

## RECENT DEVELOPMENTS IN INDIANA TORT LAW

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This Article discusses significant developments in tort law in Indiana during the survey period. In light of the breadth of the subject area, this Article is neither comprehensive nor exhaustive. This Article does not attempt to address in detail all of the cases applying tort law in Indiana during the survey period, but attempts to address selected cases in which the courts have interpreted the law or clarified existing law.

### I. NEGLIGENCE

#### A. *Duty of Care*

Two cases during the survey period addressed the duty of care in somewhat novel factual circumstances worthy of the practitioner's attention. In the first, *Geiersbach v. Frieje*,<sup>1</sup> the Indiana Court of Appeals clarified the standard of care for university sporting events and practices. In the second, *Williams v. Cingular Wireless*,<sup>2</sup> the court addressed the duty owed by a wireless telephone provider when the telephone it sold was in use at the time of a motor vehicle accident.

1. *University Athletics*.—In *Geiersbach*, a university baseball player filed suit against the university, the head coach for the team, a volunteer coach (the head coach's son), and another player on the team for personal injuries sustained during practice. The drill used during practice inadvertently caused two baseballs to be in play at once and, while the plaintiff watched and prepared to deal with the first, he was struck in the eye by the second, causing severe and permanent damage to his eye.<sup>3</sup> Defendants' motion for summary judgment was granted. On appeal, the plaintiff argued there was a genuine issue of material fact as to whether the parties had breached a duty owed to him, relying upon cases in which high school personnel were held to have a duty to exercise ordinary and reasonable care for the safety of high school students under their authority when a child was injured during a sports practice.<sup>4</sup> In the high school cases, the supreme court extended a rule previously adopted for elementary school students to apply to secondary school students.<sup>5</sup>

While the *Geiersbach* plaintiff recognized that the rationale of these cases

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1. 807 N.E.2d 114 (Ind. Ct. App. 2004).

2. 809 N.E.2d 473 (Ind. Ct. App. 2004).

3. *Geiersbach*, 807 N.E.2d at 115-16.

4. *Id.* at 116 (citing *Beckett v. Clinton Prairie Sch. Corp.*, 504 N.E.2d 552 (Ind. 1987)).

5. *Id.* (citing *Norman v. Turkey Run Cmty. Sch. Corp.*, 411 N.E.2d 614, 616 (Ind. 1980); *Miller v. Griesel*, 308 N.E.2d 701, 707 (Ind. 1974)).

did not readily transfer to the college setting, he argued that “a trend is developing among courts to find a ‘special’ relationship between colleges or universities and their student-athletes.”<sup>6</sup> No Indiana court had considered this question, and the court disagreed with the student that the reasonable care standard should apply to the university. Instead, because athletes choose to participate in sports which, “by their nature, involve a certain amount of inherent danger,” the court held that “the proper standard of care for sporting events and practices should be to avoid reckless or malicious behavior or intentional injury.”<sup>7</sup>

The court noted that “caselaw creates a clear distinction between dangers which are inherent in the activity and those which are not.”<sup>8</sup> While some of the caselaw<sup>9</sup> used misleading language of “incurred risk” and “assumption of risk,” it is more appropriate to resolve issues by merely determining whether the risks are inherent in the sport.<sup>10</sup> This avoids the confusion as to what extent incurred risk was actually subsumed by comparative fault.<sup>11</sup>

The court also addressed arguments presented by the parties as to the question of whether a co-participant is liable for an accidental injury during a sporting event. Noting that the *Mark* court had held that a participant does not have a duty to fellow participants to refrain from conduct which is inherent and foreseeable in the play of the game even though such conduct may be negligent, the court expressly expanded *Mark* to “include all participants in the sporting event,” expressly stating this expands to players participating in the event, coaches, and even to players who are sitting on the bench.<sup>12</sup> As dangers are inherent in the game, a participant should not be able to recover from a player, team, or stadium without proving recklessness or that the injury was somehow intentional.<sup>13</sup>

2. *Wireless Telephones*.—In the second case addressing duty, *Williams v. Cingular Wireless*,<sup>14</sup> the plaintiff motorist brought an action against Cingular, a cellular telephone company, alleging that the company negligently furnished a cellular phone to a customer who it knew or should have known would use the phone while operating a motor vehicle.<sup>15</sup> The cellular customer was in fact alleged to have been driving and using the phone at the time the customer’s vehicle collided with the plaintiff’s vehicle.<sup>16</sup> The complaint was dismissed for

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6. *Id.* at 117.

7. *Id.* at 118.

8. *Id.* at 119.

9. *Id.* at 118-19 (citing *Gyuriak v. Millice*, 775 N.E.2d 391 (Ind. Ct. App. 2002); *Mark v. Moser*, 746 N.E.2d 410 (Ind. Ct. App. 2001)).

10. *Id.* at 119.

11. *Id.* at 119-20.

12. *Id.* at 120.

13. *Id.*

14. 809 N.E.2d 473 (Ind. Ct. App. 2004).

15. *Id.* at 475.

16. *Id.*

failure to state a claim, and the plaintiff appealed.

Addressing whether Cingular owed a duty to the plaintiff, the court looked to the three factors required to impose a duty at common law: “(1) the relationship between the parties, (2) the reasonable foreseeability of harm to the person injured, and (3) public policy concerns.”<sup>17</sup> As to the first, the court found no evidence of a relationship in the record.<sup>18</sup> There was no contract between Cingular and the plaintiff, the accident did not involve a Cingular employee or vehicle and did not occur on Cingular property, and the cellular phone did not malfunction and cause the injury.<sup>19</sup>

