

RECENT DEVELOPMENTS IN INDIANA TORT LAW

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This Article discusses noteworthy tort law in Indiana during the survey period, October 1, 2008 through September 30, 2009. It is not intended as a comprehensive or exhaustive overview.

I. STATUTORY UPDATES

The survey period saw a number of new Acts enacted by the Indiana General Assembly in a number of areas. The subject matter is neither a comprehensive nor an exhaustive examination of legislative updates applicable to tort law during the survey period. Moreover, Indiana courts have yet to hand down a decision concerning the legislative updates.

A. *Qualified Immunity for School Personnel*

During the survey period, the General Assembly amended Indiana Code section 20-33-8-8 to grant qualified immunity to school corporation personnel with respect to a disciplinary action taken to promote student conduct “if the action is taken in good faith and is reasonable.”¹ Such disciplinary action must “promote student conduct that conforms with an orderly and effective educational system.”²

B. *Qualified Immunity for Youth Shelters*

An entity that “is not operated for profit”³ but “provides, at a minimum, necessary services to runaway or homeless youths,”⁴ is now immune from civil liability resulting from any act or omission related to admitting, caring for, or releasing a runaway or homeless youth, including its directors, employees, agents, or volunteers.⁵ But the General Assembly created an exception for acts

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1. IND. CODE § 20-33-8-8(b)(3) (Supp. 2009) (The addition of subsection (b)(3) was the only change to this section of the statute during the survey period.).

2. *Id.* § 20-33-8-8(b)(2).

3. *Id.* § 34-30-25-3(1).

4. *Id.* § 34-30-25-3(2).

5. *Id.* § 34-30-25-4. “Necessary services” are defined as the following:

1. Engaging in outreach services to locate and assist runaway or homeless youths.
2. Providing food and access to overnight shelter to a runaway or homeless youth.
3. Counseling a runaway or homeless youth to address immediate psychological or

of “gross negligence or willful and wanton misconduct.”⁶ The General Assembly defined “runaway or homeless youth” as an individual between the ages of twelve and eighteen years old who is unemancipated, mentally competent, or lives in a situation described in 42 U.S.C. § 11434a(2)(B)(ii) or § 11434a(2)(B)(iii) regardless of whether the parent, guardian, or custodian had knowledge or gave consent.⁷

II. NEGLIGENCE

A. Duty of Care

In *Clary v. Dibble*,⁸ the Indiana Court of Appeals affirmed the trial court’s grant of summary judgment as to the plaintiff’s claims of negligence and respondeat superior.⁹ The morning of a K&P Roofing Siding & Home Improvement’s (“K&P”) golf tournament, Patrick H. Dibble, an independent contractor, consumed a prescription pain reliever and had a hangover from drinking the night before.¹⁰ K&P employees saw that Dibble was visibly nauseated throughout the day.¹¹ Upon leaving the tournament, Dibble struck two motorcyclists, killing one.¹²

The court concluded that K&P did not owe plaintiffs a duty to prevent Dibble from leaving the golf course impaired.¹³ The court first recited the elements plaintiffs must establish under the theory of negligence as: “(1) defendant’s duty to conform his conduct to a standard of care arising from his relationship with the plaintiff, (2) A failure of the defendant to conform his conduct to that standard of care, and (3) An injury to the plaintiff proximately caused by the breach.”¹⁴

The court then restated the balancing factors for determining whether a duty exists: (1) the parties’ relationship; (2) the harm’s reasonable foreseeability to

emotional problems.

4. Screening a runaway or homeless youth for basic health needs and referring a runaway or homeless youth to public and private agencies for health care.
5. Providing long term planning, placement, and follow-up services to a runaway or homeless youth.
6. Referring a runaway or homeless youth to any other assistance or services offered by public and private agencies.

Id. § 34-30-25-1.

6. *Id.* § 34-30-25-5.

7. *Id.* § 34-30-25-2.

8. 903 N.E.2d 1032 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 546 (Ind. 2009).

9. *Id.* at 1041.

10. *Id.* at 1035.

11. *Id.* at 1036.

12. *Id.*

13. *Id.* at 1040-41.

14. *Id.* at 1038.

the injured person; and (3) concerns of public policy.¹⁵

The Indiana Supreme Court in *Gariup* explained that, as between an employer, an employee, and third-person motorists potentially “exposed to significant danger in the event of [the employee’s] drunk driving, there existed a relationship which as a matter of law gave rise to a duty on the part of [the employer] to exercise ordinary and reasonable care.”¹⁶

First, the court could not find that a relationship existed because Dibble was an independent contractor instead of an employee, “and therefore, was not under K&P’s influence and control as contemplated by *Gariup*.”¹⁷ The court then found that “K&P did not in any way contribute to Dibble’s impairment, where Dibble had been drinking on his own the night before the tournament and had taken a ‘prescription medication prior to the tournament.’”¹⁸

The court reasoned that the “foreseeability component of duty requires . . . a general analysis of the broad type of plaintiff and harm involved, without regard to the facts of the actual occurrence.”¹⁹ The court found that it was not reasonably foreseeable for an individual, in Dibble’s circumstances on the day in question, to cause an automobile accident.²⁰

The court concluded by reasoning that factors including “convenience of administration, capacity of the parties to bear the loss, a policy of preventing future injuries, and the moral blame attached to the wrongdoer,”²¹ are all weighed in a public policy decision to determine the existence of a duty. The court held that although society has a legitimate interest in protecting its citizens from seriously impaired drivers, the demands that the drivers bear responsibility for their own negligent driving outweigh such an interest.²²

In *Witmat Development Corp. v. Dickison*,²³ the Indiana Court of Appeals reversed the trial court’s grant of summary judgment in favor of the defendants involving the question of whether the intoxicated plaintiff (Dickison), whose vehicle struck a tree and fell into a water filled strip pit, was owed a duty by the property owner, Witmat.²⁴ The court explained that Dickison’s estate must demonstrate that (1) Witmat owed Dickison a duty; (2) Witmat breached the duty; and (3) the breach proximately caused Dickison’s death.²⁵ The court, applied the Webb test to determine whether a duty exists as “(1) the relationship between the parties; (2) the reasonable foreseeability of the harm to the person

15. *Id.* (citing *Estate of Heck ex rel. Heck v. Stoffer*, 786 N.E.2d 265, 268 (Ind. 2003)).

16. *Id.* at 1039 (quoting *Gariup Constr. Co. v. Foster*, 519 N.E.2d 1224, 1229 (Ind. 1988)).

17. *Id.*

18. *Id.* at 1039-40.

19. *Id.* at 1040 (quoting *Clark v. Aris, Inc.*, 890 N.E.2d 760, 764 (Ind. Ct. App. 2008)).

20. *Id.*

21. *Id.* (quoting *Williams v. Cingular Wireless*, 809 N.E.2d 473, 478 (Ind. Ct. App. 2004)).

22. *Id.*

23. 907 N.E.2d 170 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 552 (Ind. 2009).

24. *Id.* at 171-72.

25. *Id.* at 173 (citing *Winchell v. Guy*, 857 N.E.2d 1024, 1026 (Ind. Ct. App. 2006)).

injured; and (3) public policy concerns.”²⁶

The court found that Witmat owed no duty to Dickison.²⁷ Although traditionally those who occupy land adjacent to roads and highways have an obligation “to use reasonable care not to endanger such passage by excavations or other hazards so close to the road as to make it unsafe to persons using the road with ordinary care,”²⁸ Dickison’s failed to exert reasonable care, as his blood alcohol was 0.172 to 0.204 when he died.²⁹ Also, the plaintiff could not identify any evidence that the accident happened because Dickison overcorrected.³⁰

In *Harradon v. Schlamadinger*,³¹ the court addressed whether a property owner owes a duty to a two-month old who suffocated while sleeping on the owner’s couch with his mother.³² The parents sued the defendants, and trial court granted summary judgment in favor of the defendants.³³

The court held that a landowner is subject to liability for physical harm suffered by his invitees by a condition on the land if he:

- (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
- (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
- (c) fails to exercise reasonable care to protect them against the danger.³⁴

The court concluded that the minor plaintiffs, who were seventeen years old at the time of the incident, must exercise the standard of care of adults.³⁵ The court found that because the baby was entirely dependent on the care of his minor parents, the scope of the defendants’ care was limited to a duty to supervise the plaintiffs.³⁶ The court also relied on the fact that the baby was in their exclusive care the evening in question.³⁷

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

27. *Id.* at 175.

28. *Id.* (quoting *Ind. Limestone Co. v. Staggs*, 672 N.E.2d 1377, 1381 (Ind. Ct. App. 1996)); see *City of Indianapolis v. Emmelman*, 9 N.E. 155, 157 (Ind. 1886).

29. *Witmat Dev. Corp.*, 907 N.E.2d at 174.

30. *Id.* at 175.

31. 913 N.E.2d 297 (Ind. Ct. App. 2009), *trans. denied*, No. 75A03-0903-CV-114, 2010 Ind. LEXIS 44 (Ind. Jan. 14, 2010).

32. *Id.* at 298-99.

33. *Id.* at 298.

34. *Id.* at 301 (citing *Burrell v. Meads*, 569 N.E.2d 637, 639-40 (Ind. 1991); RESTATEMENT (SECOND) OF TORTS § 343 (1965)). All three of these preconditions must be met before a landowner will be held liable. *Id.*

35. *Id.*

36. *Id.*; see also *Davis v. LeCuyer*, 849 N.E.2d 750, 757 (Ind. Ct. App. 2006).

37. *Harradon*, 913 N.E.2d at 301; see *Kelly v. Ladywood Apartments*, 622 N.E.2d 1044, 1049 (Ind. Ct. App. 1993) (holding that the “immediate presence” of a supervising parent negates

The court also concluded that the Schlamadinger's sofa was not a dangerous condition on the property within the meaning of the Restatement.³⁸ Also, a sofa is a common household item, not generally presented as an unreasonable risk of harm to a baby.³⁹ The court held that "[t]he law does not require the [defendants] to protect a youthful invitee, such as the baby, from a danger on their premises which [the parents] themselves created, were fully aware of, and yet consciously disregarded."⁴⁰ Due to their exclusive care of the baby, the parents owed a duty to the baby to exercise reasonable care to protect the baby from a condition on the defendant's property.⁴¹

B. *Res Ipsa Loquitur*

In *Ziobron v. Squires*,⁴² the Indiana Court of Appeals affirmed the trial court's grant of summary judgment for the defendant medical providers in a case involving alleged malpractice cause during a vaginal hysterectomy with removal of ovaries and fallopian tubes and a bladder sling procedure.⁴³

The court explained that, under the doctrine of *res ipsa loquitur*, negligence may be inferred where: "1) the injuring instrumentality is shown to be under the management or exclusive control of the defendant or his servants, and 2) the accident is such as in the ordinary course of things does not happen if those who have management of the injuring instrumentality use proper care."⁴⁴

A physician's alleged negligence may be so apparent that, due to *res ipsa loquitur*, expert testimony is unnecessary to raise a genuine issue of material fact.⁴⁵ But the physician's care must be so "obviously substandard" that a layperson could recognize it.⁴⁶ The court concluded that, in addition to the plaintiff's failure to provide sufficient evidence, preparation for the bladder sling procedure, and the likelihood of symptoms following it developing five years afterwards, fell outside of the realm of negligible conduct inferable by a layperson under Indiana precedent.⁴⁷

"the policy reasons for shifting the duty of care for a child from" the parent to a third party).

