RECENT DEVELOPMENTS IN INDIANA TORT LAW

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INTRODUCTION

This Article surveys the most significant developments in Indiana tort law from October 1, 2001, through September 30, 2002. The Article has been confined solely to the review of court decisions, as the legislature did not enact any legislation that made significant changes affecting tort law during the survey period.

I. MEDICAL MALPRACTICE

A. Statute of Limitations

In *Shah v. Harris*,[1] the Indiana Court of Appeals considered under what facts and circumstances Indiana's "occurrence-based" medical malpractice statute of limitations could be applied as a "discovery-based" statute of limitations. The facts of this case were undisputed.[2] In July of 1991, Dr. Kirit C. Shah ("Dr. Shah") diagnosed Stan Harris ("Harris") with multiple sclerosis.[3] Further, Harris ended his patient-physician relationship on April 12, 1993, when Dr. Shah moved out of the area.[4] In July 1998, another one of Harris' physicians "allegedly correctly diagnosed his illness as a vitamin B-12 deficiency, rather than multiple sclerosis."[5] This diagnosis came approximately seven years after Dr. Shah's diagnosis, and approximately five years after Harris and Dr. Shah had ended their patient-physician relationship.[6] On July 24, 2000, Harris and his wife Nancy Harris (the "Harrises") filed a proposed medical malpractice complaint with the Indiana Department of Insurance, and thereafter a complaint with the trial court.[7] Thereafter, Dr. Shah filed a motion for summary judgment, which was denied by the trial court, and an appeal was taken to the Indiana Court of Appeals.[8]

On appeal, the court first noted that under the Indiana statute of limitations

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1. 758 N.E.2d 953 (Ind. Ct. App. 2001).
2. *Id.* at 958.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 954.
8. *Id.*

for medical malpractice, a malpractice claim "may not be brought against a health care provider based upon professional service or health care that was provided . . . unless the claim is filed within two (2) years after the date of the alleged act, omission, or neglect . . . ."[9] The court further noted that this statute of limitations had "been upheld as constitutional when applied to all plaintiffs able to discover the alleged malpractice and injury within two years from the occurrence."[10] To the contrary, the court explained that, as provided by the Indiana Supreme Court in *Martin v. Richey* and *Van Dusen v. Stotts*, "under Article I, Sections 12 and 23 of the Indiana Constitution, the two year statute of limitations applicable to medical malpractice claims is unconstitutional as applied to plaintiffs . . ., who could not have discovered the injury with reasonable diligence within the two years of the alleged misconduct."[11] Additionally, the court provided that in order to qualify under the exception to the "occurrence-based" medical malpractice statute of limitations, a plaintiff must have had "'no information that, in the exercise of reasonable diligence, should have led to the discovery of the alleged malpractice and . . . resulting condition during the statutory period.'"[12] Furthermore, the court considered the impact of the observations made in *Boggs v. Tri-State Radiology, Inc.*, where the supreme court stated that "medical malpractice plaintiffs will frequently, if not virtually always, have varying amounts of time within which to file their claims before an occurrence-based statute of limitations expires," but that "as long as the claim can reasonably be asserted before the statute expires, the only burden imposed upon the later discovering plaintiffs is that they have less time to make up their minds to sue."[13]

The court then turned to address the present arguments before it under the guise of *Martin*, *Van Dusen*, and *Boggs*. In doing so, the court of appeals rejected Dr. Shah's assertion that *Martin* and *Van Dusen* were distinguishable from the facts presented because those cases considered diseases with long latency periods.[14] Rather, the court stated that it could "find no case law that would support the restriction of the analysis announced in *Martin* and *Van Dusen* to specific types of diseases, nor do we discern any public policy or common sense reason for doing so."[15]

The court went on to synthesize the rulings of *Martin*, *Van Dusen*, and *Boggs* by stating that those cases created a "two-stage analysis for the application of Indiana's two-year, medical malpractice limitation period."[16] First, the court noted that [i]f a claimant discovers the alleged malpractice and resulting injury, or possesses information that would lead a reasonably diligent person to such

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9. *Id.* (quoting IND. CODE § 34-18-7-1(b) (1998)).

10. *Id.* (citing Martin v. Richey, 711 N.E.2d 1273, 1278 (Ind. 1999)).

11. *Id.* at 957 (citing *Martin*, 711 N.E.2d at 1284-85; Van Dusen v. Stotts, 712 N.E.2d 491, 493 (Ind. 1999)).

12. *Id.* (quoting *Van Dusen*, 712 N.E.2d at 493).

13. *Id.* at 958 (quoting Boggs v. Tri-State Radiology, Inc., 730 N.E.2d 692, 697 (Ind. 2000)).

14. *Id.*

15. *Id.*

16. *Id.*

discovery during the two-year period, then the purely occurrence-based limitation period is both applicable and constitutional, so long as the claim can reasonably be asserted before the period expires."[17] Second, the court considered the plaintiff who does not discover the alleged malpractice and resulting injury, and does not possess information that would lead to such discovery through reasonable diligence.[18] Under this scenario, the court found that the Indiana Supreme Court intended a second-stage of analysis; namely, a determination of when a claimant should have discovered the alleged malpractice and resulting injury.[19] This determination in turn established the date from which the two-year statute of limitations begins to run.[20] Lastly, the court noted that whether the medical malpractice statute of limitations is constitutional as applied is to be determined by the trial court on a case-by-case basis.[21]

Turning to the facts before it, the court of appeals determined that "the two-year statute of limitations began to run at the latest when Dr. Shah and Harris' physician-patient relationship ended on April 12, 1993."[22] Moreover, the information available to a reasonably diligent person, did not enable the Harrises to discover Dr. Shah's alleged malpractice, and Harris' injury, until July 31, 1998.[23] As a result, the discovery-based statute of limitations was applicable, thus tolling the Harrises' date to file a medical malpractice claim until July 31, 2000, two years from Harris' discovery of his allegedly erroneous diagnosis.[24] Accordingly, the court of appeals affirmed the trial court's order denying Dr. Shah's motion for summary judgment.[25]

In *Rogers v. Mendel*,[26] the court of appeals addressed the application of Indiana's "occurrence-based" medical malpractice statute of limitations. Dr. L. Ralph Rogers ("Dr. Rogers") performed a hysterectomy on Maryetta Mendel ("Mendel") on December 9, 1993.[27] At that time, Dr. Rogers removed a tumor from Mendel, and had a laboratory test performed on the tissue.[28] The tissue tested positive for carcinoma.[29] However, at subsequent meetings between Mendel and Dr. Rogers, on December 17, 1993 and January 4, 1994, Dr. Rogers allegedly failed to inform Mendel of her test results.[30] In January 1995, Mendel

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17. *Id.* (citing *Boggs*, 730 N.E.2d at 697-98; *Van Dusen*, 712 N.E.2d at 497-98; *Martin*, 711 N.E.2d at 1279-80).
18. *Id.* at 959.
19. *Id*.
20. *Id*. (citing *Van Dusen*, 712 N.E.2d at 497-98; *Martin*, 711 N.E.2d at 1279-80).
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. 758 N.E.2d 946 (Ind. Ct. App. 2001).
27. *Id.* at 947.
28. *Id.*
29. *Id.*
30. *Id*. at 947-48.

began suffering from abdominal cramping and visited her family doctor, who referred Mendel to a colon specialist, through whom she was eventually referred to an oncologist, Dr. Fox.[31] Dr. Fox informed Mendel that she had metastatic endometrial cancer and began Mendel on a course of chemotherapy.[32] As a result of hematologic toxicity, Mendel was forced to discontinue chemotherapy and was referred to a GYN oncologist , who recommended Taxol treatments.[33] In February of 1996, during attempts to get Medicare reimbursement, Mendel's daughter requested and received the records of Dr. Rogers, which contained a December 1993 pathology report that indicated carcinoma in the tumor removed by Dr. Rogers.[34] On September 15, 1996, Mendel died of progressive metastatic endometrial cancer.[35]

On December 30, 1996, the Mendels filed their proposed medical malpractice complaint with the Indiana Department of Insurance.[36] On March 14, 2000, the Medical Review Panel entered a decision in favor of the Mendels.[37] The Mendels filed a complaint in the trial court on May 31, 2000.[38] Thereafter, Dr. Rogers filed a motion for summary judgment, which was subsequently denied by the trial court.[39] Dr. Rogers brought an interlocutory appeal.[40]

On appeal, the court, as it did in the companion case of *Shah v. Harris*,[41] first noted that under the Indiana statute of limitations for medical malpractice, a malpractice claim "may not be brought against a health care provider based upon professional service or health care that was provided . . . unless the claim is filed within two (2) years after the date of the alleged act, omission, or neglect . . . ."[42] The court further noted that this statute of limitations had "been upheld as constitutional when applied to all plaintiffs able to discover the alleged malpractice and injury within two years from the occurrence."[43] To the contrary, the court explained that, as provided by the Indiana Supreme Court in *Martin* and *Van Dusen*, "under Article I, Sections 12 and 23 of the Indiana Constitution, the two year statute of limitations applicable to medical malpractice claims is unconstitutional as applied to plaintiffs . . . , who could not have discovered the injury with reasonable diligence within the two years of the alleged misconduct."[44] Additionally, the court provided that in order to qualify under the

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31. *Id.* at 948.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 953.
42. *Id.* at 955 (quoting IND. CODE § 34-18-7-1(b) (1998)).
43. *Id.* at 954 (citing Martin v. Richey, 711 N.E.2d 1273, 1278 (Ind. 1999)).
44. *Id.* at 957 (citing *Martin*, 711 N.E.2d at 1284-85; Van Dusen v. Stotts, 712 N.E.2d 491,

exception to the "occurrence-base" medical malpractice statute of limitations, "'no information that, in the exercise of reasonable diligence, should have led to the discovery of the alleged malpractice and . . . the resulting condition during the statutory period.'"[45] Furthermore, the court considered the impact of the observations made in *Boggs*, where the supreme court stated that "medical malpractice plaintiffs will frequently, if not virtually always, have varying amounts of time within which to file their claims before an occurrence-based statute of limitations expires[,]" but that "as long as the claim can reasonably be asserted before the statute expires, the only burden imposed upon the later discovering plaintiffs is that they have less time to make up their minds to sue."[46]

The court went on to synthesize the rulings of *Martin*, *Van Dusen*, and *Boggs* by stating that those cases created a "two-stage analysis for the application of Indiana's two-year, medical malpractice limitation period."[47] First, the court held that [i]f a claimant discovers the alleged malpractice and resulting injury, or possesses information that would lead a reasonably diligent person to such discovery during the two-year period, then the purely occurrence-based, limitation period is both applicable and constitutional, so long as the claim can reasonably be asserted before the period expires."[48] Second, the court considered the plaintiff who does not discover the alleged malpractice and resulting injury, and does not possess information that would lead to such discovery through reasonable diligence.[49] Under this scenario, the court found that the Indiana Supreme Court intended a second-stage of analysis; namely, a determination of when a claimant should have discovered the alleged malpractice and resulting injury.[50] Such a determination in turn establishes the date from which the two-year statute of limitations begins to run.[51] Lastly, the court noted that whether the medical malpractice statute of limitations is constitutional as applied is to be determined by the trial court on a case-by-case basis.[52]

In *Langman v. Milos*,[53] the Indiana Court of Appeals addressed whether plaintiffs had timely filed their medical malpractice complaint when such complaint was filed more than four years after the alleged malpractice. On February 7, 1993, the plaintiff, Lawrence Langman ("Lawrence"), was injured at his place of employment when a large piece of steel struck his left leg and foot.[54] Lawrence was immediately taken to a hospital, where his wound was cleansed

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493 (Ind. 1999)).

45. *Id.* (quoting *Van Dusen*, 712 N.E.2d at 493).

46. *Id.* at 958 (quoting Boggs v. Tri-State Radiology, Inc., 730 N.E.2d 692, 697 (Ind. 2000)).

47. *Id.*

48. *Id.* (citing *Boggs*, 730 N.E.2d at 697-98; *Van Dusen*, 712 N.E.2d at 497-98; *Martin*, 711 N.E.2d at 1279-80).

49. *Id*.

50. *Id.*

51. *Id*. (citing *Van Dusen*, 712 N.E.2d at 497-98; *Martin*, 711 N.E.2d at 1279-80).

52. *Id.*

53. 765 N.E.2d 227, 229 (Ind. Ct. App. 2002).

54. *Id.*

and sutured.[55] Several days later, Lawrence met with Dr. Babcoke, who ordered Lawrence to physical therapy.[56] On April 23, 1993, Dr. Babcoke referred Lawrence to Dr. Koscielniak, an orthopedic surgeon.[57] After examining Lawrence, Dr. Koscielniak "believed that Lawrence's symptoms indicated Reflex Sympathetic Dystrophy ('RSD')."[58] As a result, Dr. Koscielniak recommended that Lawrence seek additional treatment, and suggested "sympathetic block."[59] Dr. Koscielniak referred Lawrence to Dr. Stinson, an anesthesiologist who conducted a pain clinic.[60]

On May 8, 1993, Lawrence was admitted to the hospital and underwent an insertion of an epidural catheter.[61] After receiving the catheter, Lawrence "reported a pain level of zero," but, his mobility had decreased.[62] "Lawrence then began physical therapy, at which point he noticed increased pain."[63] Lawrence was administered Valium and again reported a decrease in pain.[64] Lawrence was discharged from the hospital three days later.[65]

During the summer of 1993, Lawrence also met several times with a Dr. Javors.[66] In order to diagnose Lawrence, Dr. Javors ordered several diagnostic tests, including a bone scan, an electromyography ("EMG"), and a magnetic resonance imaging ("MRI") of Lawrence's foot.[67] On June 11, 1993, following Dr. Javors' review of these tests, he concluded that Lawrence did in fact suffer from RSD.[68] On September 1, 1993, Dr. Javors gave Lawrence a Permanent Partial Impairment rating for purposes of worker's compensation.[69] A letter, dated October 11, 1995, indicated that Lawrence "should be permanently restricted from climbing ladders, walking on uneven ground, and walking on beams."[70] After settling his worker's compensation claim in November 1993, Lawrence did not see Dr. Javors again.[71]

Lawrence next met with Dr. Milos in October 1994.[72] At this time, Lawrence complained of severe pain in his left foot and allegedly informed Dr. Milos of

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55. *Id.*
56. *Id.*
57. *Id.*
58. *Id*.
59. *Id.* at 229-30.
60. *Id*. at 230.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id*.
65. *Id*.
66. *Id*.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*

being diagnosed with RSD.[73] Dr. Milos prescribed pain medication for Lawrence, and referred Lawrence for an EMG.[74] On November 19, 1994, following laboratory work, an arthritis profile, and more pain medication, Dr. Milos decided that Lawrence needed surgery.[75] Dr. Milos referred Lawrence to Dr. Smith for surgery on his left foot.[76]

On December 28, 1994, Dr. Smith performed surgery on Lawrence's left foot to remove two bone coalitions.[77] During post-operative visits with Lawrence, Dr. Milos noted that Lawrence had increased his activity against Dr. Milos' orders.[78] Until March 1995, Dr. Milos' notes further stated that Lawrence "was healing well with continuous improvement."[79] On March 4, 1995, Lawrence again reported pain in his left foot.[80] From March through August of 1995, Lawrence underwent injection therapy, received several referrals from Dr. Milos, and received numerous prescriptions for pain medicine.[81]

In July 1995, one of the doctors to whom Lawrence was referred, Dr. Kozelka, ordered several additional diagnostic tests for Lawrence.[82] Lawrence did not follow up with treatments or diagnostic testing with Dr. Kozelka.[83] Dr. Milos' last encounter with Lawrence was when his office telephoned in a prescription for pain killers for him on August 7, 1995.[84]

Lawrence's subsequent visit to a doctor for his left foot, ankle, and leg, took place in February 1998, when he met with Dr. Fedorchak, a podiatrist.[85] Dr. Fedorchak informed Lawrence that the surgery recommended by Dr. Milos, and performed by Dr. Smith, should not have been done.[86] Dr. Fedorchak referred Lawrence to Dr. Dallas-Prunskis.[87] Dr. Dallas-Prunskis first met with Lawrence on February 12, 1998, and noted then that Lawrence was not properly treated for his RSD.[88] Dr. Dallas-Prunskis treated Lawrence until August of 1999.[89]

On October 6, 1999, the Langmans filed a proposed complaint with the Indiana Department of Insurance.[90] The Langmans alleged in part "that Drs.