The court next considered the question of foreseeability. Although agreeing that it might be foreseeable that a person who is using a cellular phone while driving might be in an accident, it was too great a “leap in logic” to make it likewise foreseeable to a legally sufficient extent that the sale of the phone would result in an accident.<sup>20</sup> It is the driver’s inattention while using the phone, not the sale of the phone, that may cause an accident.<sup>21</sup> Finally, the court considered public policy, noting that “[d]uty is not sacrosanct in itself, but is only an expression of the sum total of those considerations of public policy which lead the law to say that the plaintiff is entitled to protection.”<sup>22</sup> After reviewing the many beneficial uses of cellular phones and the potential that imposing a duty here might “effectively require” companies to stop selling phones entirely because they would have no way of preventing customers from using the phones while driving, the court concluded “sound public policy dictates that the responsibility for negligent driving should fall on the driver.”<sup>23</sup> Balancing these factors, the court concluded that Cingular did not owe a duty to the plaintiff and affirmed the dismissal.<sup>24</sup>

### *B. Impact Rule*

In *Ritchhart v. Indianapolis Public Schools*,<sup>25</sup> the court of appeals considered the requirements of the impact rule for a claim of negligent infliction of emotional distress. Prior to 1991, Indiana courts adhered to the impact rule in claims for negligent infliction of emotional distress.<sup>26</sup> In 1991, the Indiana Supreme Court in *Shuamber v. Henderson*<sup>27</sup> relaxed the rule, and several cases

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17. *Id.* at 476 (citing *N. Ind. Pub. Serv. Co. v. Sharp*, 790 N.E.2d 462, 466 (Ind. 2003)).

18. *Id.* at 477.

19. *Id.*

20. *Id.* at 478.

21. *Id.*

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

23. *Id.* at 479.

24. *Id.*

25. 812 N.E.2d 189 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 982 (Ind. 2004).

26. *Id.* at 192.

27. 579 N.E.2d 452, 454 (Ind. 1991).

since have explored its parameters.<sup>28</sup> In *Ritchhart*, the plaintiff was the mother of a three-year-old boy who suffered from severe disabilities. The child attended the Indiana School for the Blind. The bus driver misidentified the child, attempted to deliver him to the wrong home and, finding no one there, left him with a neighbor. When the child was not delivered home as scheduled, the mother contacted the school and the police. It was several hours later before the child was found and, after a visit to Riley Children's Hospital, was determined to have been unharmed. The mother filed suit for negligent infliction of emotional distress. IPS sought summary judgment, claiming among other things that there was no direct impact on the mother.

Considering the development of negligent infliction of emotional distress, the court discussed *Groves v. Taylor*,<sup>29</sup> in which the supreme court created a new class of potential plaintiffs—"relative bystanders."<sup>30</sup> In such cases where the plaintiff can show a "sufficient direct involvement," a physical impact is not required.<sup>31</sup> *Groves* sets out a three-part test: (1) the plaintiff witnesses an injury that is either fatal or so serious that it could be expected to cause severe distress to the bystander; (2) the plaintiff and the primary victim have a close family relationship that is "analogous" to a spouse, parent, child, grandparent, grandchild, or sibling; and (3) the plaintiff witnesses the accident or the gruesome aftermath minutes after it occurs.<sup>32</sup> The *Groves* court specifically contrasted those cases falling within this test and non-compensable cases where the plaintiff learns of a loved one's death or serious injury by indirect means.<sup>33</sup> The court noted that the relative bystander case has been applied only once in Indiana in *Blackwell v. Dykes Funeral Homes, Inc.*,<sup>34</sup> a case where the parents of the deceased were found to be sufficiently and directly involved in an incident where a funeral home lost the remains of their son.

Applying the three-part test of *Groves*, the *Ritchhart* court concluded that the plaintiff met only the second part of the test, having a close family relationship.<sup>35</sup> She failed to satisfy either the first or third parts since the child was not physically injured and she did not witness any part of the incident giving rise to her complaint. Instead, the court said, this incident was more akin to the "non-compensable 'experience of learning of a loved one's death or severe injury by indirect means.'"<sup>36</sup>

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28. *Ritchhart*, 812 N.E.2d at 193-94.

29. 729 N.E.2d 569 (Ind. 2000).

30. *Id.* at 572-73.

31. *Id.* at 573.

32. *Id.*

33. *Id.*

34. 771 N.E.2d 692 (Ind. Ct. App. 2002), *trans. denied*, 792 N.E.2d 38 (Ind. 2003).

35. *Ritchhart*, 812 N.E.2d at 195.

36. *Id.* at 196 (quoting *Groves*, 729 N.E.2d at 573).

## II. LEGAL MALPRACTICE

### A. Statute of Limitations

In *Estate of Spry v. Batey*,<sup>37</sup> the Indiana Court of Appeals applied the two-year statute of limitations and the “discovery rule” in the context of a legal malpractice claim. The court of appeals affirmed the trial court’s grant of summary judgment to Ruth A. Batey and Gold & Polansky, Chartered (collectively “the Firm”) on grounds that the Estate’s legal malpractice claim against the Firm was barred by the statute of limitations.<sup>38</sup> The claim arose out of a car accident in which Kelly Spry, a passenger in a car driven by John W. Taylor, was killed after leaving the Leiters Ford Tavern. The Estate, represented by the Firm, settled with Taylor’s insurer on May 11, 1999 and signed a general release. Pursuant to the release, the Estate released “JOHN W. TAYLOR, JR. and any other person, firm or corporation charged or chargeable with responsibility or liability” in connection with the accident.<sup>39</sup>

In August 1999, the Estate hired a new attorney and filed a claim against the Leiters Ford Tavern and its owners. The tavern then demanded that the Estate dismiss the claim because the release signed by the Estate had also released any claim against the tavern. On June 1, 2000, the Estate’s new attorney sent a letter to Batey advising her of the tavern’s demand, indicating that the Estate’s attorneys agreed that the release also released the claim against the tavern, and asking Batey to contact them or have her attorney or insurer contact them to discuss the matter. The Firm disputed that the release extended to the tavern, and the Estate continued to litigate against the tavern. On November 13, 2000, the trial court granted summary judgment for the tavern based on the release.<sup>40</sup>

On September 5, 2002, the Estate filed a complaint against the Firm alleging legal malpractice for failure to provide competent advice with respect to the release. In granting summary judgment, the trial court found the Estate “knew or should have known of its claim on June 1, 2000, when its attorney sent a letter to [the Firm] advising them to put their attorney and insurance carrier on notice.”<sup>41</sup>

As the court of appeals described, the applicable statute of limitations for legal malpractice is two years<sup>42</sup> and is subject to the “discovery rule.”<sup>43</sup> Accordingly, the statute does not begin to run until the plaintiff knows, or in the exercise of ordinary diligence could have known, that he had sustained an injury as the result of the tortious act of another.<sup>44</sup> However, it is not necessary that the

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37. 804 N.E.2d 250 (Ind. Ct. App. 2004).