38. *Harradon*, 913 N.E.2d at 302 (Ind. Ct. App. 2009); see also RESTATEMENT (SECOND) OF TORTS § 343(a) (1965).

39. *Harradon*, 913 N.E.2d at 302 (citing *Lowden v. Lowden*, 490 N.E.2d 1143, 1146-47 (Ind. Ct. App. 1986)).

40. *Id.* (citing *Johnson v. Pettigrew*, 595 N.E.2d 747, 752 (Ind. Ct. App. 1992)).

41. *Id.*

42. 907 N.E.2d 118 (Ind. Ct. App. 2008). Although this is a medical malpractice case, this has been included in the survey due to its discussion *res ipsa loquitur*.

43. *Id.* at 120.

44. *Id.* at 125 (citing *Syfu v. Quinn*, 826 N.E.2d 699, 704 (Ind. Ct. App. 2005)).

45. *Id.* at 123 (citing *Syfu*, 826 N.E.2d at 703; *Wright v. Carter*, 622 N.E.2d 170, 171 (Ind. 1993)).

46. *Id.* (quoting *Malooley v. McIntyre*, 597 N.E.2d 314, 319 (Ind. Ct. App. 1992)).

47. *Id.* at 126-27. The court compared Hostetter's bladder sling procedure to a number of cases. See *id.* (citing *Wright v. Carter*, 622 N.E.2d 170, 171 (Ind. 1993) (wiring left in patient's

C. Negligence Per Se

The Indiana Court of Appeals addressed one case of statutory negligence during the survey period. In *Lindsey v. DeGroot*,⁴⁸ the court affirmed the trial court's grant of summary judgment in favor of DeGroot Dairy.⁴⁹ Plaintiffs alleged that DeGroot was negligent based on a preliminary injunction (later vacated) issued by the Indiana Department of Environmental Management (IDEM) against DeGroot for manure runoff.⁵⁰

The court restated the broad principle of negligence per se: "statutory negligence is not predicated upon any test for ordinary or reasonable care, but rather is founded in the defendant's violation of a specific requirement of law."⁵¹ The court did note that an "unexcused or unjustified violation" of a statutory duty is negligence per se.⁵² But simply committing statutory negligence fails to automatically translate to "liability *per se*."⁵³ Regardless of an established violation of a statutory duty, no actionable claim arises without first showing proximate cause between the violation and the injury.⁵⁴

The court found that the IDEM preliminary injunction concerned a manure runoff not affecting the Lindseys' land.⁵⁵ The court was not convinced that any of DeGroot's alleged or actual 2002 Continued Feeding Operation violations harmed the value of the Lindseys' land as a foreseeable consequence.⁵⁶ In fact, the court found that the land value increased despite the violations.⁵⁷

D. Causation

In *Sparks v. White*,⁵⁸ the court addressed whether defendants were entitled to summary judgment based on lack of proximate cause where the plaintiff was

body following procedure)); *Ball Mem'l Hospital v. Freeman*, 196 N.E.2d 274 (Ind. 1964) (poison administered into patient); *Funk v. Bonham*, 183 N.E. 312 (Ind. 1932) (sponge left in patient's torso); *Cleary v. Manning*, 884 N.E.2d 335 (Ind. Ct. App. 2008) (patient's oxygen mask ignited from sparks emanating surgical instruments); *Gold v. Ishak*, 720 N.E.2d 1175 (Ind. Ct. App. 1999), *Stumph v. Foster*, 524 N.E.2d 812 (Ind. Ct. App. 1988) (patient's rib broken during chiropractor's attempt to treatment migraine headaches), *Klinger v. Caylor*, 276 N.E.2d 848 (Ind. 1971) (surgical padding left in intestinal tract), *Ciesiolka v. Selby*, 261 N.E.2d 95 (Ind. Ct. App. 1970) (mesh left in patient's torso).

48. 898 N.E.2d 1251 (Ind. Ct. App. 2009).

49. *Id.* at 1265.

50. *Id.* at 1260 & n.3.

51. *Id.* (quoting *Smith v. Cook*, 361 N.E.2d 197, 199 (Ind. App. 1977)).

52. *Id.* (quoting *Town of Montezuma v. Downs*, 685 N.E.2d 108, 112 (Ind. Ct. App. 1997)).

53. *Id.* (citing *Inland Steel v. Pequignot*, 608 N.E.2d 1378, 1383 (Ind. Ct. App. 1993)).

54. *Id.* (citing *Inland Steel*, 608 N.E.2d at 1383).

55. *Id.* at 1260-61.

56. *Id.* at 1261-62.

57. *Id.*

58. 899 N.E.2d 21 (Ind. Ct. App. 2008).

injured after she drove off the road and struck the Sparkeses' mailbox.⁵⁹ The Sparkses argued that, even if they owed a duty, they were entitled to summary judgment because they did not proximately cause plaintiff's injuries.⁶⁰

The court noted that proximate cause is a factual issue not properly resolved by summary judgment.⁶¹ The court held that "[a]n act or omission is said to be a proximate cause of an injury if the resulting injury was foreseen, or reasonably should have been foreseen, as the natural and probable consequence of the act or omission."⁶² The court also held that "the plaintiff's burden of proof on foreseeability is higher for purposes of proximate cause than for purposes of the duty analysis."⁶³

The court concluded that, regardless of the plaintiff's possible violation of her own duty to maintain control of her vehicle, the Sparkses could have foreseen that plaintiff would drive out of her lane, cross oncoming traffic, leave the road and unavoidably hit their mailbox.⁶⁴ Moreover, the court concluded that a jury should address the allocation of fault because it is a "real possibility" that the plaintiff was more than fifty percent at fault for her injuries suffered, regardless of the foreseeability.⁶⁵ The court concluded that the trial court did not err in denying the plaintiff's motion for summary judgment and reversed and remanded the cause to the trial court.⁶⁶

In *Cook v. Ford Motor Co.*,⁶⁷ the court addressed whether the act of a child unbuckling her seatbelt before a vehicular collision was an intervening and superseding cause in the chain of causation.⁶⁸ Peter Cook read the page in his 1997 Ford truck manual regarding air bag, but failed to see or read the sun visor warning regarding passenger seating in relation to seat belts and air bags.⁶⁹ When the truck was involved in a low-speed rear-end collision,⁷⁰ his daughter, Lindsey, was sitting unbuckled in the front passenger seat.⁷¹ When the airbags deployed, Lindsey was injured.⁷²

The Cooks sued Ford Motor Co. for failure to warn.⁷³ The court granted summary judgment for defendants, noting that "[t]he alleged failure to give

59. *Id.* at 22.

60. *Id.* at 29.

61. *Id.* (citing *Rhodes v. Wright*, 805 N.E.2d 382, 388 (Ind. 2004); *Hedrick v. Tabbert*, 722 N.E.2d 1269, 1273 (Ind. Ct. App. 2000)).

62. *Id.* (citing *Funson v. Sch. Town of Munster*, 849 N.E.2d 595, 600 (Ind. 2006)).

63. *Id.* at 29-30 (citing *Goldsberry v. Grubbs*, 672 N.E.2d 475, 479 (Ind. Ct. App. 1996)).

64. *Id.* at 29.

65. *Id.* at 30.

66. *Id.*

67. 913 N.E.2d 311 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 785 (Ind. 2010).

68. *Id.* at 328-31.

69. *Id.* at 316-17.

70. *Id.* at 317.

71. *Id.*

72. *Id.*

73. *Id.*

adequate warnings was not the proximate cause of the harm because [the Cooks] failed to reads the warnings provided.”⁷⁴

The court noted that the defendant’s act or omission only need serve as one proximate cause to the injury, not the only proximate cause.⁷⁵ “Proximate cause is primarily a question of fact to be determined by the jury and therefore, ordinarily is not properly resolved on summary judgment.”⁷⁶ The court held that “[c]hildren between the ages of seven and fourteen are required to exercise due care for their own safety under the circumstances of a child of like age, knowledge, judgment, and experience and there is a rebuttable presumption they are incapable of negligence.”⁷⁷ A reasonably foreseeable intervening act does “not break the chain of causation,” meaning that the first wrongful act may “still be considered the proximate cause of an injury.”⁷⁸

The court concluded that the question of whether Lindsey broke the chain of causation is a jury question.⁷⁹ There is no dispute that the Cooks followed the seat belt instructions when they placed Lindsey in the front seat, but Lindsey occasionally unbelted her seat belt in the past and that this time was no different.⁸⁰ Because Lindsey was eight years old, there was a rebuttable presumption that she was incapable of negligence.⁸¹ The court held that at best a jury question existed “whether Lindsey failed to exercise the due care required of her for her own safety under these circumstances and, if so, whether her failure was an intervening cause sufficient to break any chain of causation leading back to Ford.”⁸²

The court also held that a jury should decide whether the backseat and airbag instructions were an adequate warning to the danger of airbag deployment.⁸³ The court also found that Lindsey’s injury could have been prevented had the Cooks

74. *Id.* at 318.

75. *Id.* at 328 (quoting *Hassan v. Begley*, 836 N.E.2d 303, 307 (Ind. Ct. App. 2005)); *see* IND. CODE § 34-51-2-1 (2009).

76. *Cook*, 913 N.E.2d at 328 (citing *Sparks v. White*, 899 N.E.2d 21, 29 (Ind. Ct. App. 2008)).

77. *Id.* at 329 (citing *Creasy v. Rusk*, 730 N.E.2d 659, 662 (Ind. 2000)).

78. *Id.* (citing *Briesacher v. Specialized Restoration and Constr., Inc.*, 888 N.E.2d 188, 194 (Ind. Ct. App. 2008); *Conder v. Hull Lift Truck, Inc.*, 435 N.E.2d 10, 14 (Ind. 1982) (when an individual, other than the alleged tortfeasor, acts in a way that affects the chain of causation, said act is an intervening cause, breaking the chain of causation if unforeseeable)).

79. *Cook*, 913 N.E.2d at 329-30 (citing *Control Techniques, Inc. v. Johnson*, 762 N.E.2d 104, 107 (Ind. 2002) (foreseeability concerning intervening causes from the original wrongdoer is jury question); *Underly v. Advance Mach. Co.*, 605 N.E.2d 1186, 1189 (Ind. Ct. App. 1993) (foreseeability concerning intervening misuse is a jury question), *superseded by statute as stated in* 790 N.E.2d 1023 (Ind. Ct. App. 2003)).

80. *Id.* at 328-29.

81. *Id.* at 329.

82. *Id.* (citations and footnotes omitted).

