RECENT DEVELOPMENTS IN INDIANA TORT LAW

MARIE TROENDLE GREER*
JODI L. SILCOX**

INTRODUCTION

This Article surveys the most significant developments in Indiana tort law from October 1, 2002 through September 30, 2003. Indiana appellate courts were called upon not only to re-examine long-standing judicial precedent but also to address issues of first impression.

I. NEGLIGENCE CASES

A. Duty

The Indiana Supreme Court addressed a gun owner's duty of care in *Estate of Heck ex rel. Heck v. Stoffer*.[1] Timothy Stoffer had an extensive criminal history, which culminated in his shooting and killing Allen County Police Officer Eryk Heck with a handgun he had taken from his parents' home. Timothy also died as a result of the shoot out.[2]

Timothy's parents were aware of Timothy's criminal activity—to be sure, they were the victims of several of his crimes—but, nonetheless, in the months prior to the killing, Timothy's parents had assisted him in avoiding arrest. Moreover, the Stoffers continued to store their firearm under the cushion of an armchair in their home, to which Timothy had unfettered access.

Heck's Estate ("the Estate") filed a negligence action against the Stoffers and their family-owned business (collectively, "the Stoffers"), which asserted liability for the negligent storage of the firearm.[3] The Stoffers moved to dismiss the claim or, in the alternative, for summary judgment. The trial court granted both the Stoffers' motion to dismiss with prejudice and its alternative motion for summary judgment following several hearings, noting that absent negligent entrustment, when an instrumentality passes from a person's control, responsibility for injuries inflicted by it cease.[4] The Estate then appealed. The Indiana Court of Appeals affirmed the trial court's dismissal, finding that the Stoffers had no duty to securely store their handgun.[5] In reaching this conclusion, the court of appeals relied on the constitutional right to bear arms and the absence of a relevant

---

* Associate, Cline Farrell Christie Lee & Caress, Indianapolis, Indiana. B.A., *cum laude*, 1993, Marian College; J.D.,1997, Southern Illinois University.

** Law Clerk to the Honorable Nancy H. Vaidik, Indiana Court of Appeals. B.S., 1998, Indiana University; J.D., *magna cum laude*, 2001, Valparaiso University.

1. 786 N.E.2d 265 (Ind. 2003).
2. *Id.* at 267.
3. *Id.*
4. *Id.*
5. *Id.*; *see also* Estate of Heck v. Stoffer, 752 N.E.2d 192 (Ind. Ct. App. 2001), *vacated*.

statutory duty concerning storage of guns in a home.[6] The supreme court granted transfer and reversed.[7]

In analyzing whether an owner or possessor of a loaded handgun owes a duty to exercise ordinary care in the storage and safekeeping of the handgun, the supreme court turned to the *Webb v. Jarvis* balancing test and focused on the relationship between the parties, the reasonable foreseeability of the harm, and public policy concerns.[8] The supreme court determined that any relationship between Officer Heck and the Stoffers was tenuous at best.[9] Consequently, the supreme court found that the relationship factor weighed in favor of the Stoffers.[10]

Next, the supreme court addressed the foreseeability factor. Refusing to take a narrow view of the foreseeability factor, the supreme court determined that the foreseeability factor weighed in the Estate's favor.[11] In reaching this conclusion, the supreme court cited several facts upon which it relied, including Timothy's history of stealing items from his family, Timothy's three previous charges for resisting law enforcement, Timothy's hiding from the police at the Stoffers' lake cottage, and Timothy's father's belief that Timothy would flee rather than face his sentencing hearing and the admission that he was aware of Timothy's state of mind.[12] The supreme court also noted that, despite the foregoing, the Stoffers failed to take any precautions to secure their gun from Timothy, who still retained a key to their home, although they would hide the gun when their grandchildren would visit and secured their cash, checks, and valuables from Timothy upon his release from prison.[13]

Last, the supreme court examined the public policy factor. After recognizing that in Indiana almost thirteen thousand people were killed or injured by gun violence during the last five years and that thirty-five percent of the crimes involving guns are committed with stolen firearms, the supreme court opined that requiring a gun owner to reduce the risk of gun theft is not overly burdensome.[14] Additionally, the supreme court noted that legislation regarding firearm safety, including the prohibition against selling or transferring a gun to a minor, felon, drug abuser, alcohol abuser, or a mentally incompetent person,[15] acknowledges that a degree of responsibility is associated with handgun ownership.[16] Consequently, the supreme court found that public policy weighs in favor of safe

---

6. *Stoffer*, 786 N.E.2d at 267; *see also Stoffer*, 752 N.E.2d at 199.
7. *Stoffer*, 786 N.E.2d at 267.
8. *Id.* at 268 (citing Webb v. Jarvis, 575 N.E.2d 992, 996 (Ind. 1991)).
9. *Id.*
10. *Id.*
11. *Id.* at 269.
12. *Id.*
13. *Id.* at 267.
14. *Id.*
15. IND. CODE § 35-47-2-7 (1998).
16. *Stoffer*, 786 N.E.2d at 270.

storage of firearms.[17] After balancing the three factors, the supreme court determined that the Stoffers owed a duty to exercise reasonable and ordinary care in the storage and safekeeping of their handgun.[18] Thus, the supreme court concluded that the trial court erroneously dismissed the cause of action.

The supreme court also examined whether the trial court erred by alternatively granting summary judgment in favor of the Stoffers based on the fact that Timothy's killing of Officer Heck was an intervening act that eliminated the causal connection between the Stoffers' negligence and Officer Heck's death.[19] The supreme court disagreed, finding that a gun owner's duty to safely store his firearm protects against the very result the trial court ruled was an intervening act.[20] The supreme court concluded that the trial court improperly granted summary judgment in favor of the Stoffers, because the supreme court found that Timothy's killing of Officer Heck was not an intervening act that eliminated the causal connection between the Stoffers' negligence and Officer Heck's death and factual determinations remained.[21]

The Indiana Court of Appeals also was presented with a novel duty issue in *Hammock v. Red Gold, Inc*.[22] In *Hammock*, the court of appeals addressed whether a motorist owes a duty of care to a business that loses electricity as a result of the motorist's collision with a utility pole. While Gerald Hammock operated his automobile, he struck a utility pole owned by American Electric Power. As a result of this collision, the Red Gold processing plant located approximately two miles away lost power for nearly five hours and suffered significant losses. Red Gold submitted a claim to its insurer; however, the insurer only covered a portion of Red Gold's total loss.[23] Thus, Red Gold subsequently filed a complaint against Hammock, which alleged that Hammock negligently operated his vehicle, thereby causing Red Gold to suffer substantial losses. Red Gold's insurer filed a motion for summary judgment, which Hammock challenged by asserting that Red Gold was comparatively at fault for failing to have a back-up power source. Additionally, Hammock argued on summary judgment that the damage Red Gold suffered was not foreseeable and that Red Gold's insurer's arguments—namely, that the damage was not foreseeable so as to require Red Gold to have a back-up power source but that the damage was foreseeable for the purpose of establishing the proximate cause element of its negligence claim—were logically inconsistent.[24] Following a

---

17. *Id.*

18. *Id.* The supreme court also addressed the role of the right to bear arms. While the supreme court recognized the constitutional right to bear arms, it noted that this right does not entitle gun owners to impose on their fellow citizens all the external human and economic costs associated with their ownership. *Id.* at 270-71.

19. *Id.*

20. *Id.*

21. *Id.*

22. 784 N.E.2d 495 (Ind. Ct. App. 2003), *trans. denied*, 792 N.E.2d 49 (Ind. 2003).

23. *Id.* at 496-97.

24. *Id.* at 497.

hearing, the trial court granted summary judgment for Red Gold's insurer.[25] Hammock appealed raising several issues, of which the court of appeals found one to be dispositive: did Hammock owe a duty to Red Gold?[26]

As a starting point, the court of appeals noted that the existence of a legal duty owed by one party to another in a negligence action is generally a pure question of law.[27] In answering the question of whether Hammock owed a duty to Red Gold, the court of appeals balanced the relationship between the parties, the reasonable foreseeability of harm to the party injured, and public policy concerns.[28]

While unable to identify any special relationship between Hammock and Red Gold, the court of appeals recognized the general relationship that exists between a motorist and the public at large to prevent the motorist from harming them.[29] The court of appeals then analyzed the foreseeability factor, identifying several relevant factors to be considered when discussing the foreseeability that a particular business or residence may be injured as the result of an automobile accident.[30] Ultimately, the court of appeals turned to a "zone of danger" analysis, and based on the fact that the Red Gold plant was located over two miles from the scene of the collision, determined that it was extremely unlikely that the damage suffered by Red Gold was the kind of harm that would normally be expected as the result of an automobile accident.[31]

Next, the court of appeals addressed the public policy considerations involved in holding a motorist liable for the injury suffered by a business following an interruption in electric service.[32] The court of appeals noted that because of the nature of Red Gold's operations Red Gold faced substantial losses if it lost power but nonetheless elected not to have a back-up power source.[33] Because an individual motorist is not in the best position to prevent or minimize the economic harm, the court of appeals found that public policy militates against imposing the costs of the negligent motorist's actions upon the motorist, and instead, might well pass the costs onto the business, which is better able to prevent the harm.[34] Balancing the three factors, the court of appeals concluded that Hammock did not owe a duty to Red Gold and reversed and remanded with instructions for the trial court to enter summary judgment in favor of Hammock.[35]

---

25. *Id.*

26. *Id.* at 497-98.

27. *Id.* at 498 (citing P.T. Barnum's Nightclub v. Duhamell, 766 N.E.2d 729, 737 (Ind. Ct. App. 2002)).

28. *Id.* at 499 (citing Webb v. Jarvis, 575 N.E.2d 992, 995 (Ind. 1991)).

29. *Id.* at 501 (citing RESTATEMENT (SECOND) OF TORTS (1965)).

30. *Id.*

31. *Id.* at 502.

32. *Id.* at 503.

33. *Id.* at 503-04.

34. *Id.* at 504.

35. *Id.* at 506. Judge Bailey dissented, opining that Hammock had a legal duty to use due care to avoid accidents and to keep his vehicle under reasonable control. *Id.*

B. Dog Bite Cases

The Indiana Supreme Court issued two opinions during the survey period regarding liability for dog bites. In the first decision, *Poznanski v. Horvath*,[36] the supreme court was asked to address whether the very act of an unprovoked biting by a dog, which in the past displayed no vicious tendencies, is sufficient by itself for a jury to infer that the animal's owner knew, or should have known, of the dog's vicious tendencies.[37] Writing for a unanimous court, Justice Rucker found it was not sufficient.[38]

George Horvath owned a mixed breed sheepdog named Hey.[39] One afternoon while Hey was left unattended and unrestrained in Horvath's yard,[40] the dog—without provocation—bit Alyssa Poznanski on the face. Due to the bite, Alyssa required medical attention and stitches. Subsequently, Alyssa's mother filed suit against Horvath. Horvath then filed a motion for summary judgment, which the trial court granted.[41] The court of appeals reversed and remanded, finding genuine issues of material fact regarding Horvath's knowledge of the dog's vicious propensities, Horvath's use of reasonable care in keeping the dog restrained, and Horvath's liability under the local ordinance requiring animals to be properly restrained.[42] The supreme court granted transfer to address the issue of whether a jury could infer that Horvath knew or should have known of Hey's vicious propensities based on Hey's unprovoked biting of Alyssa, which was the first time Hey exhibited any such vicious behavior.[43]

On transfer, the supreme court rejected the court of appeals' analysis regarding Horvath's knowledge of Hey's vicious propensities.[44] Specifically, the supreme court observed that the very act of unprovoked biting does not necessarily mean a dog is dangerous or vicious, reminding us that under the common law, all dogs are presumed to be harmless domestic animals regardless of breed or size.[45] The supreme court then explained that this presumption can be overcome by evidence of a known or dangerous propensity as shown by

---

36. 788 N.E.2d 1255 (Ind. 2003).

37. *Id.* at 1257.

38. *Id.*

39. *Id.*

40. A city ordinance required "[e]very owner . . . of an animal within the City shall see that his or her animal . . . is properly restrained and not at large." *Id.* (alteration in original). The ordinance further defined "at large" as "any animal that is not under restraint." *Id.* The supreme court summarily affirmed the court of appeals' finding that Horvath could be held liable under the local ordinance requiring proper restraint of animals. *Id.*

41. *Id.*

42. *Id.*; *see also* Poznanski *ex rel.* Poznanski v. Horvath, 749 N.E.2d 1283 (Ind. Ct. App. 2001), *vacated in part by* 788 N.E.2d 1255 (Ind. 2003).

43. *Poznanski*, 788 N.E.2d at 1259.

44. *Id.* at 1258-59.