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73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 231.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* at 231-32.
83. *Id.* at 232.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.* at 232-33.

Milos and Smith negligently performed surgery on him, causing his pain to increase and his RSD to advance."[91] On November 28, 2000, Drs. Milos and Smith filed a joint motion for summary judgment alleging that the "Langmans' suit was barred by the two-year medical malpractice statute of limitations."[92] On August 14, 2001, the trial court granted the motion for summary judgment, finding "that it would be unreasonable to assume that the Langmans were not aware of the underlying disease, the changes in Lawrence's condition, and other things that would have provided them with adequate notice of his potential claim of malpractice."[93]

On appeal, the court of appeals applied the two-stage analysis for determining the application of Indiana's two-year medical malpractice limitation period as addressed in *Shah v. Harris* and *Rogers v. Mendel*.[94]

Under the facts of *Langman*, the court held that it was clear that both Lawrence and his wife were aware of Lawrence's increased pain within months of his December 1994 surgery.[95] Moreover, the court noted Lawrence's admission that he felt worse within months of the surgery and his related communication to Dr. Milos.[96] In summary, the court found that "although Lawrence's worsened and worsening symptoms would have led a reasonably diligent person to discover the alleged malpractice and resulting injury, he did not seek medical assistance for anything related to his left foot, ankle or leg until February 2, 1998, nearly two and one-half years after his last visit with Dr. Milos."[97] Therefore, the court held that the facts did not pass the first stage of the *Shaw* and *Rogers* analysis and affirmed the trial court's grant of summary judgment in favor of Drs. Milos and Smith.[98]

In *Johnson v. Gupta*,[99] the Indiana Court of Appeals addressed whether the plaintiff had timely filed her medical malpractice complaint when it was filed approximately four years and four months after the alleged act of malpractice. In September 1990, Dr. Arjun Gupta performed a hemorrhoidectomy and mucopexy on the plaintiff, Charlotte Johnson ("Johnson").[100] Thereafter, Johnson began experiencing fecal incontinence.[101] Dr. Gupta ("Dr. Gupta") assured Johnson that the symptoms would disappear.[102] Johnson saw other doctors to

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91. *Id.* at 233.

92. *Id.*

93. *Id.*

94. *Id.* at 234 (citing Shah v. Harris, 758 N.E.2d 953 (Ind. Ct. App. 2001); Rogers v. Mendel, 758 N.E.2d 946 (Ind. Ct. App. 2001)).

95. *Id.* at 236.

96. *Id.*

97. *Id.* at 235-36.

98. *Id.* at 236.

99. 762 N.E.2d 1280 (Ind. Ct. App. 2002) (Johnson II).

100. *Id.*

101. *Id.*

102. *Id.*

help determine the cause of her incontinence.[103] In 1994, a doctor in Ohio discovered that her rectum had been severed during her surgery in 1990, resulting in a complete and total loss of her anal sphincter.[104] Johnson was informed that the only treatment for this condition was a colostomy.[105]

In a previous appeal,[106] the court of appeals affirmed a grant of summary judgment in favor of Dr. Gupta on the grounds that the "occurrence-based" statute of limitations in Indiana's Medical Malpractice Act did not violate article I, section 12, and article 1, section 23 of the Indiana Constitution.[107] After this decision, Johnson petitioned the Indiana Supreme Court for transfer, and transfer was granted.[108] On transfer, the supreme court remanded the case to the trial court for further proceedings consistent with the opinions contained in *Van Dusen*[109] and *Martin*,[110] which discussed the constitutionality of the medical malpractice statute of limitations.[111]

On remand, the trial court determined that the "occurrence-based" statute of limitations was constitutional as applied to *Johnson I*, and again entered summary judgment in favor of Dr. Gupta.[112] Johnson appealed that decision.[113] On appeal, the court of appeals analyzed the case in light of the Indiana Supreme Court's holdings in *Van Dusen* and *Martin*.[114]

The court first noted the changes brought about by *Van Dusen* and *Martin*, by quoting the following passage from *Van Dusen*:

> The question of when a plaintiff discovered facts which, in the exercise of reasonable diligence, should lead to the discovery of the medical malpractice and resulting injury, is often a question of fact. In general, however, a plaintiff's lay suspicion that there may have been malpractice is not sufficient to trigger the two-year period. At the same time, a plaintiff need not know with certainty that malpractice caused his injury, to trigger the running of the statutory time period. Moreover, when it is undisputed that plaintiff's doctor has expressly informed a plaintiff that he has a specific injury and that there is a reasonable possibility, if not a probability, that the specific injury was caused by a specific act at a specific time, then the question may become one of law. Under such circumstances, generally a plaintiff is deemed to have sufficient facts to

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103. *Id*.
104. *Id*.
105. *Id*.
106. 682 N.E.2d 827 (Ind. Ct. App. 1997) (Johnson I).
107. *Johnson II*, 762 N.E.2d at 1280-81 (citing IND. CODE § 34-18-7-1).
108. *Id.* at 1281.
109. 712 N.E.2d 491 (Ind. 1999).
110. 711 N.E.2d 1273 (Ind. 1999).
111. *Johnson II*, 762 N.E.2d at 1281.
112. *Id*.
113. *Id.*
114. *Id.*

> require him to seek promptly any additional medical or legal advice needed to resolve any remaining uncertainty or confusion he may have regarding the cause of his injury and any legal recourse he may have, and his unexplained failure to do so should not excuse a failure to timely file a claim. Thus, in such a case, we conclude that the date on which he receives such information—that is, information that there is a reasonable possibility that a specific injury was caused by a specific act at a specific time—is the date upon which the two-year period begins to run.[115]

The court then proceeded to apply such principles to the facts in Johnson's case.[116]

The court noted that almost immediately after Johnson's surgery, on September 11, 1990, she "'knew there was something wrong' and became incontinent of stool."[117] Moreover, the court found that upon Johnson's visit to Dr. Gupta's partner, Dr. Piatak, on January 24, 1992, Johnson continued to suffer from incontinence, and was that day informed by Dr. Piatak that she had no rectal tone.[118] Yet, Johnson did not again consult with a physician regarding her incontinence until August or September 1994, when she saw Dr. Streeter.[119] Thereafter, on September 27, 1994, Johnson was informed by Dr. Strong of the Cleveland Clinic that the laser surgery performed by Dr. Gupta on September 11, 1990, had "irreparably severed" her rectal muscles.[120]

The court rejected Johnson's contention that she had suffered a "latent injury" within the meaning of *Van Dusen* and *Martin*, holding in part that "*Van Dusen* did not, as Johnson implies, establish that the statute of limitations is tolled until the patient discovers a causal link between the physician's actions and the patient's injury."[121] Rather, the court explained that "latent injury," as defined under *Van Dusen*, was intended "where a patient suffers no discernible pain or symptoms until several years after the alleged malpractice."[122] Thus, the court discerned that under *Van Dusen* and *Martin* the medical malpractice statute of limitations "is tolled until the patient experiences symptoms that would cause a person of reasonable diligence to take action that would lead to the discovery of the malpractice."[123] Applying this rule of law, the court of appeals held that "on January 24, 1992, at the latest, Johnson had discovered facts that, in the exercise of reasonable diligence, should have lead to the discovery of the malpractice."[124] Accordingly, the court affirmed the trial court's grant of summary judgment in

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115. Van Dusen v. Stotts, 712 N.E.2d 491, 499 (Ind. 1999) (citation omitted).
116. *Johnson II*, 762 N.E.2d at 1281.
117. *Id.* (citing Brief for Appellant at 5).
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.* at 1283.
122. *Id.*
123. *Id.*
124. *Id.*

favor of Dr. Gupta.[125]

In *Jacobs v. Manhart*,[126] the court of appeals addressed the application of Indiana's medical malpractice statute of limitations within the context of plaintiffs who filed a medical malpractice claim after the running of the occurrence-based statute of limitations, but prior to the running of the discovery-based statute of limitations. The plaintiff, Manhart, had a PAP smear in February of 1996.[127] Manhart's PAP smear indicated severe dysplasia.[128] Shortly after her diagnosis, Manhart underwent a colposcopy.[129] A month after her colposcopy, Manhart had a biopsy.[130] Manhart was then instructed to have a follow-up PAP smear at three months, six months, and one year.[131] Manhart's three month PAP smear, taken on June 20, 1996, indicated that she still had "marked dysplasia."[132] Manhart's "doctor explained that such abnormal results were to be expected so soon after the biopsy. [Manhart] had follow-up PAP smears taken in October 1996, February 1997, and again in November 1997; the results of all three were reported as normal."[133] In February of 1998, Manhart discovered that she was pregnant, and on February 12, she had a PAP smear pursuant to her obstetrician's order.[134] The specimen was analyzed by South Bend Medical Foundation, Inc. ("SBMF") and read by Dr. Kristin M. Jacobs ("Jacobs").[135] Thereafter, Manhart's obstetrician received notice that the results of the PAP smear were normal.[136] On March 11, 1999, approximately eight months after the birth of twins, Manhart had another "routine examination and PAP smear."[137] Again, Manhart was told that the results of the PAP smear were normal.[138]

In June 1999, Manhart began to experience "breakthrough bleeding."[139] Manhart thought the bleeding was from use of birth control pills, so thinking, she sought and received a different prescription for birth control pills, but the bleeding continued.[140] On August 24, 1999, an ultrasound revealed that Manhart had a "large tumor."[141] A subsequent second opinion confirmed the diagnosis of

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125. *Id*.
126. 770 N.E.2d 344 (Ind. Ct. App. 2002).
127. *Id.* at 346.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* at 347.
133. *Id.*
134. *Id*.
135. *Id.*
136. *Id*.
137. *Id.*
138. *Id.*
139. *Id*.
140. *Id.*
141. *Id.*

cancer and indicated that her cancer was at "Stage III or IV, the highest stage."[142] On September 3, 1999, Manhart underwent a radical hysterectomy.[143]

In October 1999, at the request of Manhart, a cytotechnologist and family friend, Nora Clark ("Clark"), reviewed the slides from Manhart's previous PAP smears.[144] Sometime between Thanksgiving and Christmas of 1999, Clark informed Manhart of her opinion that "some of the [PAP smear] slides had been misread."[145] Between Christmas 1999 and the New Year, Clark, at the request of Manhart, forwarded Manhart's PAP smear slides to a pathologist ("Dr. Clark") for his review.[146] The pathologist's report, dated April 13, 2000, indicated that he agreed with some of the readings of Manhart's PAP smear slides, but disagreed with others.[147]

Thereafter, on May 16, 2000, Manhart and her husband (collectively "plaintiffs") filed their proposed complaint for medical malpractice with the Indiana Department of Insurance.[148] The plaintiffs subsequently filed their complaint in the trial court on May 19, 2000, and alleged that SBMF and Jacobs "failed to comply with the applicable standards of care."[149] "On September 20, 2000, SBMF filed a motion for preliminary determination upon the issue of the medical malpractice statute of limitation . . . ."[150] The trial court denied SBMF's motion for preliminary determination, as well as SBMF's motion to reconsider, but granted SBMF's motion to certify the trial court's order for interlocutory appeal.[151]

On appeal, the appellate court examined the applicable medical malpractice statute of limitations and further noted that the Indiana Supreme Court had construed Indiana's medical malpractice statute of limitation as an "occurrence-based" statute rather than a "discovery-based" statute.[152]

It was undisputed on appeal that the alleged malpractice asserted against SBMF occurred in February 1998.[153] It was also undisputed that the plaintiffs did not file their complaint against SBMF until May 2000.[154] Thus, the court explained that by its terms, Indiana's two-year medical malpractice statute of limitations barred the plaintiff's claim.[155] The plaintiffs argued that Indiana's medical malpractice statute of limitations was unconstitutional as applied to

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142. *Id*.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id*.
148. *Id.* at 328.
149. *Id.*
150. *Id*.
151. *Id.*
152. *Id.* at 349 (quoting Martin v. Richey, 711 N.E.2d 1273, 1278 (Ind. 1999)).
153. *Id*.
154. *Id.*
155. *Id.*

them.[156] In addressing this argument, the court of appeals first noted that "our occurrence-based malpractice statute of limitation has been upheld as constitutional on its face under Article 1, Sections 12 and 23 of the Indiana Constitution."[157] However, the court further recognized "that under some circumstances, the statute of limitation is unconstitutional as applied to plaintiffs who, in the exercise of reasonable diligence, could not have discovered the alleged malpractice within the two-year limitation period."[158]

Relying on *Martin*, *Van Dusen*, and *Boggs*, the court noted that the "first step" to analyzing Manhart's claim was to "determine when the alleged malpractice occurred and thus, when the two-year statutory period expired."[159] "[T]he next step is to determine the 'discovery date.'"[160] Then, the court stated, that if the discovery date falls within the two-year limitation period, a third stage of analysis is necessary to determine "whether the time which remains of the limitation period is reasonable rendering the occurrence-based statute of limitations constitutional as applied."[161] Alternatively, the court of appeals noted that if the "discovery date" was found to be after the expiration of the occurrence-based statute of limitation, then the limitation period would be unconstitutional as applied to the plaintiffs' claim.[162]