38. *Id.* at 254.

39. *Id.* at 251.

40. *Id.* at 251-52.

41. *Id.* at 252.

42. *Id.* (citing IND. CODE § 34-11-2-4 (1998)).

43. *Id.* at 253.

44. *Id.*

full extent of damages be known or ascertainable, as long as some ascertainable damage has occurred.<sup>45</sup>

In rejecting the Estate's argument that the statute did not begin to run until November 2002 when the trial court granted summary judgment for the Firm, the court observed that the "Estate's argument confuses the distinction between the occurrence of damage and the amount of damage."<sup>46</sup> The court then noted that the injury and damage actually occurred in May 1999 when the Firm advised the Estate to sign the release.<sup>47</sup> The Estate discovered that it had sustained an injury as a result of the Firm's tortious conduct at least by June 1, 2000 when the Estate's new lawyer sent the letter to the Firm putting it on notice of the issue with the release.<sup>48</sup>

### *B. Assignment of Legal Malpractice Claim*

In *Rosby Corp. v. Townsend, Yosha, Cline & Price*,<sup>49</sup> the court clarified that any assignment of a legal malpractice claim is void as contrary to public policy, regardless of whether the intended assignee is an adversary. The *Rosby* case arose out of a suit filed by Monon Corporation against its attorneys in 1992. Monon, which had filed for bankruptcy and entered into a settlement agreement with creditors, purported to assign a legal malpractice claim to Rosby, its creditor. In July 2002, Monon moved to substitute Rosby as the party in interest. The trial court granted the attorneys' motion for summary judgment on grounds that Monon's attempted assignment of the legal malpractice claim to Rosby was contrary to law.<sup>50</sup>

As noted by the *Rosby* court, in *Picadilly, Inc. v. Raikos*, the Indiana Supreme Court held that "legal malpractice claims are not assignable."<sup>51</sup> In *Picadilly*, appellant's bar was sued by Charles Colvin, who was injured in an accident caused by a patron of the bar. Colvin recovered \$75,000 in compensatory damages and \$150,000 in punitive damages. The bar then sued its attorneys for alleged malpractice relating to an erroneous instruction on punitive damages, and the attorneys were granted summary judgment. The bar then filed bankruptcy, and as part of its reorganization plan, the punitive damages were discharged. However, Colvin was assigned the malpractice claim against the bar's attorneys. Colvin appealed the grant of summary judgment for the attorneys, which the supreme court reversed.<sup>52</sup>

In affirming the trial court's grant of summary judgment for the attorneys, the court of appeals rejected Rosby's argument that *Picadilly* was limited to an

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45. *Id.* at 252-53.

46. *Id.* at 254.

47. *Id.*

48. *Id.*

49. 800 N.E.2d 661 (Ind. Ct. App. 2003), *trans. denied*, 812 N.E.2d 801 (Ind. 2004).

50. *Id.* at 663.

51. *Id.* at 665 (quoting *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338, 339 (Ind. 1991)).

52. *Id.* (citing *Picadilly*, 582 N.E.2d at 339).

assignment of a malpractice claim to an adversary in the underlying action. The court held that “*Picadilly* represents a bright-line rule drawn by the supreme court holding that no legal malpractice claims may be assigned, regardless whether they are assigned to an adversary.”<sup>53</sup> The court of appeals noted that the *Picadilly* court discussed the implications of a role reversal in the event of an assignment to an adversary, but it found no indication that the holding in *Picadilly* was limited to such facts.<sup>54</sup> Rather, the court of appeals concluded that the *Picadilly* court was concerned with any assignments of legal malpractice claims. The court noted that allowing such assignments would lead to the “treatment of such claims as a commodity,” which would “denigrate the unique fiduciary relationship that exists between a client and an attorney.”<sup>55</sup> The court of appeals explained that the attorney-client relationship could be harmed by weakening the attorney’s loyalty to a client and by threatening the duty to maintain client confidences.<sup>56</sup>

### III. ACCOUNTANT MALPRACTICE

The court of appeals interpreted the statutory accountant-client privilege in *Orban v. Krull*.<sup>57</sup> In that case, Dana Krull performed accounting services for Richard and Janet Orban personally and for a business owned by Richard and another partner. After the partner advised Krull that he believed Richard was stealing from the business, the Indiana Department of Revenue sent Krull a subpoena seeking the Orbans’ accounting information. Krull released the information, and criminal charges were filed against the Orbans. Although the claims were ultimately dismissed, the Orbans filed suit against Krull for accountant malpractice and tortious interference with contract. The trial court granted Krull’s motion for summary judgment.<sup>58</sup>

In reversing the judgment for the accountant, the court relied on the statutory accountant-client privilege, which unambiguously states “[t]he information derived from or as the result of professional services is confidential and privileged.”<sup>59</sup> Because the information disclosed was obtained as a result of Krull’s professional services, Krull had a duty to keep it confidential unless he had the Orbans’ consent or was ordered by a court to produce the information. The court noted that under Indiana Code section 25-2.1-14-1, an accountant is not required to divulge information acquired in connection with his services as an accountant, so Krull could have properly refused to comply with the subpoena.<sup>60</sup> The court also rejected Krull’s argument that the Orbans waived the privilege by

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53. *Id.*

54. *Id.* at 666.

55. *Id.* at 665-66.

56. *Id.* at 666 (citing *Picadilly*, 582 N.E.2d at 342-43).

57. 805 N.E.2d 450 (Ind. Ct. App. 2004).

58. *Id.* at 453.

59. *Id.* at 453-54 (citing IND. CODE § 25-2.1-14-2).