83. *Id.* at 330.

placed her in the backseat.⁸⁴ While the vehicle instruction told parents in equivocal language to do so “if possible,” they also did not address the role airbags play in affecting the safety of children in the front seat.⁸⁵ The court concluded that “Ford failed to negate an element of the Cooks’ failure to warn claim as a matter of law,” rendering summary judgment inappropriate.⁸⁶ The court reversed and remanded the case for further proceedings.⁸⁷

In *Foddrill v. Crane*,⁸⁸ the court addressed circumstances under which a plaintiff need not present expert testimony in order to establish proximate cause.⁸⁹ Plaintiff was injured after being struck in her vehicle while at a traffic light.⁹⁰ At trial, the defendant proposed instruction that the jury should not infer negligence from a rear end collision, which the court denied.⁹¹ Moreover, the jury apportioned one-hundred percent fault to defendant.⁹² On appeal, defendant claimed that Crane failed to produce sufficient expert testimony to establish that a breach of duty proximately caused her injuries.⁹³

The court noted that proximate cause “requires, at a minimum, causation in fact—that is, that the harm would not have occurred ‘but for’ the defendants’ conduct.”⁹⁴ Rather than rely on speculation, the plaintiff must “present evidence of probative value based on facts, or inferences to be drawn [therefrom], establishing both that the wrongful act was the cause in fact of the occurrence and that the occurrence was the cause in fact of her injury.”⁹⁵

The court found sufficient evidence of “but-for” causation, as defendant was possibly using his cell phone at the time of the accident.⁹⁶ He claimed that it was inoperative.⁹⁷ Although, he was seen holding it as he exited the vehicle and later was seen placing calls with it.⁹⁸ The court next concluded that no expert testimony was required to show a causal relationship between the accident and Crane’s injuries following the accident.⁹⁹ Generally, courts consider plaintiffs competent to testify to an injury that is objective in nature without expert testimony.¹⁰⁰ But “[w]hen the issue of cause is not within the understanding of

84. *Id.* at 334.

85. *Id.* at 326-27.

86. *Id.* at 331.

87. *Id.*

88. 894 N.E.2d 1070 (Ind. Ct. App. 2008), *trans. denied*, 915 N.E.2d 982 (Ind. 2009).

89. *Id.* at 1077-78.

90. *Id.* at 1074-75.

91. *Id.* at 1075.

92. *Id.*

93. *Id.* at 1077-78.

94. *Id.* at 1077.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 1078.

100. *Id.* at 1077.

a lay person, testimony of an expert witness on the issue is necessary.”¹⁰¹ Although Crane’s physician was unable to definitely say that the collision caused Crane’s injuries, the injuries’ nature were objective “inasmuch as [the physician] was able to detect their physical manifestations.”¹⁰² The court concluded that a layperson could understand the causal connection in the absence of an expert’s help.¹⁰³

In *Kovach v. Caligor Midwest*,¹⁰⁴ the Indiana Supreme Court addressed whether a failure to warn was the proximate cause of the patient’s death.¹⁰⁵ Following surgery, nine-year-old Matthew Kovach was administered acetaminophen with codeine in a medicine cup with a volume a little more than 30 milliliters (mL).¹⁰⁶ The nurse testified that she only administered the 15 mL prescribed for him, but Matthew’s parents claimed that the cup was completely full.¹⁰⁷ Shortly after being discharged, Matthew went into respiratory arrest and died of asphyxia.¹⁰⁸ The Kovachs sued the medicine cup’s distributor and manufacturers.¹⁰⁹

At trial, the court admitted the affidavit of a pharmacist who found the measuring cup unsuitable for precision measurement and needing an appropriate warning.¹¹⁰ The trial court eventually granted summary judgment in favor of the defendants.¹¹¹ The Indiana Court of Appeals reversed, holding that “(1) the trial court did not abuse its discretion in admitting [the] affidavit,” and (2) a genuine issue of fact precluded the plaintiff’s claims against the defendants.¹¹² On proximate cause, the court held that “the missing warning is in essence a presumption of causation.”¹¹³

The supreme court found issue of causation dispositive to all four claims.¹¹⁴ Issues of causation-in-fact and scope of liability compose proximate cause.¹¹⁵ The burden is on the plaintiff to show that “but for the defendant’s allegedly tortious act or omission, the injury at issue would not have occurred.”¹¹⁶ Scope

101. *Id.*

102. *Id.* at 1077-78.

103. *Id.*

104. 913 N.E.2d 193 (Ind. 2009).

105. *Id.* at 196-97.

106. *Id.* at 195.

107. *Id.*

108. *Id.*

109. *Id.* at 195-96.

110. *Id.* at 196.

111. *Id.*

112. *Id.*

113. *Id.* (citing *Ortho Pharm. Corp. v. Chapman*, 388 N.E.2d 541, 555 (Ind. App. 1979)).

114. *Id.* at 197; see also *Ford Motor Co. v. Rushford*, 868 N.E.2d 806, 810 (Ind. 2007); 63 AM. JUR. 2D *Products Liability* § 724 (1997).

115. *Kovach*, 913 N.E.2d at 197 (citing *City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1243-44 (Ind. 2003)).

116. *Id.* at 198 (citing *Smith & Wesson Corp.*, 801 N.E.2d at 1243-44).

of liability requires that the injury be “a natural and probable consequence of the defendant’s conduct, which in the light of the circumstances, should have been foreseen or anticipated.”¹¹⁷

On transfer, the Indiana Supreme Court concluded that the undisputed facts failed to establish a causal connection between Matthew’s overdose and the precision-measuring nature of the measuring cup in question.¹¹⁸ The court first found that Matthew’s death could not be attributed to any alleged defects in the cup itself.¹¹⁹ It was an undisputed fact that if there was an overdose in this case, it was not caused by an imprecise measurement of medication attributable to any alleged defects in the cup itself.¹²⁰ Instead, the accident was due to “an erroneous double dosage of 30 mL of codeine when [he] was only supposed to receive 15 mL.”¹²¹ This precluded any need to address the admissibility of the physician’s expert testimony.¹²² The undisputed fact that the cup at issue could result in a twenty to thirty percent margin of error fails to account for the one hundred percent error in codeine administration.¹²³

The Indiana Supreme Court also distinguished the application of the *Ortho* rule from the court of appeals in disposing of the failure-to-warn claim.¹²⁴ The court noted that the *Ortho* rule, which holds that a missing warning would have been read and obeyed had it been present,¹²⁵ ignores the reality that “[t]he plaintiff invoking the presumption must still show that the danger would have been prevented by an appropriate warning was the danger that materialized in the plaintiff’s case.”¹²⁶ In this case, even if the *Ortho* rule were applied, and a nurse would have read a warning that the cup were not designed for precision measurement, the court would have to conclude that Matthew’s cause of death was the result of imprecise measurement, which is already established not to be the case.¹²⁷ The court unanimously concluded that the Defendants had established that the cup’s alleged defects had not caused Matthew’s death and affirmed the trial court’s grant of summary judgment in their favor.¹²⁸

117. *Id.* (citing *Smith & Wesson Corp.*, 801 N.E.2d at 1244).

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 199.

125. *Id.* (citing *Ortho Pharm. Corp. v. Chapman*, 388 N.E.2d 541, 555 (Ind. App. 1979)).

126. *Id.* Compare *Ortho Pharm. Corp.*, 388 N.E.2d at 555; *Nissen Trampoline Co. v. Terre Haute First Nat’l Bank*, 332 N.E.2d 820, 826-27 (Ind. Ct. App. 1975), *rev’d on procedural grounds*, 358 N.E.2d 974 (1976), with 2 DAN B. DOBBS, *THE LAW OF TORTS* § 367 (2001) and 1 DAVID G. OWEN ET AL., *MADDEN & OWEN ON PRODUCTS LIABILITY* § 9:11 (3d ed. 2000).

127. *Kovach*, 913 N.E.2d at 199.

128. *Id.* at 200.

E. Infliction of Emotional Distress

In *Lindsey v. DeGroot*,¹²⁹ the court addressed an alleged and intentional trespass of Lindsey's disputed property by a DeGroot employee and intentional infliction of emotional distress.¹³⁰ This portion of the Article discusses Lindsey's intentional infliction of emotional distress claim.

Intentional infliction of emotional distress is defined as one who: "(1) [e]ngages in extreme and outrageous conduct (2) [w]hich intentionally or recklessly (3) [c]auses (4) [s]evere emotional distress to another."¹³¹

In affirming summary judgment, the court concluded that DeGroot's actions did not constitute "outrageous" behavior as contemplated under law.¹³² DeGroot's dairy farm operated largely within Indiana regulations, and their activity was not extreme, atrocious, and intolerable beyond all possible bounds of decency.¹³³ The court also could not find evidence that DeGroot intended to cause emotional distress.¹³⁴

F. Assumption of Risk

In *Spar v. Cha*,¹³⁵ the Indiana Supreme Court held that, among other things, "incurred risk is not a defense to medical malpractice based on negligence or lack of informed consent."¹³⁶ Brenda Spar suffered complications arising from a laparoscopic surgery to repair a perforated bowel and Spar sued.¹³⁷ Following a jury verdict in favor of the defendant, Spar appealed.¹³⁸ The court of appeals reversed and remanded, holding that "except where a patient has disregarded her physician's instructions, incurred risk is not a defense to claims of lack of informed consent or negligent performance of a medical procedure."¹³⁹

The court has defined the largely obsolete defense of "incurred risk" or "assumption of risk" in four ways:

1. "Express," in which "the plaintiff has given his express consent to relieve the defendant of an obligation to exercise care . . . , and agrees to take his chances as to injury from a known or possible risk."
2. "Implied primary," in which "the plaintiff has entered voluntarily into some relation with the defendant which he knows to involve the risk,"

129. 898 N.E.2d 1251 (Ind. Ct. App. 2009).

130. *Id.* at 1256.

131. *Id.* at 1264 (citing *Cullison v. Medley*, 570 N.E.2d 27, 31 (Ind. 1991)); *see also* *Bradley v. Hall*, 720 N.E.2d 747, 752-53 (Ind. Ct. App. 1999).

132. *Lindsey*, 898 N.E.2d at 1264-65.

133. *Id.*

134. *Id.* at 1265.

135. 907 N.E.2d 974 (Ind. 2009).

136. *Id.* at 976.

137. *Id.* at 976-78.

138. *Id.* at 979.

139. *Id.* (citing *Spar v. Cha*, 881 N.E.2d 70, 70, 74-75 (Ind. Ct. App. 2008)).

and is deemed to have impliedly agreed to relieve the defendant of responsibility, and to take his own chances. A spectator at a baseball game consents to the game's proceeding without precautions to protect from being hit by the ball.

3. "Implied secondary," in which "the plaintiff, aware of a risk created by the negligence of the defendant, proceeds or continues voluntarily to encounter it." An example is an independent contractor who knows that he has been furnished by his principal with a machine in dangerous condition but reasonably continues to work with it.

4. "Unreasonable," in which the plaintiff's conduct in voluntarily encountering a known risk is itself unreasonable, and amounts to contributory negligence.¹⁴⁰

Express or implied "consent must be based on actual knowledge of the risk, not merely 'general awareness of a potential for mishap.'"¹⁴¹ Implied assumption of the risk is an affirmative defense that relieves a defendant of the duty of care concerning negligence.¹⁴² They may not require an affirmative defense pleading under Trial Rule 8, "because they negate an element of the claim," and the burden is on the defendant.¹⁴³ But implied secondary assumption of risk fails to "negate the defendant's duty or breach."¹⁴⁴

In affirming the court of appeals, the Indiana Supreme Court agreed with the court of appeals' conclusion that "assumption of risk—whether in the express, primary, or secondary sense—has little legitimate application in the medical malpractice context."¹⁴⁵ The court held that "the disparity in knowledge between professionals and their clientele generally precludes recipients of professional services from knowing whether a professional's conduct is in fact negligent."¹⁴⁶ Thus, "there is virtually no scenario in which a patient can consent to allow a healthcare provider to exercise less than 'ordinary care.'"¹⁴⁷ Even if the defense

140. *Id.* at 979-80 (quoting RESTATEMENT (SECOND) OF TORTS § 496A cmt. c (1965)); *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 68, at 480-81, 496-97.