45. *Id.* at 1258 (citing Ross v. Lowe, 619 N.E.2d 911, 914 (Ind. 1993)).

specific acts of the specific animal.[46] The supreme court concluded that a jury may not infer that an owner knew or should have known of a dog's dangerous propensities solely from the fact of a first time bite.[47] Instead, the supreme court determined that a jury may only infer that an owner knew or should have known of a dog's dangerous or vicious propensities following the animal's first unprovoked bite where the evidence establishes that the particular breed to which the owner's dog belongs is known to exhibit such tendencies.[48] Because there was no evidence before the trial court that mixed breed sheepdogs exhibit dangerous or vicious propensities, but there was ample evidence presented that Hey was well-trained and had not exhibited any signs of aggression in the past, the supreme court concluded that the jury could not infer that Horvath knew, or had reason to know, that his dog was vicious or dangerous.[49]

The second dog bite case issued by the supreme court during the survey period was *Cook v. Whitsell-Sherman*.[50] In *Cook*, our supreme court addressed the liability of dog owners whose dogs bite mail carriers and certain other public servants under Indiana Code section 15-5-12-1.[51] As Kenneth Whitsell-Sherman was discharging his duties as a mail carrier for the United States Postal Service, Maggie—a 100-pound Rottweiler—broke free from her leash and bit Whitsell-Sherman on the hand.[52] Maggie had never before exhibited any aggressive or violent tendencies. When Maggie bit Whitsell-Sherman, she was staying with the Hart family while her owner, Tamara Cook, was out of town.

As a result of the injuries he sustained, Whitsell-Sherman sued both Cook, as the owner of the dog, and the Harts, as the keeper of the dog.[53] Following a bench trial, the trial court found that Cook was the owner of the dog, the Harts had custody and control of the dog at the time of the incident, and concluded that Cook was liable for negligence per se and violation of a statutory duty.[54] Cook then appealed.

The Indiana Court of Appeals looked to Indiana Code section 15-5-12-1 and

---

46. *Id.*

47. *Id.* at 1260.

48. *Id.*

49. *Id.*

50. 796 N.E.2d 271 (Ind. 2003).

51. *Id.* at 274. Indiana Code section 15-5-12-1 provides:

> If a dog, without provocation, bites any person who is peaceably conducting himself in any place where he may be required to go for the purpose of discharging any duty imposed upon him by the laws of this state or by the laws or postal regulations of the United States of America, the owner of such dog may be held liable for any damages suffered by the person bitten, regardless of the former viciousness if such dog or the owner's knowledge of such viciousness.

IND. CODE § 15-5-12-1 (1998).

52. *Cook*, 796 N.E.2d at 273.

53. *Id.*

54. *Id.* The Harts failed to appear. Consequently, a default judgment was rendered against them on both Whitsell-Sherman's complaint and Cook's cross claim for indemnity. *Id.*

decided that Cook was the "owner" of the dog for purposes of the statute.[55] However, the court of appeals reversed the trial court's determination that the statute rendered the owner liable under the doctrine of negligence per se, reasoning that the statute imposed no duty upon Cook and did not alter the common law standard of reasonable care required of dog owners except to eliminate the common law presumption that a dog is harmless.[56] Consequently, the court of appeals concluded that under the general rules of negligence, a public servant who has been bitten by a dog must still establish that the dog's owner failed to act reasonably to prevent the dog from causing harm.[57]

On transfer, the supreme court examined whether Indiana Code section 15-5-12 renders a dog's owner liable for a dog bite when the owner is not the custodian of the dog at the time when the bite occurred.[58] As a starting point, the supreme court looked to Indiana Code section 15-5-12-2[59] and determined that Cook was an "owner" of the dog even though she was not the custodian of the dog at the time of the incident.[60] The supreme court explained that such a conclusion seems fair because the owner is ordinarily best positioned to know the dog's temperament and to give whatever special instructions are necessary to control the dog.[61]

The supreme court next addressed the impact of Indiana Code section 15-5-12-1 on the common law, which presumes all dogs, regardless of breed or size, are harmless.[62] Specifically, the supreme court found that the statute imposes strict liability for failure to prevent dog bite injuries to public employees covered by the statute.[63] The supreme court continued by stating that such strict liability reflects a policy choice that the dog's owner and keeper should bear the loss rather than the injured public employee.[64] The supreme court concluded by recognizing that the statute's removal of the presumption of canine harmlessness allows the injured public servant to establish liability by simply proving who the owner is and that the dog bit the public servant without provocation to establish liability.[65]

---

55. *Id.* at 274.

56. *Id.*

57. *Id.*

58. *Id.* at 273.

59. *Id.* Indiana Code section 15-5-12-2 provides that "owner" as the term is used in 15-5-12-1 "includes a possessor, keeper, or harborer of a dog." *Id.* The statute also explicitly provides, however, that "owner" means the owner of a dog. *Id.* (citing IND. CODE § 15-5-12-2 (1998)).

60. *Id.* at 274.

61. *Id.* at 275.

62. Poznanski *ex rel.* Poznanski v. Horvath, 788 N.E.2d 1255, 1257 (Ind. 2003).

63. *Cook*, 796 N.E.2d at 276.

64. *Id.*

65. *Id.* at 276-77.

II. PREMISES LIABILITY

In *Baker v. Fenneman & Brown Properties*, the court of appeals addressed the issue of whether a restaurant had a duty to render medical aid to an injured customer.[66] After entering a Taco Bell restaurant to purchase a drink, Baker fell backward and hit his head. The impact rendered him unconscious and caused Baker to convulse. After he regained consciousness, Baker fell again and in addition to losing consciousness, he lacerated his chin, knocked out his four front teeth and cracked the seventh vertebra of his neck. When Baker regained consciousness a second time, he was choking on the blood and teeth in his mouth. Baker stumbled out of the restaurant to a friend, who arranged for Baker to be taken to a hospital.[67]

Baker filed suit against the restaurant claiming that "1) Taco Bell breached its duty to render assistance to him until he could be cared for by others when Taco Bell employees knew or should have known that he was ill or injured, and 2) Taco Bell's conduct constituted gross negligence, wanton disregard and wanton recklessness toward Baker."[68] Taco Bell successfully moved for summary judgment asserting that it had no duty to assist Baker because "it was not responsible for the instrumentality that caused Baker's initial injury."[69]

On appeal, the court noted that the question of duty is a question of law for the court to decide.[70] To determine whether a duty exists, the court must weigh the relationship between the parties, the reasonable foreseeability of harm to the person injured, and public policy concerns.[71] The court next observed that "[a]s a general rule, an individual does not have a duty to aid or protect another person, even if he knows that person needs assistance."[72] Baker argued that there are exceptions to this rule. Specifically, Baker asserted that Taco Bell's duty to assist him is rooted in section 314A of the Restatement (Second) of Torts:

> "(1) A common carrier is under a duty to its passengers to take reasonable action:
> (a) to protect them against unreasonable risk of physical harm; and
> (b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.
> (2) An innkeeper is under a similar duty to his guests.
> (3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation.
> (4) One who is required by law to take or who voluntarily takes the

66. 793 N.E.2d 1203 (Ind. Ct. App. 2003).

67. *Id.* at 1205.

68. *Id.*

69. *Id.* at 1206.

70. *Id.* (citing Ind. State Police v. Don's Guns & Galleries, 674 N.E.2d 565, 568 (Ind. Ct. App. 1996)).

71. *Id.*

72. *Id.* (citing L.S. Ayres v. Hicks, 40 N.E.2d 334, 337 (Ind. 1942)).

> custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other."[73]

In considering section 314A, the court noted that the duty imposed by section 314A arises because of a special relationship between the parties and applies only while the relationship exists.[74] Further, the court noted that comment d to 314A explains that the

> "duty to give aid to one who is ill or injured extends to cases where the illness or injury is due to natural causes, to pure accident, to the acts of third person, or to the negligence of the plaintiff himself, as where a passenger has injured himself by clumsily bumping his head against a door."[75]

The court determined that Indiana precedent did not limit the application of 314A to cases where the injured party is an invitee *and* the instrumentality causing the injury belonged to the defendant.[76] Specifically, the court rejected Taco Bell's position that it had no duty to assist Baker because it was not responsible for Baker's initial injury or illness.[77]

The court also held that public policy suggested that Taco Bell had a duty to provide reasonable care to Baker given that Taco Bell opened its doors to the public expecting to gain an economic benefit from its patrons.[78] The court countered Taco Bell's position that the imposed duty was unreasonable because it would require businesses to hire employees trained to render medical treatment by emphasizing that the duty that arises is only a duty to exercise reasonable care under the circumstances.[79] Finally, the court opined that:

> [A]s a practical matter, we fail to see the logic in Taco Bell's position that it should have no duty to aid in these types of situations. First, we find it unlikely customers would patronize a business that left another customer who was ill or injured lying on the floor of the business simply because the business was not responsible for the customer's illness or injury. Second, imposing on a business a duty to provide reasonable care even when the business is not responsible for an illness or injury will rarely force a business to act in circumstances in which it should not have already have been acting.[80]

Relying on Indiana case law, the Restatement (Second) of Torts, authority from

---

73. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 314 A (1965)).
74. *Id.* at 1207.
75. *Id.* at 1208 (quoting RESTATEMENT (SECOND) OF TORTS § 314A cmt. d (1965)).
76. *Id.*
77. *Id.*
78. *Id.* at 1209.
79. *Id.*
80. *Id.* at 1210.

other jurisdictions and public policy, the court determined that Taco Bell had a duty to provide reasonable assistance to Baker even though Taco Bell did not cause Baker's illness.

In *Smith v. Baxter*,[81] the plaintiff slipped and fell off of a ladder on the defendants' land. The matter was tried and the jury awarded the plaintiff $600,000 in damages after finding the plaintiff forty percent at fault and the defendants sixty percent at fault with regard to the fall.[82] The defendants appealed the trial court's denial of their motion for judgment on the evidence. The court of appeals reversed the trial court in a memorandum decision and the supreme court accepted transfer.[83]

The defendants argued that, because the plaintiff's knowledge of the ladder's deficiencies was equal to or greater than that of the defendants, the defendants had not breached their duty of care to the plaintiff.[84] The plaintiff countered that, under the Indiana Comparative Fault Act, incurred risk was not a complete defense and "requires that conduct previously constituting the defense of incurred risk must now be apportioned along with the fault of others in determining liability."[85] The court observed that

> [r]esolution of the parties' disagreement requires us to determine, in the analysis of a negligence claim, the proper role of the parties' relative knowledge of the risks involved. The question is whether such knowledge is relevant not only to apportioning fault but also to determining whether the defendants breached their duty of reasonable care.[86]

Consistent with existing precedent, the court noted that "the comparative knowledge of a possessor of land and an invitee is not a factor in assessing whether a duty exists, but it is properly taken into consideration in determining whether such duty was breached."[87] In reviewing Indiana case law and sections 343 and 343A of the Restatement (Second) of Torts, the court held that Indiana's Comparative Fault Act did not alter the fact that the court may still consider the comparative knowledge of possessors of land and invitees regarding known or obvious dangers in the court's analysis of the possessor's alleged breach of the duty of reasonable care.[88] The court further noted that in order for the defendants

---

81. 796 N.E.2d 242 (Ind. 2003).
82. *Id.* at 243.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id*. (citing Douglass v. Irvin, 549 N.E.2d 368 (Ind. 1990)).
88. *Id*. at 244-45. Restatement (Second) of Torts section 343 provides:

Dangerous Conditions Known to or Discoverable by a Possessor

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he:
>
> (a) knows or by the exercise of reasonable care would discover the condition,

to successfully appeal the trial court's denial of their motion for judgment on the evidence, the defendants must establish that there is no substantial evidence supporting an essential issue in this case.[89]

The defendants maintained that the plaintiff was as familiar with the ladder as they were on the date of the incident. The defendants also asserted that the plaintiff had experience in climbing a variety of ladders and would have declined to climb their ladder had it posed an "unreasonable risk."[90] Moreover, the defendants argued that liability may not be imposed on a possessor of land under section 343 and 343A, unless "an invitee's conduct notwithstanding the known or obvious risk [is] undertaken for a 'type of strong, external compelling circumstance.'"[91] The supreme court rejected the defendants' position that an invitee's conduct must be undertaken for compelling circumstances.[92]

The court concluded that substantial evidence existed as to whether the defendants knew or should have known that climbing the ladder posed an unreasonable risk of harm.[93] The court further noted that:

> It is a much closer question as to whether there was substantial evidence that (1) the defendants should have expected that the plaintiff would not discover or realize the danger, or fail to protect himself against it, and (2) the defendants should have anticipated the harm despite the plaintiff's knowledge or the obvious nature of the risk. Because we must look only to the evidence and the reasonable inferences most favorable to the

---

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

RESTATEMENT (SECOND) OF TORTS § 343.

Restatement (Second) of Torts section 343A provides:

> Known or Obvious Dangers
>
> (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.
>
> (2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

RESTATEMENT (SECOND) OF TORTS § 343(A).

89. *Smith*, 796 N.E.2d at 245.

90. *Id.*

91. *Id.* (quoting Tate v. Cambridge Commons Apartments, 712 N.E.2d 525, 528 (Ind. Ct. App. 1999)).

92. *Id.*

93. *Id.* at 246.