When applying the aforementioned process to determine the viability of the plaintiffs' claim, the court of appeals held that Manhart was "on notice that there was a reasonable possibility" that her tumor had gone undetected as a result of SBMF's malpractice upon receiving Dr. Clark's report.[163] In so holding, the court noted that Manhart "closely monitored her condition, and up until August 24, 1999, when she was diagnosed with cervical cancer, there [was] no evidence that [she] had any information, which in the exercise of reasonable diligence, should have led to the discovery of the alleged malpractice and resulting injury."[164] Moreover, the court, considering the totality of the circumstances, concluded "that it was a practical impossibility for Ms. Manhart to assert her claim before the expiration of the limitation period and that the rigid application of the occurrence-based statute would deny her the meaningful opportunity to pursue her claim."[165] Consequently, the court of appeals determined that the plaintiffs' medical malpractice claim was not barred by the statute of limitations.[166]

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156. *Id.*
157. *Id.* (citing *Martin*, 711 N.E.2d at 1279).
158. *Id.* at 349-50 (quoting Van Dusen v. Scotts, 712 N.E.2d 491, 495 (Ind. 1999)).
159. *Id.* at 352.
160. *Id.*
161. *Id.* (citing *Boggs*, 730 N.E.2d at 697).
162. *Id.* at 352 (citing *Van Dusen*, 712 N.E.2d at 497).
163. *Id.* at 354.
164. *Id.*
165. *Id.* at 355.
166. *Id.*

B. Sufficiency of Physician's Affidavit

In *McIntosh v. Cummins*,[167] the court of appeals addressed "whether the trial court erred in finding a genuine issue of material fact in a motion for summary judgment supported by a favorable medical review panel opinion and opposed only by the testimony of a family practitioner."[168] In October 1992, Cummins fractured his right femur and hip which required Dr. McIntosh to perform surgery and insert an intramedullary nail in Cummins' femur and to fixate his hip with screws.[169] In December 1992, Dr. McIntosh took an x-ray of Cummins' femur and the results noted a "paucity of callus formation at the distal femoral fracture."[170] In January 1993, x-ray results noted an "interval improvement in the callus formation," and Dr. McIntosh instructed Cummins to "gradually increase weight bearing."[171]

Cummins was released back to work in April 1993, and, in June 1993, Cummins "felt something strange in his leg."[172] X-ray results discovered that the intermedullary nail had broken and a second surgery was required to replace the nail.[173] After the second surgery, Cummins experienced more pain, and it was discovered that there was a misalignment which was putting stress on his knee.[174] Cummins proceeded to see another physician and, after his pain had not subsided, he was referred to another physician who performed a bone graft.[175]

In June 1995, "Cummins filed his proposed complaint with the Indiana Department of Insurance, alleging that Dr. McIntosh breached the applicable standard of care by permitting Cummins to return to work and to full weight bearing without the benefit of x-rays to determine if the bones had properly healed."[176] "The Medical Review Panel issued its opinion finding that 'the evidence does not support the conclusion that Defendant, Brent R. McIntosh, M.D., failed to meet the applicable standard of care as charged in the Complaint.'"[177] In May 1999, Cummins brought an action in the trial court and, in June 1999, Dr. McIntosh moved for summary judgment attaching the Medical Review Panel opinion in support of his argument.[178] Cummins' filed his response attaching the affidavit of Dr. Norman Glanzman, a family practitioner.[179] Dr. Glanzman stated in his affidavit that he had an opportunity to treat numerous

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167. 759 N.E.2d 1180 (Ind. Ct. App. 2001).
168. *Id.* at 1182.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.* at 1182-83.
177. *Id.* at 1183.
178. *Id.*
179. *Id.*

individuals with fractures and to review their x-rays for adequate healing, and that he was of the opinion that Dr. McIntosh deviated from the standard of care in the treatment of Cummins by failing to take an x-ray to determine if sufficient healing had taken place before releasing Cummins to return to work and to full weight bearing.[180] The trial court denied Dr. McIntosh's motion for summary judgment.

On interlocutory appeal, Dr. McIntosh contended that "the evidence Cummins utilized to establish a genuine issue, Dr. Glanzman's affidavit, was insufficient because Dr. Glanzman failed to state he was familiar with the applicable standard of care."[181] The court of appeals noted that in a medical malpractice action, an opposing affidavit submitted to establish that a defendant doctor breached the applicable standard of care must set forth that the expert is familiar with the proper standard of care under the same or similar circumstances, what that standard of care is, and that the defendant's treatment of the plaintiff fell below the standard.[182]

Dr. Glanzman's opposing affidavit stated that he:

1. was a licensed medical physician within the State of Indiana . . . .
2. was the Medical Coordinator of Helix Health which is a multi-disciplinary health center which specializes in returning individuals with serious injuries, including bone fractures . . . .
3. has reviewed the depositions of Mr. Cummins, the defendant, and reviewed Dr. McIntosh's medical records for the plaintiff.
4. had an opportunity to treat numerous individuals with fractures and review their x-rays for adequate healing, and [is] of the opinion that Dr. McIntosh deviated from the standard of care.[183]

The court stated, "although the affidavit does not directly state that Dr. Glanzman is familiar with the applicable standard of care, it is evident from the content of the affidavit that Dr. Glanzman's employment and experience made him indeed familiar with the applicable standard in the treatment of bone fractures and x-rays."[184] In addition, the court observed that it had previously held that an affidavit which establishes an expert's credentials, states that the expert has reviewed the relevant medical records, and sets forth the expert's conclusions that the defendant violated the standard of care in their treatment, which in turn caused the complained of injury, is sufficient to demonstrate the existence of a material fact, thus making summary judgment inappropriate.[185]

Dr. McIntosh also argued that the affidavit was not sufficient because Dr. Glanzman practiced a completely different specialty than Dr. McIntosh; Dr. Glanzman was a family practitioner and Dr. McIntosh was an orthopedic

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180. *Id.*

181. *Id.* at 1184.

182. *Id.* (quoting Lusk v. Swanson, 753 N.E.2d 748, 753 (Ind. Ct. App. 2001)).

183. *Id.*

184. *Id.*

185. *Id.* (quoting Jones v. Minick, 697 N.E.2d 496, 499 (Ind. Ct. App. 1998)).

surgeon.[186] However, the court stated that "there is no requirement that the expert physician be of the same specialty as the defendant doctor."[187] The court went on to say that "[p]rovided there is at least a generalized and supportable conclusion by the affiant that he is familiar with the applicable standard of care, the specific knowledge of an expert witness is neither determinative of the witness' qualification as an expert nor the admissibility of his opinion into evidence."[188] Furthermore, "[a] witness' competency is determined by his knowledge of the subject matter generally, and his knowledge of the specific subject of inquiry goes to the weight to be accorded his opinion, not its admissibility."[189] The court concluded, "the fact that Dr. Glanzman is a family practitioner and not an orthopedic surgeon is not dispositive."[190]

Finally, Dr. McIntosh argued that Dr. Glanzman admitted in his deposition testimony that he was not familiar with the applicable standard of care, and his testimony must therefore be excluded.[191] However, Cummins pointed to deposition testimony where Dr. Glanzman testified that he was an expert in callus formation, and that he had treated numerous post-fracture patients.[192] The court noted that "[e]ven if facts are not in dispute, summary judgment is inappropriate if conflicting inferences arise."[193] In applying this deferential standard, the court agreed with the trial court and resolved the conflicts in favor of Cummins as the non-movant.[194]

The court concluded that "the trial court properly determined that Dr. Glanzman's affidavit was sufficient to raise a genuine issue of material fact."[195]

II. PREMISES LIABILITY

In *Lawson v. Lafayette Home Hospital*,[196] the court of appeals addressed whether municipal ordinances that require abutting property owners or occupiers to remove snow and ice from public sidewalks create, as a matter of law, a duty under which an owner or occupier may be held liable to third party pedestrians. Lawson slipped and fell on ice on a public sidewalk adjacent to Lafayette Home Hospital ("Hospital"). The Hospital had shoveled the sidewalk prior to Lawson's fall.[197] Lawson brought suit against the Hospital "alleging that the Hospital's

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186. *Id.*

187. *Id.* (quoting Snyder v. Cobb, 638 N.E.2d 442, 446 (Ind. Ct. App. 1994)).

188. *Id.* at 1185 (quoting *Snyder*, 638 N.E.2d at 446; *see also* Aldrich v. Coda, 732 N.E.2d 243, 245 (Ind. Ct. App. 2000)).

189. *Id.* (quoting *Snyder*, 638 N.E.2d at 446).

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. 760 N.E.2d 1126 (Ind. Ct. App. 2002).

197. *Id*. at 1128.

negligence in failing to warn visitors of the dangerous condition or failing to warn visitors to the Hospital of the dangerous condition was the direct and proximate result of Lawson's personal injuries."[198] The Hospital moved for summary judgment asserting that it had no duty to keep public sidewalks owned by the city of Lafayette cleared of ice and snow. The Hospital also alleged that it did not assume a duty by creating an artificial condition that increased the risk of harm to Lawson.[199] Finding that the Hospital owed no duty of care to Lawson, the trial court granted summary judgment in the Hospital's favor. Lawson's appeal ensued.[200]

On appeal, Lawson argued that the Hospital, by shoveling the sidewalks, assumed a duty to maintain the public sidewalks adjacent to its building and that its attempts at snow removal increased the risk of harm to Lawson.[201] The court observed that in order for Lawson to prevail in his negligence action, he must demonstrate that "the Hospital: 1) owed him a duty, 2) that the Hospital breached its duty, and 3) that the breach proximately caused Lawson's injuries."[202] Moreover, the court noted that "[i]t is well settled in Indiana that an owner or occupant of property abutting a public street or sidewalk has no duty to clear those streets and sidewalks of ice and snow. . . . Additionally, municipal ordinances that require abutting owners or occupiers to remove snow and ice from public sidewalks do not, as a matter of law, create a duty under which an owner or occupier can be held liable to third party pedestrians."[203] Despite this precedent, Lawson maintained that the Hospital assumed a duty.[204]

The court opined that "[i]n Indiana, persons are held to have assumed a duty to pedestrians on public sidewalks only when they create artificial conditions that increase the risk and proximately cause injury to persons using those sidewalks."[205] The court next noted that Indiana has never recognized the removal of ice and snow to be an artificially created condition that increased the risk of harm to pedestrians.[206] Instead, the court asserted that "such efforts to reduce danger to pedestrians are generally considered desirable and worthy, and should not be discouraged by holding such persons liable simply because they endeavor to do so."[207] The court affirmed the judgment of the trial court.[208]

In *Wellington Green Homeowners' Association v. Parsons*,[209] the court of

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198. *Id*.

199. *Id*.

200. *Id*.

201. *Id*. at 1129.

202. *Id*. (citing Delta Tau Delta v. Johnson, 712 N.E.2d 968, 970-71 (Ind. 1999)).

203. *Id*. (citing Hirschauer v. C&E Shoe Jobbers, Inc., 436 N.E.2d 107, 110-11 (Ind. Ct. App. 1982) (citations omitted) (citing Carroll v. Jobe, 638 N.E.2d 467, 471 (Ind. Ct. App. 1994)).

204. *Id*.

205. *Id*. at 1130.

206. *Id*.

207. *Id*. (quoting Halkias v. Gary Nat'l Bank, 234 N.E.2d 652, 654 (Ind. App. 1968)).

208. *Id*.

209. 768 N.E.2d 923 (Ind. Ct. App. 2002).

appeals addressed whether a homeowners' association could be held liable for injuries to an invitee when they had no notice of the hidden defect that caused the harm. Parsons, a mail carrier, delivered mail to a condominium association owned by Wellington Green Homeowners' Association.[210] Mail receptacles for residents were clustered in one location known as a "multi-box mailbox."[211] Parsons experienced difficulty in opening a multi-box mailbox; ultimately, the multi-box unit came off the wall and threw Parsons off balance.[212] Consequently, Parsons sustained injuries. [213] Parsons brought suit against Wellington Green Homeowners' Association and Kirkpatrick Management Company (hereinafter collectively referred to as "homeowners' association"). The jury found the defendants 80% at fault and awarded Parsons $180,000.00 in damages.[214]

On appeal, the homeowners' association argued that the trial court erred in denying their motions for judgment on the evidence.[215] Specifically, the homeowners' association argued that "even though Parsons was an invitee, they cannot be held liable, because they had no notice of the hidden defect that allegedly caused Parsons' injuries."[216]

The court began its analysis by noting that the question of whether a duty to exercise care exists is dictated by the relationship of the parties and "is an issue of law within the province of the court."[217] Recognizing that Parsons was an invitee on the appellants' property, the court looked to the Restatement (Second) of Torts to define a landowners' duty to an invitee:

> A possessor of land is subject to liability for physical harm caused by his invitees by a condition of 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
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> (c) fails to exercise reasonable care to protect them against the danger.[218]

The homeowners' association argued that there was no evidence that it had

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210. *Id*. at 924.
211. *Id*.
212. *Id*. at 925.
213. *Id*.
214. *Id*.
215. *Id*.
216. *Id*.
217. *Id*. at 926 (citing Douglass v. Irvin, 549 N.E.2d 368, 369 (Ind. 1990)).
218. *Id*. (citing RESTATEMENT (SECOND) OF TORTS § 343 (1965)).

installed or placed the multi-box mailbox on the wall at the condominium.[219] Further, the homeowners' association argued that Parsons failed to show that the defendants had notice of a hidden defect that they should have warned Parsons of or taken steps to correct.[220] In its analysis, the court noted that the homeowners' association had never received any complaints about the security of the multi-box mailboxes such that would have prompted it to test the strength of the units' attachment to the wall.[221] The court next noted that there was no evidence that the homeowners' association had installed the multi-box mailboxes.[222] In sum, "there was no evidence that the Appellants were aware of how the multi-box mailboxes were attached to the wall, i.e. whether the screws were attached to the studs, or to the drywall."[223]

Finally, the court observed that a landowner's duty of care is a known or should have known standard.[224] Finding that the record was devoid of any evidence that the homeowners' association knew or should have known about the defect that allegedly caused Parsons' injuries, the court observed that there was "a complete failure of proof on at least one essential element of Parsons' case."[225] Accordingly, the court concluded that the trial court erred in denying the appellants' motions for judgment on the evidence.[226]

III. WRONGFUL DEATH

In *Bolin v. Wingert*, [227] the Indiana Supreme Court addressed an issue of first impression under Indiana's Child Wrongful Death Statute: "[w]hether an eight- to ten-week-old fetus fits the definition of 'child.'"[228] In their complaint, the Bolins alleged that Wingert caused Mrs. Bolin's miscarriage and requested compensation for the wrongful death of their unborn child.[229] In response, Wingert moved for partial summary judgment, alleging that the Child Wrongful Death Statute did not provide for such a recovery.[230] The trial court granted the motion. The Bolins appealed, and the court of appeals held "that the term 'child' was not expressly defined by the legislature. In relying upon *Britt v. Sears*,[231] the court held that only 'an unborn viable child' had a claim under the Wrongful

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219. *Id*. at 926.
220. *Id*.
221. *Id*. at 928.
222. *Id*.
223. *Id*.
224. *Id*. at 929 (citing Burrell v. Meads, 569 N.E.2d 637, 640 (Ind. 1991)).
225. *Id*.
226. *Id*.
227. 764 N.E.2d 201 (Ind. 2002).
228. *Id.* at 203.
229. *Id.*
230. *Id.*
231. 277 N.E.2d 20 (Ind. App. 1972).