141. *Spar*, 907 N.E.2d at 981 (quoting *Clerk v. Wiegand*, 617 N.E.2d 916, 918 (Ind. 1993); *Beckett v. Clinton Prairie Sch. Corp.*, 504 N.E.2d 552, 554 (Ind. 1987)).

142. *Id.*; *see also* *Get-N-Go, Inc. v. Markins*, 544 N.E.2d 484, 486 (Ind. 1989); KEETON ET AL., *supra* note 140, § 68, at 480-81.

143. *Spar*, 907 N.E.2d at 981; *see also* RESTATEMENT (SECOND) OF TORTS § 496G cmt. c ("Assumption of risk . . . comes into question only where there would otherwise be a breach of some duty owed by the defendant to the plaintiff. It is then a defense, which relieves the defendant of the liability to which he would otherwise be subject. The burden of proof is therefore upon the defendant."); DAN B. DOBBS, THE LAW OF TORTS, § 250 (2001) (footnotes omitted).

144. *Spar*, 907 N.E.2d at 981; *see also* *Richardson v. Marrell's, Inc.*, 539 N.E.2d 485, 486 (Ind. Ct. App. 1989), *trans. denied* (Nov. 7, 1989).

145. *Spar*, 907 N.E.2d at 982.

146. *Id.* (quoting *Morrison v. MacNamara*, 407 A.2d 555, 567 (D.C. 1979) (citations omitted); *accord* *Smith v. Hull*, 659 N.E.2d 185, 194 n.6 (Ind. Ct. App. 1995)).

147. *Id.* (quoting *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 884 (Del. Super. Ct.

were available, the court could not find any evidence that Spar “incurred the risk of negligent care.”¹⁴⁸

The court concluded that assumption of the risk was not a defense to Spar’s claim that she lacked informed consent.¹⁴⁹ A patient may waive the right to be informed, but the physician does not need to make a disclosure if the patient has requested as much.¹⁵⁰ A patient who waives informed consent assumes only the risks associated with nondisclosure. Here, the court found no evidence that “Spar waived her right to informed consent or otherwise assumed the risks related to negligent nondisclosure disclosure.”¹⁵¹

G. Rescue Doctrine

In *Franciose v. Jones*,¹⁵² the court of appeals affirmed the Porter County Superior Court’s entry of judgment against Ray Ramirez, III and Mark P. Franciose.¹⁵³ Ramirez lost control of his truck in snowy weather, crashed into the interstate guardrails, and was stuck in the passing lane.¹⁵⁴ A traffic jam formed around the accident.¹⁵⁵ Franciose’s vehicle approach the traffic jam and hit Ramirez’s passenger, Aaron A. Jones, as Jones attempted to push the stranded truck off the interstate.¹⁵⁶ Jones sued Ramirez and Franciose claiming that they acted negligently and injured him.¹⁵⁷ On appeal, the defendants claimed that the trial court erred in rendering the following jury instruction:

A rescuer is one who undertakes physical activity in a reasonable attempt to rescue persons or property from imminent peril. The rescue doctrine is designed to encourage and reward humanitarian acts. If you fin[d] that Aaron Jones attempted to move the disabled vehicle off the roadway in a reasonable attempt to prevent further harm, then you may find that his actions were both reasonable and foreseeable as to Ray Ramirez.¹⁵⁸

Among the six issues raised on appeal by the defendants, this Article addresses

2005)). The Indiana Supreme Court did not agree with the court of appeals’ conclusion that failure to follow instruction of a healthcare provider is the only exception; however, the court does not address other circumstances where the defense would apply. *Id.* & n.2.

148. *Id.* at 983.

149. *Id.*

150. *Id.*; see, e.g., DEL. CODE ANN. tit. 18, § 6852(b)(2) (2006); IND. CODE § 34-18-12-8; *Arato v. Avedon*, 858 P.2d 598, 609 (Cal. 1993); *Holt v. Nelson*, 523 P.2d 211, 219 (Wash. App. 1974).

151. *Spar*, 907 N.E.2d at 983.

152. 907 N.E.2d 139 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 558 (Ind. 2009).

153. *Id.* at 142.

154. *Id.*

155. *Id.*

156. *Id.* at 142-43.

157. *Id.*

158. *Id.* at 152 (citing Tr. Vol. IV p. 223-24).

whether the trial court erred in its jury instruction concerning the rescue doctrine.¹⁵⁹

The court recited the Indiana Supreme Court's adopted version of the rescue doctrine, "which is a rule that '[o]ne who has, through his negligence, endangered the safety of another may be held liable for injuries sustained by a third person in attempting to save such other from injury.'"¹⁶⁰ The doctrine was intended to "encourage and reward humanitarian acts."¹⁶¹ In order for a defendant to be liable, the injured third party "must actually act to rescue someone who is endangered by the defendant's actions."¹⁶² A rescuer is defined by the court as "one who actually undertakes physical activity in a reasonable and prudent attempt to rescue."¹⁶³

In affirming the trial court's entry of judgment, the court first concluded that the designated evidence supports the instruction.¹⁶⁴ The court found Jones had acted out of concern "*for the safety of others*."¹⁶⁵ The court found that "[t]he passage of a short amount of time from the initial accident does not mean that the peril created by the accident dissipated or that the continuity between the commission of the wrong and the effort to avert its consequences was broken."¹⁶⁶ Furthermore, Jones's actions comports with the public policy surrounding the doctrine, which encourages "Good Samaritan efforts."¹⁶⁷

The court further concluded that the jury instruction is a correct statement of the law.¹⁶⁸ The court read the instruction as properly leaving to the jury the question of whether Jones acted reasonably during the accident, instead of shifting the burden of proof to Ramirez¹⁶⁹

The court finally concluded that the instruction did not substantially affect Ramirez's right when it informed the jury that he could be held liable for Jones' injuries if Jones acted to protect *property* from imminent peril.¹⁷⁰ Even when a jury is given an incorrect instruction on the law, reversal will not occur unless the party seeking a new trial shows a reasonable probability that substantial rights of the complaining party or the results of the proceeding have been adversely affected.¹⁷¹ Given the "ample evidence that Jones acted in an attempt to rescue

159. *Id.* at 143.

160. *Id.* at 151 (citing *Neal v. Home Builders, Inc.*, 111 N.E.2d 280, 284 (Ind. 1953) (citation omitted), *reh'g denied*).

161. *Id.* at 152 (citing *Heck v. Robey*, 659 N.E.2d 498, 502 (Ind. 1995), *abrogated on other grounds by Control Techniques, Inc. v. Johnson*, 762 N.E.2d 104 (Ind. 2002)).

162. *Id.*

163. *Id.* (citing *Lambert v. Parrish*, 492 N.E.2d 289, 291 (Ind. 1986)).

164. *Id.* at 154.

165. *Id.* at 152 (citing Tr. Vol. II p. 214).

166. *Id.* at 152-53.

167. *Id.* at 153.

168. *Id.* at 154.

169. *Id.* at 153-54.

170. *Id.* at 154.

171. *Id.*; *see also Penn Harris Madison Sch. Corp. v. Howard*, 861 N.E.2d 1190, 1195 (Ind.

human life—that is, the lives of approaching motorists,” in addition to the fact that the instruction defines a rescuer as one who attempts to rescue “persons or property from imminent peril,” the court could not say that Ramirez’s substantial rights were affected.¹⁷²

III. LEGAL MALPRACTICE

In *In re Recker*,¹⁷³ the Indiana Supreme Court addressed whether two attorneys who shared office space and had access to each other’s files could ethical represent two clients in related matters.¹⁷⁴ James R. Recker and Laura Paul were court-appointed to represent “AB” in a Child in Need of Services case and “XY” in a criminal case, respectively.¹⁷⁵ Both Respondent and Paul shared an office in adjoining cubicles with limited amenities arranged by the county in the public defender’s office.¹⁷⁶ XY and AB shared a prison cell.¹⁷⁷

The prosecutor in AB’s case approached Paul concerning a possible deal for XY in exchange for information about AB’s alleged battery.¹⁷⁸ Paul, not knowing Recker represented AB, informed Recker of the potential deal, revealing AB’s name but not XY’s name.¹⁷⁹ Recker then called James Holder, a private attorney handling a separate matter for AB, and informed him that AB was talking to cellmates concerning his case.¹⁸⁰ Holder suspected XY as the informant.¹⁸¹ The prosecutor eventually learned of the situation and separated XY and AB.¹⁸² The State charged and convicted AB of murder, and XY testified at his trial.¹⁸³

The Indiana Disciplinary Commission (“Commission”) filed a verified complaint charging Recker with violating 1.6(a), 1.8(b), and 1.8(k) of the Indiana Rules of Professional Conduct.¹⁸⁴ After a hearing officer found that Recker did not engage in misconduct, the Commission filed a petition for review by the court.¹⁸⁵

A “firm” or “law firm” is defined as “a lawyer or lawyers in a law

2007) (quoting *Elmer Buchta Trucking, Inc. v. Stanley*, 744 N.E.2d 939, 944 (Ind. 2001)); *Wallace v. Rosen*, 765 N.E.2d 192, 196 (Ind. Ct. App. 2002).

172. *Franciose*, 907 N.E.2d at 154.

173. *In re Recker*, 902 N.E.2d 225 (Ind. 2009).

174. *Id.* at 226.

175. *Id.*

176. *Id.*

177. *Id.* at 226-27.

178. *Id.* at 227.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.”¹⁸⁶ “[T]wo practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm.”¹⁸⁷ But “if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as such, then they should be regarded as a firm.”¹⁸⁸ Mutual access to client information is an important factor to weigh in determining firm status or not.¹⁸⁹

The court concluded that Recker and Paul’s office-sharing arrangement did not constitute a firm.¹⁹⁰ Although their common space, staff, letterhead, and phone line might suggest a firm, the Putnam County courts and not the attorneys arranged the office.¹⁹¹ The attorneys did not hold themselves out for business to the public at the arranged office; instead, the two used their office exclusively for court-assigned cases.¹⁹²

In *Harris v. Denning*,¹⁹³ the Indiana Court of Appeals affirmed the trial court’s grant of summary judgment on Thomas P. Harris’ suit against Richard Denning and the Indiana Public Defender, Susan K. Carpenter, on claims of deceit, collusion, fraud, and misrepresentation.¹⁹⁴ Denning was a deputy public defender who represented Harris in a petition for post-conviction relief (PCR) on two counts of murder in 1993.¹⁹⁵ In support of his PCR claims, Harris asked Denning to order his probable cause hearing’s transcript, but for over a year and a half, Denning indicated to Harris repeatedly that he had made the order.¹⁹⁶

Denning and the Public Defender’s Merit Review Committee investigated Harris’s PCR claims and concluded that they lacked merit.¹⁹⁷ Denning stopped representing Harris as mandated by Indiana Post Conviction Rule 1(9)(c), but Denning had yet to receive the transcript.¹⁹⁸ Harris subsequently filed suit pro se against Carpenter and Denning, and the trial court entered summary judgment in favor of Denning and Carpenter.¹⁹⁹

In affirming summary judgment in favor of Carpenter and Denning, the court

186. *Id.* (quoting IND. PROF. CONDUCT R. 1.0).