> plaintiff as a non-moving party, and because the motion for judgment on the evidence is proper only where there is no substantial evidence supporting an essential issue in the case, we decline to reverse the trial court.[94]

In affirming the judgment of the trial court, the supreme court held that resolution of the matter was properly left to the determination of the jury.[95]

III. MEDICAL MALPRACTICE

A. Statute of Limitations

In *Booth v. Wiley*,[96] the Indiana Court of Appeals addressed the discovery based statute of limitations. On October 26, 1998, Dr. Norlund, an optometrist, recommended that Booth undergo Lasik surgery due to his poor vision. Dr. Norlund assured Booth that his disclosed history of glaucoma and cataracts did not preclude him from being a candidate for Lasik surgery.[97]

On November 2, 1998, Dr. Wiley performed bi-lateral Lasik surgery on Booth. Because Booth was not satisfied with the improvement in his vision, Dr. Wiley performed laser enhancement surgery on February 8, 1999. On May 4, 1999, Dr. Wiley performed cataract surgery on Booth's right eye. Two additional surgeries, on May 11, 1999, and on August 2, 1999, were necessary to complete the implantation of an intraocular lens in Booth's right eye.[98]

Booth continued to experience poor vision. When he questioned Dr. Wiley about his sight problems, Dr. Wiley advised Booth that he may have suffered a series of mini strokes that affected the vision in his right eye. Consequently, Booth was referred to Dr. Chern, a retinal vitreous specialist. Dr. Chern examined Booth on October 5, 1999, and found various problems with Booth's right eye. Thereafter, Booth began experiencing problems with his left eye and asked Dr. Wiley for a referral to another physician.[99]

On December 4, 2000, Booth met with Dr. Parent, an opthalmologist that informed Booth that he should not have had Lasik surgery because it was not indicated for a patient with pre-existing glaucoma and cataracts. Dr. Parent performed cataract surgery on Booth's left eye on February 13, 2001.[100]

On April 9, 2001, Booth and his wife met with an attorney who filed their medical negligence complaint on July 24, 2001. The complaint also included claims under the doctrine of fraudulent concealment and the Indiana Deceptive Consumer Sales Act.[101] The complaint was filed with the Indiana Department of

---

94. *Id.*
95. *Id.*
96. 793 N.E.2d 1104 (Ind. Ct. App. 2003).
97. *Id.* at 1105.
98. *Id.*
99. *Id.*
100. *Id.* at 1106.
101. *Id.*

Insurance on September 18, 2001.[102]

Thereafter, the defendant physicians successfully moved for summary judgment alleging that the Booths' claims were time-barred.[103] The trial court reasoned that

> the occurrence-based limitation period is constitutional as applied to Booth, who in this case, should have reasonably been expected to learn of his injury in October 1999 [when Booth saw Dr. Chern]. The statute of limitations did not shorten the time between the discovery of the alleged mistake and the expiration of the limitation period so unreasonably that it became impractical for Booth to file his claim.[104]

The central issue for the court of appeals was to determine the date Booth knew or should have known that the Lasik surgery should not have been performed on him and was the cause of his continued vision complaints.[105] The physicians argued that Dr. Chern's assessment of Booth's eyes in October of 1999, should have alerted Booth that his poor vision was related to the Lasik surgery. Thus, the doctors asserted, a complaint filed by Booth after October of 2001 was time-barred.[106]

Dr. Wiley further opined that if Booth's vision loss was attributable to the lens implant surgery of May 11, 1999, the statute of limitations on Booth's claim expired on May 11, 2001. Moreover, Dr. Norlund and Midwest Eye argued that because the last Lasik surgery was performed on February 8, 1999, that Booth had to file his claims on or before February 8, 2001. Booth maintained that, because he was unaware of the relationship between the Lasik surgery and his impaired vision until Dr. Parent advised him of the connection on December 4, 2000, the filing of his complaint on July 24, 2001, was timely.[107]

In its analysis, the court observed that there are certain circumstances when the occurrence-based statute of limitations "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."[108] In such instances, a plaintiff has two full years from the date "'they discover the malpractice and resulting injury or facts that, in the exercise of reasonable diligence, should lead to the discovery of the malpractice and the resulting injury.'"[109]

The court then looked to the holdings in *Boggs v. Tri-State Radiology, Inc.*[110]

---

102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 1106-07 (quoting Van Dusen v. Stotts, 712 N.E.2d 491, 493 (Ind. 1999)).
110. 730 N.E.2d 692 (Ind. 2000).

and *Rogers v. Mendel*.[111] In *Boggs*, the Indiana Supreme Court considered the scenario wherein a plaintiff cannot reasonably be expected to learn of the injury when the alleged malpractice occurs but nevertheless discovers the injury before the statute of limitations expires.[112] The court held that

> "as long as the statute of limitations does not shorten this window of time [between the discovery of the alleged malpractice and the expiration of the limitation period] so unreasonably that it is impractical for a plaintiff to file a claim at all . . . it is constitutional as applied to that plaintiff."[113]

In *Rogers*, the Indiana Court of Appeals set forth a two-part analysis in applying the two-year malpractice statute of limitations.[114] The first inquiry is "whether the plaintiff discovered the alleged malpractice and resulting injury, or possessed information that through the exercise of reasonable diligence would have led to such discovery, within the limitation period."[115] If the answer is affirmative, then the limitation period is constitutional as applied, so long as the claim can reasonably be asserted in the time that remains.[116]

If, however, the discovery of the alleged malpractice occurs after the limitation period has expired, then the analysis rests in when the plaintiff acquired the information that in the exercise of due diligence, would have led to the discovery of the alleged malpractice.[117] The answer to this question is determinative of the date on which the full two-year period begins to run.[118]

In applying the precedent set forth in *Boggs* and *Rogers* to this case, the court first questioned whether Booth discovered the alleged malpractice "on October 5, 1999, when he learned his vision loss was permanent, or December 4, 2000, when Dr. Parent informed him that Lasik surgery should not have been performed."[119] Although a plaintiff need not know with certainty that malpractice has occurred, the court reasoned that a plaintiff must be informed by a doctor of a possible causal link between her injury and the negligence. Thus, there must be something more than mere suspicion by a plaintiff that is without technical or medical knowledge.[120]

The court noted that, prior to December 4, 2000, the record lacked any evidence that Booth was informed that Lasik surgery was not recommended for patients with glaucoma and cataracts.[121] The court also observed that Dr. Wiley

---

111. 758 N.E.2d 946 (Ind. Ct. App. 2001).
112. *Booth*, 793 N.E.2d at 1107.
113. *Id.* (quoting *Boggs*, 730 N.E.2d at 695).
114. *Id.* (citing *Rogers*, 758 N.E.2d at 951).
115. *Id.* (citing *Rogers*, 758 N.E.2d at 951).
116. *Id.* (citing *Rogers*, 758 N.E.2d at 951).
117. *Id.* (citing *Rogers*, 758 N.E.2d at 952).
118. *Id.*
119. *Id.*
120. *Id.* at 1108 (citing Van Dusen v. Stotts, 712 N.E.2d 491, 498 (Ind. 1999)).
121. *Id.*

had given Booth reason to believe his vision problems may have resulted from his cataracts, glaucoma or mini strokes. Further, Dr. Chern's diagnosis of permanent vision loss did not give Booth, who lacked medical knowledge, a reason to suspect that malpractice may have occurred due to the Lasik surgery.[122]

Concluding that Booth's Lasik surgery took place on February 8, 1999, and that he discovered the cause of the malpractice on December 4, 2000, the court found that Booth had approximately two months to file his claim before the limitation period expired.[123] Because Booth learned of the malpractice shortly before the limitation period expired, the court had to evaluate whether Booth was faced with "'the practical impossibility'" of asserting the claim before the limitation period expired.[124]

The court held that two months was not enough time for the Booths to locate an attorney willing to represent them and have time to investigate the claim. Booth met with an attorney within two months of his last cataract surgery and the attorney met with Dr. Parent within five weeks of being retained by the Booths. A complaint was filed less than two months later.[125]

The court was not persuaded by Dr. Wiley's argument that, because the Booths also asserted a claim regarding the insertion of the intra-ocular lens on May 11, 1999, the Booths only had until May 11, 2001 to bring that claim.[126] The court rejected Dr. Wiley's arguments stating that "[w]e have determined that Booth became aware of the potential malpractice on December 4, 2000, five months before the expiration of the statute of limitations under Dr. Wiley's argument. We find that, under the facts of this case, a five-month delay is not unreasonable."[127] Holding that the Booths filed their complaint within the two year statute of limitations, the court reversed the trial court and remanded the matter for further proceedings.

In *Randolph v. Methodist Hospitals, Inc.*,[128] in a case of first impression, the court of appeals held that the exception to the statute of limitations giving a minor until the age of eight to bring an action against a health care provider applies only to living children.[129] On October 7, 1991, Kwabene Randolph was born with a severe brain injury. Kwabene's condition did not improve and he passed away on May 7, 1992. More than five years later, a special administration was opened on Kwabene's behalf for the sole purpose of collecting damages in a wrongful death suit based on medical malpractice. On September 26, 1997, Charlotte Randolph, Kwabene's mother, filed a medical malpractice complaint with the Department of Insurance individually and as next friend of Kwabene.[130]

---

122. *Id.*
123. *Id.*
124. *Id.* (quoting Boggs v. Tri-State Radiology, Inc., 730 N.E.2d 692, 697 (Ind. 2000)).
125. *Id.* at 1108-09.
126. *Id.* at 1109.
127. *Id.*
128. 793 N.E.2d 231 (Ind. 2003).
129. *Id.* at 235.
130. *Id.* at 233.

In July 2002, defendant Methodist Hospital filed a Complaint and Motion for Preliminary Determination of Law under the Indiana Medical Malpractice Act based on its contention that the plaintiffs' proposed complaint was time-barred.[131] The issue was briefed by the parties, including all of the other defendant health care providers. The trial court determined that the action was properly brought by Charlotte Randolph, as the personal representative of the deceased child's estate; however, the court found that the claims were time-barred by the Medical Malpractice Act's two-year statute of limitations. All of the plaintiff's claims were dismissed.[132]

On appeal, the appellants argued that, because Kwabene's injuries occurred prior to what would have been his sixth birthday, his representatives had until his eighth birthday to file his claim for damages.[133] This exception to the medical malpractice statute of limitations is set forth in Indiana Code section 34-18-7-1. The statute reads:

> A claim, whether in contract or tort, may not be brought against a health care provider based upon professional services or health care that was provided or that should have been provided unless the claim is filed within two (2) years after the date of the alleged act, omission, or neglect, except that a minor less than six (6) years of age has until the minor's eighth birthday to file.[134]

The health care providers argued, as they had successfully before the trial court, that the exception carved out in Indiana Code section 34-18-7-1 applies only to living children.[135] Because the application of Indiana Code section 34-18-7-1 to deceased children was a matter of first impression in Indiana, the court looked to other jurisdictions for guidance in deciding this issue.[136] The court reviewed similar statutes and cases in Pennsylvania and Wisconsin. The court of appeals was persuaded by both jurisdictions' reasoning in finding that the respective exceptions to the medical malpractice statute of limitations for minors was intended to apply only to living children.[137] Adopting that rationale, the court found that Kwabene's claims should be analyzed under the general medical malpractice statute of limitations; therefore, Kwabene's claims "expired two years after the occurrence that caused his injuries and death—his birth on October 7, 1991."[138]

The court further noted that when a statute is unambiguous, its plain and clear meaning should be applied.[139] The court determined that because the plain

---

131. *Id.*
132. *Id.* at 234.
133. *Id.*
134. IND. CODE § 34-18-7-1 (1998).
135. *Randolph*, 793 N.E.2d at 234.
136. *Id.* at 234-36.
137. *Id.* at 235-36.
138. *Id.*
139. *Id.* at 236.

language of the exception provision only applies to actions actually brought by the minor, the exception could only apply to a child alive at the time the cause of action is filed.[140]

Charlotte Randolph conceded that her claims were derivative to her son's claims; thereby, her claims expired when her son's claims expired. Because the court held that Kwabene's claims expired two years after his birth, it followed that Randolph's claims expired at the same time.[141] The court further noted that the medical malpractice statute of limitations, not the wrongful death act statute of limitations, applies in cases where the wrongful death resulted from the medical malpractice.[142] Because Randolph's claims were based in medical malpractice and were derivative of her son's claims, her claims expired along with Kwabene's claims, on October 7, 1993.

B. Use of Decedent's Affidavit in Summary Judgment Proceeding

In another case of first impression, *Reeder v. Harper*, the Indiana Supreme Court held that a deceased physician's affidavit, which would be inadmissible at trial, could be considered at the summary judgment stage, given that the substance of the affidavit would be admissible in another form at trial.[143]

Denise Harper and her husband, Dennis Harper, filed a medical negligence complaint against three physicians for failing to diagnose and treat Denise's breast cancer. After Denise died, Dennis continued the claim, joined by Denise's estate. The complaint was further amended to allege both a survivorship action and a wrongful death action.

The Medical Review Panel found that certain healthcare providers deviated from the standard of care in their treatment of Denise Palmer but that the deviations did not alter the course of the patient's care or hasten her death. Thereafter, those healthcare providers moved for summary judgment, relying in part on the panel opinion.[144]

In their opposition to summary judgment, the plaintiffs designated the affidavit of Dr. Alpern, whose opinions contradicted the panel's findings. After a hearing, the plaintiffs successfully defeated summary judgment. Approximately one year later, Dr. Alpern died.

After Dr. Alpern's death, the defendants renewed their motion for summary judgment. The plaintiffs again designated Dr. Alpern's affidavit. This time, the trial court granted the defendants' motions for summary judgment.[145] Finding that the only evidence the plaintiffs designated regarding causation for both the survivorship and wrongful death claims was the affidavit of Dr. Alpern, the court of appeals affirmed the trial court's grant of summary judgment in the

---

140. *Id.*

141. *Id.*

142. *Id.* at 237.