60. *Id.* at 454.

checking the box on their tax returns that authorized “*the Department* to discuss my return with my tax preparer.”<sup>61</sup> This did not authorize the accountant to release information to the Department.

#### IV. MEDICAL MALPRACTICE

##### *A. No Cause of Action for Death of a Fetus*

In *Breece v. Lugo*, the court of appeals held that there is no cause of action under the Medical Malpractice Act for the wrongful death of a fetus.<sup>62</sup> In that case, James and Geneva Breece brought suit individually and on behalf of their deceased daughter after Geneva had an emergency caesarian section that resulted in the delivery of one healthy baby and one deceased fetus. Because Indiana does not recognize a cause of action for the wrongful death of a fetus under the Child Wrongful Death Act,<sup>63</sup> the plaintiffs stressed that their claim was under the Medical Malpractice Act.

In rejecting the plaintiffs’ claim that the Act created a cause of action, the court emphasized that the Medical Malpractice Act did not create a new class of plaintiffs nor did it increase the scope of damages that can be sought against healthcare providers.<sup>64</sup> Indeed, “the obvious purpose of the act was to protect health care providers from malpractice claims, . . . not to create new and additional causes of actions.”<sup>65</sup>

However, the court reversed the trial court’s grant of summary judgment in favor of the health care providers on the issue of the mother’s recovery of damages for negligent infliction of emotional distress associated with the death of the fetus.<sup>66</sup> The court observed that in the *Bolin* case, in which the supreme court held that there is no recovery for the wrongful death of a fetus under the Child Wrongful Death Act, the supreme court noted that its conclusion “does not mean that negligently injured expectant mothers have no recourse.”<sup>67</sup>

##### *B. No Private Cause of Action Under Statute Imposing Duty on Hospital Staff to Review Practices*

In *Roberts v. Sankey*, the court of appeals held that Indiana Code section 16-21-2-7, which imposes a duty on hospital staff to review the professional practices at the hospital, does not create a private cause of action for medical

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61. *Id.*

62. 800 N.E.2d 224 (Ind. Ct. App. 2003), *reh’g denied* (Ind. Ct. App. 2004).

63. *See Bolin v. Wingert*, 764 N.E.2d 201, 207 (Ind. 2002).

64. *Breece*, 800 N.E.2d at 228-29.

65. *Id.* at 227 (citing *Warrick Hosp., Inc. v. Wallace*, 435 N.E.2d 263 (Ind. Ct. App. 1982), *rev’d in part and affirmed in part*, *Cnty. Hosp. of Anderson & Madison County v. McKnight*, 493 N.E.2d 775, 777 (Ind. 1986)).

66. *Id.* at 230.

67. *Id.* at 229 (citing *Bolin*, 764 N.E.2d 201 at 207).

malpractice.<sup>68</sup> In that case, the personal representative of Nell Roberts's estate brought a medical malpractice action against the hospital's pathologist and others. Roberts was a patient at Vermillion County Hospital during the time period in which the death rate in the four-bed intensive care unit had increased dramatically. Subsequently, Orville Lynn Majors, a licensed practical nurse who was on duty when 121 of 147 such patients died, was convicted of the murder of six of those patients. Roberts's estate brought a claim against Dr. Sankey, a pathologist and member of the hospital staff. In affirming summary judgment for Dr. Sankey, the court observed that a physician-patient relationship is necessary in order to bring a malpractice action.<sup>69</sup> Here, it was undisputed that Dr. Sankey had no such relationship with Roberts.<sup>70</sup>

The court rejected the estate's argument that Indiana Code section 16-21-2-7 created a duty in the absence of a physician-patient relationship. The court noted the general rule that "a private party may not enforce rights under a statute designed to protect the public in general and containing a comprehensive enforcement mechanism."<sup>71</sup> The court found that the statutory scheme contained such an enforcement mechanism for monitoring compliance with the hospital licensure requirements for the protection of hospital patients.<sup>72</sup> The court found no apparent legislative intent to authorize a private right of action.<sup>73</sup>

C. *"Qualified Healthcare Provider" and Failure to File Assumed Name*

In *Schriber v. Anonymous*, the court of appeals held, as a matter of first impression, that a corporation which did not file a certificate of assumed name was not a "qualified healthcare provider" under the Act.<sup>74</sup> In that case, at the time of the incident in question, the nursing home conducted business and was licensed under one assumed name (Eagle Care Healthcare), was listed in the Department of Insurance records as a qualified health care provider under a different assumed name (Eagle Valley Meadows), but failed to file a certificate of assumed name pursuant to Indiana Code section 23-15-1-1. As a result, the court reversed the trial court's dismissal of the complaint for lack of subject matter jurisdiction because "Eagle Valley Meadows" not "Eagle Care Healthcare" was a qualified health care provider.<sup>75</sup>

The court noted that the purpose of the filing requirement under Indiana Code section 23-15-1-1 is to "provide information to litigants and others as to the true party in interest when . . . business is done [under] an assumed name."<sup>76</sup>

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68. 813 N.E.2d 1195, 1199 (Ind. Ct. App. 2004).

69. *Id.* at 1197.

70. *Id.* at 1196-98.

71. *Id.* at 1198 (citing *LTV Steel Co. v. Griffin*, 730 N.E.2d 1251, 1260 (Ind. 2000)).

72. *Id.* at 1199.

73. *Id.*

74. 810 N.E.2d 1119, 1125 (Ind. Ct. App. 2004).

75. *Id.*

76. *Id.* at 1124 (citing *Aronson v. Price*, 644 N.E.2d 864, 868 (Ind. 1994)).

Generally, without strict compliance with the filing requirements, a party doing business with such a corporation cannot be charged with constructive notice of that corporation's use of an assumed name.<sup>77</sup> Here, because EagleCare failed to file an assumed business name, the plaintiff was not charged with constructive knowledge of its use of the name "Eagle Valley Meadows."