Death Statute."[232] The court of appeals affirmed the trial court's grant of partial summary judgment because the Bolins had not produced any evidence that their unborn child was "capable of independent life."[233]

In an opinion by Chief Justice Shepard, the supreme court concluded that an eight- to ten-week-old fetus did not fit into the definition of 'child' in Indiana's Child Wrongful Death Statue.[234] In reaching this conclusion, the supreme court looked at the Child Wrongful Death Statute which states, "An action may be maintained under this section against the person whose wrongful act or omission caused the injury or death of a child."[235] The Child Wrongful Death Statute defines child: "As used in this section, 'child' means an unmarried individual without dependents who is: (1) less than twenty (20) years of age; or (2) less than twenty-three (23) years of age and is enrolled in an institution of higher education or in a vocational school or program."[236] The statute allows parents to recover damages for the loss of the child's services, love, and companionship, as well as expenses such as hospital bills and funeral costs resulting from the child's death.[237]

In interpreting who will fall within the statute's provisions, the supreme court recognized that courts have generally resolved this question in one of four ways: (1) permit recovery only for the death of children "born alive," (2) permit recovery only for the death of "viable" unborn children, (3) permit recovery for the death of unborn children that are "quick," and (4) permit recovery for the death of any unborn child.[238]

The supreme court noted that ten states adhere to the "born alive" rule which requires that the injured child be born alive before recovery is permitted.[239] The predominant rule, the rule followed by more than thirty states, is the viability rule. "A fetus is viable when it is 'so far formed and developed that if then born it would be capable of living.'"[240] The "quick" standard is followed only by Georgia and states that "[a] child is considered 'quick' when the fetus 'is able to move in its mother's womb.'"[241] The supreme court noted that West Virginia was the only state that allowed recovery for non-viable fetuses without express language from the legislature that "unborn children" are included in the state's wrongful death statute.[242]

After considering these four options, the supreme court focused on the express language of Indiana's Child Wrongful Death Statute. The supreme court

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232. 764 N.E.2d at 203.
233. *Id.*
234. *Id.*
235. *Id.* at 204 (citing IND. CODE ANN. § 34-1-1-8(b) (West 1996)).
236. *Id.* (citing IND. CODE ANN. § 34-1-1-8(a) (West 1996)).
237. *Id.* (citing IND. CODE ANN. § 34-1-1-8(e) (West 1996)).
238. *Id.* at 205.
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.*

observed that the "definition in the statute contains four concepts: an (1) unmarried, (2) individual, (3)without dependents, (4) who is less than twenty years of age."[243] In analyzing these four concepts, the supreme court went on to say that the first three concepts tend to indicate the legislature contemplated that only living children would fall within the definition of 'child.' 'Unmarried' and 'without dependents' involve activities in which only living persons engage. While very young children cannot marry or have dependents, the vocabulary suggests a desire to define persons who have been born. It would strain this rather express language to read 'unmarried individual without dependents' to encompass an unborn child. . . ."[244]

In addition, the supreme court looked at other statutes where the legislature had provided protection for unborn children, such as Indiana Code section 35-42-1-6 which deals with the termination of a human pregnancy and Indiana Code section 35-46-5-1 which deals with the trafficking fetal tissue.[245] "From these statutes, the supreme court felt it was apparent that the legislature knows how to protect unborn children."[246]

The supreme court stated:

> The express language of the statute and the fact that it is to be narrowly construed lead us to conclude that the legislature intended that only children born alive fall under Indiana's Child Wrongful Death Statute. The legislature can certainly expand the scope of protection under the Child Wrongful Death Statute if it so chooses.[247]

The court went on to say that "[t]he exclusion of unborn children from Indiana's Child Wrongful Death Statute does not mean that negligently injured expectant mothers have no recourse."[248] The supreme court quoted the Missouri Supreme Court, which said, "[T]he mother has her own action for negligently inflicted injury, in which the circumstances of her pregnancy and miscarriage may be brought out and considered as part of the intangible damages."[249]

In *Goleski v. Fritz*,[250] the Indiana Supreme Court addressed whether derivative claims under the Medical Malpractice Act survive a spouse's death and whether a claim for a deceased patient's medical expenses survive and pass on to their estate.[251] Lawrence Vetter was treated by defendant physicians and subsequently died the following day.[252] Dorothy Vetter, Lawrence's wife, filed

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243. *Id.* at 206.

244. *Id.*

245. *Id.* at 207.

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.* (quoting Rambo v. Lawson, 799 S.W.2d 62, 63 (Mo. 1990), superseded by statute as stated in Connor v. Monkem Co., 898 S.W.2d 89 (Mo. 1995)).

250. 768 N.E.2d 889 (Ind. 2002).

251. *Id.*

252. *Id.* at 890.

a claim with the Indiana Department of Insurance seeking damages from the hospital and the physicians for lost "financial support, love, affections, kindness, attention and companionship" as well as reasonable funeral, burial, and medical expenses.[253] Dorothy died before the claim review process was completed and Nadine Goleski, the couple's daughter, was appointed as personal representative of Dorothy's estate.[254] An amended malpractice claim was filed, contending that Dorothy's claim survived Dorothy's death and passed to Dorothy's estate.[255]

The trial court granted summary judgment for the defendants, holding that Goleski could not maintain an action under any of the three theories.[256] The court said that Goleski had no cause under the Wrongful Death Act because she was not the personal representative of Lawrence's estate.[257] The court further noted that Goleski could not claim under the Medical Malpractice Act because she was not Lawrence's "representative" as that term appears in the statute.[258] Finally, the trial court said that the Survival Statute did not help Goleski because she was not the personal representative of Lawrence's estate and was not alleging that something other than the defendant's negligence caused Lawrence's death.[259] The court of appeals affirmed the decision.[260]

On transfer, the Indiana Supreme Court held that since a personal representative was not timely appointed within the two-year period, there was not an action under the Wrongful Death Statute.[261] Further, the supreme court also held that "claims made by a patient's 'representative' under the Medical Malpractice Act survive the death of the representative and pass to the representative's estate."[262] Finally, the supreme court held that "[d]erivative claims for medical malpractice such as a claim by a spouse for loss of consortium generally survive the death of the claimant under the Survival Statute."[263]

In *Estate of Sears v. Griffin*,[264] the Indiana Supreme Court addressed the issue of whether there was a genuine issue of material fact in a motion for summary judgment that the sister, Elizabeth, was dependent on her deceased brother, Evan.[265] The Defendant's, Griffin, automobile struck Evan as he was installing a traffic counting strip in a roadway and he died from the resulting head injuries.[266] Evan's parents signed a release discharging Griffin from all claims

253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.* at 890-91.
262. *Id.* at 889-90.
263. *Id.* at 890.
264. 771 N.E.2d 1136 (Ind. 2002).
265. *Id.* at 1137.
266. *Id.*

arising from the accident in exchange for the limit on Griffin's liability insurance policy.[267] After signing the release, Evan's mother sued Griffin as administratrix of Evan's estate and as next friend of her daughter, Elizabeth, who was twelve when the release was signed.[268] "Griffin moved for dismissal of the claims, arguing that the Sears were entitled to only one remedy, which they had received, and that Elizabeth could only make a claim through Evan's estate."[269]

The trial court granted Griffin's motion to dismiss all the claims.[270] Treating the ruling as a grant of summary judgment, the court of appeals reversed on the wrongful death claims and Judge Baker concluded that he would affirm the trial court on all claims.[271] The supreme court held that the estate's survival claim had no merit because Evan undisputedly died of the injuries suffered when struck by Griffin's car, and the statute requires the person to die from causes *other than* those personal injuries sustained in the wrongful act or omission.[272] Furthermore, the supreme court held that only a personal representative can bring an action under the Wrongful Death Statute and that Evan's mother as next friend to Elizabeth lacked standing to bring such a claim.[273]

In analyzing the wrongful death claims, the supreme court did note that "the question whether Elizabeth qualified as a dependent is important in evaluating the estate's wrongful death claim because the determination of which statute applies (Wrongful Death Statute or Child Wrongful Death Statute) turns on whether Evan died 'without dependents.'"[274] "The person claiming dependence must, however, 'show a need or necessity for support . . . coupled with the contribution to such support by the deceased."[275] "Pecuniary loss is the foundation of the wrongful death action. This loss can be determined in part from the assistance that the decedent would have provided through money, services or other material benefits."[276] Concerning this loss, the court stated, "Although the record is not yet developed, it would be quite unusual for a twelve-year-old with both parents living to be dependent on her teen-age sibling for services and/or financial support that the parents could not or would not provide in that sibling's absence."[277]

The court then began to define the parameter of services, stating that services must go beyond merely helping other family members, even those who have relied on such assistance.[278] Further, "[t]he support must also be more than just

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267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.*
272. *Id.* (emphasis added by court).
273. *Id.* at 1138.
274. *Id.* at 1138-39.
275. *Id.* at 1139 (quoting N.Y. Cent. R. Co. v. Johnson, 127 N.E.2d 603, 607 (Ind. 1955)).
276. *Id.* (quoting Luider v. Skaggs, 693 N.E.2d 593, 596-97 (Ind. Ct. App. 1998)).
277. *Id.*
278. *Id.* (citing Chamberlain v. Parks, 692 N.E.2d 1380, 1381, 1384-85 (Ind. Ct. App. 1998).

a service or benefit to which the claimed dependent had become accustomed."[279] The court also was unable to find any cases establishing dependency for purposes of the Wrongful Death Statute based purely on emotional support, or on financial support and/or services that parents were capable of providing and would be obligated to provide in the absence of deceased sibling.[280] The court stated that "[u]nless more than this is proven on remand, Evan died without legal dependents and recovery for his wrongful death lies under the Child Wrongful Death Statute, not the Wrongful Death Statute."[281]

The Indiana Supreme Court reversed on the estate's wrongful death claim and remanded for a determination of whether Elizabeth was Evan's legal dependent.

IV. UNDERINSURED MOTORIST

In *Corr v. American Family Insurance*,[282] the Indiana Supreme Court addressed whether a vehicle is an underinsured motor vehicle pursuant to section 27-7-5-4(b) of the Indiana Code if the amount actually available for payment to the insured from the tortfeasor's bodily injury liability policies is less than the policy limits of the insured's underinsured motorist coverage. The Corrs' fifteen-year-old daughter, Janel, was killed in a single-vehicle accident in which several other people were injured. The owner of the vehicle, Balderas, had two separate policies in effect. Each policy had $100,000 per person, $300,000 per occurrence limits.[283] Pursuant to mediation, the parties to the lawsuit agreed that "Janel's parents, who were divorced, would each receive $57,500."[284]

The Corrs each had insurance policies through American Family Insurance ("AFI") that provided underinsured motorist coverage ("UIM") with limits of $100,000 per person and $300,000 per occurrence.[285] The Corrs maintained that since all that was available was $57,500, the responsible party was

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> The Court found these services [helping mother in and out of chairs, driving her to doctor appointments, carrying groceries, helping with lawn care and snow removal, and other household tasks] not sufficiently "tangible and material" to establish the parent's dependence; they "amounted to no more than gifts, donations and acts of generosity expected of a son to whom free housing, most of his board, gasoline money and automobile insurance was provided."

Id.

279. *Id.* (citing Wolf v. Boren, 685 N.E.2d 86, 87 (Ind. Ct. App. 1997) ("Although '[i]n general a general sense, [decedent's] family was depending on [decedent] to provide his vacation home as a family retreat,' the Court declined to extend coverage of the Wrongful Death Statute that far.")).

280. *Id.* at 1140.

281. *Id.*

282. 767 N.E.2d 535 (Ind. 2002).

283. *Id*. at 537.

284. *Id*.

285. *Id.*

underinsured.[286] AFI argued that since the responsible party's coverage was identical to the claimants, Balderas' vehicle was not underinsured.[287] Accordingly, AFI denied the parents' claims for Janel's death under each party's respective UIM coverage.[288]

The Corrs sued AFI and the trial court granted summary judgment in AFI's favor "on the ground that the Balderas van was not underinsured."[289] The trial court's decision was affirmed by the court of appeals.[290]

On transfer, the supreme court first reviewed the statutory definition of underinsured motor vehicle. Section 27-7-5-4(b) of the Indiana Code provides:

> For the purpose of this chapter, the term underinsured motor vehicle, subject to the terms and conditions of such coverage, includes an insured motor vehicle where the limits of coverage available for payment to the insured under all bodily injury liability policies covering persons liable to the insured are less than the limits for the insured's underinsured motorist coverage at the time of the accident, but does not include an uninsured motor vehicle as defined in subsection (a).[291]

AFI argued that the statute requires a

> comparison of the $600,000 per accident bodily injury liability limits provided by the two Balderas policies to the $300,000 per accident UIM limit under either James' or Pamela's policy. Under this comparison, AFI contends that the van was not underinsured because the aggregate limits of Balderas' bodily injury liability coverage exceeded the limit of either James or Pamela Corr's UIM coverage.[292]

In other words, AFI posited that the proper consideration was of the per accident limits rather than the per person limits. In rejecting this proposal, the court stated that "if a limits-to-limits comparison is to be employed, where only one insured is injured in an accident, the appropriate limits to compare to determine if a vehicle is underinsured are the per person limit of the tortfeasor's liability policy and the per person limit of the insured's UIM policy."[293] The court arrived at this conclusion based upon section 27-7-5-5(c) of the Indiana Code, which states that the "maximum amount payable for bodily injury under [UIM] coverage is the lesser of: (1) the difference between: (A) the amount paid in damages to the insured by [the tortfeasor] and (B) the per person limit of [UIM] coverage [held by the insured,] or (2) the difference between: (A) the total amount of damages

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286. *Id.* at 539.
287. *Id.* at 538.
288. *Id.* at 537.
289. *Id.*
290. *Id.*
291. *Id.* at 538 (citing IND. CODE § 27-7-5-4(b) (1998)).
292. *Id.*
293. *Id.*

incurred by the insured; and (B) the amount paid by the tortfeasor."[294]

The court next observed that the mediation determined that Balderas' mother's policy was an excess policy above and beyond Balderas' father's policy; thus, the aggregate per person coverage under both policies was $200,000.[295] Although the amount of James Corr's UIM coverage was in dispute, the court did not consider this issue.[296] Instead, the court noted that the amount actually recovered by James and Pamela Corr was $57,500 each, or a total of $115,000.[297] Therefore, the court concluded that "the issue is whether we are to compare the Balderas policy limits ($200,000) or the amount recovered ($57,500) to the amount of each Corr's UIM coverage."[298]

AFI urged the court to follow the holding in an Indiana opinion that looked to Colorado case law in deducing that a policy limits to policy limits comparison was mandated in Indiana.[299] The Corrs, however, submitted that the appropriate comparison is

> between the amount of each Corr's UIM coverage and the amount of coverage limits actually "available for payment" to each Corr from Balderas' coverage. Under that comparison, the Corrs argue, the van is underinsured because the amount available for payment to each Corr ($57,500) is less than the limit of each Corr's UIM coverage ($100,000 for Pamela, and either $100,000 or $250,000 for James).[300]

In its consideration of the parties' positions, the court first rejected AFI's contention that the reasoning in *Allstate v. Sanders* was instructive.[301] The Colorado statute relied upon in *Sanders* was not the same as Indiana's UIM statute.[302] Unlike the Colorado statute in *Sanders*, "Indiana's UIM statute does not express [a] clear preference for a limits-to-limits comparison" but instead "turns on the amount of the 'coverage limits available for payment to the insured.'"[303]

The court next noted that a cardinal rule of statutory construction in Indiana: "[w]ords and phrases shall be taken in their plain, or ordinary and usual, sense."[304] Accordingly, the court determined the phrase "available for payment to the insured" meant money that is "present or ready for immediate use by the insured, not amounts potentially accessible. Under this view, the amount 'available' is the

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294. IND. CODE § 27-7-5-5(c) (2002).