143. 788 N.E.2d 1236 (Ind. 2003).

144. *Id.* at 1239.

145. *Id.*

defendants' favor.[146]

Applying the same standard of review as used in the trial court, the supreme court reversed the grant of summary judgment in the defendants' favor.[147] In reversing the lower courts, the supreme court looked at the plain language of Trial Rule 56(E); specifically, the court considered that "[s]upporting and opposing affidavits shall be made on personal knowledge, *shall set forth such facts as would be admissible in evidence*, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."[148] The court next observed that "declarations of a decedent offered at trial as proof of their contents are hearsay and thus inadmissible as such unless falling within one of the exceptions to the hearsay rule."[149]

In resolving the "first impression" issue of whether, in the summary judgment context, there is a distinction between "hearsay affidavit offered as evidence on the one hand versus the facts established by the affidavit on the other," the court looked to federal opinions for guidance.[150]

The United States Supreme Court has held that some forms of affidavit that would be inadmissible at trial may be considered at the summary judgment stage.[151] Federal courts have also held that not considering a deceased's affidavit at the summary judgment stage confuses the issue by reading a cross-examination requirement into Rule 56 that is not there.[152]

The Indiana Supreme Court also noted that "[a]lthough the affidavit would not be admissible at trial, there is nothing in the record before us suggesting that the substance of the affidavit would not be admissible at trial in another form—most likely, the testimony of another expert witness."[153] The court concluded that even if an affidavit would be inadmissible at trial, it may be considered during summary judgment proceedings, so long as the substance of the affidavit is admissible in some other form at trial.[154] Holding that the trial court should have considered Dr. Alpern's affidavit in its summary judgment ruling, the court opined that

> [t]o hold otherwise and embrace the view that the death of an affiant renders an affidavit a nullity would result in summary judgment where the opposing party had the misfortune to select the one short-lived witness from among the many who may be able to testify to the same thing. We do not believe that Indiana Trial Rule 56(E) should be read

146. *Id.* at 1239-40.

147. *Id.* at 1240.

148. *Id.* (citing IND. T.R. 56(E) (alteration in original)).

149. *Id.* (citing Am. United Life Ins. Co. v. Peffley, 301 N.E.2d 651, 658 (Ind. 1973)).

150. *Id.*

151. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

152. Oto v. Metro. Life Ins. Co., 224 F.3d 601, 604-05 (7th Cir. 2000).

153. *Reeder*, 788 N.E.2d. at 1242.

154. *Id.* at 1241-42.

so narrowly.[155]

The court concluded its opinion by finding that Dr. Alpern's affidavit created a genuine issue of material fact that made summary judgment on the plaintiffs' wrongful death claims inappropriate. Further, the court concluded that Dennis Palmer's affidavit created genuine issues of fact regarding his deceased wife's mental anguish and physical pain; thereby, making summary judgment inappropriate on the plaintiffs' survivorship claims.[156]

C. Right to Be Present in Court

In *Jordan v. Deery*, the Indiana Supreme Court held that the constitutional right to a jury trial entitled a minor plaintiff to be present in the courtroom during both the liability and damage phase of a medical malpractice action against healthcare providers.[157]

Following a delivery that resulted in fetal distress, asphyxia, cerebral palsy and Erb's palsy of the left arm, the parents of Shelamiah Jordan filed a medical negligence suit against various healthcare providers. After a unanimous medical review panel opinion in favor of the healthcare providers, the Jordans—on their own behalf and acting as Shelamiah's next friends—filed their complaint for medical negligence in the trial court.[158] Thereafter, the healthcare providers successfully moved for summary judgment. The court of appeals affirmed the trial court's grant of summary judgment in the defendants' favor, and the Indiana Supreme Court accepted transfer.[159] On transfer, the supreme court found that the trial court properly granted summary judgment on the parents' claims due to the statute of limitations. However, the supreme court determined that the motion was improperly granted as to Shelamiah's claims and remanded the cause for trial.[160]

The trial court granted the defendants' motion to bifurcate the liability and damages phases of the trial.[161] The defendant healthcare providers next moved for an order in limine alleging that Shelamiah should be excluded from the courtroom during the liability phase of the trial as she was "unable to consult with counsel, and her presence would prejudice the jury."[162] In support of their motion, the defendants relied upon *Gage v. Bozarth*,[163] in which the Indiana Court of Appeals adopted a two-pronged test that must be satisfied before a trial court may exclude a plaintiff from the courtroom during the liability phase of a trial. First, the party seeking the exclusion must show that the plaintiff's

---

155. *Id.* at 1242.
156. *Id.* at 1242-43.
157. 778 N.E.2d 1264 (Ind. 2002).
158. *Id.* at 1266.
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. 505 N.E.2d 64 (Ind. Ct. App. 1987), *abrogated by Jordan*, 778 N.E.2d at 1264.

presence has a potentially prejudicial effect on the jury.[164] Second, "the trial court must determine whether the plaintiff can understand the proceedings and assist counsel in any meaningful way . . . if the trial court finds that the plaintiff can understand the proceedings and aid counsel, the plaintiff cannot be excluded regardless of prejudicial impact."[165]

Shelamiah countered the defendants' motion in limine by arguing that *Gage* did not survive the enactment of the American with Disabilities Act of 1990.[166] After a series of procedural battles that ended in the defendants' favor, the case was tried before a jury and resulted in a defense verdict.[167] On appeal, the court of appeals affirmed the trial court's decision to exclude Shelamiah from the courtroom during the liability phase of the trial concluding that "the *Gage* test survived the enactment of the ADA and that the test was satisfied in this case."[168]

On transfer, the supreme court reversed the judgment of the trial court, concluding that *Gage* was no longer good law.[169] The court's decision, however, was not based upon the ADA, but was instead rooted in article I, section 20 of the Indiana Constitution. This section provides : "In all civil cases, the right to trial by jury shall remain inviolate."[170]

In a 4-1 opinion, the supreme court held that

> [i]n our view, the right to be present in the courtroom during both the liability and damage phase of trial is so basic and fundamental that it is, by implication, guaranteed by Article I, Section 20 . . . . Absent waiver or extraordinary circumstances, a party may not be so excluded. Because neither waiver nor extraordinary circumstances exist here, the judgment of the trial court is reversed and this cause remanded for a new trial.[171]

IV. WRONGFUL BIRTH

In *Chaffee v. Seslar*, the Indiana Supreme Court accepted transfer of an interlocutory appeal to consider whether damages recoverable pursuant to a claim for an alleged negligent sterilization procedure may include the costs of raising and educating a normal, healthy child conceived after the procedure.[172] On transfer, the court considered whether such damages were appropriate and whether its recent decision in *Bader v. Johnson*,[173] compelled the recognition of

---

164. *Id.* at 67.

165. *Id.*

166. *Jordan*, 778 N.E.2d at 1266-67.

167. *Id.* at 1267.

168. *Id.*

169. *Id.* at 1267-68.

170. IND. CONST. art. I, § 20.

171. *Jordan*, 778 N.E.2d at 1272.

172. 786 N.E.2d 705 (Ind. 2003).

173. 732 N.E.2d 1212 (Ind. 2000). In *Bader*, a couple claimed that the defendants' failure to

such recovery.[174]

In addition to its consideration of its holding in *Bader*, the supreme court examined recovery other jurisdictions have permitted in wrongful birth cases. Some states allow recovery for the costs of rearing a normal, healthy child with no offset for the benefit conferred by the presence of the child. Other courts permit recovery for the costs of rearing a child; provided that the damages awarded reflect an offset for the benefits the parents receive from the child's presence.[175] The majority of jurisdictions, however, hold that the parents may not recover damages for child rearing—limiting recovery to pregnancy and childbearing expenses.[176]

Ultimately, the court subscribed to the latter position, noting that

> [a]lthough raising an unplanned child, or any child for that matter, is costly, we nevertheless believe that all human life is presumptively invaluable . . . [w]e hold that the costs involved in raising and educating a normal, healthy child conceived subsequent to an allegedly negligent sterilization procedure are not cognizable as damages in action for medical negligence.[177]

V. WRONGFUL DEATH

In *Deaconess Hospital, Inc. v. Gruber*, the Indiana Court of Appeals addressed whether an adult daughter was dependent under the Indiana Wrongful Death Act.[178] Irma Lawson and her adult daughter, Gunthild Gruber, were partners in operating a restaurant together in Mt. Vernon, Indiana for more than thirty-five years. Both women worked at the restaurant and paid various living expenses out of the restaurant accounts.

Mother and daughter split the restaurant profits equally until 1994. From 1995 to 1999, Gunthild received sixty percent of the profits and Irma received the remaining profits. Although Irma worked more hours than Gunthild, the record contained evidence that Irma wanted Gunthild to have a higher percentage of the restaurant's profits because Gunthild had a husband and two children. Gunthild also testified that Irma wanted Gunthild to have the majority of the profits to make up for the material things Gunthild was deprived of in her childhood.[179]

In 1999, Irma died. Gunthild filed a wrongful death action alleging failure

---

report adverse prenatal test results deprived them of the opportunity to terminate their pregnancy. The couple sought various damages, including costs associated with the pregnancy and medical costs attributable to the birth defects during the child's minority. In *Bader*, the court was not asked to consider whether the parents could recover anticipated ordinary costs of raising the child.

174. *Chaffee*, 786 N.E.2d at 706.

175. *Id.*

176. *Id.* at 708.

177. *Id.* at 708-09.

178. 791 N.E.2d 841 (Ind. Ct. App. 2003).

179. *Id.*

to provide timely medical care.[180] The defendants filed a motion for partial summary judgment arguing that since Irma had no dependents, recovery under the Indiana Wrongful Death Act was limited to recovery of reasonable medical, hospital, funeral and burial expenses, and costs of administration.

In this case, the court found that there was evidence to support the conclusion that:

> [T]he economic loss occasioned by the death of the decedent was more than a simple loss to the business in which she participated. Rather, there is evidence that the decedent essentially took most of the income to which she was entitled from her business efforts and gave it to the Respondent for her use. Consequently, the [c]ourt finds that there are genuine issues of material fact in this case on the issue of dependency.[181]

On appeal, the court observed that the Indiana Supreme Court has defined the standard for establishing dependency in wrongful death actions by stating that "'proof of dependency must show a need or necessity of support on the part of the person alleged to be dependent . . . coupled with the contribution to such support by the deceased.'"[182] Hence, the court focused its analysis on whether genuine issues of material fact existed regarding: "(1) 'a need or necessity of support on the part of' Gunthild; and (2) Irma's contributions to such support."[183]

The defendants argued that Gunthild was able-bodied, self-sufficient and fully-employed. Pointing out that Gunthild's yearly income was $62,696 prior to her mother's death and exceeded $100,000 after her mother's death, the defendants argued that Gunthild's "need" was actually an "expectation" and not a necessity.[184] Gunthild countered the defendants' position by asserting that she was partially dependent on Irma. Although the court of appeals agreed that partial dependency was sufficient, the court found that Gunthild had not designated evidence to support recovery as Irma's partial dependent.[185]

In partial dependency, the contribution must be "'more than just a service or benefit to which the claimed dependent has become accustomed . . . [s]ervices must go beyond merely helping family members, even those who have relied on the assistance.'"[186] Because Gunthild, her husband and her two adult children, were all able-bodied and self-sufficient, the court determined that Irma's alleged support was more akin to a gift or act of generosity.[187] Although the court determined that Gunthild was not Irma's "dependent" because she failed to establish an actual need for Irma's support, the court proceeded with the second part of its analysis—Irma's contribution to Gunthild's support.

---

180. *Id*.

181. *Id*. at 844.

182. *Id*. at 845 (quoting N.Y. Cent. R.R. v. Johnson, 127 N.E.2d 603, 607 (Ind. 1955)).

183. *Id*. (quoting *Johnson*, 127 N.E.2d at 607).

184. *Id*. at 845-46.

185. *Id*. at 846.

186. *Id*. (quoting Estate of Sears *ex rel.* Sears v. Griffin, 771 N.E.2d 1136, 1139 (Ind. 2002)).

187. *Id*. at 847.

The defendants maintained that Irma's contributions were rendered to the partnership and not directly to Gunthild.[188] Gunthild contended that contributions to establish dependency may be non-economic damages, such as love, care, affection, and services.[189] The court rejected Gunthild's position finding that no precedent existed establishing that emotional support may be the sole basis for dependency. The court further noted that Gunthild's position confused the establishment of dependency with the damages that are available if dependency is established.[190] Finding that Gunthild failed to designate evidence both of her need for support and of Irma's contributions to such support—the court held that the defendants were entitled to partial summary judgment as a matter of law.