#### *D. Collateral Estoppel*

In *Infectious Disease of Indianapolis v. Toney, P.S.C.*, the court of appeals held that where a patient settled with another health care provider and received her full damages resulting from the claimed injury, she was collaterally estopped from collecting additional damages.<sup>78</sup> The case arose out of a spinal fusion surgery that Toney underwent at Orthopaedics Indianapolis. After the surgery, Toney developed an infection which worsened, and Toney underwent emergency debridement surgery. Dr. Douglas Webb of Infectious Disease of Indianapolis then became involved in Toney's treatment. In her complaint, Toney alleged that Orthopaedics was negligent in treating her wound infection, and its negligence necessitated another surgery and intravenous antibiotics. Toney also alleged Dr. Webb negligently treated her wound infection and was allegedly harmed by Dr. Webb's improper administration of antibiotics. Toney settled with Orthopaedics for \$100,000 and proceeded against the Patient's Compensation Fund for additional damages.<sup>79</sup> Toney presented evidence of all of her injuries, which the court noted was appropriate since an original tortfeasor is responsible for all damages flowing from its negligence.<sup>80</sup> The trial court found Toney's total damages amounted to \$725,000, which was less than the applicable medical malpractice cap.<sup>81</sup>

The court of appeals noted that "Toney had a full and fair opportunity to litigate her total damages arising from Orthopaedics' malpractice, which included the injuries she suffered as a result of Dr. Webb's alleged malpractice."<sup>82</sup> Thus, the court found an identity of issues as to damages and determined collateral estoppel barred any additional recovery for the same damages.<sup>83</sup>

Interestingly, although holding that Toney was precluded from recovering additional damages, the court concluded that Toney was not precluded from attempting to establish that Dr. Webb was liable for malpractice.<sup>84</sup> As such, the court recognized that notwithstanding the absence of any financial incentive, an injured plaintiff may desire to prove she has been wronged by another "to

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77. *Id.*

78. 813 N.E.2d 1223, 1231 (Ind. Ct. App. 2004).

79. *Id.* at 1225-26.

80. *Id.* at 1231.

81. *Id.* at 1226.

82. *Id.* at 1231.

83. *Id.*

84. *Id.*

achieve a catharsis of sorts.”<sup>85</sup>

*E. Single Occurrence with Injuries to Multiple Patients*

In *McCarty v. Sanders*, the court of appeals addressed several cases consolidated by the trial court in which it was alleged that a single occurrence of malpractice resulted in injuries to more than one victim.<sup>86</sup> The *Sanders* case involved alleged malpractice in the delivery of twins: one twin died and the other suffered brain damage. The mother also suffered various injuries. In the *Koehl* case, the plaintiffs alleged malpractice in the administration of thyroid treatments to Carla Koehl while she was pregnant with twins, which resulted in injuries to the twins. In *Thomas*, a nurse anesthetist negligently administered an epidural injection, resulting in the death of Kerry Thomas and injuries to her child who was delivered by caesarian section. In each of these three cases, the health care providers paid the equivalent of the maximum amount under the Medical Malpractice Act of \$100,000 for a single occurrence of malpractice. The individual claimants then made claims against the Patient’s Compensation Fund (“the Fund”) for damages in excess of the statutory cap paid by the health care providers. In asserting claims against the Fund, each individual made a separate claim under a separate cap.<sup>87</sup> The Commissioner of the Indiana Department of Insurance argued that settlement payments of the \$100,000 statutory cap should be made by the health care providers to each of the injured parties before they could seek excess damages from the Fund.<sup>88</sup>

The court of appeals held that a separate statutory cap on recovery from the Fund applies to each patient injured by a single occurrence of malpractice, but that health care providers are only required to pay \$100,000 for each occurrence.<sup>89</sup> The court based its decision on the plain meaning of the statute.<sup>90</sup> At the relevant time, Indiana Code section 34-18-14-3(a), unambiguously limited recovery for an “injury or death of a patient” to \$750,000, and subsection (b) limited the amount a provider must pay for “an occurrence of malpractice” to \$100,000. The court noted that the “occurrence” is the act of malpractice itself, and not the claimed injury.<sup>91</sup> The court also noted that as so interpreted, “the statute achieves the twin goals of compensating those injured by malpractice and at the same time assuring that malpractice insurance will be available to health care providers.”<sup>92</sup>

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85. *Id.*

86. 805 N.E.2d 894 (Ind. Ct. App. 2004).

87. *Id.* at 896-97.

88. *Id.* at 897.

89. *Id.* at 898-99.

90. *Id.*

91. *Id.* at 899.

92. *Id.*

## V. EQUITABLE ASSIGNMENT OF PROCEEDS

In *Midtown Chiropractic v. Illinois Farmers Insurance Co.*,<sup>93</sup> the Indiana Court of Appeals addressed an issue of first impression: whether an accident victim's assignment to a health care provider of the proceeds of a personal injury claim is a valid equitable assignment. As the court explained, the general proposition under Indiana law is that "torts for personal injuries and for wrongs done to the person, reputation, or feelings of the injured party are unassignable."<sup>94</sup> Over time, however, the list of types of torts that are not assignable has become increasingly narrow so that nonassignability is more the exception than the rule.<sup>95</sup>

As this was a case of first impression, the court looked beyond Indiana and reviewed cases that distinguished "between the assignment of a *claim* for personal injury and the assignment of the *proceeds* from such a claim."<sup>96</sup> The significance of this distinction is the effect of the assignment on control of the case. Where the *claim* is assigned, control transfers to the assignee, the contract appears to promote champerty, and is void as against public policy.<sup>97</sup> In contrast, the assignment of the *proceeds* of a claim does not transfer away any of the control over the case, and there is no reason it should be invalid.<sup>98</sup>

The court concluded that an accident victim's assignment to a health care provider of the proceeds of a personal injury claim is a valid equitable assignment.<sup>99</sup> In reaching this conclusion, the court noted that the ability to assign portions of the proceeds allows an injured person to hire an attorney through a contingency fee arrangement and also allows the plaintiff to pursue the action without the burden of medical bills associated with the accident. "If the assignment of those funds is not permitted, the health care provider may be forced to pursue its claim expeditiously against the patient, a likely effect of which will be to involve the patient in double litigation and put at risk the patient's personal assets."<sup>100</sup> Enforcing an assignment avoids this problem, provides some assurance of payment to the medical provider, and allows the patient a measure of financial stability.<sup>101</sup> Thus, the court recognized the assignment and proceeded to consider how it might be enforced.