187. *Id.* (citing IND. PROF. CONDUCT R. 1.0 cmt. 2).

188. *Id.* (citing IND. PROF. CONDUCT R. 1.0 cmt. 2).

189. *Id.* at 227-28 (citing IND. PROF. CONDUCT R. 1.0 cmt. 2).

190. *Id.* at 229.

191. *Id.*

192. *Id.*

193. 900 N.E.2d 765 (Ind. Ct. App. 2009).

194. *Id.* at 766.

195. *Id.* at 766-67.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 767-78.

concluded that respondeat superior cannot apply to Carpenter.²⁰⁰ “[A] public defender cannot be held liable for the professional malpractice of her deputies.”²⁰¹ Carpenter, as public defender, could not interfere in any deputy public defender’s relationship with a client by controlling the decisions that the deputy made in the exercise of his professional judgment.²⁰² Therefore, any liability attributed to Denning could not extend to Carpenter.²⁰³ Furthermore, the court affirmed summary judgment in favor of Denning “because Harris failed to establish any injury or damages as a result of Denning’s alleged deceit, fraud, or failure to obtain the transcript of the probable cause hearing.”²⁰⁴

IV. DAMAGES

A. Collateral Source Rule: Reasonable Value of Medical Services

In *Stanley v. Walker*,²⁰⁵ the Indiana Supreme Court, in a 3-2 decision, affirmed and remanded the trial court’s award of \$70,000 in damages, with reductions, to plaintiff in an automobile accident suit following the trial court’s

200. *Id.* at 768.

201. *Id.* (quoting *Diaz v. Carpenter*, 650 N.E.2d 688, 691 (Ind. Ct. App. 1995)).

202. *Id.*

203. *Id.*

204. *Id.* at 769.

205. 906 N.E.2d 852 (Ind. 2009). The Indiana General Assembly attempted to reject the Supreme Court’s opinion. House Bill 1255 passed the House of Representatives 57-40, but it died in the Senate Judiciary Committee. H.B. 1255 provides as follows:

In a personal injury or wrongful death action, the court shall allow the admission into evidence of:

(1) proof of collateral source payments other than:

(A) payments of life insurance or other death benefits;

(B) insurance benefits for which the plaintiff or members of the plaintiff’s family have paid for directly;

(C) payments made by:

(i) the state or the United States; or

(ii) any agency, instrumentality, or subdivision of the state or the United States;

that have been made before trial to a plaintiff as compensation for the loss or injury for which the action is brought; or

(D) a writeoff, discount, or other deduction associated with a collateral source payment.

(2) proof of the amount of money that the plaintiff is required to repay, including worker’s compensation benefits, as a result of the collateral benefits received; and

(3) proof of the cost to the plaintiff or to members of the plaintiff’s family of collateral benefits received by the plaintiff or the plaintiff’s family.

It should be noted that these legislative actions fall outside of this article’s survey period.

denial of defendant's request to admit evidence of plaintiff's discounted medical bills.²⁰⁶ Plaintiff introduced original medical bills during trial that totaled at \$11,570, but those bills did not reveal \$4750 in discounts bargained between plaintiff's medical service providers and his insurer.²⁰⁷ Defendant subsequently sought to admit the Discount Rate into evidence, "complete with an offer of proof," and plaintiff objected on the grounds that such an admission would violate the Indiana collateral source statute.²⁰⁸ The trial court agreed with plaintiff, holding that "'anything flowing from the insurance benefit purchased by the plaintiff. . . ' would thus be prohibited under the collateral source statute," including Discount Rates.²⁰⁹

The court explained the development of the modern day iteration of the collateral source statute. At common law, the collateral source rule prevented defendants from admitting evidence of compensation received by claimants from sources excluding the defendant, to reduce damage awards.²¹⁰ This left liable defendants responsible for the entirety of the consequences of their conduct no matter what secondary compensation plaintiffs may have acquired through first-party insurers, agreements, or gratuity.²¹¹ The General Assembly abrogated the common law rule when it passed the collateral source statute in order to permit evidence of collateral source payments with the exception of specified exceptions.²¹²

The collateral source statute's purpose is "to determine the actual amount of

206. *Stanley*, 906 N.E.2d at 859. The court did remand the case back to the trial court and reduced their original award for damages by \$4750; however, it left the door open for retrial should plaintiff seek it. *Id.*

207. *Id.* at 854. This means that plaintiff's medical providers were only paid \$6820 from his insurance company ("Discount Rate"), which represents the \$11570 minus the Discount Rate of \$4750. *Id.*

208. *Id.*; see also IND. CODE § 34-44-1-2.

209. *Stanley*, 906 N.E.2d at 854.

210. *Id.*

211. *Id.* (citing *Shirley v. Russell*, 663 N.E.2d 532, 534 (Ind.1996); *Shirley v. Russell*, 69 F.3d 839, 842 (7th Cir.1995)).

212. *Id.* at 854-55. The modern collateral source statute provides:

In a personal injury or wrongful death action, the court shall allow the admission into evidence of:

(1) proof of collateral source payments other than:

(A) payments of life insurance or other death benefits;

(B) insurance benefits for which the plaintiff or members of the plaintiff's family have paid for directly; or

(C) payments made by:

(i) the state or the United States; or

(ii) any agency, instrumentality, or subdivision of the state or the United States; that have been made before trial to a plaintiff as compensation for the loss or injury for which the action is brought[.]

the prevailing party's pecuniary loss and to preclude that party from recovering more than once from all applicable sources for each item of loss sustained in a personal injury or wrongful death action."²¹³ Simultaneously, the statute preserves the common law rule "that collateral source payments should not reduce a damage award if they resulted from the victim's own foresight—both insurance purchased by the victim and also government benefits—presumably because the victim has paid for those benefits through taxes."²¹⁴

The court held that concluded that courts must use the reasonable value of medical services in determining damages to injured parties.²¹⁵ The court determined that the fairest approach would be to make the defendant liable for a reasonable value for medical services, independent of the original bill.²¹⁶ The court explained that in order for juries to determine reasonable value, they might require, among other things, "the amount of the payments, amounts billed by medical service providers, and other relevant and admissible evidence to be able to determine the amount of reasonable medical expenses."²¹⁷

The court concluded that the collateral source statute could not bar evidence of Discount Rates to determine the reasonable value of medical services.²¹⁸ The court held that when the reasonable value of medical services is in dispute, "[t]he opposing party may produce contradictory evidence to challenge to reasonableness of the proffered medical bills, including expert testimony."²¹⁹ While not dispositive, the bill actually paid comports with reasonableness of medical expenses and services.²²⁰ The court found that the trial court "should have also referred to the discounted amount actually paid" when it found that "Statements of charges for medical, hospital or other health care expenses for diagnosis or treatment occasioned by an injury constitute prima [facie] evidence that the charges are reasonable and fair."²²¹

B. Excessive Punitive Damages

In *Clark v. Simbeck*,²²² the court of appeals examined a trial court's award of \$738,500 compensatory and \$60,000 punitive damages to a victim, who was kicked in the head between thirty to fifty times causing severe injuries to his face

213. *Stanley*, 906 N.E.2d at 855; see also IND. CODE § 34-44-1-1(1)-(2).

214. *Stanley*, 906 N.E.2d at 855.

215. *Id.* at 858.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.* at 856. Compare IND. R. EVID. 413, with *Cook v. Whitsell-Sherman*, 796 N.E.2d 271, 277 (Ind. 2003).

220. *Stanley*, 906 N.E.2d at 856; see also *Smith v. Syd's, Inc.*, 598 N.E.2d 1065, 1066 (Ind. 1992).

221. *Stanley*, 906 N.E.2d at 859.

222. 895 N.E.2d 315 (Ind. Ct. App. 2008).

and head.²²³

The victims of a brutal battery sued the defendants civilly following the batterers' convictions.²²⁴ The batterers, who were without counsel, waived liability at the court's suggestion, resulting in a waiver of a jury trial.²²⁵ At the conclusion of the bench trial, the court granted judgment and money damages in favor of the Simbecks.²²⁶ Of the four issues the court addressed on appeal, the court focused on whether the trial court erred in ordering defendants to pay punitive damages to each of the plaintiffs.²²⁷

Punitive damage awards are reviewed de novo.²²⁸ The Indiana Supreme Court held that "a defendant's financial condition and ability must be considered when such an award is made."²²⁹ The court reasoned:

An award that not only hurts but permanently cripples the defendant goes too far. A life of financial hopelessness may be an invitation to a life of crime. Perpetual inability to get the financial burden of a judgment off his back leaves a defendant with few alternatives. . . . [A] staggering punitive damages award is not merely a useless act. It also traps the plaintiff and defendant forever in a creditor-debtor relationship that offers little if any financial reward to the plaintiff and seems far more likely to lead to nothing but travail for both.²³⁰

The court concluded that the trial court's award of punitive damages was excessive.²³¹ The evidence presented to the court indicated that neither defendant had significant assets.²³² Clark's job paid \$13.00 an hour and Biddle apparently had no income.²³³ In dissent, Chief Judge Baker, acknowledged the *Stroud* rule, but believed that defendant's conduct in question was "so egregious, so malicious, and so brutal that the relatively nominal punitive damages award of \$60,000 [was] warranted."²³⁴

223. *Id.* at 317.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at 320 (citing *Stroud v. Lints*, 790 N.E.2d 440, 443 (Ind. 2003)).

229. *Id.* (citing *Stroud*, 790 N.E.2d at 446-47).

230. *Id.* at 320-01 (citing *Stroud*, 790 N.E.2d at 446).

231. *Id.*; see also IND. CODE § 34-52-2-1 (2008); *Becker v. Fisher*, 852 N.E.2d 46, 48 (Ind. Ct. App. 2006); *Coffman v. Rohrman*, 811 N.E.2d 868, 872-73 (Ind. Ct. App. 2004).

232. *Clark*, 895 N.E.2d at 321.

233. *Id.*

234. *Id.* (Baker, C.J., dissenting).