VI. UNDERINSURED/UNINSURED MOTORIST COVERAGE

The Indiana Court of Appeals addressed whether an insured should be entitled to uninsured motorist coverage when the motorist is involved in a collision caused by debris in a roadway in *Will v. Meridian Insurance Group, Inc*.[191] As Melissa Will was driving her father's automobile, she encountered a four to five foot pile of debris in the roadway. Will hit the pile of debris, the car went airborne, and then rolled over four or five times. Will and her passenger were both injured in the collision.[192]

Will submitted a claim to Meridian Insurance Group ("Meridian"), the insurer of her father's automobile, under the uninsured motorist provision of her father's policy. The policy's uninsured motorist provision defined an uninsured motor vehicle in pertinent part as "a hit-and-run vehicle whose owner or operator cannot be identified" and which "hits" the insured or a family member, an automobile which the insured or a family member is occupying, or the insured's covered automobile.[193] Meridian denied coverage. Subsequently, Will filed an action against Meridian, alleging that the pile of debris had been left on the roadway by an unidentified motorist, that the unidentified motorist was an uninsured motorist under the terms of Meridian's policy, and that Meridian refused to pay for the injuries caused by the uninsured motorist. In response, Meridian filed a motion for summary judgment, which the trial court granted.[194] Will then appealed, asserting that the trial court should not have granted summary judgment in Meridian's favor because there was a question of fact as to whether there was "indirect" physical contact between her father's automobile and an unidentified automobile.[195]

---

188. *Id*.
189. *Id*.
190. *Id*. at 847-48.
191. 776 N.E.2d 1233 (Ind. Ct. App. 2002).
192. *Id.*
193. *Id.* at 1234.
194. *Id.*
195. *Id.* at 1235.

The court of appeals reversed, beginning its analysis by noting that the uninsured motorist policy at issue was ambiguous and therefore the language should be interpreted by reference to extrinsic facts to ascertain whether either direct or indirect physical contact has occurred.[196] The court of appeals then traced the evolution of Indiana case law interpreting uninsured motorist provisions as they pertain to hit-and-run drivers and indirect physical contact.[197] The court of appeals continued by explaining that although a majority of jurisdictions are in agreement that no coverage is provided in "miss-and-run" situations,[198] the jurisdictions differ significantly in their application of uninsured motorist coverage to fact situations in which the insured is injured by impelled objects, by still-moving vehicle parts or loads, or by collision with stationary parts or loads that are left upon the road.[199] After reviewing this case law, the court concluded that Will is entitled to coverage "upon providing evidence sufficient to establish that there was a continuous sequence of events that clearly began with a load of debris falling from an unidentified vehicle and ended in Will's contact with the pile of debris."[200]

In *State Farm Fire and Casualty v. Garrett*,[201] the Indiana Court of Appeals examined whether one named insured could reject uninsured motorist coverage on behalf of all named insureds in a personal liability umbrella policy ("umbrella policy"). In January 1986, James Garrett ("Garrett") applied for an umbrella policy from State Farm.[202] When filling out the application, Garrett listed his wife's name on the application.[203] Only Garrett signed the application, including the section entitled, "REJECTION OF UNINSURED MOTORISTS COVERAGE."[204] When Garrett received the umbrella policy, he was the only named insured listed on the declarations page.[205] The definitions section of the policy, however, provided that "named insured" means the person named in the declarations and the spouse.[206] The policy was annually renewed, with the last renewal effective January 17, 1999.[207] On January 18, 1999, Garrett's wife, Barbara, was involved in an automobile accident which resulted in her death.[208]

---

196. *Id.* (citing Rice v. Meridian Ins. Co., 751 N.E.2d 685, 688 (Ind. Ct. App.), *trans. denied*, 761 N.E.2d 422 (Ind. 2001)).

197. *Id.*

198. "Miss-and-run" situations are those situations where an accident occurs not because of a direct impact between two or more vehicle but because one vehicle indirectly causes another vehicle to collide with a third vehicle or object. *See, e.g.*, *Rice*, 751 N.E.2d at 686 n.1.

199. *Will*, 776 N.E.2d at 1236.

200. *Id.* at 1237.

201. 783 N.E.2d 329 (Ind. Ct. App.), *trans. denied*, 804 N.E.2d 748 (Ind. 2003).

202. *Id.* at 331.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

Subsequently, Garrett submitted a claim for uninsured motorist benefits to State Farm.[209] State Farm then filed a declaratory judgment action seeking a determination that uninsured motorist coverage was not available under the umbrella policy because Garrett had expressly rejected such coverage when he applied for the policy.[210] Barbara's Estate ("Estate") counterclaimed, seeking a determination that State Farm was required to provide uninsured motorist benefits under the umbrella policy.[211] Following cross-motions for summary judgment, the trial court denied State Farm's motion and granted the Estate's motion, finding "uninsured motorist coverage as mandatory under the provisions of Indiana Code [section] 27-7-5-2 was not rejected as to the named insured, [Barbara]."[212] At the time that Garrett applied for the umbrella policy, Indiana Code section 27-7-5-2, in pertinent part, simply provided that "'the named insured of an automobile or motor vehicle liability policy has the right, in writing'" to reject uninsured and underinsured motorist coverage.[213]

The court of appeals framed the issue as whether the Estate is entitled to recover uninsured motorist benefits under the Garretts' umbrella policy when James Garrett, but not his wife Barbara Garrett, expressly rejected uninsured motorist coverage in writing when he applied for the policy.[214] State Farm argued that because any recovery for Barbara's death will inure to the direct benefit of Garrett, and not the Estate, Garrett should not be able to claim the uninsured motorist benefits that he rejected in his application for coverage.[215] Additionally, State Farm contended that Garrett was acting as Barbara's agent when he signed the application for insurance; therefore, his rejection of coverage served to reject coverage for Barbara as well.[216] Last, State Farm claimed that a legislative amendment to the statute indicates that Garrett's signature declining coverage was sufficient to reject uninsured coverage on behalf of himself and Barbara under Indiana Code section 27-7-5-2.[217]

At the outset, the court of appeals reiterated that Indiana Code section 27-7-5-2 is "a mandatory coverage, full-recovery, remedial statute,"[218] that the insured is entitled to uninsured motorist benefits unless expressly waived in the manner provided by law,[219] and that "[p]ersons defined as 'insureds' under the liability section of an insurance policy are those for whom the legislature intended uninsured motorist benefits."[220] Further, the court of appeals recognized that

---

209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.* at 333 (quoting IND. CODE § 27-7-5-2 (1982)).
214. *Id.*
215. *Id.* at 334.
216. *Id.* at 335.
217. *Id.* at 337.
218. *Id.* at 333 (citing United Nat'l Ins. Co. v. DePrizio, 705 N.E.2d 455, 460 (Ind. 1999)).
219. *Id.* (citing *United Nat'l Ins. Co.*, 705 N.E.2d at 460).
220. *Id.* (quoting Connell v. Am. Underwriters, Inc., 453 N.E.2d 1028, 1030 (Ind. Ct. App.

Barbara was a named insured under the State Farm umbrella policy and was, therefore, entitled to uninsured motorist coverage unless she expressly rejected it in the manner provided for by law.[221] Thus, the court of appeals had to decide whether Garrett's written rejection of uninsured motorist coverage was sufficient to reject such coverage on behalf of Barbara.[222]

As to State Farm's first argument, the court of appeals posited that the determinative factor in deciding whether uninsured motorist coverage applied to Barbara was whether Barbara, a named insured by the policy's own terms, rejected such coverage.[223] The court of appeals continued by stating that whether Garrett rejected such coverage for himself, yet stood to benefit if Barbara was deemed to have such coverage, was irrelevant.[224]

Moving on to State Farm's next argument, the court of appeals initially noted that marriage in itself does not create an agency relationship.[225] Further, the court of appeals found that contrary to State Farm's contention, the umbrella policy did not establish an agency relationship between Garrett and Barbara.[226] In reaching this conclusion, the court of appeals distinguished the instant case from *Employers Insurance v. Stopher*,[227] based on the language of the policy in the *Stopher* case, which provided, "'[t]he Named Insured shown in the Declarations is authorized to act for each additional Named Insured listed in all matters pertaining to this insurance including, but not limited to . . . .'"[228] There was no similar provision in the Garretts' umbrella policy. Consequently, the court of appeals found *Stopher* unpersuasive and readily distinguishable.[229]

The court of appeals then disposed of State Farm's final argument by resorting to the fundamental rule of statutory construction that an amendment changing a prior statute indicates a legislative intention that the meaning of the prior statute has changed.[230] Moreover, the court of appeals noted that such an amendment raises a presumption that the legislature intended to change the law unless it clearly appears that the legislature passed the amendment to express the original intention of the law more clearly.[231] Because there was no clear indication that the legislature passed the amendment to express the original

---

1983)).

221. *Id.*

222. *Id.*

223. *Id.* at 334.

224. *Id.*

225. *Id.* at 335 (citing Bradford v. Bentonville Farm Supply, Inc., 510 N.E.2d 745, 747 (Ind. Ct. App. 1987)).

226. *Id.* at 336.

227. 155 F.3d 892 (7th Cir. 1998) (applying Indiana law), *reh'g denied*.

228. *State Farm Fire & Cas. Co.*, 783 N.E.2d at 336 (quoting *Employers Ins.*, 155 F.3d at 896).

229. *Id.*

230. *Id.* at 337 (citing Bennett v. Ind. Life & Health Ins. Guar. Ass'n, 688 N.E.2d 171, 179 (Ind. Ct. App. 1997), *trans. denied*, 698 N.E.2d 1191 (Ind. 1998)).

231. *Id.*

intention more clearly, the court of appeals resolved that the 1999 amendment to Indiana Code section 27-7-5-2, providing that any named insured could reject coverage on behalf of all insureds, represented a change in the law.[232] Thus, the court of appeals affirmed the trial court's denial of State Farm's motion for summary judgment and grant of summary judgment in favor of the Estate.[233]

The Indiana Court of Appeals revisited Indiana Code section 27-7-5-2 in *State Farm Mutual Automobile Insurance Co. v. Steury*.[234] In March 1986, Esther Steury signed an application for State Farm automobile insurance in which she specifically requested uninsured motorist coverage but rejected underinsured motorist coverage.[235] Subsequently, Esther signed a "Rejection of Uninsured and Underinsured Motor Vehicle Coverage."[236]

In 1995, the Indiana legislature amended Indiana's uninsured and underinsured motorist coverage statute by adding a requirement that insurers "'make underinsured motorist coverage available to all existing policyholders on the date of the first renewal of existing policies that occurs on or after January 1, 1995, and on any policies newly issued or delivered on or after January 1, 1995.'"[237] Esther received a document entitled "Important Information About Underinsured Motor Vehicle Coverage" with the first premium-due notice after January 1, 1995.[238] After receiving this document, Esther did not contact State Farm or otherwise notify State Farm of her intent to purchase the underinsured motorist coverage.[239]

Esther and her niece were both killed in 2000 as a result of a collision between Esther's State Farm insured automobile and an underinsured motorist. State Farm filed a declaratory relief action, which prompted the representatives of Esther and her niece (collectively, "Representatives") to file a motion for summary judgment because Esther "did not reject the coverage in writing on or after the occasion of the first renewal of her policy that occurred on or after January 1, 1995."[240] State Farm also filed for summary judgment, arguing that it made underinsured motorist coverage available to Esther by sending her the document entitled "Important Information About Underinsured Motor Vehicle Coverage."[241] The trial court granted the Representatives' motion for summary judgment and denied State Farm's, holding that Esther's 1988 written rejection of the uninsured and underinsured motorist coverage did not operate to reject the coverage after January 1, 1995, and that State Farm did not make coverage

---

232. *Id.* at 337-38.

233. *Id.* at 338.

234. 787 N.E.2d 465 (Ind. Ct. App.), *trans. dismissed*, 2003 Ind. LEXIS 509, at *1 (Ind. 2003).

235. *Id.* at 467.

236. *Id.*

237. *Id.* (quoting IND. CODE § 27-7-5-2 (2003)).

238. *Id.*

239. *Id.* at 468.

240. *Id.*

241. *Id.*

available to Esther after January 1, 1995, nor did it obtain a written rejection of the coverages after January 1, 1995.[242]

The court of appeals defined the issue as whether the Representatives were entitled to underinsured motorist benefits because State Farm did not make underinsured motorist coverage available to the insured by offering the coverage to Esther after January 1, 1995, and did not obtain a written rejection of coverage.[243] State Farm argued that the trial court erred in its determination that State Farm did not make underinsured motorist coverage available to Esther, pointing to the document entitled "Important Information About Underinsured Motor Vehicle Coverage" as evidence that it did in fact make such coverage available.[244] The Representatives countered that the document was insufficient to make coverage available and that State Farm was required to, but did not, obtain Esther's rejection of coverage in writing.[245]

Relying on its previous holding in *State Auto Insurance Cos. v. Shannon*,[246] the court of appeals opined that the amendment to Indiana Code section 27-7-5-2 did not carve out an exception from offering underinsured motorist coverage to those who had previously waived underinsured motorist coverage.[247] The court of appeals, however, recognized that this case turned not on the sufficiency of the offer, as it did in *Shannon*, but rather on the sufficiency of the response.[248] After examining the language of Indiana Code section 27-7-5-2, the court of appeals concluded that the statute clearly and unambiguously requires a written rejection of both newly issued policies and post-January 1, 1995 renewal policies.[249] Because Esther did not reject underinsured motorist coverage in writing, the court of appeals found that she was entitled to such coverage as a matter of law and affirmed the trial court's grant of summary judgment in favor of the Representatives.[250]

---

242. *Id.*

243. *Id.*

244. *Id.* at 469.