An assignment vests equitable title to the assigned funds in the assignee.<sup>102</sup>

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93. 812 N.E.2d 851 (Ind. Ct. App. 2004).

94. *Id.* at 853 (citing *Allstate Ins. Co. v. Axsom*, 696 N.E.2d 482, 485 (Ind. Ct. App. 1998)).

95. *Id.* (citing *Allstate Ins. Co.*, 696 N.E.2d at 485; *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338, 340 (Ind. 1991)).

96. *Id.* at 854 (citing *Charlotte-Mecklenburg Hosp. Auth. v. First of Georgia Ins. Co.*, 455 S.E.2d 655, 657 (N.C.), *reh'g denied*, 458 S.E.2d 186 (N.C. 1995)).

97. *Id.* (citing *Charlotte-Mecklenburg Hosp. Auth.*, 455 S.E.2d at 655).

98. *Id.*

99. *Id.* at 855.

100. *Id.* (citing *Hernandez v. Suburban Hosp. Ass'n*, 572 A.2d 144, 148 (Md. 1990)).

101. *Id.*

102. *Id.* at 856 (citing *Hernandez*, 572 A.2d at 148).

When enforced in equity, equitable assignments to things that will be acquired in the future are deemed to attach to the funds when the funds come into being.<sup>103</sup> Thus, during the time between the execution of the assignment and the receipt of the proceeds, the assignee had a mere equitable assignment and once the proceeds were actually paid over, “the equitable title ripened into a legal title sufficient to sustain an action by the assignee” against the party in possession of the proceeds.<sup>104</sup> When an insurer pays a sum to an accident victim in disregard of an assignment, the assignment may be directly enforceable against the insurer.<sup>105</sup> The facts of the case before the court did not clearly provide a date upon which the insurer had been notified of the assignment, so the court reversed summary judgment and remanded for a determination whether the insurance company had notice of the assignment before settling with and paying the injured person.<sup>106</sup>

## VI. FRAUD AND MISREPRESENTATION

### A. *Knowing Misrepresentation*

In *Passmore v. Multi-Management Services, Inc.*, the Indiana Supreme Court held that former employers may be liable for knowing misrepresentation, adopting section 310 of the *Restatement (Second) of Torts*.<sup>107</sup> In this case, a nursing home hired an employee based in part on a favorable recommendation from his former employer, and the employee assaulted a patient. The patient argued that the former employer wrongly gave a favorable recommendation and should be liable for damages. The trial court granted summary judgment in favor of the former employer, which was affirmed by the Indiana Court of Appeals.<sup>108</sup>

In holding that there is a claim for conscious misrepresentation, the court stated “we can think of no reason why one who knowingly supplies false information in response to an employment inquiry should not be liable for physical injury that flows thereafter.”<sup>109</sup> The court adopted section 310 of the *Restatement* which defines liability as follows:

An actor who makes a misrepresentation is subject to liability to another for physical harm which results from an act done by the other or a third person in reliance upon the truth of the representation, if the actor

- (a) intends his statement to induce or should realize that it is likely to induce action by the other, or a third person, which involves an unreasonable risk of physical harm to the other, and

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103. *Id.* (citing *Methodist Hosp. of Ind., Inc. v. Town & Country Mut. Ins. Co.*, 197 N.E.2d 773, 779 (Ind. App. 1964)).

104. *Id.* at 856 (citing *Goldwater v. Nitzberg*, 292 N.Y.S. 119, 120 (Mun. Sup. Ct. 1936)).

105. *Id.* at 857.

106. *Id.*

107. 810 N.E.2d 1022, 1024 (Ind. 2004).

108. *Id.*

109. *Id.* at 1025.

- (b) knows
  - i. that the statement is false, or
  - ii. that he has not the knowledge which he professes.<sup>110</sup>

Although the court adopted the *Restatement*, it nevertheless affirmed summary judgment for the employer because the facts did not support a knowing misrepresentation.<sup>111</sup>

The court then considered whether to adopt section 311 of the *Restatement*, which, among other things, contemplates liability for injury caused by negligent employment references.<sup>112</sup> The court declined to adopt this section as it applies to employment references, observing that to do so would discourage former employers from providing information. As the court reasoned, “[on]ly those employers dull-witted enough to issue free-wheeling assessments without calling their lawyers would supply any but the most rudimentary information.”<sup>113</sup>

#### *B. Fraud Claim Against Minors Who Use False Identification*

As a matter of first impression, the court of appeals held that a bar stated a claim for fraud against minors who gained entry to the bar by presenting fraudulent identifications and signing false affidavits as to their ages.<sup>114</sup> In the *Millenium Club* case, the club operated a bar and restaurant, and the minors gained access to the bar by presenting false driver’s licenses and other means of false identification. The club was then charged by the Indiana Alcohol and Tobacco Commission and the State of Indiana for allowing the minors to gain access to the bar. The club filed small claims actions against Avila and other minors seeking \$3000 in damages, but the claims were dismissed for failure to state a claim.<sup>115</sup>

In reversing the dismissal, the court rejected the minors’ argument that the club’s fraud claim violates public policy. Although the court recognized the

110. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 310 (1965)).

111. *Id.* at 1026.

112. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 311 (1965)). Section 311 states that an entity may be liable for negligent misrepresentation when one negligently gives false information to another. That entity is subject to liability for physical harm caused by:

- [(1)] . . . action taken by the other in reasonable reliance upon such information, where such harm results:
  - (a) to the other, or
  - (b) to such third persons as the actor should expect to be put in peril by the action taken.
- (2) Such negligence may consist of failure to exercise reasonable care
  - (a) in ascertaining the accuracy of the information, or
  - (b) in the manner in which it is communicated.

RESTATEMENT (SECOND) OF TORTS § 311 (1965).