295. *Corr*, 767 N.E.2d at 538.

296. *Id*.

297. *Id*.

298. *Id*.

299. *Id*. (citing Allstate v. Sanders, 644 N.E.2d 884 (Ind. Ct. App. 1994) (citing Leetz v. Amica Mut. Ins. Co., 839 P.2d 511 (Colo. Ct. App. 1992)).

300. *Id*. at 538-39.

301. *Id*. at 539.

302. *Id.*

303. *Id*.

304. *Id*. (citing IND. CODE § 1-1-4-1(1)(2000)).

$57,500 each Corr actually recovered, not the $200,000 theoretically available from the Balderas. Moreover, if the term 'available for payment' did not achieve this result, it would apparently be wholly surplusage, contrary to standard principles of statutory construction."[305]

In reversing the trial court, Justice Boehm noted that "[o]ur holding today is also congruent with the underlying purpose of UIM coverage, which broadly stated is to give the insured the recovery he or she would have received if the underinsured motorist had maintained an adequate policy of liability insurance."[306] Further, the court opined that AFI's position "leads to the anomalous result that when multiple people are injured in an accident, an injured party is in a better position if the driver responsible for the accident is not insured at all than if he or she has insurance."[307]

Finally, the court rejected AFI's argument that the language of its policy mandates a limits-to-limits comparison based on the fact that Indiana does not permit insurers to offer less coverage than the law requires.[308] By unanimous opinion, the supreme court found that the Balderas' van was underinsured; therefore, the trial court erred in granting summary judgment in AFI's favor.[309]

V. DAMAGES

A. Punitive Damages

In *Cheatham v. Pohle*,[310] the court of appeals considered whether the allotment of 75% of punitive damage awards to the State of Indiana's victim compensation fund, pursuant to section 34-51-3-6 of the Indiana Code, is an unconstitutional taking of the prevailing party's property under the United States and Indiana Constitutions. The court also addressed whether the same statute violates article 1, section 21 of the Indiana Constitution because it is an unconstitutional demand on the prevailing party's attorney without just compensation.

Doris Cheatham sued her former husband, Michael Pohle, for invasion of privacy and intentional infliction of emotional distress after he posted nude photographs of her in various public places.[311] A jury awarded Cheatham $100,000 in compensatory damages and $100,000 in punitive damages.[312]

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305. *Id*. at 540 (citing State *ex rel.* Hatcher v. Lake Superior Court, 500 N.E.2d 737, 740 (Ind. 1986); Ind. Dep't of Envtl. Mgmt. v. Chem. Waste Mgmt., Inc., 643 N.E.2d 331, 339 (Ind. 1994) (mere surplusage unacceptable according to ordinary canons of statutory construction)).

306. *Id.* (citing LEE R. RUSS & THOMAS F. SEGELLA, COUCH ON INSURANCE 3D § 171:2 (1995)).

307. *Id*. (quoting Corr v. Shultz, 743 N.E.2d 1194, 1197 (Ind. Ct. App. 2001)).

308. *Id*. (citing *Corr*, 743 N.E.2d at 1199).

309. *Id*. at 541.

310. 764 N.E.2d 272 (Ind. Ct. App. 2002).

311. *Id*. at 274.

312. *Id*.

The statute that permits the State to take 75% of Cheatham's punitive damage award, reads, in relevant part, as follows:

> (a) [W]hen a judgment that includes a punitive damage award is entered in a civil action, the party against whom the judgment was entered shall pay the punitive damage award to the clerk of the court where the action is pending.
>
> (b) Upon receiving the payment described in subsection (a), the clerk of the court shall:
>
> (1) pay the person to whom punitive damages were awarded twenty-five percent (25%) of the punitive damage award; and
> (2) pay the remaining seventy-five percent (75%) of the punitive damage award to the treasurer of state, who shall deposit the funds into the violent crime victims compensation fund.[313]

Cheatham asserted that the State's collection of 75% of her punitive damages award was an "unconstitutional taking under the Fourteenth Amendment of the United States Constitution and Article 1, Section 21 of the Indiana Constitution."[314] The court observed that courts in several states have found no vested property right in punitive damage awards. "Moreover, it is well settled law in Indiana that there is no entitlement to punitive damages . . . . That being the case, we decline to hold that the State's appropriation of a portion of a judgment creditor's punitive damages is an unconstitutional 'taking.'"[315]

The court next addressed Cheatham's argument that the State's right "to collect 75% of her punitive damage award, without a corresponding obligation to pay any attorney's fees, unconstitutionally demands the services of her attorney without just compensation."[316] Cheatham contended that section 34-51-3-6 of the Indiana Code conflicts with article 1, section 21 of the Indiana Constitution, which provides that "[n]o person's particular services shall be demanded, without just compensation . . . ."[317]

The court stated that Cheatham must meet a three part test in order to prevail on her particular services claim.[318] Specifically, based on the test set forth by the Indiana Supreme Court in *Bayh v. Sonnenburg*,[319] Cheatham must demonstrate that her attorney "(1) performed particular services, (2) on the State's demand, (3) without just compensation."[320]

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313. IND. CODE § 34-51-3-6 (2002).

314. *Cheatham*, 764 N.E.2d at 276.

315. *Id*. at 277 (citing Durham *ex. rel.* Estate of Wade v. U-Haul Int'l, 745 N.E.2d 755, 764 (Ind. 2001)).

316. *Id*.

317. IND. CONST. art. I, § 21.

318. *Cheatham*, 764 N.E.2d at 277-78.

319. 573 N.E.2d 398 (Ind. 1991).

320. *Cheatham*, 764 N.E.2d at 278. (citing *Sonnenburg*, 573 N.E.2d at 411).

First, the court looked to *Sonnenburg* to determine whether the Cheatham's attorney's services were "particular" as contemplated by article 1, section 21.[321] The proper query to determine whether services are "particular" is "(1) whether the services [have] been historically compensated; and (2) whether the service was something required of a party as an individual, in contradistinction to what is required, generally, of all citizens."[322] The court found that "at least since 1853, our supreme court has recognized that attorneys have a right to be compensated for services different from those that are required of ordinary citizens . . . . We conclude, and it is well settled, that attorneys perform 'particular services' within the meaning of Article 1, Section 21."[323]

The court next examined the question of whether Cheatham's attorney performed services "on demand" from the State.[324] The court observed that "[t]he essence of a demand, as opposed to a mere request, for one's services encompasses 'the use or threatened use of physical force or legal process which creates in the citizen a reasonable belief that he is not free to refuse the request.'"[325] Because the State effectively compels attorneys to forfeit their right to collect fees on 75% of a punitive damage award pursuant to section 34-51-3-6 of the Indiana Code, the court deduced that Cheatham's lawyer "provided legal services on demand from the State."[326] "In other words, this statute presents a threat of legal process against all attorneys who fail to surrender to the State their right to collect fees and costs from 75% of a punitive damage award."[327]

Finally, the court considered the final prong of the *Sonnenburg* analysis to ascertain whether section 34-51-3-6 of the Indiana Code mandates withholding just compensation from attorneys who win punitive damage awards for their clients.[328] The court noted that the constitutional question is whether the statute "allows the State to exploit an attorney's particular legal services without paying for them."[329] The court further observed that "[a]s drafted, the statute not only forces the winning party to surrender 75% of its award, but prevents that party's attorney from recovering fees and costs from that portion of the award while allowing the State to benefit from successful legal representation without having to pay any renumeration or expenses."[330] Continuing, the court stated

> the statute as written presents an interesting ethical dilemma for attorneys. If the State is not required to pay the prevailing party's attorney's fees, as it relates to the State's share of the punitive damages

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321. *Id*. (citing *Sonnenburg*, 573 N.E.2d at 413-14).
322. *Id.*
323. *Id.*
324. *Id*.
325. *Id*. at 279 (citing *Sonnenburg*, 573 N.E.2d at 417).
326. *Id*.
327. *Id.*
328. *Id*. at 279-80.
329. *Id*. at 280.
330. *Id.* at 280-82.

> award, what incentive to attorneys have to then seek such damages for their clients, even in cases where punitive damages might be warranted?[331]

The court surmised that Cheatham demonstrated that her attorney was not justly compensated under the statute; accordingly, the third prong of the *Sonnenburg* test was met.[332] As such, the court held that "Indiana Code Section 34-51-3-6 violates Article 1, Section 21 of the Indiana Constitution and is void on its face as matter of law to the extent that it requires attorneys to perform, upon demand from the State, particular services without just compensation."[333]

B. Negligent Infliction of Emotional Distress

In *Blackwell v. Dykes Funeral Homes, Inc.*,[334] the court of appeals addressed the scope of the impact rule as it applies to claims for the negligent infliction of emotional distress. After Phil Blackwell's suicide, his family arranged for him to be cremated by Dykes Funeral Home and entombed by Graceland Cemetery's Chapel of Peace in a glass niche. Several years after Phil Blackwell's urn was entombed, his parents learned that his remains were not in the glass niche and were, in fact, lost. The Blackwells brought suit against Dykes and Graceland for breach of contract and intention and negligent infliction of emotional distress.[335]

The trial court granted the defendants' motions for summary judgment on the intentional and negligent infliction of emotional distress claims. The trial court also granted summary judgment in favor of the defendants on the plaintiffs' request for punitive damages on their breach of contract claim. On appeal, the Blackwells asserted that the trial court erred when it granted summary judgment in favor of the defendants on the Blackwells' claim for negligent infliction of emotional distress.[336]

In addressing the Blackwells' appeal, the court examined the erosion of the traditional impact rule in Indiana throughout the last decade. Specifically, the court discussed Indiana's modified impact rule as applied by the Indiana Supreme Court in the *Shuamber*, *Groves* and *Bader* opinions.[337] The court recognized that, under the modified impact rule, Indiana allows claims for negligent infliction of emotional distress resulting from a physical injury that has occurred to another person.[338] The court noted:

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331. *Id*. at 281 n.8.

332. *Id*. at 282.

333. *Id*.

334. 771 N.E.2d 692 (Ind. Ct. App. 2002).

335. *Id*. at 694.

336. *Id*. at 695.

337. *See id*. at 695-96 (citing Shuamber v. Henderson, 579 N.E.2d 452 (Ind. 1991); Groves v. Taylor, 729 N.E.2d 569 (Ind. 2000); Bader v. Johnson, 732 N.E.2d 1212 (Ind. 2000)).

338. *See id*. at 696 (citing Shuamber v. Henderson, 579 N.E.2d 452 (Ind. 1991); Groves v. Taylor, 729 N.E.2d 569 (Ind. 2000); Bader v. Johnson, 732 N.E.2d 1212 (Ind. 2000)).

> [T]he Blackwells, as bystanders, claim that they suffered emotional distress that resulted from the alleged negligent conduct that involved a close relative's remains. . . . While there was no physical impact, the Blackwells have alleged serious emotional trauma and it is of a kind that a reasonable person would experience.
>
> In our view, this is the type of claim . . . where the plaintiff is sufficiently and directly involved in the incident giving rise to the emotional trauma. . . . We are satisfied that the evidence designated to the trial court in this case is such that the alleged mental anguish suffered by the Blackwells is not likely speculative, exaggerated, fictitious, or unforeseeable. . . . Provided they can prevail on their negligence claim, we see no reason why the Blackwells should not be able to claim damages for emotional distress.[339]

Accordingly, the court found that the trial court erred in granting summary judgment in Dykes' favor. However, the court affirmed the trial court's grant of summary judgment in Graceland's favor based upon the court's finding that the Blackwells failed to provide any evidence demonstrating that Graceland ever took possession of the urn.[340]

C. Zero Verdict

In *Neher v. Hobbs*,[341] the Indiana Supreme Court considered whether, in a matter where liability is admitted or clear, a case may be remanded for a new trial solely on the issue of damages. At the trial of this personal injury case, the jury returned a verdict in favor of plaintiff/husband Gary Hobbs but awarded him zero damages.[342] The jury found for the defendant on Mrs. Hobbs' loss of consortium claim. The trial court granted the plaintiffs' motion to correct errors and ordered a new trial.[343] The court of appeals reversed the trial court and ordered the verdict reinstated.[344]

On transfer, the supreme court considered Neher's position that "the trial court failed to supply sufficient findings of fact pursuant to Indiana Trial Rule 59(J)(7)" and abused its discretion as the "thirteenth juror."[345] Additionally, the court considered a cross-appeal by the plaintiffs asserting that the trial court erred in failing to limit the new trial to the issue of damages only.[346]

With regard to Neher's argument that the trial court failed to comply with

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339. *Id*. at 697 (citation omitted).
340. *See id*.
341. 760 N.E.2d 602 (Ind. 2002).
342. *Id*. at 604.
343. *Id*.
344. *Id*.
345. *Id*.
346. *Id*.