245. *Id.*

246. 769 N.E.2d 228, 233-34 (Ind. Ct. App. 2002).

247. *Steury*, 787 N.E.2d at 471.

248. *Id.* at 472.

249. *Id.*

250. *Id.* Judge Sullivan concurred in part and dissented in part. *Id.* at 473 (Sullivan, J., concurring and dissenting). While Judge Sullivan would affirm the trial court, he disagreed with the majority leaving unresolved the question of whether the document entitled "Important Information About Underinsured Motor Vehicle Coverage" constituted an offer under Indiana Code § 27-7-5-2. *Id.* (Sullivan, J., dissenting). Judge Sullivan opined that the document "clearly and unmistakably constitutes an offer . . . ." *Id.* (Sullivan, J., dissenting).

VII. RELEASE

In *American Family Insurance Group v. Houin*,[251] the Indiana Court of Appeals addressed whether an insurer's release of a tortfeasor and his automobile liability insurer, together with all other persons, corporations, associations, and partnerships, barred an insured's claim for underinsured motorist benefits. In September 1994, a vehicle driven by Mark Milliser collided with a vehicle driven by John Houin.[252] The Houins, who were insured by American Family at the time of the collision, sued Milliser.[253]

Counsel for the Houins sent American Family correspondence in December 1994, placing it on notice that the Houins intended to file a claim for underinsured motorist benefits if Milliser did not have sufficient insurance coverage.[254] The Houins' attorney followed up on this first letter by sending a second one in November 1999 which disclosed that the Houins would be making a claim for underinsured motorist benefits and indicated that Milliser's insurer had offered to tender Milliser's policy limits to Houin.[255] Additionally, the letter referenced Indiana Code section 27-7-5-6, which provides that once an insurer is informed of a bona fide offer to settle it has thirty days to either advance the settlement amount to the insured or give the insured permission to accept the offer.[256] Indiana Code section 27-7-5-6 further provides that if the insurer does not respond within thirty days, it is deemed to have given the insured permission to accept the offer in exchange for a full and complete release of the wrongdoer.[257] After sending two more letters with no response, the Houins executed a release with Milliser and his insurer.[258] The lengthy release referenced and linked the parties to the release at three different points.[259] Nearly twelve months later, the Houins filed a complaint against their insurer, American Family, for underinsured motorist coverage.[260] In response, American Family filed a motion for summary judgment, claiming that the language of the release signed by the Houins unequivocally released all potential claims against any entity or person.[261] The trial court denied American Family's motion.[262]

In an interlocutory appeal, American Family urged the court of appeals to

---

251. 777 N.E.2d 757 (Ind. Ct. App. 2002).

252. *Id.* at 758.

253. *Id.*

254. *Id.* at 759.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.* at 761; *cf.* Estate of Spry v. Greg & Ken, Inc., 749 N.E.2d 1269, 1272 (Ind. Ct. App. 2001) (finding that all possible defendants were released by a general release that did not contain language limiting release to the parties).

260. *Houin*, 777 N.E.2d at 760.

261. *Id.*

262. *Id.*

reverse the trial court's denial of its motion for summary judgment because the release signed by the Houins unequivocally and unqualifiedly released all possible claims with regard to the collision with Milliser.[263] Noting its disagreement, the court of appeals reiterated some of the standards for contract interpretation.[264] The court of appeals then indicated that the parties to the release clearly employed qualifying language to express their intent that the release only pertain to the parties who were signatories to the document and any person or corporation connected to them.[265] Consequently, the court of appeals affirmed the trial court's denial of American Family's motion for summary judgment.[266]

In another case involving a release, *Depew v. Burkle*,[267] the Indiana Court of Appeals addressed whether a release of the tortfeasor in an automobile accident operates to also release a physician who treated the plaintiff's injuries and was sued for malpractice based upon that treatment. Tonda Depew was involved in an automobile accident with David Stigler.[268] As a result of the collision, Depew sustained multiple injuries, including a fractured right arm.[269] Dr. Robert Burkle performed multiple surgeries on Depew's arm.[270] After her right arm "snapped" at or near the site where Dr. Burkle had previously performed surgery, Depew underwent additional surgery which revealed that Dr. Burkle had nearly severed Depew's radial nerve.[271] Additionally, Depew was informed that the surgery performed by Dr. Burkle may not have been medically necessary.[272] Subsequently, Depew filed a negligence complaint against Stigler based on the damages she sustained as a result of the collision.[273] Stigler's insurer settled the case for $102,500.00.[274] In exchange for this amount, Depew executed a release, which stated:

> Plaintiff hereby absolutely and unconditionally releases and forever discharges David Stigler, and all other companies and persons, their respective successors and assigns, and whether known or unknown, from any and all claims, demands, actions, costs, damages and causes of

---

263. *Id.*

264. *Id.* at 761.

265. *Id.*

266. *Id.* at 762. Chief Judge Brook concurred in the result, noting that in his eyes the release was ambiguous but that based on the facts he would affirm based on certain portions of the release and parol evidence, which indicated that the parties to the release did not intend to release American Family. *Id.*

267. 786 N.E.2d 1144 (Ind. Ct. App.), *trans. denied*, 804 N.E.2d 757 (Ind. 2003).

268. *Id.* at 1145.

269. *Id.*

270. *Id.* at 1146.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

> action which the Plaintiff now has, ever had, or may have in the future on account of any and all damages, losses or injuries sustained by the Plaintiff by reason of an incident which occurred on October 10, 1995, it is understood and agreed by and among all of the parties to the within release that payment of said sum to the Plaintiff, and its acceptance by the Plaintiff, is in full accord and satisfaction of a disputed claim and that the payment of said sum shall not in any way be construed as an admission of liability in said matter by any party hereto, and that liability is expressly denied by the party making said payment or on whose behalf said payment is made.[275]

Prior to settling her claim against Stigler with his insurer, Depew filed a proposed complaint against Dr. Burkle with the Indiana Department of Insurance alleging medical malpractice.[276] Following a decision by a medical review panel, Depew filed a complaint for damages against Dr. Burkle.[277] By this time, Depew had already settled her claim against Stigler and signed the release.[278] Consequently, in his answer Dr. Burkle asserted the affirmative defense of either full or partial satisfaction.[279] Thereafter, Dr. Burkle filed a motion for summary judgment, designating in support of the motion the settlement with Stigler and the ensuing release Depew signed in connection with that action.[280] The trial court granted summary judgment in Dr. Burkle's favor, and Depew appealed.[281]

The general rule regarding releases was first articulated by our supreme court in *Huffman v. Monroe County Community School Corp.* as follows:

> A release executed in exchange for proper consideration works to release only those parties to the agreement unless it is clear from the document that others are to be released as well. A release, as with any contract, should be interpreted according to the standard rules of contract law. Therefore, from this point forward, release documents shall be interpreted in the same manner as any other contract document, with the intention of the parties regarding the purpose of the document governing.[282]

Adhering to *Huffman*, the court of appeals examined the language of the release to determine whether Depew intended it to release not only Stigler but Dr. Burkle as well.[283] The court of appeals identified two controlling factors when

---

275. *Id.* at 1149.

276. *Id.* at 1146.

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.* at 1146-47.

281. *Id.* at 1147.

282. 588 N.E.2d 1264, 1267 (Ind. 1992).

283. *Depew*, 786 N.E.2d at 1147. While generally distinguishing joint tortfeasors—which are tortfeasors whose actions unite and combine to form a single injury—from successive

determining the effect of a release. First, the trier of fact must examine whether the injured party received full satisfaction.[284] Second, the trier of fact examines whether the parties intended that the release be in full satisfaction of the injured party's claim, thus releasing all successive tortfeasors from liability.[285] The court of appeals noted, however, that a release executed in exchange for proper consideration works to release only those parties to the agreement unless it is clear from the document that others are to be released as well.[286] Because these are factual determinations that are not proper subjects for summary disposition, the court of appeals concluded that summary judgment was inappropriate.[287] The court of appeals explained that on remand, the jury could consider parol evidence in determining whether Depew intended to release Burkle when she signed the release of Stigler.[288]

After determining that the release of Stigler did not—as a matter of law—operate as a release of Dr. Burkle, the court of appeals then addressed whether Dr. Burkle is entitled to any type of set-off with respect to the amount paid to Depew by Stigler.[289] Recognizing that a plaintiff should not be able to recover twice for the same injury, the court of appeals explained that where acts committed by multiple defendants cause a single injury to a plaintiff, a defendant against whom judgment is rendered at trial may set-off the amount of any funds plaintiff received from any settling joint tortfeasor.[290] Because the facts in the record were not sufficiently developed to establish whether Dr. Burkle's medical malpractice was contemplated in the Stigler action, the court of appeals remanded the case for the fact-finder to make the determination of whether Dr. Burkle is entitled to a set-off.[291]

VIII. DAMAGES

A. Punitive Damages

In *Cheatham v. Pohle*,[292] the Indiana Supreme Court upheld the constitutionality of the punitive damages statute. In reaching its holding, the court considered whether the allotment of seventy-five percent of punitive

---

tortfeasors—which are tortfeasors whose respective negligent acts are independent of one another and produce different injuries—the court of appeals resolved that it need not decide whether Dr. Burkle should be considered a joint tortfeasor or successive tortfeasor because the same analysis applied regardless of how it chose to classify Dr. Burkle. *Id.*

284. *Id.* at 1148 (citing Wecker v. Kilmer, 294 N.E.2d 132 (Ind. 1973)).

285. *Id.*

286. *Id.* (citing Stemm v. Estate of Dunlap, 717 N.E.2d 971 (Ind. Ct. App. 1999)).

287. *Id.* at 1150.

288. *Id.* at 1149 (citing Cooper v. Cooper, 730 N.E.2d 212, 216 (Ind. Ct. App. 2000)).

289. *Id.* at 1150.

290. *Id.*

291. *Id.* at 1152.

292. 789 N.E.2d 467 (Ind. 2003).

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 pursuant to the U.S. 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. A jury awarded Cheatham $100,000 in compensatory damages and $100,000 in punitive damages.[293]

The statute that permits the State to take seventy-five percent 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.[294]

Cheatham asserted that the statute violates both the Takings Clauses found in the Indiana Constitution and the U.S. Constitution. She also argued that the statute demands an attorney's "particular services" without just compensation.[295]

At the outset, the court first observed that the "purpose of punitive damages is not to make the plaintiff whole or to attempt to value the injuries of the plaintiff. Rather, punitive damages, sometimes designated 'private fines' or 'exemplary damages,' have historically been viewed as designed to deter and punish wrongful activity."[296] The court also noted that "Indiana . . . has chosen an intermediate ground permitting juries to award punitive damages and thereby inflict punishment on the defendant, but placing restrictions on the amount the plaintiff may benefit from the award."[297] Because punitive damages are not intended to compensate a plaintiff, the court asserted that a plaintiff has no entitlement to an award of punitive damages in any amount.[298]

---

293. *Id.* at 470.
294. IND. CODE § 34-51-3-6 (2002).
295. *Cheatham*, 789 N.E.2d at 470.
296. *Id.* at 471.
297. *Id.* at 472.
298. *Id.*

The court also reasoned that a plaintiff has no right to punitive damages because they are a common law creation subject to change by the legislature.[299] Rejecting Cheatham's argument that her right to collect punitive damages is "connected to" her claim for actual, compensatory damages, the court stated that the "Indiana legislature has chosen to define the plaintiff's interest in a punitive damages award as only twenty-five percent of any award, and the remainder is to go to the Violent Crimes Victims' Compensation Fund. The award to the Fund is not the property of the plaintiff."[300]

The court next addressed Cheatham's argument that the State's right to collect seventy-five percent 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.[301] The court agreed that an attorney's services are "particular" as that term appears in the Indiana Constitution.[302]

The court found that, although legal representation of a plaintiff is a particular service, it is not a service that is demanded by the State. Specifically, the court observed that "[i]n order for there to be a state demand on a person's particular services, there must be the threatened use of physical force or legal process that leads that person to believe that they have no choice but to submit to the will of the State."[303] Finding that an attorney may not be compelled to represent a plaintiff to pursue punitive damages without recovering a fee, the court held that "[s]ection 34-51-3-6 does not exact a taking of private property or place a demand on any attorney to undertake any representation."[304]

B. Excessive Damages

In *Stroud v. Lints*,[305] the Indiana Supreme Court accepted transfer to review a damage award in a personal injury bench trial. An intoxicated Michael Stroud, aged seventeen, drove through a stop sign at an excessive speed and collided with another vehicle.[306] Stroud's passenger was severely and permanently injured and all occupants of the other vehicle died.[307] The surviving passenger and his

---

299. *Id.* at 473.

300. *Id.*

301. *Id.* at 476.

302. *Id.* The court looked to the test set forth in *Bayh v. Sonnenburg*, 573 N.E.2d 398 (Ind. 1991), "to determine whether there has been a state demand of particular services." *Cheatham*, 789 N.E.2d at 475. In this case, the test is whether Cheatham's attorney (1) performed particular services, "(2) on the State's demand, (3) without just compensation." *Id.* (citing *Bayh*, 573 N.E.2d at 411).

303. *Cheatham*, 789 N.E.2d at 476 (citing *Bayh*, 573 N.E.2d at 417).

