erred when it entered judgment *for* the plaintiff on the home improvement fraud count while at the same time entered judgment *against* the plaintiff on the fraud and constructive fraud counts.[281]

The court of appeals held that the trial court did not err in this respect and found that to prove fraud and constructive fraud a "plaintiff must show a material misrepresentation of a past or existing fact" and reliance on the material misrepresentations.[282] On the other hand, to prove home improvement fraud, a plaintiff must show only one of the following: "that the home improvement supplier either [(1)] misrepresented a material fact or promised performance that he did not intend to perform, or [(2)] used or employed deception to cause the plaintiff to enter into the contract, or [(3)] entered into an unconscionable contract."[283] Furthermore, unlike with fraud and constructive fraud, there is "no reliance requirement in the home improvement fraud statute."[284]

B. Commercial Interference & Malicious Prosecution

The Indiana Court of Appeals addressed two intentional torts in *Government Payment Service, Inc. v. Ace Bail Bonds*.[285] First, the court reversed the trial court and held that there was no intentional interference with business relationships by Government Payment Service, Inc. ("GPS") as against Ace Bail Bonds, American Bail Bond Company, Bertholet Bail Bond, and Express Bail

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276. *Id.* at 986.
277. *Id.*
278. *Id.* (citing Ind. Code §§ 34-13-3-1 to -5 (2004)).
279. 855 N.E.2d 716 (Ind. Ct. App. 2006).
280. *Id.* at 721. (citing Brief for the Appellee at 17).
281. *Id.*
282. *Id.* (citing Wheatcraft v. Wheatcraft, 825 N.E.2d 23, 30 (Ind. Ct. App. 2005)).
283. *Id.* (citing Ind. Code § 35-43-6-12 (2004)).
284. *Id.*
285. 854 N.E.2d 1205 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 455 (Ind. 2007).

Bond (collectively, the "Bail Agents").[286] Second, the court affirmed the trial court and held that GPS failed to prove malicious prosecution by the Bail Agents, and GPS's counterclaim to that effect should be denied.[287]

In reaching its conclusion regarding the intentional interference with business relationship claim, the court first listed the elements of the tort as: "(1) the existence of a valid relationship; (2) the defendant's knowledge of the existence of the relationship; (3) the defendant's intentional interference with that relationship; (4) the absence of justification; and (5) damages resulting from defendant's wrongful interference with the relationship."[288] The court noted that the Indiana Supreme Court additionally requires that the defendant must have acted illegally to achieve the complained of end result.[289]

The court of appeals also concluded that there was no evidence that the Bail Agents or their clients had any valid business relationship with the government entities with whom GPS had contracts, such as contracts, property or other rights, access to incarcerated defendants flowing from a valid business relationship, or consideration paid by the Bail Agents for such access.[290] Furthermore, the court of appeals concluded that

> [t]here is also no evidence that GPS intentionally interfered, or could interfere, with the relationship which Bail Agents claim to have had with the governmental entities . . . [because] [i]t was the governmental entities, not GPS, who adopted the cash bail program[, and] . . . who restricted the access of the Bail Agents to the jails and the incarcerated defendants.[291]

Lastly, with regard to GPS's malicious prosecution counterclaim, the court held that because the original action granting the temporary restraining order against GPS was not terminated in GPS's favor, but rather, the permanent injunction was issued on the merits at a later time by a different trial court, GPS failed to prove malicious prosecution on the part of the Bail Agents.[292] The court therefore affirmed the trial court's order denying GPS's counterclaim.[293]

VII. Intentional Torts

A. Defamation

During the survey period, Indiana appellate courts decided no less than three

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286. *Id.* at 1210.

287. *Id.* at 1210-11.

288. *Id.* at 1209 (citing Felsher v. Univ. of Evansville, 755 N.E.2d 589, 598 n.21 (Ind. 2001)).

289. *Id.* (citing Brazauskas v. Fort Wayne-South Bend Diocese, Inc., 796 N.E.2d 286, 291 (Ind. 2003)).

290. *Id.*

291. *Id.* at 1209-10.

292. *Id.* at 1211.