V. PREMISES LIABILITY

A. *Possessors of Land*

The Indiana Supreme Court addressed a matter of first impression in *Jackson v. Scheible*.²³⁵ In *Jackson*, the court addressed the question of “under what circumstances a vendor of land may be liable to a third party for harm resulting from the condition of trees on the land near a highway.”²³⁶ Travis Scheible was struck and killed by an oncoming car as he attempted to cross the street from behind a mature tree overhanging a sidewalk.²³⁷ The tree was on property owned by Ronald Smith, who purchased it from Fred Jackson and his wife nearly six months before the accident.²³⁸

Travis’ mother, Christine Scheible brought a wrongful death action against the former and current owners of the property on which the tree was located.²³⁹ The trial court granted summary judgment in favor of the Jacksons without issuing an opinion,²⁴⁰ but the court of appeals reversed, holding that “a vendor may be liable for harm caused by the condition of sold property if the vendor retains control of the property.”²⁴⁰

Both parties relied on the Restatement rule that “[a] possessor of land in an urban area is subject to liability to persons using a public highway for physical harm resulting from his failure to exercise reasonable care to prevent an unreasonable risk of harm arising from the condition of trees on the land near the highway.”²⁴¹ The court adopted the Restatement definition of “possessor” as “a person who is in occupation of the land with intent to control it.”²⁴² The court noted that a common theme throughout premises liability is “actual control over the condition causing the injury” is a common theme throughout premises liability cases.²⁴³ Also, “a vendor in a land-sale contract will have no liability under [Restatement] section 363 because the vendor no longer occupies or controls the condition of the property,” regardless of who retains legal title as security.²⁴⁴

In affirming the trial court’s grant of summary judgment, the court concluded that as a matter of law, Smith was liable as possessor of the land under section

235. 902 N.E.2d 807 (Ind. 2009).

236. *Id.* at 810.

237. *Id.* at 809.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.* at 810 (citing RESTATEMENT (SECOND) OF TORTS § 363(2) (1965) as adopted in *Valinet v. Eskew*, 574 N.E.2d 283, 285 (Ind. 1991)).

242. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 328E(a) (1965)).

243. *Id.* (citing *Risk v. Schilling*, 569 N.E.2d 646, 647-48 (Ind. 1991); *Olds v. Noel*, 857 N.E.2d 1044, 1046 (Ind. Ct. App. 2006); *Harris v. Traini*, 759 N.E.2d 215, 225 & n.11 (Ind. Ct. App. 2001)).

244. *Id.* (citing *Skendzel v. Marshall*, 301 N.E.2d 641, 646 (Ind. 1973)).

343, regardless of Fred's retention of equity.²⁴⁵ The plaintiff acknowledged that vendors generally have no post-sale liability, but argued that this does not apply to Fred because he continued to act like a landowner following the sale.²⁴⁶ But the court concluded that evidence in support of Fred's landowner status instead evinced a "keen interest in the maintenance of the Property," which "does not translate into his control over the property."²⁴⁷

B. Proportional Fault

In *Cox v. Matthews*,²⁴⁸ the Indiana Court of Appeals affirmed a suit for damages including a jury assessment of proportional fault.²⁴⁹ Plaintiff Alan Matthews was injured when a loader, operated by the defendant Larry Cox, drove into him and crushed him.²⁵⁰ Defendant-contractor, Tube City, LLC employed Cox.²⁵¹ Following a jury trial in the Lake County Superior Court, the jury assessed no fault against Matthew's employer, Beta Steel, 5.83% against Matthews, and 94.17% of fault against Tube City.²⁵² Tube City maintained that the percentages of fault were "clearly against the weight of the evidence."²⁵³

The court in affirming the judgment and the jury assessment.²⁵⁴ "The process by which a jury analyzes the evidence, reconciles the views of its members, and reaches a unanimous decision is inherently subjective and is entitled to maximum deference."²⁵⁵ In this case, Tube City conceded during its opening statement that a contract existed between Cox and Matthews.²⁵⁶ Additionally, "evidence indicated that the backup alarm on the front loader that Cox was operating was not functioning properly."²⁵⁷

C. Obvious Dangers

In *Smith v. King*,²⁵⁸ the Indiana Court of Appeals addressed whether the trial court erred when it found that homeowners did not owe a duty to a contractor who fell through an uncovered opening in their unfinished home.²⁵⁹ Jeffery

245. *Id.* at 812.

246. *Id.* at 811.

247. *Id.* at 812.

248. *Cox v. Matthews*, 901 N.E.2d 14 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 995 (Ind. 2009).

249. *Id.* at 24.

250. *Id.* at 17.

251. *Id.*

252. *Id.* at 18, 24.

253. *Id.* at 23.

254. *Id.* at 24.

255. *Id.* (citing *Paragon Family Rest. v. Bartolini*, 799 N.E.2d 1048, 1056 (Ind. 2003)).

256. *Id.*

257. *Id.*

258. 902 N.E.2d 878 (Ind. Ct. App. 2009).

259. *Id.* at 879-80.

Harbrecht, while constructing the residence of general contractor Gerhard King (“Gerhard”) and Christine King, left an open hole in the stairs.²⁶⁰ Kenneth E. Smith, Jr. sustained personal injuries suffered after he fell through the uncovered stairway opening.²⁶¹ Kenneth and his wife filed a complaint against the Kings and Harbrecht,²⁶² and the trial court entered summary judgment for the Kings concerning Smith’s claims.²⁶³

In affirming summary judgment, the court first concluded that the Kings owed no duty as homeowners to Kenneth, because the danger of the hole was known and obvious.²⁶⁴ The court found the real issue to be whether “the Kings were required to maintain the property in a reasonably safe condition for independent contractors and their employees.”²⁶⁵ The court restated the general rule that property owners must maintain their property in a “reasonably safe condition for business invitees, including independent contractors and their employees.”²⁶⁶ A property owner does not, however, have a “duty to furnish the employees of an independent contractor a safe place to work, at least as that duty is imposed on employers.”²⁶⁷ The issue of liability turns on whether “the defendant was in control of the premises when the accident occurred.”²⁶⁸ The court also looks to whether a landowner in those circumstances could have prevented any foreseeable danger.²⁶⁹ The evidence demonstrated that Kenneth was aware of the opening in the residence before to his accident, because he climbed into it using a ladder previously.²⁷⁰

The court next addressed the issue of Gerhard’s liability as general

260. *Id.*

261. *Id.* at 880.

262. *Id.* The trial court also found that the Kings were not vicariously liable for Harbrecht’s negligence. This issue was not raised on appeal. *Id.*

263. *Id.*

264. *Id.* at 882.

265. *Id.*

266. *Id.* at 881-82 (citing *Merrill v. Knauf Fiber Glass GmbH*, 771 N.E.2d 1258, 1264-65 (Ind. Ct. App. 2002)); see also RESTATEMENT (SECOND) OF TORTS § 343 (1965) (defining the duty owed by landowners, which Indiana has adopted as: “A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger”); RESTATEMENT (SECOND) OF TORTS § 343A(a) (1965) states that “[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 possessor should anticipate the harm despite such knowledge or obviousness.”

267. *Smith*, 902 N.E.2d at 881-82 (citing *Merrill*, 771 N.E.2d at 1264-65).

268. *Id.* at 882 (citing *Rhodes v. Wright*, 805 N.E.2d 382, 385 (Ind. 2004)).

269. *Id.*

270. *Id.*

contractor.²⁷¹ The general rule of the duty owed by a general contractor is that “an employer does not have a duty to supervise the work of an independent contractor to assure a safe workplace and consequently is not liable for the negligence of the independent contractor.”²⁷² Five exceptions to this rule, as recognized in Indiana, include:

- (1) where the contract requires . . . intrinsically dangerous work;
- (2) where one party is by law or contract charged with performing the specific duty;
- (3) where the performance of the contracted act will create a nuisance;
- (4) where the act to be performed will probably cause injury to others unless due precaution is taken; and
- (5) where the act to be performed is illegal.²⁷³

Although “a contractor has a duty to use reasonable care both in his or her work and in the course of performance,”²⁷⁴ the plaintiffs did not argue to the trial court that the defendants were liable based on Gerhard’s negligence as general contractor, and therefore, waived their right to appeal this issue.²⁷⁵

Finally, the court concluded that Gerhard did not assume a duty to Kenneth when he nailed a plywood sheet atop the opening.²⁷⁶ One may raise a duty of care by conduct, creating “a special relationship between the parties and a corresponding duty to act in the manner of a reasonably prudent person.”²⁷⁷ Gerhard’s single instance of nailing the plywood sheet as a safety precaution does not raise a jury question regarding assumed duty because it was not sufficient to “constitute a deliberate attempt to control or actively supervise safety at the job site.”²⁷⁸ “[O]ne or two instances of safety precautions taken by the defendant does not raise a jury question as to whether a duty was assumed.”²⁷⁹

D. Natural Conditions Upon the Land

The final damages case decided during the survey period is *May v. George*.²⁸⁰ In this case, Dwight R. May sued Jerry George after a tree that fell from George’s property landed on May’s truck, injuring May.²⁸¹ The trial court granted

271. *Id.* at 883.

272. *Id.* (quoting *Stumpf v. Hagerman Constr. Corp.*, 863 N.E.2d 871, 876 (Ind. Ct. App. 2007)).

273. *Id.* (citing *Stumpf*, 863 N.E.2d at 876).

274. *Id.* (citing *Peters v. Forster*, 804 N.E.2d 736, 734 (Ind. 2004)).

275. *Id.*

276. *Id.* at 884.

277. *Id.* at 883 (quoting *Merrill v. Knauf Fiber Glass GmbH*, 771 N.E.2d 1258, 1270 (Ind. Ct. App. 2002)).

278. *Id.* at 884 (quoting *Merrill*, 771 N.E.2d at 1271).

279. *Id.* (citing *Robinson v. Kinnick*, 548 N.E.2d 1167, 1170 (Ind. Ct. App. 1989)).

280. 910 N.E.2d 818 (Ind. Ct. App. 2009).

281. *Id.* at 820-21.

George's motion for summary judgment.²⁸²

The court concluded that George owed no duty to May.²⁸³ The court recited the Indiana Supreme Court's interpretation of the *Valinet* rule, which denies liability for landowners for physical harm caused by others or natural conditions upon their land.²⁸⁴ The general exception to this rule applies when the landowner has "actual knowledge of a dangerous natural condition, regardless of location."²⁸⁵ Moreover, possessors of land in urban areas may be subject to liability for failing to "exercise reasonable care to prevent an unreasonable risk of harm arising from the condition of trees on the land near [a] highway."²⁸⁶ Although continuous inspections are not required to satisfy a duty to motorists under *Valinet*, periodic inspections of trees may be reasonably required in some circumstances.²⁸⁷

The court found that George's land was rural, excluding him from the *Valinet* exception for urban possessors of land.²⁸⁸ The property was used for agricultural purposes, was not near any city, town, business, or residence.²⁸⁹ Also, May failed to designate evidence to the contrary, making this a clear-cut distinction from former cases.²⁹⁰

The court then found that the tree was a natural condition on George's land.²⁹¹ "A natural condition is 'land that was not changed by any acts of humans' and includes 'the natural growth of vegetation, such as weeds, on land that is not artificially made receptive to them.'"²⁹² The tree in question was approximately sixty years old, and no evidence suggested that other trees or

282. *Id.* at 820.

283. *Id.* at 826.