304. *Id.* at 477.

305. 790 N.E.2d 440 (Ind. 2003).

306. *Id.* at 441.

307. *Id.*

parents filed suit against Stroud.[308]

After a bench trial, the trial court found against the defendants and awarded the plaintiffs approximately $1.4 million in compensatory and $500,000 in punitive damages.[309] On appeal, the defendant contended that the $500,000 punitive damage award "was excessive because, given his financial situation and prospects, there was no possibility he could ever pay it."[310] Finding that the trial court had not abused its discretion, the court of appeals affirmed the punitive damage award.[311]

On transfer, the supreme court first stated that the amount of damages awarded by a trial court is subject to appellate review de novo.[312] The supreme court found that the court of appeals had erroneously reviewed the trial court's punitive damage award under an abuse of discretion standard.[313] The supreme court's unanimous opinion devotes significant attention to the court's analysis as to why de novo was the appropriate standard of review.[314]

The court next determined that the award was inappropriate given the defendant's finances.[315] In considering the legal rationale for punitive damage awards, the court noted that such awards are not to compensate the victim or the victim's attorney. Instead,

> [c]urrent law recognizes that punitive damages may serve the societal objective of deterring similar conduct by the defendant or others by way of example. For that reason, if punitive damages are appropriate, the wealth of the defendant has for many years been held relevant to a determination of the appropriate amount.[316]

Because this case involved a motor vehicle collision, the court reasoned that the defendant, and others the court may seek to deter, were frequently without significant resources.[317] As such, the defendant's wealth warranted due consideration in this circumstance.[318] The court concluded that Stroud's inability to discharge the punitive damage award in bankruptcy, coupled with his age and incarceration, made it highly improbable that he would ever be able to satisfy the punitive damage judgment.[319] The court further opined that the award would

---

308. *Id.* at 442.

309. *Id.* at 441.

310. *Id.* at 442.

311. *Id.* at 441.

312. *Id.*

313. *Id.* at 442.

314. *Id.* at 442-46. The court's analysis discusses the recent United States Supreme Court opinion of *State Farm Mutual Automobile Insurance Co. v. Campbell*, 503 U.S. 408 (2003).

315. *Id.* at 445.

316. *Id.* (citing Hibschman Pontiac, Inc. v. Batchelor, 362 N.E.2d 845, 849 (Ind. 1977)).

317. *Id.* at 446.

318. *Id.*

319. *Id.*

"permanently cripple" the defendant and potentially lead him to a life of crime.[320]

Moreover, the court noted that in cases where punishment and deterrence are the stated purposes for a punitive damage award, "the economic wealth of the defendant is material to the issue of punitive damages so that these objectives will be fulfilled."[321]

Applying the de novo standard of review the court held that, given the defendant's financial circumstances, the trial court's $500,000 punitive damages award was clearly excessive.[322] The court vacated the judgment and remanded the case to the trial court for entry of a new award.[323]

C. Inadequate Damages

In *Matovich v. Rogers*,[324] the Indiana Court of Appeals found that a jury's damage award of $586.16 was not inadequate as a matter of law despite the fact that (1) the trial court held that the defendant was negligent as a matter of law; and (2) the plaintiff presented evidence that she incurred $8110.10 in medical expenses related to the automobile collision at issue.[325]

After final arguments were made as to damages, the jury was instructed that it could only award damages for injuries caused by the defendant and that the plaintiff had the burden of proving that her claimed condition was due to the defendant's negligence. The jury was further instructed that it could not allow any damages which were "remote, imaginary, uncertain, or conjectural or speculative in their nature, even though testified to by witnesses."[326] After the jury awarded the plaintiff $586.16 in damages, the plaintiff unsuccessfully moved for a new trial.[327]

On appeal, the court noted that when an appellant claims a jury award is inadequate, the court must "'consider only the evidence that supports the award together with the reasonable inferences therefrom. . . . If there is any evidence to support the amount of the award, even if it is conflicting, this court will not reverse.'"[328]

The plaintiff primarily argued that the defendant had presented no evidence to refute her medical bills. The court agreed that there was no controversy that the plaintiff incurred the medical expenses; however, the court noted it was the plaintiff's "burden to prove by a preponderance of the evidence the expenses that

---

320. *Id.*

321. *Id.* at 447 (quoting Ramada Hotel Operating Co. v. Shaffer, 576 N.E.2d 1264, 1267-68 (Ind. Ct. App. 1991)).

322. *Id.* at 441.

323. *Id.*

324. 784 N.E.2d 954 (Ind. Ct. App. 2003).

325. *Id.* at 956-57.

326. *Id.* at 957.

327. *Id.*

328. *Id.* (quoting Ritter v. Stanton, 745 N.E.2d 828, 843 (Ind. Ct. App. 2001)).

were *incurred as a proximate result of the collision*."[329]

After her initial medical treatment, the plaintiff was not referred to any other physicians for additional treatment. Instead, the plaintiff testified that she sought additional treatment at the suggestion of family and friends.[330] The physician from whom the plaintiff next received treatment, Dr. Jordan, was unable to determine whether some of the plaintiff's injuries had existed before the collision. Dr. Jordan did not refer the plaintiff to any other healthcare providers for treatment.[331] Nonetheless, the plaintiff began treatment with Dr. Frechette for problems other than her neck pain. In the course of her treatment with Dr. Frechette, the plaintiff asked Dr. Frechette to order an MRI at the request of her attorney.[332] The court noted that the MRI showed a minimal herniation of the plaintiff's disc, but showed no resulting pressure on the nerves in her spinal column. Further, "pressure on the spinal nerve root will produce radiating pain symptoms on the same side of the body as the pressure on the nerve, but the herniation to [plaintiff's] disk was on the right side and her complained of pain was on the left side of her neck."[333] Finally, the court observed that the herniation was first observed more than three years after the accident.[334]

Finding that Dr. Jordan's records and testimony supported the inference that the injuries to the plaintiff that were proximately caused by the collision had resolved within two months of the incident, the court deduced that the jury

> could have concluded that only [the plaintiff's] initial medical expenditures—from PromptCare, the prescriptions, and early examination and treatments by Dr. Jordan—were damages "directly attributable" to the collision. . . . The jury's damages award covers these damages. Because the evidence supports the damages awarded, we cannot find them inadequate as a matter of law.[335]

D. Emotional Damages

In *Keim v. Potter*,[336] the Indiana Court of Appeals held that the trial court erred when it found that Keim's emotional damages claim was barred by the modified impact rule. After donating blood, Keim was informed that his blood tested positive for hepatitis C and was advised to contact a physician. After some testing, Keim's physician, Dr. Potter, advised Keim that his test results were not definitive and suggested that Keim return for a second recombinant immuno-blot assay ("RIBA") test. Keim complied and returned to Dr. Potter for a second

---

329. *Id.* at 958 (emphasis in original).
330. *Id.*
331. *Id.*
332. *Id.*
333. *Id.*
334. *Id.*
335. *Id.* at 958-59 (internal citations omitted).
336. 783 N.E.2d 731 (Ind. Ct. App. 2003).

RIBA test; however, Dr. Potter ordered another antibody screen instead of the RIBA test.[337] The test results showed that Keim's antibody screen was positive for hepatitis C. In January 1994, Dr. Potter telephoned Keim and advised him that he definitely had hepatitis C. Dr. Potter also advised Keim that his symptoms may include fatigue, pain, and jaundice and that Keim "could develop serious liver damage, including cirrhosis and cancer."[338] Keim was also advised that his "hepatitis C would kill him in fifteen to twenty years' time."[339]

At the time he was told he had hepatitis C, Keim was thirty-three years old, married and the father of two children. Keim made several changes to his lifestyle, including taking extreme measures to protect his wife and kids from becoming infected. He also changed the way he ate, drank, and exercised. The dramatic changes took a toll on Keim's behavior and negatively impacted his familial relationships. Eventually, Keim and his wife divorced.[340]

Keim followed Dr. Potter's advice to have his liver function tested every six months. Over a two and one half year period, no impairment of Keim's liver function was detected. On May 13, 1996, Dr. Potter realized the mistake he made with regard to Keim's second RIBA test and admitted as much to Keim. Subsequent testing showed that Keim never had hepatitis C.[341]

After filing a claim against Dr. Potter before the Department of Insurance and obtaining an opinion from a medical review panel, Keim filed his complaint with the trial court. Thereafter, Dr. Potter filed a motion for partial summary judgment alleging that Keim's emotional damages claim was barred by the modified impact rule. The trial court entered partial summary judgment in Dr. Potter's favor, and Keim brought an interlocutory appeal.[342]

On appeal, the court reviewed Indiana's current modified impact rule as it has been defined in the last several years by *Shuamber v. Henderson*, *Conder v. Wood* and *Groves v. Taylor*.[343] Most recently, in *Groves*, the supreme court held that direct involvement in an incident was sufficient to satisfy the modified impact rule.[344]

Applying the standard espoused in *Groves*, the court determined that Dr. Potter mistakenly diagnosed Keim with a "life-altering and deadly disease . . . [a]s such, he was 'directly involved' in the result of Dr. Potter's alleged negligence . . . . Keim's claimed emotional injuries are serious in nature and of a kind and extent normally expected to occur in a reasonable person faced with

---

337. *Id.* at 732.

338. *Id.*

339. *Id.*

340. *Id.* at 732-33.

341. *Id.* at 733.

342. *Id.*

343. *Id.* at 734 (citing Groves v. Taylor, 729 N.E.2d 569 (Ind. 2000); Conder v. Wood, 716 N.E.2d 432 (Ind. 1999); Shuamber v. Henderson, 579 N.E.2d 452 (Ind. 1991)).

344. *Groves*, 729 N.E.2d at 573.

the same circumstances."[345]

Dr. Potter argued that the *Groves* holding was controlling only with regard to recovery by bystanders. As such, Dr. Potter argued that Keim did not sustain an "impact" sufficient to meet the requirements of the Indiana's modified impact rule.[346] In rejecting Dr. Potter's argument, the court stated that it did "not see the logic in allowing a witness to claim emotional damages while precluding an actual victim of negligence from claiming such damages, where both plaintiffs have suffered a direct involvement reasonably expected to result in emotional injury."[347] The court concluded its opinion noting that "where, as here, a patient claims emotional damages as a result of alleged medical malpractice, he is sufficiently 'directly involved' to satisfy the modified impact rule."[348] After finding that Keim was entitled to present his emotional damages claim to the trier of fact, the court reversed the trial court's order and remanded the case for further proceedings.

IX. GOVERNMENTAL ENTITIES AND THE INDIANA TORT CLAIMS ACT

The Indiana Supreme Court also touched on different aspects of the Indiana Tort Claims Act ("ITCA")[349] during the survey period. In the first of the three ITCA cases discussed herein,[350] *Catt v. Board of Commissioners*,[351] the supreme court examined whether a county was entitled to immunity under the ITCA for a condition caused by the weather.[352] As Brian Catt was driving through Knox County, Indiana, the morning after heavy rains had fallen on the area, he crashed his car into a water-filled ditch in the middle of the road. Apparently, the heavy rains had washed out a culvert, which in turn, left a ditch in the middle of the road. Unable to stop his automobile in time due to slick mud on the roadway, Catt crashed into the ditch left by the washed-out culvert.[353] As a result, Catt

345. *Keim*, 783 N.E.2d at 735 (citing *Groves*, 729 N.E.2d at 573; *Shuamber*, 579 N.E.2d at 456).

346. *Id.*

347. *Id.*

348. *Id.*

349. The legislature enacted the ITCA in 1974 in response to appellate court decisions that abolished sovereign immunity for the State and its political subdivisions. Gonser v. Bd. of Comm'rs, 378 N.E.2d 425, 427 (Ind. 1978). The enactment of the ITCA was aimed at establishing a uniform body of law to govern the prosecution of tort claims, and only tort claims, against the State and other governmental entities, including counties. *Id.* In particular, the ITCA sets forth special notice requirements that must be adhered to when seeking to file a claim against a governmental entity, *see* IND. CODE §§ 34-13-3-6 and –8 (2003); delineates certain situations where a governmental entity enjoys immunity, *see id.* § 34-13-3-3; and limits a governmental entity's aggregate liability, *see id.* § 34-13-3-4.

350. As an aside, we note that all three unanimous opinions were authored by Justice Rucker.

351. 779 N.E.2d 1 (Ind. 2002).

352. *Id.* at 2.