293. *Id.*

cases regarding suits for defamation. One of these cases, from the Indiana Supreme Court, made new law. In *Kelley v. Tanoos*,[294] the Indiana Supreme Court decided a defamation case based upon the qualified privilege defense. The defendant in *Kelley*, Daniel Tanoos ("Tanoos"), made statements to plaintiff Paul Kelley's ("Kelley") employer accusing Kelley of firing a shotgun at Tanoos.[295] When the statements were made, the police were conducting an investigation, and they knew of and cooperated with Tanoos's decision to make the accusatory statements.[296] The police gave Tanoos questions to ask and wired him so the conversation would be recorded.[297] Nevertheless, Kelley was never charged with a crime related to the shooting.[298]

Kelley subsequently sued Tanoos for defamation for the statements made during the taped conversation.[299] The trial court granted Tanoos's motion for summary judgment "without findings of fact or conclusions of law."[300] "The [c]ourt of [a]ppeals reversed and remanded, holding that" there were genuine issues of material fact regarding the defamation claim and that Tanoos's statements were not qualifiedly privileged.[301] The Indiana Supreme Court affirmed the trial court, and held that "Tanoos is protected from liability for defamation in these circumstances because the statements were made to assist law enforcement investigate criminal activity."[302]

The Indiana Supreme Court relied on the qualified privilege doctrine to decide the case. "A qualified privilege protects 'communications made in good faith on any subject matter in which the party making the communication has an interest or in reference to which he has a duty, either public or private, either legal, moral, or social, if made to a person having a corresponding interest or duty.'"[303] Furthermore, communications to law enforcement officers are protected by the qualified privilege "[t]o 'enhance[] public safety by facilitating the investigation of suspected criminal activity.'"[304] Whether the privilege applies is a question of law for the court.[305]

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294. 865 N.E.2d 593 (Ind. 2007).

295. *Id.* at 595.

296. *Id.* at 596.

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.* at 595.

303. *Id.* at 597 (quoting Bals v. Verduzco, 600 N.E.2d 1353, 1356 (Ind. 1992)).

304. *Id.* (second alteration in original) (quoting Holcomb v. Walter's Dimmick Petroleum, Inc., 858 N.E.2d 103, 108 (Ind. 2006)). In *Holcomb*, also decided by the Indiana Supreme Court during the current survey period, the court held that the defendant's statements to a police officer, relaying that she believed the plaintiff had driven from the gas station without paying for pumped gasoline, could not be the basis for claims of false arrest, false imprisonment, defamation, or abuse of process, because such statements were qualifiedly privileged. *Holcomb*, 858 N.E.2d at 105.

305. *Kelley*, 865 N.E.2d at 597 (citing *Bals*, 600 N.E.2d at 1356).

Even though the Indiana Supreme Court found the common interest privilege to be inapplicable,[306] it found the public interest privilege to be applicable.[307] Both of these privileges are qualified privileges. This decision created new law in Indiana. As the court noted, Indiana had not yet adopted the Restatement (Second) of Torts section 598 comment f reading of the public interest privilege.[308] Comment f provides that the public interest privilege "affords protection to a private citizen who publishes defamatory matter to a third person even though he is not a law enforcement officer, under circumstances which, if true, would give to the recipient a privilege to act for purposes of preventing a crime or of apprehending a criminal or fugitive from justice."[309] The court cautioned, however, that extending the public interest privilege to protect communications of private citizens is not without its limits.[310]

The public interest privilege applies only to communications made to private citizens if the statements further the same interest as communications made to law enforcement officers.[311] "That interest is grounded in a public policy intended to encourage private citizens and victims not only to report crime, but also to assist law enforcement with investigating and apprehending individuals who engage in criminal activity."[312]

In *Hamilton v. Prewett*,[313] the Indiana Court of Appeals affirmed a trial court's grant of summary judgment on a defamation claim involving a website.[314] "The law of defamation was created to protect individuals from reputational attacks."[315] To win a defamation claim, four elements must be proven: "(1) a communication with defamatory imputation, (2) malice, (3) publication, and (4) damages."[316] To determine whether defamatory imputation exists, courts will look "'among other factors, . . . the temper of the times [and] the current of contemporary public opinion.'"[317]

The court determined that no Indiana court has addressed the relationship among defamation and parody, which was at issue in *Hamilton*, and looked to case law from other jurisdictions and secondary sources for guidance.[318] The

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306. *Id.* at 598-99.

307. *Id.* at 601.

308. *Id.* at 600.

309. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 598 cmt. f (1977)).

310. *Id.*

311. *Id.*

312. *Id.* at 601.

313. 860 N.E.2d 1234 (Ind. Ct. App.), *trans. denied*, 869 N.E.2d 459 (Ind. 2007).

314. *Id.* at 1247.

315. *Id.* at 1243 (citing Journal-Gazette Co. v. Bandido's, Inc., 712 N.E.2d 446, 451 (Ind. 1999)).