Trial Rule 59(J)(7), the court countered that "[w]hen, as here, a trial court grants a new trial on grounds that the verdict is *clearly erroneous* rather than because it is *against the weight* of the evidence, the findings need not set forth the supporting and opposing evidence."[347] Further, the court noted:

> In the present case, the trial court's findings provide adequate explanation as to why the trial court ordered a new trial rather than entering a judgment on the evidence. The court did not take issue with the jury's determination that the defendant was at fault for the collision, but only with the jury's failure to award damages to plaintiff Gregory Hobbs and to award a judgment for plaintiff Emma Hobbs. While finding that these aspects of the jury's verdicts clearly erroneous as contrary to the evidence, the trial court could not, on this basis, affirmatively determine the proper amount of damages and enter a final judgment accordingly. From the trial court's findings, it is clear why it ordered a new trial rather than entering a judgment on the evidence. We therefore reject the defendant's claims that the trial court's findings failed to comply with the procedural requirements of Trial Rule 59(J).[348]

The court next addressed Neher's contention that the trial court abused its discretion as a thirteenth juror in setting aside the jury's verdict.[349] Noting that "[a] trial court's authority to act under the 'thirteenth juror' principle refers to its power to grant a new trial if it determines that the verdict is 'against the weight of the evidence' pursuant to Trial Rule 59," the court again recognized that the trial court's "new trial order was not based upon its weighing of the evidence but upon its finding that the verdicts were clearly erroneous as contrary to the evidence."[350] Relying upon the parties' stipulation to Mr. Hobbs' medical expenses and compensation for his partial permanent impairment (PPI) rating at trial, along with comments made by defense counsel in his closing argument, the court deduced that Neher admitted Hobbs sustained medical expenses and impairment as a result of the auto accident.[351] Therefore, the court determined that the trial court did not abuse its discretion when it ordered a new trial upon its finding that the jury's verdict was clearly erroneous.[352]

Finally, the court agreed with Hobbs that, pursuant to Trial Rule 59(J), the new trial should be limited to two issues: "(a) the amount of damages to be awarded to plaintiff Gregory D. Hobbs, and (b) whether the plaintiff Emma J. Hobbs is entitled to a judgment in her favor and, if so, the amount of any

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347. *Id*. at 606 (citing IND. T.R. 59(J); State v. Kleman, 503 N.E.2d 895, 896 (Ind. 1987); Karl v. Stein, 749 N.E.2d 71, 78 (Ind. Ct. App. 2001); Keith v. Mendus, 661 N.E.2d 26, 32 (Ind. Ct. App. 1996)) (emphasis supplied by the court).

348. *Id*.

349. *See id*. at 606-07.

350. *Id*. at 607 (citing State v. Kleman, 503 N.E.2d 895, 896 (Ind. 1987)).

351. *See id*.

352. *See id*. at 607-08.

damages."[353]

In *Russell v. Neumann-Steadman*,[354] the court of appeals addressed the trial court's role in granting additur in an instance where there is a plaintiff-favorable verdict and evidence of damages, yet the jury has failed to award damages. Russell's vehicle rear-ended Neumann-Steadman ("Steadman") while the vehicles were in line at a car wash.[355] Steadman incurred $2100 in medical expenses.[356]

"At trial, Russell admitted that she was at fault for the collision, and that Steadman could not have avoided it."[357] Steadman's physician testified that her injuries were caused by the accident and Russell failed to call a medical expert to refute this testimony.[358] Despite the evidence presented at trial and its finding in favor of Steadman, the jury awarded zero damages to Steadman.[359] Steadman then filed a Motion to Correct Error and Request for Additur.[360] The trial court found the jury's award to be inadequate because there was undisputed evidence of Steadman's medical expenses.[361] However, the trial court not only awarded $2100 for medical expenses, it "also awarded an additional $4200, presumably for pain and suffering."[362]

The court of appeals noted that Trial Rule 59(J) "empowers the trial court to enter a final judgment fixing damages only when the evidence on the amount of damages is clear and unrebutted."[363] Moreover, "[d]amage awards for pain and suffering are particularly within the province of the jury because they involve the weighing of evidence and credibility of witnesses."[364] Here, the court of appeals found that the trial court's award of $4200 above and beyond the amount of undisputed medical expenses, presumably for pain and suffering, invaded the jury's province.[365] Hence, the court held that the trial court abused its discretion. Accordingly, the court reversed the trial court's judgment and remanded the matter for a new trial on the issue of damages.[366]

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353. *Id*. at 608.

354. 759 N.E.2d 234 (Ind. Ct. App. 2001).

355. *See id*. at 236.

356. *See id*. at 238.

357. *Id*. at 236.

358. *See id*. at 237.

359. *See id*. at 236.

360. *Id*.

361. *Id*.

362. *Id*. at 238.

363. *Id*. (quoting Sherman v. Kluba, 734 N.E.2d 701, 704 (Ind. Ct. App. 2000), *trans. denied* (quoting Amos v. Keplinger, 397 N.E.2d 1010, 1011 (Ind. App. 1979))).

364. *Id*. (citing Ritter v. Stanton, 745 N.E.2d 828, 845 (Ind. Ct. App. 2001)).

365. *See id*.

366. *Id*.

VI. STATUTE OF LIMITATIONS

In *Ray-Hayes v. Heinamann*,[367] the Indiana Supreme Court, in a per curiam decision, addressed "whether a civil action is timely commenced if the plaintiff files a complaint within the applicable statute of limitations but does not tender the summons to the clerk within that statutory period."[368] In resolving this issue, the supreme court was also resolving a conflict between the court of appeals opinion in this case,[369] and the opinion in *Fort Wayne International Airport v. Wilburn*.[370]

In *Wilburn*, the court of appeals held that the complaint was not timely commenced where the plaintiff tendered the complaint and filing fee to the clerk within the proper statute of limitations, but did not tender the summons to the clerk until after the statute of limitations had expired.[371] The court in *Wilburn* followed the language in *Boostrom v. Bach*,[372] which stated that the statute of limitations continues to run, and is not tolled, where a plaintiff failed to send the filing fee with the complaint which the clerk refused to file.[373] The court described its result in *Boostrom* as "consistent with the modern notion that the commencement of an action occurs when the plaintiff presents the clerk with the documents necessary for commencement of suit."[374]

On the other hand, the court of appeals reached the opposite conclusion in *Ray-Hayes I*.[375] In that case, the plaintiff amended her complaint within the two-year statutory period but failed to tender summonses until more than four months after the two-year statutory period.[376] The trial court dismissed the claims against the defendant, Nissan.[377] The court of appeals held that "because the plaintiff filed her amended complaint within the statute of limitations, she commenced her claims against Nissan timely and dismissal was error."[378]

In a narrow 3-2 majority, the Indiana Supreme Court held that the summons are required to be tendered within the statute of limitations period.[379] The court also said that "[r]equiring that the summons be tendered within the statute of limitations is also good policy because it promotes prompt, formal notice to defendants that a lawsuit has been filed."[380] Moreover, the supreme court stated

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367. 760 N.E.2d 172 (Ind. 2002) (Ray-Hayes II).
368. *Id.* at 173.
369. 743 N.E.2d 777 (Ind. Ct. App. 2001) (Ray-Hayes I).
370. 723 N.E.2d 967 (Ind. Ct. App. 2000).
371. *See id.*
372. 622 N.E.2d 175 (Ind. 1993), *cert. denied*, 513 U.S. 928 (1994).
373. *Ray-Hayes II*, 760 N.E.2d at 173 (quoting *Boostrom*, 622 N.E.2d at 175).
374. *Id.* at 173-74 (quoting *Boostrom*, 622 N.E.2d at 177).
375. *Id.* at 174.
376. *See id.*
377. *See id.*
378. *Id.*
379. *Id.*
380. *Id.*

that its approval of *Wilburn* coincided with recent amendments to the Indiana Trial Rules.[381] Indiana Trial Rule 3 became effective April 1, 2002, and states:

> A civil action is commenced by filing with the court a complaint or such equivalent pleading or document as may be specified by statute, by payment of the prescribed filing fee or filing waiving the filing fee, and, where service of process is required, by furnishing to the clerk as many copies of the complaint and summons as are necessary.[382]

The Indiana Supreme Court vacated the court of appeals opinion in *Ray-Hayes I* and affirmed the trial court's dismissal of the claims against Nissan.

In *Ray-Hayes v. Heinamann*,[383] the Indiana Supreme Court revisited the case and addressed the issue of whether to apply the previous decision only prospectively.[384] In *Bayh v. Sonnenburg*,[385] the Indiana Supreme Court followed "the three-prong test employed by the United States Supreme Court to determine when to follow the unusual course of applying a decision prospectively."[386] The first prong states that "the decision must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed."[387] The second prong requires the court to "look at the purpose and effect of the rule, and whether retrospective operation will further or retard its operation."[388] The final prong requires the court to "weigh the inequity imposed by retroactive application."[389]

Concerning the first prong, the supreme court noted that "[s]everal judges on the court of appeals shared the view that service of the summons was not needed to toll the statute of limitations, and [that] it [was] regrettable that former Trial Rule 3 did not explicitly refer to the summons."[390] Further, the supreme court's mention of the summons in *Boostrom* came in a footnote.[391] Under these circumstances, the supreme court thought "the resolution of this issue was arguably a surprise" and was not "clearly foreshadowed."[392] In regards to the second prong, the supreme court considered it only "marginally relevant."[393] The supreme court believed the third prong warranted giving relief to Ray-Hayes because the "[d]ismissal of her complaint as a result of her understanding of the

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381. *See id.*
382. *Id.* at 174-75.
383. 768 N.E.2d 899 (Ind. 2002) (Ray-Hayes III).
384. *Id.* at 900.
385. 573 N.E.2d 398 (Ind. 1991).
386. *Ray-Hayes III*, 768 N.E.2d at 900.
387. *Id.*
388. *Id.*
389. *Id.*
390. *Id.* at 901.
391. *Id.*
392. *Id.*
393. *Id.*

rule, which was shared by some respected authorities on Indiana law, [was] a particularly harsh result."[394] The supreme court said:

> Prospective application in this case [was] a product of its very specific circumstances: the diversity of opinion among legal experts as to the proper application of [Indiana] Trial Rule 3 when Ray-Hayes' complaint was filed, that retrospective application of [their] decision to Ray-Hayes' case [would] not further that holding's operation, the harsh result of dismissal, and the apparent lack of prejudice to the opposing parties from delay in the services of summonses.[395]

The Indiana Supreme Court granted Ray-Hayes' petition for rehearing, vacated the trial court's dismissal of her action against Nissan for failure to tender summonses before the statute of limitations expired, and remanded for further proceedings, "including an opportunity for the defendants to renew their motions to dismiss if they can establish a material detriment in the presentation of their case or otherwise occurring as a result of the delay in issuance of summons and notification to them that a claim had been asserted."[396]

In *Young v. Tri-Etch, Inc.*,[397] the court of appeals addressed the issue of "whether the trial court erred in determining that a liability limitation in the service contract between Tri-Etch and Muncie Liquors applied to the estate's claim against Tri-Etch."[398] Muncie Liquors purchased a security system and contracted for alarm monitoring services from Tri-Etch.[399] Tri-Etch provided an additional service which was that if the store's alarm was not set within a certain amount of time after the usual closing time, Tri-Etch would call the store, notify the general manager, and then call the police.[400] On August 12, 1997, the store was robbed and the employee was kidnapped, severely beaten, and left tied to a tree in a nearby park.[401] Tri-Etch, based on its additional service, did not contact the general manager until 3:00 AM, on August 13, 1997, which led the estate to file its complaint on August 6, 1999, because Tri-Etch failed to notify the store of the alarm not being set by 12:30 AM.[402] Tri-Etch filed a motion for summary judgment that requested the court enter judgment in its favor for the reason that under the terms of the service contract between Muncie Liquors and Tri-Etch, any action against Tri-Etch must have been brought within one year of the incident giving rise to the cause of action.[403]

The trial court's decision was based on the opinion in *Orkin Exterminating*

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394. *Id.*
395. *Id.*
396. *Id.* at 901-02.
397. 767 N.E.2d 1029 (Ind. Ct. App. 2002) (Young I).
398. *See id.* at 1030.
399. *See id.*
400. *Id.* at 1030-31.
401. *Id.*
402. *Id.* at 1030-31.
403. *Id.* at 1031.

Co. v. Walters,[404] where that court noted that "Indiana law recognizes that Walters [the plaintiff] had an option of suing in tort or in contract for the negligent performance of a contractual duty. . . . Walters' suit based in tort does not change the fact that Orkin's duty to Walters is based on the contract. Moreover, bringing a suit in tort does not allow Walters to avoid the limitation of liability clause in the contract."[405]

The rationale for *Orkin* court's rule came from *Better Food Markets, Inc. v. American District Telegraph Co.*:[406] "Although an action in tort may sometimes be brought for the negligent breach of a contractual duty, . . . still the nature of the duty owed and the consequences of its breach must be determined by reference to the contract which created that duty."[407]

The estate asserted that "no private contract can be effective in extinguishing or limiting [a party's] legal liabilities to third persons."[408] The estate cited to *CSX Transportation, Inc. v. Kirby*,[409] where the court noted that "'a party may not contract against his own negligence' . . . [so] CSX could not contract away the duty of reasonable care which it owed the Kirbys."[410]

The court of appeals noted that neither *Orkin* nor *CSX Transportation* directly addressed the issue of whether contract liability limits apply to third parties suing in tort, but that the holding in *Orkin* was instructive.[411] The court held that "whether the estate brings its claim in contract or tort, it cannot escape the liability limitations in the service contract."[412] The court also found it unnecessary to determine whether a separate oral contract existed because its genesis in the relationship was established by the written contract.[413] The court of appeals affirmed the trial court's grant of summary judgment for Tri-Etch.[414]

In *Young v. Tri-Etch, Inc.*,[415] the court of appeals revisited the case which was before the court on a petition for rehearing. The estate made two arguments: (1) *Morris v. McDonald's Corp.*, [416] was binding precedent that conflicted with the court's decision in *Young I*; and (2) the summary judgment for Tri-Etch was contrary to public policy.[417] The court of appeals restated that "Tri-Etch would

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404. 466 N.E.2d 55 (Ind. Ct. App. 1984), *trans. denied.*, abrogated on other grounds in Mitchell v. Mitchell, 695 N.E.2d 920, 922 (Ind. 1998).

405. *Orkin*, 466 N.E.2d at 58 (citation omitted)).

406. 253 P.2d 10, 15-16 (Cal. 1953).

407. *Orkin*, 466 N.E.2d at 58 (citation omitted)).

408. *Id.* at 1034.

409. 687 N.E.2d 611 (Ind. Ct. App. 1997).

410. *Id.* at 615 (quoting Freigy v. Gargaro Co., 60 N.E.2d 288, 292 (Ind. 1945) (citations omitted)).

411. *Young I*, 767 N.E.2d at 1034.

412. *Id.*

413. *Id.* at 1035.

414. *Id.*

415. 773 N.E.2d 298 (Ind. Ct. App. 2002) (Young II).

416. 650 N.E.2d 1219 (Ind. Ct. App. 1995).