113. *Passmore*, 810 N.E.2d at 1028.

114. *Millenium [sic] Club, Inc. v. Avila*, 809 N.E.2d 906 (Ind. Ct. App. 2004).

115. *Id.* at 908-09.

public policy of “placing the burden of enforcing the underage drinking laws upon the taverns because the tavern is in the best position to prevent the violation and the public policy of barring the Club from shifting the liability for its own illegal actions to the Minors,” the court also recognized “the competing public policy that the Minors should be held accountable for their actions.”<sup>116</sup>

### *C. Fraud and Duty to Disclose*

In *American United Life Insurance Co. v. Douglas*,<sup>117</sup> employees of Computer Business Services, Inc. sued American United Life (“AUL”) for losses sustained by the company’s 401(k) plan based on the purchase of an AUL group annuity contract. Plaintiffs asserted several causes of action, including fraud for failure to disclose all material facts by one on whom the law imposes a duty to disclose. Whether there can be fraud for failure to disclose depends on whether there is a duty to disclose.<sup>118</sup> AUL argued that it had no duty to disclose because it had no fiduciary relationship with the plaintiffs because they were involved in an arms length transaction.

The court of appeals agreed that there was no fiduciary relationship, but explained that the existence of a fiduciary relationship is not the only basis for a claim of fraud.<sup>119</sup> Although AUL did not have a fiduciary relationship to plaintiffs, it claimed to have special knowledge as to matters of tax planning. The court stated that “AUL has the kind of superior knowledge of the subject which invokes a duty of good faith and fair dealing with the purchaser of its products, including the duty to disclose the nature of the investment[,] especially when it knew that it was selling a product for placement in a 401(k) plan.”<sup>120</sup> Accordingly, the court upheld the trial court’s denial of a motion for summary judgment on the fraud claim for alleged lack of duty.

AUL also argued on appeal that the alleged misrepresentations or omissions were matters of opinion, not fact, and thus not actionable in fraud. Fraud requires a misrepresentation of a material fact, and expressions of opinion generally cannot be the basis of fraud.<sup>121</sup> The court of appeals observed, however, that the omission in question was not a matter of the appropriateness or value of the annuities but the fact that any investment in a qualified plan is tax deferred and the independent tax deferral property of the annuity in question was unnecessary, which is a matter of law, not a matter of opinion.<sup>122</sup> The court noted that a misstatement of law cannot form the basis of fraud because everyone is presumed to know the law, but there is an exception for misstatements of law

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116. *Id.* at 914.

117. 808 N.E.2d 690 (Ind. Ct. App. 2004).

118. *Id.* at 701.

119. *Id.*

120. *Id.* at 703-04.

121. *Id.* at 703.

122. *Id.*

made by someone professing knowledge in legal matters.<sup>123</sup> The court held that this exception would extend here to AUL who proclaimed an expertise in retirement savings plans.<sup>124</sup> Thus, AUL could be held liable with respect to the alleged misrepresentations regarding the tax deferred nature of the plaintiffs' plan.<sup>125</sup>

## VII. PREMISES LIABILITY

### A. Duty of Landowner to Protect from Third Party Criminal Acts

In *Paragon Family Restaurant v. Bartolini*, the Indiana Supreme Court addressed what it termed a "procedural inconsistency" between prior supreme court cases dealing with the duty of a landowner to protect its invitees from foreseeable criminal attacks.<sup>126</sup> In *Paragon*, the plaintiff, Mario Bartolini, won a \$280,000 jury verdict against Paragon (d/b/a Round The Corner Pub) as a result of an assault on Bartolini by underage patrons of the pub in its parking lot. On appeal, the pub argued that it was entitled to judgment on the evidence because Bartolini failed to prove duty and proximate cause.

The court noted that landowners generally have a duty to take reasonable precautions to protect invitees from foreseeable criminal acts. It also noted that it held in *Northern Indiana Public Service v. Sharp*, that "an individualized judicial determination of whether a duty exists in a particular case is not necessary where such a duty is well-settled."<sup>127</sup> Therefore, there is usually no need to determine in each case what duty a business owner owes to its invitees because the law clearly recognizes a duty to use reasonable care to protect business invitees from injury caused by other patrons.

In noting the "procedural inconsistency" in its prior holdings, the court pointed to the *Sharp* case and three cases handed down together in 1999 which held that the determination of whether a landowner owed a duty of reasonable care to protect invitees against third parties depends on whether, under the totality of the circumstances, the criminal act was reasonably foreseeable.<sup>128</sup> In resolving this inconsistency, the court decided that *Sharp* controls, so that where there is a well-established duty, there is no need for a new judicial determination of duty.<sup>129</sup> Rather, the trial court must inform the jury of the applicable duty, and it is then for the jury to determine whether the duty is breached. The court further determined that such a duty was sufficiently established in *Paragon*

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123. *Id.* at 703-04.

124. *Id.* at 704.

125. *Id.*

126. 799 N.E.2d 1048, 1053 (Ind. 2003).

127. *Id.* at 1052 (citing *N. Ind. Pub. Serv. v. Sharp*, 790 N.E.2d 462, 465 (Ind. 2003)).

128. *Id.* (citing *L.W. v. W. Golf Ass'n*, 712 N.E.2d 983, 984-85 (Ind. 1999); *Vernon v. Kroger Co.*, 712 N.E.2d 976, 979 (Ind. 1999); *Delta Tau Delta v. Johnson*, 712 N.E.2d 968, 973 (Ind. 1999)).