284. *Id.*; see generally *Valient v. Eskew*, 574 N.E.2d 283, 285 (Ind. 1991) (adopting RESTATEMENT (SECOND) OF TORTS § 363 (1965) and stating that whether a duty is imposed on a landowner to prevent harm caused by falling trees requires the consideration of factors such as land use and traffic patterns); RESTATEMENT (SECOND) OF TORTS § 363 (1965) (stating the rule that "(1) [e]xcept as stated in Subsection (2), neither a possessor of land, nor a vendor, lessor, or other transferor, is liable for physical harm caused to others outside of the land by a natural condition of the land. (2) A possessor of land in an urban area is subject to liability to persons using a public highway for physical harm resulting from his failure to exercise reasonable care to prevent an unreasonable risk of harm arising from the condition of trees on the land near the highway.").

285. *May*, 910 N.E.2d at 823 (quoting *Valient*, 574 N.E.2d at 285).

286. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 363 (1965)); see also *Valient*, 574 N.E.2d at 285.

287. *May*, 910 N.E.2d at 824 (quoting *Valient*, 574 N.E.2d at 286).

288. *Id.*; see generally *Valient*, 574 N.E.2d at 285.

289. *May*, 910 N.E.2d at 824.

290. *Id.*; *Miles v. Christensen*, 724 N.E.2d 643, 646 (Ind. Ct. App. 2000) (holding that "determination of a landowner's duty does not hinge solely upon the 'urban'/'rural' distinction," but also factors such as traffic patterns and land use must be taken into account when determining a landowner's liability).

291. *May*, 910 N.E.2d at 824.

292. *Id.* (quoting *Spears v. Blackwell*, 666 N.E.2d 974, 977 (Ind. Ct. App. 1996)).

manmade objects interfered with the natural condition of the tree.²⁹³

In affirming summary judgment, the court concluded that there was not sufficient evidence to support May's assertion that George knew or should have known that the tree was in a dangerous condition.²⁹⁴ The court agreed with the trial court's rejection of photographs and affidavits introduced by May to create an issue of fact, because none of the evidence would have aided May's argument and May failed to supplement discovery at trial.²⁹⁵

VI. WORKER'S COMPENSATION

In *Beatty v. LaFontaine*,²⁹⁶ the Indiana Court of Appeals affirmed the trial court's grant of summary judgment in favor of the defendant.²⁹⁷ In *Beatty*, James Thad Martin, while delivering logs for LaFontaine Logging caused a tractor-trailer collision with Rodger Beatty and Nora K. Beatty which resulted in Nora Beatty's death.²⁹⁸ Representatives of Beatty's estate brought a wrongful death action against LaFontaine.²⁹⁹ The court previously addressed circumstances of this case three separate times.³⁰⁰

It is long-standing Indiana law "that a principal is not liable for the negligence of an independent contractor."³⁰¹ The Indiana Supreme Court established a ten-factor test to distinguish employees from independent contractors:

- (a) The extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;

293. *Id.*

294. *Id.* at 825.

295. *Id.*

296. 896 N.E.2d 16 (Ind. Ct. App. 2008), *trans. denied*, 915 N.E.2d 982 (Ind. 2009).

297. *Id.* at 17-18.

298. *Id.* at 17-19.

299. *Id.*

300. *Id.* at 18; *see Walker v. Martin*, 887 N.E.2d 125 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1233 (Ind. 2008) (most recent of the three prior appeals).

301. *Beatty*, 896 N.E.2d at 20 (citing *Walker*, 887 N.E.2d at 131).

- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not in business.³⁰²

Although one's status as an employee or independent contractor is generally a question of fact, such an issue may be resolved as a question of law if the facts are undisputed.³⁰³ Although courts must consider all ten factors, and no one factor should be dispositive, "extent of control' is the single most important factor."³⁰⁴

In this case, the court applied the same analysis as it employed in the last appeal concerning similar facts to affirm the trial court's conclusion that Martin was an independent contractor instead of an employee.³⁰⁵ The court reasoned that, "except for being told where to pick up and deliver the logs, all of the details of how the job was to be done were left to Martin's discretion."³⁰⁶ It was determined that others engaged in hauling logs locally were considered specialists.³⁰⁷ Moreover, Martin never maintained regular, continuous hours with LaFontaine, nor did Martin earn a profit from the transport of the logs.³⁰⁸ The court determined that the only factor that weighed in favor of an employee status for Martin is the fact "that LaFontaine was a business engaged in the procuring and selling of timber logs."³⁰⁹

Notwithstanding the status of Martin, the court also concluded that LaFontaine did not assume a nondelegable duty to the plaintiff concerning the safety of the tractor-trailer.³¹⁰ The court reasserted the "long-standing general rule" that "a principal is not liable for the negligence of an independent contractor" with only limited exceptions.³¹¹ But the court declined to apply any of the exceptions to LaFontaine's duty.³¹²

302. *Id.* at 20-21 (listing the factors found in RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958) as adopted by Indiana) (citing *Moberly v. Day*, 757 N.E.2d 1007, 1010 (Ind. 2001)).

303. *Id.* at 20.

304. *Id.* at 21 (quoting *Walker*, 887 N.E.2d at 131; *Moberly*, 757 N.E.2d at 1010); *see also* RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958).

305. *Beatty*, 896 N.E.2d at 22.

306. *Id.* at 21.

307. *Id.*

308. *Id.*

309. *Id.* at 22.

310. *Id.*

311. *Id.* (quoting *Selby v. N. Ind. Pub. Serv. Co.*, 851 N.E.2d 333, 337 (Ind. Ct. App. 2006) (stating the exceptions to the *Selby* rule are that: "(1) where the contract requires the performance of intrinsically dangerous work; (2) where the principal is by law or contract charged with performing the specific duty; (3) where the act will create a nuisance; (4) where the act to be performed will probably cause injury to others unless due precaution is taken; and (5) where the act to be performed is illegal." Such duties are "deemed 'so important to the community' that the principal should not be permitted to transfer those duties to another.")).

312. *Id.* at 23.

VII. DEFAMATION AND TORTIOUS INTERFERENCE

A. *Invasion of Privacy*

In *Vargas v. Shepherd*,³¹³ Dr. Elian M. Shepherd treated Ruben Vargas for injuries Vargas sustained while working at an apartment complex.³¹⁴ During a subsequent lawsuit between Vargas and the apartment, Shepherd reviewed Vargas's medical records and prepared a report concerning them for the apartment's lawyer.³¹⁵ Believing that Shepherd impermissibly disclosed his medical history, Vargas sued Shepherd alleging invasion of privacy, and breach of fiduciary duty.³¹⁶ The Lake County Superior Court granted the Shepherd's motion for summary judgment.³¹⁷

The court recited the elements for invasion of privacy as: "(1) intrusion upon seclusion; (2) appropriation of likeness; (3) public disclosure of private facts; and (4) false-light publicity."³¹⁸ The court noted that "disclosure of private facts occurs when a person gives 'publicity' to a matter that concerns the 'private life' of another, a matter that would be 'highly offensive' to a reasonable person and that is not of legitimate public concern."³¹⁹

A narrow interpretation of the publicity element "requires communication to the public at large or to so many persons that the matter is substantially certain to become one of public knowledge."³²⁰ However, a more liberal view permits "a disclosure to be actionable even if not made to the public at large, as long as it is made to a 'particular public' with a special relationship to the plaintiff."³²¹

In affirming the trial court's grant of summary judgment in favor of Shepherd, the court concluded that Shepherd revealed no confidential information related to Vargas' treatment.³²² The court found that Shepherd merely reiterated information to the apartment's attorney.³²³ Therefore, Shepherd could not have committed an invasion of privacy by disclosing confidential information concerning Vargas's medical records.³²⁴

313. 903 N.E.2d 1026 (Ind. Ct. App. 2009).

314. *Id.* at 1029.

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.* at 1031 (citing *Munsell v. Hambright*, 776 N.E.2d 1272, 1282 (Ind. Ct. App. 2002), *trans. denied*, 792 N.E.2d 39 (2003)).

319. *Id.* (quoting *Munsell*, 776 N.E.2d at 1282).

320. *Id.* (quoting *Munsell*, 776 N.E.2d at 1282).

321. *Id.*

322. *Id.*

323. *Id.* (quoting *Doe v. Methodist Hosp.*, 690 N.E.2d 681, 692 (Ind. 1992)).

324. *Id.*

B. Libel & Slander

In *West v. Wadlington*,³²⁵ the court of appeals reversed and remanded the trial court's dismissal of a defamation and invasion of privacy-false light suit.³²⁶ This portion of the Article only discusses the defamation claims. Rosalyn West, Betty Wadlington, Jeanette Larkins were members of the Mt. Olive Missionary Baptist Church.³²⁷ Wadlington sent an email to Larkins viciously attacking West's character and accusing her of plotting to oust a pastor.³²⁸ Larkins received the message at her government address and forwarded it to eight-nine other fellow church members.³²⁹ West brought a defamation and invasion of privacy and false light suit in Marion County Superior Court against Wadlington, Larkins, and Larkins's employer, the City of Indianapolis.³³⁰ The court granted the Defendants' motion to dismiss citing that the case would become "'excessively entangled' in church policies and doctrines."³³¹

The *Brazauskas I* rule prohibits courts from analyzing defamation claims because it would require it to "engag[e] in an impermissible scrutiny of religious doctrine."³³² Determining defamation under neutral principles of law had previously only been applied to disputes involving church property.³³³ "[T]he First Amendment effectively prohibits civil tribunals from reviewing these reasons to determine whether the statements are either defamatory or capable of a religious interpretation related to the employee's performance of her duties."³³⁴ In *Wadlington*, like *Brazauskas I*, the alleged defamatory statements were made in the context of the termination of a church employee; therefore, addressing the issue would require the court so to "intrude into a purely ecclesiastical dispute."³³⁵

The court could not "state with the level of certainty called for in summary judgment proceedings that the statements contained in Wadlington's letter remained a purely intra-church dispute."³³⁶ West argued that because Larkins used a government email account to send the letter to others, there is a

325. 908 N.E.2d 1157 (Ind. Ct. App. 2009).

326. *Id.* at 1168.

327. *Id.* at 1159.

328. *Id.* at 1159-61.

329. *Id.* at 1161.

330. *Id.* at 1159. The City of Indianapolis was included as a defendant in the lawsuit because they employed Larkins (through the Indianapolis Metropolitan Police Department) at all times relevant in this case.

331. *Id.*

332. *Id.* at 1165 (citing *Brazauskas v. Fort Wayne-South Bend Diocese, Inc.*, 714 N.E.2d 253, 262 (Ind. Ct. App. 1999)).

333. *Id.* (citing *Brazauskas*, 714 N.E.2d at 262).

334. *Id.* (quoting *Brazauskas*, 714 N.E.2d at 762).