417. *Young II*, 773 N.E.2d at 299.

have had no relationship with Young at all were it not for the service contract between Muncie Liquors and Tri-Etch. Thus, the liability limitations in the contract are controlling over Young's claim against Tri-Etch."[418] In addition, the court stated that they did "not need to reach the question of the existence of duty in this case because any duty that might exist would arise out of the service contract and would thus be bound by contract terms."[419] The court of appeals affirmed its previous opinion in full.[420] However, on November 13, 2002, transfer was granted according to Indiana Rule of Appellate Procedure 58(a)[421] which vacates the court of appeals opinion.[422]

VII. BAD FAITH

In *Stoehr v. Yost*,[423] the court of appeals addressed whether the trial court abused its discretion in sanctioning State Farm for acting in bad faith during the mediation process.[424] In April 1999, Stoehr's counsel sent a letter to Yost's counsel stating that a mediation would be required before trial under the local rules of court. Because of scheduling issues, the parties failed to perform a timely mediation. Stoehr moved the court for a continuance, which was granted.[425] Upon arrival at the scheduled mediation, Stoehr's counsel told the mediator that "based on the facts of the case he did not believe his client was liable, and therefore, he did not intend to offer the Yosts any money."[426] "While Stoehr's counsel expressed a willingness to go forward with the mediation and possibly change his position depending on what the Yosts had to say, counsel for the Yosts elected to terminate the mediation upon learning that State Farm would not be making a settlement offer."[427]

The Yosts filed a Petition for Fees and Costs, claiming that "State Farm acted in bad faith by failing to authorize Stoehr's counsel to settle the case."[428] The petition was granted, but the sanctions award was delayed until an evidentiary hearing.[429] In the meantime, the case went to trial and ended in a verdict for the defendant.[430] During the evidentiary hearing, "Stoehr's counsel requested that the trial court reconsider its prior ruling on the Yosts' petition."[431] The trial court

418. *Id.*
419. *Id.* at 300.
420. *Id.*
421. IND. R. APP. P. 58(a).
422. 783 N.E.2d 702 (Ind. 2002).
423. 765 N.E.2d 684 (Ind. Ct. App. 2002).
424. *Id*. at 685.
425. *Id.* at 686.
426. *Id.*
427. *Id.*
428. *Id.*
429. *Id.*
430. *Id.*
431. *Id.*

granted a hearing de novo where it "found that State Farm had acted in bad faith and ordered Stoehr to pay for the Yosts' costs and attorney's fees."[432] Stoehr appealed the trial court's ruling.[433]

On appeal, Stoehr asserted "that the trial court abused its discretion by sanctioning State Farm for meditating in bad faith when the Yosts failed to provide the trial court with evidence that State Farm engaged in conscious wrongdoing for dishonest purposes or that State Farm proposed mediation with surreptitious or malevolent intent."[434] Conversely, the Yosts maintained that State Farm's "conduct in inducing the Yosts to mediate, when it had no intention of participating, was bad faith."[435] Initially, the court of appeals observed that

> a trial court, not present at the mediation, is unlikely to appreciate all that took place there and, as a result, may not understand whether the parties mediated in "good faith." Moreover, a trial court that equates "good faith" with the fact or amount of settlement offers, or with the success of the parties in reaching resolution, may fail to recognize that sometimes mediation exposes that a case is not "about money," but rather, is about issues not neatly resolved in a formal legal setting.[436]

Next the court noted that in *State v. Carter*,[437] the court of appeals previously defined "bad faith" in the context of a mediation as follows: "Bad faith amounts to more than bad judgment or negligence; 'rather it implies the conscious doing of wrong because of dishonest purpose or moral obliquity. . . . It contemplates a state of mind affirmatively operating with furtive design or ill will.'"[438] Further, in response to the Yosts' assertion that State Farm should have objected to mediation, the court found paragraph four of the trial court's order instructive:

> Settlement of the whole case is not the only goal of mediation; "agreement" is another goal, whether it be a factual stipulation, an agreement to forego jury trial in favor of binding arbitration, an identification of issues, a reduction of misunderstandings, a clarification of priorities, or a location of points of agreement. Thus, even where the odds of resolution are slim, mediation can be beneficial because other goals might be achieved.[439]

The court of appeals concluded that "because mediation is not all 'about money,' . . . State Farm's behavior in suggesting that a mediation be scheduled in accordance with local rules" did not amount to bad faith.[440] The court of

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432. *Id.*
433. *Id.*
434. *Id.* at 686-87.
435. *Id.* at 687.
436. *Id.* (quoting Gray v. Eggert, 635 N.W.2d 667, 671 (Wis. Ct. App. 2001)).
437. 658 N.E.2d 618 (Ind. Ct. App. 1995).
438. *Stoehr*, 765 N.E.2d at 687-88 (quoting *Carter*, 658 N.E.2d at 621).
439. *Id.* at 688 (quoting *Carter*, 658 N.E.2d at 623).
440. *Id.* at 689.

appeals noted that State Farm's counsel was willing to listen to what the other side had to say, and depending on what was said, might have been willing to give an offer at that time.[441] The court also concluded that State Farm did have someone present at the mediation with settlement authority because a claims adjuster was present and was in a position to advise State Farm to change its position and settle the matter.[442] Further, the court found that an attorney is not required "to notify an opposing party of its intention to not offer any dollar amount to settle a case prior to mediation."[443] Based on the above findings that State Farm did not act with dishonest purpose or moral obliquity, the court of appeals reversed the judgment of the trial court.[444]

In *Allstate Insurance Co. v. Hammond*,[445] the court of appeals addressed the following two issues:

> 1. whether the trial court should have granted [Allstate's] motion to correct error, which sought to reduce the jury's $160,000 judgment against it to $51,000, the stipulated amount of uninsured motorist and medical expenses coverage under Hammond's policy; and,
>
> 2. whether the trial court erred by instructing the jury that it was to assess damages against Allstate without regard to the policy limits.[446]

Hammond was rear-ended by an uninsured motorist while stopped at an intersection. Allstate and Hammond were unable to agree as to the extent of Hammond's injuries. Hammond sued Allstate alleging that she was its insured at the time of the accident and that the other motorist was uninsured.[447] The parties stipulated that "Hammond's policy with Allstate provided uninsured motorist coverage of $50,000, plus $1,000 in medical expenses coverage."[448] After closing arguments, the following instruction was given to the jury despite Allstate's objection:

> You are instructed that the policy of insurance between Sharon Hammond and Allstate Insurance Company provided uninsured motorist benefits with a policy limit of $51,000. In assessing damages for the injury suffered by Sharon Hammond, you are to fairly value that injury based on these instructions without regard to the policy limits that were in effect at the time of this collision.[449]

The jury returned and the trial court entered a judgment for Hammond.

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441. *Id.*
442. *Id.*
443. *Id.*
444. *Id.* at 690.
445. 759 N.E.2d 1162 (Ind. Ct. App. 2001).
446. *Id.* at 1164-65.
447. *Id.*
448. *Id.*
449. *Id.*

Allstate motioned to correct error, "asserting that it could not be held liable for any amount in excess of the policy limits, $51,000."[450] The motion was denied and Allstate appealed.

In its appeal, Allstate relied on *Town & Country Mutual Insurance Co. v. Hunter*,[451] which states "an insurer providing uninsured motorist coverage is liable to its insured for damages caused by the uninsured motorist, but only up to the limits provided for in the insurance policy."[452] The court concluded that *Hunter* "accurately reflects the general law in Indiana and controls the outcome of this case."[453]

The court observed that

> this case was never tried as a tort action alleging Allstate breached its duty to Hammond of good faith and fair dealing. The complaint made no mention of that type of breach. . . . The jury was not instructed on the requirements of bad faith. . . . The evidence at trial focused entirely on the nature and extent of Hammond's injuries and the extent of her ability to work.[454]

Moreover, the court noted that "Hammond cites no authority to support her assertion that the mere fact the jury returned a verdict in excess of the policy limits is 'prima facie evidence of bad faith.'"[455] In finding that the action was one claiming breach of contract, the court of appeals stated that "the measure of damages in a contract action is limited to those actually suffered as a result of the breach *which are reasonably assumed to have been within the contemplation of the parties at the time the contract was formed*."[456] The court held that

> In a first-party action by an insured to collect uninsured motorist benefits from his or her insurer, the amount of recoverable damages cannot exceed the limits provided for in the insurance policy in effect at the time of the accident, in the absence of any claim or evidence that the insurer breached its duty of good faith and fair dealing to its insured.[457]

Having chosen not to pay for a higher amount of uninsured motorist coverage, the court opined that Hammond "cannot now seek to effectively increase her policy limits via a lawsuit in which no evidence of bad faith or unfair dealing on the part of Allstate was introduced."[458]

Hammond further challenges to Allstate's reliance on the uninsured motorist

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450. *Id*.

451. 472 N.E.2d 1265 (Ind. Ct. App. 1985).

452. *Hammond*, 759 N.E.2d at 1166 (citing *Hunter*, 472 N.E.2d at 1270).

453. Id.

454. *Id*.

455. *Id*.

456. *Id.* at 1166-67 (quoting Erie Ins. Co. v. Hickman, 622 N.E.2d 515, 519 (Ind. 1993) (emphasis added)).

457. *Id.* at 1167.

458. *Id.*

coverage limits in the policy.[459] Specifically, Hammond asserted that (1) Allstate acted in bad faith by using in-house counsel because of the prohibition against representing two adverse clients; (2) Allstate violated public policy in its handling of uninsured motorist claims; and (3) Allstate's policy was ambiguous and "should be read as waiving the stated policy limits if the insurer and insured failed to settle a claim and the case is tried in a court."[460] The court rejected Hammond's challenges, concluding that "the trial court misinterpreted the law when it denied Allstate's motion to correct error."[461] It thus abused its discretion in permitting a jury verdict to stand when it exceeded the allowable limit of recoverable damages as provided in Hammond's policy. The court further noted that there was no trial evidence or argument that Allstate had acted in bad faith.[462]

With regard to the propriety of the jury instruction that directed the jury to disregard the limits of the uninsured policy limits, the court noted that when determining whether error resulted from the giving of an instruction, a three-prong test is to be followed: "(1) whether the tendered instruction correctly states the law; (2) whether there is evidence in the record to support giving the instruction; and (3) whether the substance of the instruction is covered by other instructions that are given."[463] Further, "[a] jury instruction that misstates the law will serve as grounds for reversal unless the Court on appeal finds that the error was harmless."[464]

Having held that the amount of Hammond's recoverable damages cannot exceed the policy limits, the disputed jury instruction was a misstatement of the law; thereby, Allstate was prejudiced.[465] The court found that the trial court erroneously instructed the jury as to the amount of permissible damages,[466] and the court reversed and remanded with instructions to reduce the judgment against Allstate to $51,000.[467]

VIII. ACCEPTANCE RULE

In *Becker v. Kreilein*,[468] the Indiana Supreme Court addressed whether the owner of property was liable to a third party for injuries sustained due to the acts of an independent contractor. Mr. and Mrs. Kreilein hired Krueger, a plumber, to install a sewer line at their home. Failing to realize that the Kreileins' old sewer line served as the conduit for the next-door neighbors' sewage, Krueger

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459. *Id*.

460. *Id.* at 1167-68.

461. *Id.* at 1169.

462. *Id*.

463. *Id.* (citing King v. Clark, 709 N.E.2d 1043, 1046 (Ind. Ct. App. 1999).

464. *Id.* (citing Liberty Mut. Ins. Co. v. Blakesley, 568 N.E.2d 1052, 1058 (Ind. Ct. App. 1991).

465. *Id.* at 1169-70.

466. *Id.* at 1170.

467. *Id.*

468. 770 N.E.2d 315 (Ind. 2002).

disconnected the Kreiliens' old line from both the Kreileins' home and from the main sewer line and left it uncapped. Consequently, the neighbors' sewage seeped up into the Kreileins' back yard and flowed downhill into the Beckers' basement. The Beckers sued the Kreileins and Krueger, alleging that their house had been "condemned as uninhabitable and that they had suffered life-threatening, permanent injury and other loss from exposure to raw sewage."[469] The trial court granted summary judgment in favor of all defendants; however, the court of appeals reversed in a split decision.[470]

On transfer, the court first recognized that "Indiana's long-standing general rule is that principals are not vicariously liable for the negligence of their independent contractors."[471] In addressing whether Krueger was an independent contractor, the court noted that while the question of whether "someone is an employee or an independent contractor is generally a question for the trier of fact," a court may decide the issue "if the significant underlying facts are undisputed."[472] The Beckers contended that because "Krueger recommended the easiest, most cost efficient manner in which the work might be done, but the Kreileins made the ultimate decision" that Krueger was an employee of the Kreileins.[473] In rejecting this argument, the court held that, as a matter of law, Krueger was not the Kreileins' employee.[474]

Next, the court noted that "Indiana recognizes five exceptions to the general rule of non-liability of a principal for an independent contractor's negligence."[475] The exceptions are:

> (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.[476]

At the outset of its analysis, the court noted that the only exception that was applicable to the Beckers' cause of action was exception number four.[477] The court noted that "[a]s to the fourth exception, the proper inquiry is whether, as a matter of law, the principal should have foreseen a danger that was 'substantially similar to the accident that produced the complained-of injury.'"[478] Therefore, the proper inquiry was "whether the Kreileins should have foreseen that, absent due

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469. *Id*. at 317.
470. *Id*. (referencing Becker v. Kreilein, 754 N.E.2d 939 (Ind. Ct. App. 2001)).
471. *Id*. (citing Bagley v. Insight Communications Co., 658 N.E.2d 584, 586 (Ind. 1995)).
472. *Id*. at 318 (citing Moberly v. Day, 757 N.E.2d 1007 (Ind. 2001)).
473. *Id*. (Brief for Appellant at 17).
474. *Id*.
475. *Id*.
476. *Id*. (citing *Bagley*, 658 N.E.2d at 586).
477. *Id.*
478. *Id.*. (quoting Carie v. PSI Energy, Inc., 715 N.E.2d 853, 857 (Ind. 1999)).

precaution by Krueger in installing their new sewer line, [the neighbors'] sewage would seep into their yard and be washed downhill to contaminate the Beckers' property. The court concluded that the record did not support the inference that the Kreileins should have expected this outcome; hence, the fourth exception was inapplicable.[479]

Finding that none of the five exceptions to the general rule that a principal will not be liable for the acts of an independent contractor was applicable to the facts at issue, the court held that the trial court was correct in granting summary judgment in favor of the Kreileins.[480] With regard to the Beckers' recourse against the plumber, the court agreed with the court of appeals that there existed genuine issues of material fact as to "whether Krueger left the sewer line in a dangerously defective or imminently dangerous condition."[481] Thus, the court summarily affirmed the court of appeals ruling to reverse the trial court's grant of summary judgment in favor of Krueger.[482]

In *Peters v. Forster*,[483] the court of appeals examined whether an independent contractor who performs work in knowing or negligent violation of applicable building codes owes a duty to third parties injured as a result of the defective condition where the work has been completed and accepted by the owner or general contractor.