316. *Id.* (citing Lovings v. Thomas, 805 N.E.2d 442, 447 (Ind. Ct. App. 2004)). Communications can be per se defamatory, in which case damages are presumed without proof, but that form of defamation is not applicable in *Hamilton*. *Id.*

317. *Id.* (quoting *Bandido's*, 712 N.E.2d at 452 n.6).

318. *Id.* at 1243-44.

court concluded "that defamation and parody are mutually exclusive."[319] The court reasoned that "'parody' is speech that one cannot reasonably believe to be fact because of its exaggerated nature," whereas defamation requires a "false statement of fact."[320] The court warned, however, that an action may still lie for defamatory imputation of fact that is "couched in humor" because the key to the analysis is whether the information is factual.[321]

The *Hamilton* court disagreed with the plaintiff's arguments and concluded that the website at issue was a parody despite the factual differences between this case and *Hustler v. Falwell*,[322] a U.S. Supreme Court case wherein defendant Falwell's claim of intentional infliction of emotional distress was dismissed on summary judgment because the cartoon about which he complained was deemed to be a parody rather than defamatory imputation of fact.[323]

B. Battery

In *Mullins v. Parkview Hospital, Inc.*,[324] the Indiana Supreme Court affirmed the trial court's grant of summary judgment to defendant LaRea VanHoey ("VanHoey"), a then student of a University of St. Francis emergency medical technician certification program.[325] The plaintiffs, W. Ruth Mullins and Johnce Mullins, Jr. (collectively "Mullins"), sued VanHoey for battery for injuries Ruth Mullins suffered as a result of VanHoey's attempt to intubate Mullins.[326] In affirming the trial court, the Indiana Supreme Court concluded that there was no evidence that VanHoey intended to harm Mullins, a prerequisite to a successful battery claim.[327]

The court first examined the limited consent that Mullins gave to her doctors. Mullins consented to the surgery, but crossed out those portions of the consent form allowing "'the presence of healthcare learners'" and photography and videotaping of the procedure.[328] Nevertheless, the gynecologist and anesthesiologist attending Mullins's surgery allowed VanRoey, a student, to

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319. *Id.* at 1244 (citing Browning v. Clinton, 292 F.3d 235, 248 (D.C. Cir. 2002); Victoria Square, LLC v. Glastonbury Citizen, 891 A.2d 142, 145 (Conn. Super. Ct. 2006); Kiesau v. Bantz, 686 N.W.2d 164, 176-77 (Iowa 2004); Stein v. Marriott Ownership Resorts, Inc., 944 P.2d 374, 380 (Utah Ct. App. 1997). The *Hamilton* court also relied heavily on the U.S. Supreme Court's opinion in *Hustler v. Falwell*, 485 U.S. 46, 57 (1988), which discussed parody with regard to actual malice in an intentional infliction of emotional distress claim. *Id.*

320. *Id.*

321. *Id.* at 1245 (citing *Hamilton*, 860 N.E.2d at 1251 (Najam, J., concurring)).

322. 485 U.S. 46 (1988).

323. *Hamilton*, 860 N.E.2d at 1245-47.

324. 865 N.E.2d 608 (Ind. 2007).

325. *Id.* at 609.

326. *Id.*

327. *Id.*

328. *Id.*

attempt to intubate Mullins, which resulted in injury.[329]

The court found that "[e]very actor in a medical context, however, is not obligated to obtain consent," and "the burden falls on a physician to obtain a patient's consent for treatment."[330] In this case, the physician and anesthesiologist did obtain consent from Mullins for her surgery; however, neither passed along to VanHoey that Mullins did not consent to the presence of students.[331] Based upon VanHoey's status as a student, the court held that "she was under no obligation to obtain consent herself or inquire into the consent under which [the anesthesiologist] was acting."[332]

Because VanHoey was not obligated to obtain or know of Mullins's consent, the Mullinses had to "establish the traditional elements of battery," which includes intent to cause harm.[333] The court found that the Mullinses did not allege that VanHoey intended her acts to cause harm to Mullins, and there were no facts or evidence supporting a proposition that VanRoey intended to harm Mullins.[334] Therefore, the court affirmed the trial court's grant of summary judgment in favor of VanRoey, "a student following a curriculum and the instructions of her superiors" who had no intent to cause harm.[335]

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329. *Id.*

330. *Id.* at 610 (citing Culbertson v. Mernitz, 602 N.E.2d 98, 101 (Ind. 1992)).

331. *Id.* at 611.

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.* at 612.