335. *Id.* at 1166. The court did note that *Brazauskas I* is discernible from the case at bar. *Id.*

336. *Id.*

“reasonable possibility” that recipients attributed the email to the City.³³⁷ The Defendants referred to Larkins’ affidavit, which provided that “to the best of my knowledge all of the email addresses identified in [the email] belong to members of or are associated with the Church.”³³⁸ The court found that the affidavit failed to state that “only Church members have access to the email addresses or that only Church members saw the email Larkins forwarded.”³³⁹

The court concluded that the emails “could be defamatory without any question of religious doctrine or practice.”³⁴⁰ Communications that impute criminal conduct is considered per se defamation.³⁴¹ Although the court concluded that the emails fail to show that West physically attacked the former pastor and his family, the court could reasonably infer such.³⁴² A claim in Wadlington’s letter calling West an “evil spirit,” “a one-woman wrecking crew,” and stating that she behaved disrespectfully,³⁴³ “could be considered defamatory in a secular sense.”³⁴⁴

Finally, the court concluded that it did not have to view the letter entirely in a religious context.³⁴⁵ To conclude otherwise “would allow someone to shield any number of defamatory statements simply by framing them in the context of a religious dispute.”³⁴⁶

In *Dugan v. Mittal Steel USA, Inc.*,³⁴⁷ Mittal Steel USA, Inc. fired Christine Dugan following a North America Security Solutions (NASS) investigation into a theft ring.³⁴⁸ Mittal subsequently rehired Dugan following arbitration.³⁴⁹ Dugan filed suit against Mittal, NASS, and Mittal employee Jay Komorowski claiming defamation per se and intentional infliction of emotional distress. In her complaint, Dugan alleged the following:

6. In April 2004, [Mittal employee] Komorowski told Kevin Vana, chief of security at Mittal, that [Dugan] was stealing time by working on Sundays on a “core exchange” scheme with her boss, Albert Verduco, allegedly an attempt to defraud [Mittal]. [Komorowski] also accused [Dugan] of stealing an air compressor from [Mittal].

7. On or about September 9, 2004, [Komorowski] told Jim McClain and

337. *Id.*

338. *Id.* (alteration in original).

339. *Id.*

340. *Id.* at 1167.

341. *Id.* (citing *Kelley v. Tanoos*, 865 N.E.2d 593, 596 (Ind. 2007)).

342. *Id.*

343. *Id.*

344. *Id.* at 1167-68 (citing *Kliebenstein v. Iowa Conference of United Methodist Church*, 663 N.W.2d 404, 405-08 (Iowa 2003)).

345. *Id.* at 1168.

346. *Id.*

347. 911 N.E.2d 692 (Ind. Ct. App. 2009).

348. *Id.* at 694.

349. *Id.*

Zigmund Gorroll, employees of [Mittal], that [Dugan] was working on a “core exchange” (theft) of welding machines with her boss, Albert Verduco.³⁵⁰

The trial court granted summary judgment in favor of Defendants, and Dugan appealed only on the issue of defamation.³⁵¹

The court defined the tort of defamation as a communication “that tends to harm a person’s reputation by lowering the person in the community’s estimation or deterring third persons from dealing or associating with the person.”³⁵² The elements of defamation are: “(1) a communication with defamatory imputation, (2) malice, (3) publication, and (4) damages.”³⁵³ “Communications are considered defamatory per se when they impute 1) criminal conduct; 2) a loathsome disease; 3) misconduct in a person’s trade, profession, office, or occupation; or 4) sexual misconduct to the plaintiff.”³⁵⁴

The defense to defamation is the doctrine of qualified privilege.³⁵⁵ In order to prove qualified privilege, one must establish “good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner to the appropriate parties only.”³⁵⁶ Once the defendant has established the privilege, the burden shifts to the plaintiff to show abuse by establishing “that: (1) the communicator was primarily motivated by ill will in making the statement; (2) there was excessive publication of the defamatory statements; or (3) the statement was made without belief or grounds for belief in its truth.”³⁵⁷

The court concluded that although Komorowski’s statements concerning paragraph six were defamatory per se,³⁵⁸ the public interest privilege protected the statements.³⁵⁹ The public interest privilege is applied to “‘communications made to law enforcement to report criminal activity’ on the basis that such statements ‘enhanc[e] public safety by facilitating the investigation of suspected criminal activity.’”³⁶⁰ Komorowski’s statements made to Kevin Vana “relate to suspected criminal activity at Mittal.”³⁶¹ But it was undisputed that Komorowski made the

350. *Id.* at 696 (citing Appellant’s App. at 28) (alterations in original).

351. *Id.* at 694.

352. *Id.* at 695 (citing *Kelly v. Tanoos*, 865 N.E.2d 593, 596 (Ind. 2007)).

353. *Id.* (citing *Hamilton v. Prewett*, 860 N.E.2d 1234, 1243 (Ind. Ct. App. 2007)).

354. *Id.* at 695-96 (citing *Trail v. Boys & Girls Clubs of Nw. Ind.*, 845 N.E.2d 130, 137 (Ind. 2006) (citations and quotations omitted)).

355. *Id.* at 697.

356. *Id.* (citing *Schrader v. Eli Lilly & Co.*, 639 N.E.2d 258, 262 (Ind. 1994)).

357. *Id.* (citing *Coachmen Indus., Inc. v. Dunn*, 719 N.E.2d 1271, 1276 (Ind. Ct. App. 1999) (citation omitted)).

358. *Id.* at 696.

359. *Id.* at 698.

360. *Id.* at 697 (citing *Kelley v. Tanoos*, 865 N.E.2d 593, 600 (Ind. 2007) (alterations in original)).

361. *Id.*

statements in good faith.³⁶² Dugan failed to offer anything beyond unsupported assertions that Komorowski abused the privilege.³⁶³

But the court reversed the grant of summary judgment concerning paragraph seven of Dugan's complaint because there was no indication that the common interest privilege protected Komorowski's statement concerning the core exchange.³⁶⁴ The qualified privilege of common interest "protects communication made in connection with membership qualifications, employment references, intracompany communications, and the extension of credit."³⁶⁵ Here, Komorowski said in his deposition that:

A. I do remember the one time that employees were very-hourly supervisors were upset with what was going on [i.e., NASS's theft investigation at Mittal] and had very much concern. And since I was their supervisor we kind of had a quick meeting of some of their questions. *And I was to stop the rumors and calm them down.*

Q. Okay. What were the rumors?

A. No one was sure if more people were going to be terminated. That was really the biggest thing. They were-everyone was on edge. Was the investigation over? *Which I really did not know.* Were more going to be terminated? *Which I did not know.* Were they themselves going to be terminated? I mean, these were-

Q. Were any of the rumors about Albert Verduczo [sic] taking equipment from the company?

A. Yes.

Q. Were those-was this talked about in this supervisor's [sic] meeting?

A. Yes.³⁶⁶

The court was unconvinced that the statement "was made for the purpose of 'facilitating the investigation of suspected criminal activity'" making the public interest privilege inapplicable.³⁶⁷ The court failed to see how Komorowski's statements were limited to the purpose of upholding his interest concerning an admission that "he did not know whether the investigation was over or whether more employees would be terminated."³⁶⁸ Thus, the court concluded that Mittal failed to establish that the common interest privilege protected the statement.³⁶⁹

C. *Tortious Interference with a Contractual Relationship*

The Indiana Court of Appeals addressed a number of cases concerning

362. *Id.* at 698.

363. *Id.*

364. *Id.* at 700.

365. *Id.* at 698 (citing *Kelley*, 865 N.E.2d at 597-98).

366. *Id.* at 699-700 (citing Appellees' App. at 151 (p. 23 of Komorowski's deposition)).

367. *Id.* at 698 (citing *Kelley*, 865 N.E.2d at 600).

368. *Id.* at 700.

369. *Id.*

tortious interference during the survey period. A key issue, among the four addressed by the court in *Stoffel v. Daniels*³⁷⁰ concerned whether the trial court properly denied the plaintiffs' declaratory and injunctive action on the grounds of tortious interference.³⁷¹ In 2008, Indiana enacted legislation abolishing the office of township assessor.³⁷² Plaintiff, and Huntington township assessor, Joan Stoffel, individually and as Representative of Class of State Township Assessors brought suit against Indiana Governor Mitchell E. Daniels, State of Indiana, Commissioner Cheryl Musgrave, and the Indiana Department of Local Government Finance (DLGF).³⁷³ The trial court granted the DLGF's motion to dismiss,³⁷⁴ and on appeal, Stoffel asserted, among other things, that DLGF wrongly interfered with "her contractual right to her public office."³⁷⁵

The court recited the elements to tortious interference with a contract as, "(1) the existence of a valid and enforceable contract; (2) defendant's knowledge of the existence of the contract; (3) defendant's intentional inducement of breach of the contract; (4) the absence of justification; and (5) damages resulting from defendant's wrongful inducement of the breach."³⁷⁶

The court briefly concluded that tortious interference with a contractual relationship was impossible because no contract could exist in this instance.³⁷⁷ As a township assessor, Stoffel was considered a "public officer," which is defined as "one who holds an elective or appointive position for which public duties are prescribed by law."³⁷⁸ The court reaffirmed the long-held rule that the duties of a public officer are based in the law, legislative will, and constitutional protections against interference, instead of contract or "obligations which cannot be changed or impaired."³⁷⁹

The court returned to the issue of tortious interference less than a month later in *Columbus Medical Service Organization v. Liberty Healthcare Corp.*³⁸⁰ Columbus Medical Services Organization won a competitive bid to provide medical staffing services at Logansport State Hospital over its competitor, Liberty Healthcare Corporation.³⁸¹ Liberty filed suit against Columbus alleging that, but for Columbus's false representations in submitting its bid, Liberty would

370. 908 N.E.2d 1260 (Ind. Ct. App. 2009).

371. *Id.* at 1263.

372. *Id.* at 1263-65.

373. *Id.* at 1265.

374. *Id.* at 1266.

375. *Id.* at 1270.

376. *Id.* (citing *Bilimoria Computer Sys., L.L.C. v. Am. Online, Inc.*, 829 N.E.2d 150, 156 (Ind. Ct. App. 2005)).

377. *Id.* at 1271.

378. *Id.* (citing *Mosby v. Bd. of Comm'rs*, 186 N.E.2d 18, 20 (1962)).

379. *Id.*; see generally *State ex rel. Black v. Burch*, 80 N.E.2d 294, 299 (Ind. 1948); *State ex rel. Yancey v. Hyde*, 28 N.E. 186, 187 (Ind. 1891); *Stuckey v. State*, 560 N.E.2d 88, 91 (Ind. Ct. App. 1990); *Mosby v. Bd. of Comm'rs*, 186 N.E.2d 18, 20 (Ind. App. 1962).

380. 911 N.E.2d 85 (Ind. Ct. App. 2009).

381. *Id.* at 87-91.

have acquired the winning bid and the Hospital would have retained six medical staff.³⁸²

The trial court concluded that Columbus made knowing substantial false representations, constituting tortious interference.³⁸³ Although the court of appeals did not address Columbus' uncontested findings concerning unjustified interference on appeal, the court did hold, among other things, that tortious interference with a business relationship "requires some independent illegal action."³⁸⁴

CONCLUSION

Indiana tort law saw significant changes in the area of damages since the previous survey period. *Stanley v. Walker*³⁸⁵ will have a lasting effect on the way practitioners plan long-term litigation strategies and frame methods for recovery for their clients. Practitioners should pay close attention to the Indiana General Assembly during the following survey periods to see if the legislature undertakes further action in reaction to the supreme court's decisions concerning excessive punitive damages and determining reasonable value of medical services.

382. *Id.* at 91.

383. *Id.* at 92-93.

384. *Id.* at 95 (citing *Brazauskas v. Fort Wayne-South Bend Diocese, Inc.*, 796 N.E.2d 286, 291 (Ind. 2003)).

385. 906 N.E.2d 852 (Ind. 2009).