The Hamms, both in poor health, purchased a pre-built ramp to allow access to their home. Forster, the Hamms' landlord and an independent contractor, charged the Hamms seventy-five dollars to have two of his employees transport and install the ramp at the Hamms' residence. Forster later testified that, although he was unfamiliar with the applicable building codes, he was aware that the ramp was too steep and did not comply with the applicable building codes for handicapped ramps. He also stated that he was unaware that the ramp would be used as a handicapped or wheelchair ramp.

The year following the ramp's installation, Peters delivered a meal to the Hamm's home. Upon exiting the home, he was injured when he slipped on the ramp and fell. Peters filed suit against the Hamms and later added Forster as a party defendant.[484] The Hamms were dismissed from the case after settlement.[485] Finding that Forster owed no duty of care to Peters, the trial court granted summary judgment in Forster's favor.[486]

On appeal, the court noted that to succeed in their negligence claim, the Peters must prove that (1) a duty was owed to them by Forster; (2) Forster breached that duty; and (3) their injuries were proximately caused by Forster's

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479. *Id.*

480. *Id*.

481. *Id*. at 319.

482. *Id*.

483. 770 N.E.2d 414 (Ind. Ct. App. 2002), *reh'g denied*, 2002 Ind. App. LEXIS 1333 (Ind. Ct. App. July 31, 2002), *trans. granted and vacated by* 2003 Ind. LEXIS 13 (Ind. Jan. 16, 2003).

484. *Id*.

485. *Id*.

486. *Id*.

breach.[487] Relying upon Indiana's long-standing rule that independent contractors do not owe a duty of care to third parties after an owner accepts a contractor's work, Forster argued that he owed no duty to the Peters upon the Hamms' acceptance of his work.[488] Further, "evidence of [an] independent contractor's mere negligence is insufficient to impose liability against the contractor after acceptance of the work by the general contractor or owner."[489]

The court next observed that several factors may be considered in determining whether the Hamms accepted Forster's work. These factors include whether "(1) the owner or its agent reasserted physical control over the premises or instrumentality; (2) the work was actually completed; (3) the owner expressly communicated an acceptance or release of liability; or (4) the owner's actions permit a reasonable inference that the work was accepted."[490] The court noted that the rule relieving the contractor of liability once his work has been accepted is rooted in the premise that the owner, having control of the premises, is generally in the best position to prevent harm to third parties.[491]

The court determined that Forster actually completed the work and the Hamms reasserted physical control over their premises.[492] The court noted that "[a]lthough there is evidence that Mrs. Hamm did not expressly communicate an acceptance, the reasonable inference to be drawn from the evidence before us is that the work was in fact accepted."[493]

Having established that acceptance occurred, the court next addressed whether any of the exceptions to the acceptance rule were applicable under the circumstances.[494] Despite the general rule that a contractor owes no duty to third parties once an owner accepts the contractor's work, a contractor may be liable where the work was left "in a condition that was dangerously defective, inherently dangerous or imminently dangerous such that it created a risk of imminent personal injury."[495] The court further noted that if "the thing sold or constructed be not imminently dangerous to human life, but may become such by reason of some concealed defect, then a liability may arise against such vendor or constructor if he knew of the defect and fraudulently concealed it."[496]

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487. *Id*. at 417 (citing Wickey v. Sparks, 642 N.E.2d 262, 265 (Ind. Ct. App. 1994)).

488. *Id*. (citing Blake v. Calumet Constr. Corp., 674 N.E.2d 167, 170 (Ind. 1996)(citing Daugherty v. Herzog, 44 N.E. 457 (1896))).

489. *Id*. (citing U-Haul Intn'l Inc. v. Mike Madrid Co., 734 N.E.2d 1048, 1052 (Ind. Ct. App. 2000)).

490. *Id*. (citing *U-Haul, Int'l*, 734 N.E.2d at 1052) (quoting *Blake*, 674 N.E.2d at 171).

491. *Id*. (citing Kostidis v. Gen. Cinema Corp., 754 N.E.2d 563, 568 (Ind. Ct. App. 2001) (citing *Blake*, 674 N.E.2d at 171)).

492. *Id*. at 419.

493. *Id*.

494. *Id*.

495. *Id*. at 418 (citing *U-Haul, Int'l*, 734 N.E.2d at 1052 (quoting Hill v. Rieth-Riley Constr. Co., 670 N.E.2d 940, 944-45 (Ind. Ct. App. 1996))).

496. *Id*. (citing Nat'l Steel Erection v. Hinkle, 541 N.E.2d 288, 292 (Ind. Ct. App. 1989) (quoting Holland Furnace Co. v. Nauracaj, 14 N.E.2d 339, 342 (1938); Snider v. Bob Heinlin

Ultimately, the court reversed the trial court finding that latent defects existed in the ramp due to its failure to comply with applicable building codes.[497] The court opined that Forster installed a ramp, the quality of which did not comply with the building codes, and which created a dangerous condition that was not easily ascertainable by the Hamms. The latent defects, which were not discoverable by the Hamms reasonable inspection, revealed themselves after installation of the ramp. Forster, as the independent contractor, was in a better position to prevent the harm given his experience and expertise. Independent contractors should not be immune when they knowingly or negligently violate building codes. Accordingly, the court reversed the trial court's grant of summary judgment in favor of Forster and remand for further proceedings.[498]

IX. JURY INSTRUCTIONS

In *Wal-Mart Stores, Inc. v. Wright*,[499] the Indiana Supreme Court addressed the propriety of a jury instruction that instructed the jury to consider violations of Wal-Mart policies in deciding whether Wal-Mart was negligent. The instruction at issue further stated that such violations were evidence tending to show the degree of care that Wal-Mart itself recognized as ordinary care.[500]

Wright sued Wal-Mart alleging negligence in the maintenance, care and inspection of its property after she slipped in a puddle of water at a Wal-Mart store.[501] At trial, the parties stipulated to the admissibility of multiple Wal-Mart employee documents collated as a "Store Manual."[502] At the conclusion of the trial, Wright tendered the following instruction:

> There was in effect at the time of the Plaintiff's injury a store manual and safety handbook prepared by the Defendant, Wal-Mart Stores, Inc., and issued to Wal-Mart Stores, Inc., employees. You may consider the violation of any rules, policies, practices and procedures contained in these manuals and safety handbook along with all of the other evidence and the court's instructions in deciding whether Wal-Mart was negligent.
>
> The violation of its rules, policies, practices and procedures are a proper item of evidence tending to show the degree of care recognized by Wal-Mart as ordinary care under the conditions specified in its rules, policies, practices and procedures.[503]

Wal-Mart objected to the instruction asserting that a party should not be

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Concrete Constr. Co., 506 N.E.2d 77, 81 (Ind. Ct. App. 1987)).

497. *Id*. at 419.

498. *Id*. at 419-20.

499. 774 N.E.2d 891 (Ind. 2002).

500. *Id*.

501. *Id*. at 892.

502. *Id*.

503. *Id*. at 893.

penalized for setting standards for itself that exceed ordinary care. Wal-Mart further argued that ordinary care is decided by the jury.[504] The trial court overruled Wal-Mart's objection and the plaintiff's tendered instruction became final.[505] The jury found in Wright's favor and "assessed Wright's total damages at $600,000, reduced to $420,000 by 30% comparative fault attributed to Wright."[506] The court of appeals affirmed the trial court's decision "holding the challenged [second] paragraph of the instruction was proper because it 'did not require the jury to find that ordinary care, as recognized by Wal-Mart, was the standard to which Wal-Mart would be held' . . . and because the trial court had not 'instructed the jury that reasonable or ordinary care was anything other than that of a reasonably, careful and ordinarily prudent person.'"[507]

On transfer, the Indiana Supreme Court initially noted that since Wal-Mart was challenging the second paragraph of the instruction as an incorrect statement of the law, the proper standard of appellate review was de novo.[508] The court considered Wal-Mart's argument that the second paragraph of the instruction invited the jury to apply Wal-Mart's subjective view of the standard of care as set forth in its Store Manual, "rather than an objective standard of ordinary care."[509] Wright countered that the instruction's language did not convert the objective standard to a subjective standard; instead, Wright asserted that the second paragraph "simply allows jurors to consider Wal-Mart's subjective view of ordinary care as some evidence of what was in fact ordinary care."[510]

The supreme court opined that Wal-Mart was correct in its assertion that its rules and policies "may exceed its view of what is required by ordinary care in a given situation."[511] The supreme court also noted that "[t]he law has long recognized that failure to follow a party's precautionary steps or procedures is not necessarily failure to exercise ordinary care."[512] Furthermore, the supreme court agreed with Wal-Mart's position that the instruction, as worded, "invites jurors to apply Wal-Mart's subjective view—as evidenced by the Manual—rather than an objective standard of ordinary care."[513]

By unanimous opinion, the Indiana Supreme Court reversed the trial court judgment and remanded the case for a new trial based upon the court's conclusion that "the second paragraph of Final Instruction 17 was an improper invitation to deviate from the accepted objective standard of ordinary care and therefore

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504. *Id*.

505. *Id*.

506. *Id*.

507. *Id*. (quoting Wal-Mart Stores, Inc. v. Wright, 754 N.E.2d 1013, 1018 (Ind. Ct. App. 2001)).

508. *Id*. at 893-94 (citing Brown v. State, 703 N.E.2d 1010, 1019 (Ind. 1998)).

509. *Id*. at 894.

510. *Id*.

511. *Id*.

512. *Id*. (citing 57A AM. JUR. 2D *Negligence* § 187 at 239 (1998)).

513. *Id*. at 895.

incorrectly stated the law."[514]

X. SET OFFS

In *R.L. McCoy, Inc. v. Jack*,[515] the Indiana Supreme Court addressed whether a non-settling defendant was entitled to a credit for amounts paid by nonparty defendants who settled with the plaintiff prior to trial. Michael Jack was severely injured while he was attempting to pass another vehicle in a construction zone. In addition to suing the State of Indiana, Jack sued the construction project's contractor, R.L. McCoy, Inc. ("McCoy") and a subcontractor. Prior to trial, the Jacks entered into a "loan receipt" agreement with McCoy in which they released McCoy from the suit in exchange for $1.5 million.[516] In relevant part, the loan agreement read as follows:

> 7. The parties acknowledge that to the extent an as yet unquantified portion of the Settlement Payment would otherwise constitute a credit, setoff, or partial satisfaction to the benefit of any other defendant if it were not a loan, that as yet unquantified sum is a loan. Accordingly, to the extent that:
>
> a. The settlement payment exceeds a final non-party verdict (total damagessuffered by the plaintiffs multiplied by the percentage at fault, if any, on the part of McCoy (against McCoy)
>
> AND
>
> b. If such excess of the settlement payment over the amount of the non-party verdict against McCoy would otherwise operate to reduce the amount which S.E. Johnson, Inc., the Indiana Department of Transportation, or the State of Indiana or any other defendant against whom a final jury verdict is rendered is obligated to pay as a result of the final verdict in said action, after all appeals have either been abandoned or exhausted, if it were not a loan,
>
> THEN the amount of the excess which would otherwise reduce the amount another defendant is obligated by a verdict to pay if the excess were not considered a loan, must be repaid by Jack to McCoy.[517]

The Jacks proceeded to trial against the State and the subcontractor. The subcontractor asserted a nonparty defense against McCoy pursuant to the

514. *Id.*
515. 772 N.E.2d 987 (Ind. 2002).
516. *Id.*
517. *Id.*

Comparative Fault Act.[518] The jury returned a verdict of $5.4 million, but found McCoy only ten percent at fault and the subcontractor fifteen percent at fault.[519] The subcontractor, therefore, was ordered to pay fifteen percent of $5.4 million, or $810,000.[520] The subcontractor then moved for a set-off of $960,000, the amount that McCoy's loan receipt agreement exceeded his $540,000 obligation under the jury's fault allocation.[521] McCoy then moved to enforce the repayment provisions of the loan and requested that the Jacks repay McCoy the same $960,000.[522] The trial court denied both motions.[523] The same panel of the court of appeals affirmed the denial of the subcontractor's motion but reversed the denial of McCoy's motion.[524] The court of appeals "concluded that McCoy's $960,000 excess payment would have been a credit against Johnson's liability if payment by McCoy to the Jacks were not a loan."[525] The Jacks requested transfer.[526]

On transfer, the court first recognized that in the pre-comparative fault era "credits . . .were a tool to avoid overcompensation of plaintiffs . . . [and] were a tool to avoid a single defendant bearing too much responsibility for the plaintiff's damages."[527] The court opined that Indiana's comparative fault system rectified these issues by replacing joint and several liability with several liability.[528] Further, the defendants were allowed to assert a nonparty defense; thereby, defendants were permitted to prove the negligence of the absent tortfeasor.[529] The subcontractor asserted a nonparty defense against McCoy and the jury apportioned fault accordingly.[530] Hence, the court determined that if the subcontractor were entitled to a $960,000 credit, the subcontractor's "liability would have been eliminated despite its being found at greater fault than McCoy. Thus, elimination of credit requires the comparative fault defendant to pay for its own share, but no more."[531]

The court next noted that the plaintiffs were not overcompensated because a "settlement payment normally incorporates an assessment of the exposure to liability" and includes "the parties' desires to avoid the expense and effort of litigation and the tactical effect of eliminating a defendant and its counsel from

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518. *Id*. (citing IND. CODE § 34-51-2-14 (1999)).

519. *Id*.

520. *Id*.

521. *Id*. at 988-89.

522. *Id*. at 989.

523. *Id*

524. *Id*.

525. *Id*.

526. *Id*.

527. *Id*. (citing Mendenhall v. Skinner & Broadbent Co., 728 N.E.2d 140, 143-44 (Ind. 2000)).

528. *Id*. at 989-90.

529. *Id*. at 990.

530. *Id*. at 988.

531. *Id*. at 990.

trial."[532] Accordingly, the court expanded its holding in *Mendenhall v. Broadbent & Skinner Co*.[533] In *Mendenhall*, the Indiana Supreme Court held that since the adoption of comparative fault, credits were no longer warranted where the remaining defendant at trial did not assert a nonparty defense against a settling party.[534] In expanding on *Mendenhall*, the court found that the settlement agreement between the Jacks and McCoy had no bearing on the subcontractor's liability as assessed by the jury.[535] The court observed that "[u]nlike a joint and several liability regime, no other defendant is liable for that claim, and none has a claim to benefit from its overvaluation by the settling defendant or undervaluation by the plaintiff as compared to the jury's assessment."[536] Finally, the court concluded that, pursuant to the wording of the loan receipt agreement, McCoy was not entitled to repayment by the Jacks of the $960,000 that exceeded the jury's assessment of McCoy's liability.[537]

532. *Id*.
533. 728 N.E.2d 140 (Ind. 2000).
534. *Id*.
535. *R.L. McCoy*, 772 N.E.2d at 991.
536. *Id*.
537. *Id*.