353. *Id.*

sustained serious injuries.[354]

Subsequently, Catt filed an action against Knox County ("the County"), alleging negligent inspection and maintenance of the roadway.[355] The County claimed statutory immunity, among other defenses, and filed a motion for summary judgment in which it alleged that it owed no duty to Catt, it was immune from liability under the ITCA, and that Catt's action was completely barred by his contributory negligence.[356] The trial court granted summary judgment to the County but issued no findings or conclusions in support of its decision.[357] Catt appealed the trial court's grant of summary judgment.[358] The Indiana Court of Appeals reversed, finding that the County was not entitled to immunity under the ITCA because the washed-out culvert was not a "temporary" condition. There were disputed issues of material fact regarding whether Catt was contributorily negligent, and genuine issues of material fact existed as to whether the County breached its duty of care to maintain public thoroughfares in a safe condition for travel.[359] The County sought transfer solely on whether the County was immune from liability under the ITCA.[360]

On transfer, the supreme court affirmed the trial court's holding that the ITCA granted immunity to the County.[361] Relying on Indiana Code section 34-13-3-3(3), which provides in pertinent part that "[a] governmental entity or an employee acting within the scope of the employee's employment is not liable if a loss results from . . . [t]he temporary condition of a public thoroughfare . . . which results from weather," the court analyzed whether the loss suffered by the plaintiff was the result of the weather and whether the condition of the road was "temporary."[362] Initially, the court reiterated that a governmental entity has a common law duty to exercise reasonable care and diligence to keep its streets and sidewalks in a reasonably safe condition for travel.[363] The court also acknowledged, however, that the ITCA provides immunity for temporary conditions caused by the weather.[364] The court continued by explaining that the relevant inquiry in determining whether a governmental entity is immune under the ITCA is whether the loss suffered was actually the result of weather or some other factor.[365] Additionally, the court explained that the focus of whether the

---

354. *Id.*

355. *Id.*

356. *Id.* at 2-3.

357. *Id.* at 3.

358. *Id.*

359. *Id.*; *see also* Catt v. Bd. of Comm'rs, 736 N.E.2d 341 (Ind. Ct. App. 2000), *vacated*.

360. *Catt*, 789 N.E.2d at 3.

361. *Id.*

362. *Id.*

363. *Id.* (citing Galbreath v. City of Indianapolis, 255 N.E.2d 225, 227 (1970)).

364. *Id.* at 4 (citing Van Bree v. Harrison County, 584 N.E.2d 1114, 1117 (Ind. Ct. App. 1992)).

365. *Id.* (citing Bd. of Comm'rs v. Angulo, 655 N.E.2d 512, 513 (Ind. Ct. App. 1995)).

condition is permanent is whether the governmental entity has had the time and opportunity to remove the obstruction but failed to do so.[366]

Based on the materials in the record, the supreme court determined that the culvert washed out as a result of the rainstorm, which had occurred just a few hours before the accident, and the condition of the thoroughfare was unknown to the County until after the accident.[367] Thus, the court declared that the ditch in the middle of the roadway was indeed a "temporary" condition that resulted from the weather, of which the County had no notice.[368] Because the condition of the roadway was temporary and resulted from the weather, the court concluded that the County was immune under the ITCA.[369]

The Indiana Supreme Court also addressed the ITCA in *Bushong v. Williamson*.[370] Specifically, in *Bushong*, the supreme court addressed whether a trial court may examine evidence outside of a complaint to determine whether a public employee was acting within the scope of employment at the time he committed an alleged tort.[371] After being kicked once by a student and admonishing the student to cease such behavior, David Williamson, a teacher with the South Montgomery School Corporation, caught fifth-grade student Jonathan Bushong's ankle as he attempted to kick the teacher again and then struck Bushong on the back, legs, and buttocks with his hand. Bushong sustained bruises from the encounter.[372] Bushong's parents ("the Bushongs") subsequently filed a tort claims notice with the school corporation and the Indiana Political Subdivision Risk Management Commission.[373] The Bushongs did not pursue a claim against the school, but they did file an action against Williamson individually.[374] Following discovery, Williamson moved for summary judgment.[375] The trial court granted Williamson's motion based upon its review of the pleadings and discovery responses, which revealed that Williamson's actions were done within the scope of his employment and that the Bushongs failed to give Williamson notice as required by the ITCA.[376] The Bushongs appealed and the court of appeals reversed after finding that the ITCA precluded the trial court from considering documents outside of the complaint in determining whether the defendant's acts occurred within the scope of employment, that a genuine issue of material fact existed whether Williamson's act occurred in the scope of employment, and that the trial court erred in

366. *Id.* at 5 (citing *Van Bree*, 584 N.E.2d at 1117).
367. *Id.* at 6.
368. *Id.*
369. *Id.*
370. 790 N.E.2d 467 (Ind. 2003).
371. *Id.* at 469.
372. *Id.*
373. *Id.*
374. *Id.*
375. *Id.*
376. *Id.*

determining that the Bushongs were required to give Williamson notice under the ITCA.[377] Williamson sought transfer, which the supreme court granted.[378]

On transfer, the supreme court rejected the court of appeals' view that the ITCA—specifically Indiana Code section 34-13-3-5(a)—precludes a court from examining materials other than the complaint when deciding whether an employee acted within the scope of his employment.[379] In particular, the court held that the 1995 Amendment to the ITCA, which bars lawsuits against government employees personally, does not preclude the trial court from examining evidence outside of the complaint to determine whether the employee was acting within the scope of employment.[380]

Indiana Code section 34-13-3-5(a) in pertinent part provides, "[a] lawsuit alleging that an employee acted within the scope of the employee's employment must be *exclusive to the complaint* and bars an action by the claimant against the employee personally."[381] While the court of appeals interpreted the italicized language to mean that the trial court is confined to looking only to the face of the complaint in determining whether the defendant's acts occurred in the scope of employment, the supreme court opined that the italicized language was merely intended to require a plaintiff to explicitly state in his complaint whether the plaintiff was alleging that the plaintiff was acting within the scope of his employment when the tort occurred.[382] In other words, Indiana Code section 34-13-3-5(a) does not preclude a court from considering materials outside of the complaint when making a scope of employment determination. The supreme court indicated that requiring the plaintiff to designate in his complaint that a tortious act occurred within the scope of employment provides an immediate and early indication that the employee is not personally liable.[383] Further, the supreme court continued by stating that the statute is silent as to what happens when no scope of employment allegation is set forth in the complaint and explained that in such a situation, if the post-complaint discovery supports that the employee acted within the scope of his employment, then it is appropriate to grant summary judgment.[384]

The supreme court also addressed whether an employee's actions fall outside the scope of his employment simply because his actions can be characterized as

---

377. *Id.*; *see also* Bushong v. Williamson, 760 N.E.2d 1090, 1095, 1097, 1098 (Ind. Ct. App. 2001), *vacated*.

378. *Bushong*, 790 N.E.2d at 470; *see also* Bushong v. Williamson, 774 N.E.2d 514 (Ind. 2002).

379. *Bushong*, 790 N.E.2d at 471.

380. *Id.* at 474.

381. *Id.* at 471.

382. *Id.* at 471-72.

383. *Id.* at 472.

384. *Id. But see id.* at 472 n.4 (indicating that an Indiana Trial Rule 12(b)(6) motion to dismiss is the appropriate course of action where the complaint alleges that a government employee acted within the scope of employment).

criminal.[385] The court posited that even criminal acts may be considered within the scope of employment if "'the criminal acts originated in activities so closely associated with the employment relationship as to fall within its scope.'"[386] Because the discovery materials conclusively established that Williamson was acting within the scope of his employment, the supreme court found that the trial court was correct to make that determination as a matter of law and grant summary judgment in favor of Williamson.[387]

The Indiana Supreme Court also applied the ITCA in *King v. Northeast Security, Inc*.[388] Following some incidents of mischief at North Central High School, the Metropolitan School District of Washington Township ("Washington Township") contracted with Northeast Security, Inc. ("Northeast") to provide uniformed deputies to be positioned outside of the school from 7:00 a.m. to 3:30 p.m. each school day. After classes were dismissed at 3:00 p.m. on April 18, 1996, a fight broke out in the North Central parking lot. During the altercation, Nicholas King sustained serious injuries. The Northeast employee who was supposed to be stationed in the parking lot was inside the school building making a personal phone call as the fight occurred.[389] Additionally, the school official who usually kept watch over the parking lot after classes were dismissed was absent that day and did not assign anyone to replace him that afternoon in the parking lot.[390] King sued both Northeast and Washington Township.[391]

In response, both defendants filed motions for summary judgment, claiming that they did not owe King a duty to protect him from the criminal acts of third parties.[392] The trial court ruled that Northeast owed no duty to King because King was not a third party beneficiary of the security services agreement between Northeast and Washington Township.[393] Additionally, the trial court granted summary judgment in favor of Washington Township, noting that, as a governmental entity, Washington Township did not owe a private duty to King to protect him from the alleged harm.[394] King appealed and the Indiana Court of Appeals affirmed summary judgment in favor of Northeast but reversed the summary judgment in favor of Washington Township, holding that Washington Township could be liable to King for breach of its duty to supervise the safety of its students.[395] Both King and Washington Township sought transfer, which was

---

385. *Id.* at 472-73.

386. *Id.* at 473 (quoting Stropes v. Heritage House Children's Ctr., Inc., 547 N.E.2d 244, 247 (Ind. 1989)).

387. *Id.*

388. 790 N.E.2d 474 (Ind.), *reh'g denied*, 2003 Ind. LEXIS 570, at *1 (Ind. 2003).

389. *Id.*

390. *Id.*

391. *Id.*

392. *Id.*

393. *Id.*

394. *Id.* at 478.

395. *Id.*; *see also* King v. Northeast Sec., Inc., 732 N.E.2d 824 (Ind. Ct. App.), *vacated*, 2000

granted.[396]

On transfer, the supreme court first addressed whether Washington Township was entitled to immunity, examining common law immunity and the ITCA.[397] As to common law, the court explained that sovereign immunity persists in only three areas following Indiana's enactment of the ITCA: (1) where a city or state fails to provide adequate police protection to prevent crime; (2) where a state official makes an appointment of an individual whose incompetent performance gives rise to a suit alleging negligence on the part of the state official for making such an appointment; and (3) where judicial decision-making is challenged.[398] Finding that none of these three categories were implicated by the facts of this case, the court ruled that Washington Township was not entitled to common law immunity.[399] The court then turned to the ITCA.

Under the ITCA, the supreme court separately examined immunity for acts of non-governmental employees and immunity for law enforcement.[400] After identifying Washington Township as a governmental entity within the meaning of the ITCA that is entitled to immunity, the court turned to Indiana Code section 34-13-3-3(9).[401] The court explained that immunity under Indiana Code § 34-13-3-3(9) applies in "'actions seeking to impose vicarious liability by reason of conduct of third parties'" other than governmental employees acting within the scope of their employment.[402] While recognizing that Indiana Code section 34-13-3-3(9) immunizes Washington Township from liability for non-governmental employees' actions, the court opined that summary judgment was not appropriate because there was a factual dispute as to whether King's injuries were the result of an act or omission by Northeast or by Washington Township itself.[403]

The supreme court next examined Indiana Code section 34-13-3-3(7),[404] which grants law enforcement immunity. After essentially rejecting the public/private duty test,[405] the court posited that Indiana Code section 34-13-3-3(7) does not provide immunity to Washington Township.[406] In making this determination, the court explained that Indiana Code section 34-13-3-3(7)

Ind. App. LEXIS 1994, at *1 (Ind. Ct. App. 2000).

396. King v. Northeast Sec., Inc., 753 N.E.2d 10 (Ind. 2001).

397. *King*, 790 N.E.2d at 478.

398. *Id.* (citing Campbell v. State, 284 N.E.2d 733, 736-37 (Ind. 1972)).

399. *Id.* at 478-80.

400. *Id.* at 480.

401. The current version of Indiana Code section 34-13-3-3(9) is now codified at Indiana Code section 34-13-3-3(10). *Id.* at 480 n.2.

402. *Id.* at 481 (quoting Hinshaw v. Bd. of Comm'rs, 611 N.E.2d 637, 640-41 (Ind. 1993)).

403. *Id.*

404. The current version of Indiana Code section 34-13-3-3(7) is now codified at Indiana Code section 34-13-3-3(8). *Id.* at 480 n.2.

405. For a more in-depth discussion of the public/private duty test, see *Quakenbush v. Lackey*, 622 N.E.2d 1284 (Ind. 1993).

406. *King*, 790 N.E.2d at 483.

immunity is restricted to the adoption and enforcement of laws that are within the assignment of the governmental unit.[407] Because the court did "not think a school district is 'enforcing' a law when it provides for school security, even if the action taken may deter or prevent acts that would violate a law 'adopted' and 'enforced' by other units of government,"[408] it ruled that Indiana Code section 34-13-3-3(7) did not confer immunity upon Washington Township.[409] Finally as to King's negligence claim against Washington Township, the court explained that summary judgment is not appropriate on King's claim due to a discrepancy in the evidence bearing on the extent of control retained by Washington Township and how any such control was exercised.[410]

Shifting its focus to Northeast, the court examined whether King must be a third party beneficiary to the Washington Township/Northeast Contract in order to assert a claim.[411] Answering this inquiry in the negative, the court highlighted that the purpose of the agreement between Washington Township and Northeast was to provide security services for the school, thereby protecting all members of the public, including students, who were rightfully on the premises.[412] The court noted that "[i]f the trier of fact concludes that Northeast's failure to 'observe' King's assault was due to its negligence and was a proximate cause of King's injuries," then recovery is appropriate.[413] In light of the foregoing, the supreme court reversed the trial court's grant of summary judgment in favor of Washington Township and in favor of Northeast.[414]

CONCLUSION

While there were several new developments in the area of tort law during the survey period, the foregoing represent those cases that the authors consider to be the most significant.

---

407. *Id.* at 482.
408. *Id.* at 483.
409. *Id.* at 484.
410. *Id.* at 485.
411. *Id.*
412. *Id.*
413. *Id.* at 487.
414. *Id.*