129. *Id.* at 1053.

where a customer of the pub was assaulted in the parking lot as he was leaving.<sup>130</sup> The jury received instructions as to the general nature of the duty and was then able to determine whether the criminal attack on Bartolini was reasonably foreseeable and whether the pub failed to exercise reasonable care.<sup>131</sup>

Interestingly, in *Star Wealth Management Co. v. Brown*,<sup>132</sup> decided by the Indiana Court of Appeals after the supreme court decided *Paragon*, the court of appeals applied the “totality of the circumstances” test as set forth in *Delta Tau Delta*, *Kroger*, and *Western Golf*, to determine whether a security company, which had a contract with the landowner, had a duty to protect a tenant who was shot by a third party. The court affirmed summary judgment for the security company on the basis that it had no duty, stating “[a]pplying the totality of the circumstances test pursuant to our supreme court’s analysis and its application, we agree that the evidence presented to us does not show that the shooting of Hester was a reasonably foreseeable act such that Brown had a duty to protect Hester from that act.”<sup>133</sup>

#### *B. Duty-Control of the Premises*

In *Rhodes v. Wright*, the Indiana Supreme Court addressed the issue of duty in the context of whether the farmers or the buyer of chickens controlled the premises where and when the buyer’s truck driver was killed in an accident at the farm.<sup>134</sup> In that case, the Wrights owned the farm and raised chickens under a contract with Tyson Foods, Inc. Dwayne Gurtz, a truck driver for Tyson, was struck and killed by a forklift while he and other Tyson employees were at the farm picking up chickens. Gurtz parked his truck near one of the chicken houses and began unbooming chains from his trailer while another Tyson employee backed a forklift out of the chicken house. The forklift struck Gurtz from behind and pinned him between the forklift and trailer. At the time of the accident, it was dark and foggy, and there were no lights outside the chicken houses illuminating the area where the Tyson employees were loading.<sup>135</sup> Gurtz’s estate sued the Wrights for failure to light the loading area and failure to warn him.

The supreme court reversed the trial court’s grant of summary judgment for the farm owners, finding a factual dispute as to whether Tyson or the farm owner controlled the premises “where and when the accident occurred,” and that the jury should decide the issue.<sup>136</sup> Initially, the court noted that Indiana law, not the contract between Tyson and the farm, governed whether a duty exists.<sup>137</sup> The question of duty in the context of premises liability depends on whether the

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130. *Id.*

131. *Id.*

132. 801 N.E.2d 768 (Ind. Ct. App. 2004).

133. *Id.* at 773.

134. 805 N.E.2d 382 (Ind. 2004).

135. *Id.* at 384-85.

136. *Id.* at 386.

137. *Id.* at 385.

defendant controlled the premises. Generally, the question of duty is for the court to decide, but the existence of a duty may depend upon underlying facts which require resolution by the trier of fact.<sup>138</sup>

The court stated that “even if Tyson controlled the premises while it caught chickens, that would not automatically relieve Defendants of responsibility for injuries to Tyson’s employees” because the farm owners had always controlled the lighting and there was evidence that the lack of lighting may have contributed to the accident.<sup>139</sup> Although Tyson provided the farm with specifications for building the chicken houses, it had not prescribed any procedures for lighting.

In *Daisy v. Roach*, the Indiana Court of Appeals cited *Rhodes* in affirming the trial court’s grant of summary judgment in favor of a homeowner who was sued by an employee of an independent contractor who fell while climbing down a ladder when the ladder slid on ice.<sup>140</sup> Although noting that the ground was frozen and icy, the court of appeals stated that the cause of the accident was the failure of the employees of the independent contractor to safely secure the ladder. Accordingly, the landowner was not liable because there was no assertion that the landowner had any control over the manner in which the ladder was used.<sup>141</sup>

### C. Acceptance Rule

Since 1896, Indiana law has recognized the acceptance rule.<sup>142</sup> In general, this rule provided that “contractors do not owe a duty of care to third parties after the owner has accepted the work.”<sup>143</sup> In *Peters v. Forster*, the Indiana Supreme Court abandoned this “outmoded relic”<sup>144</sup> in favor of the “so-called ‘modern rule’ or ‘foreseeability doctrine.’”<sup>145</sup>

Reviewing the history of the acceptance rule, the court noted the primary reasons supporting the rule were: “(1) the application of the doctrine of privity to cases involving negligence; and (2) the owner’s control of the entity when the injury occurred.”<sup>146</sup> Since the adoption of the acceptance rule, however, the privity of contract requirement in the law of negligence has largely eroded. In 1997, the Indiana Supreme Court removed the privity requirement from personal injury actions for defective products.<sup>147</sup> Despite that change in products liability law, Indiana continued to allow privity as an absolute defense for contractors,

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138. *Id.* at 385-86.

139. *Id.* at 386.

140. 811 N.E.2d 862 (Ind. Ct. App. 2004).

141. *Id.* at 866-67.

142. *Peters v. Forster*, 804 N.E.2d 736, 738-40 (Ind. 2004) (citing *Daugherty v. Herzog*, 44 N.E. 457 (Ind. 1896)).

143. *Id.* (quoting *Blake v. Calumet Constr. Corp.*, 674 N.E.2d 167, 170 (Ind. 1996); *Citizens Gas & Coke Util. v. Am. Econ. Ins. Co.*, 486 N.E.2d 998, 1000 (Ind. 1985)).

144. *Id.* at 737.

145. *Id.* at 741.

146. *Id.* at 739-40 (citations omitted).

147. *Id.* at 740 (citing *Perdue Farms, Inc. v. Pryor*, 683 N.E.2d 239, 241 (Ind. 1997)).

subject to numerous exceptions.<sup>148</sup> Similarly, the “control” rationale for the acceptance rule had also waned in importance as courts began to recognize that the rule shifted responsibility from a negligent party to an innocent one who had paid the negligent party for services based on the negligent party’s perceived expertise and knowledge.<sup>149</sup>

The court quoted Professor Prosser<sup>150</sup> and the Restatement (Second) of Torts,<sup>151</sup> as examples reflecting the modern trend, abandoned the acceptance rule, and endorsed the “better view” that there are insufficient grounds to differentiate between a manufacturer of goods and a building contractor.<sup>152</sup> The court explained that the new rule, consistent with traditional principles of Indiana negligence law:

provides that a builder or contractor is liable for injury or damage to a third person as a result of the condition of the work, even after completion of the work and acceptance by the owner, where it was reasonably foreseeable that a third party would be injured by such work due to the contractor’s negligence.<sup>153</sup>

The court hastened to add that the rule did not create absolute liability for the contractor, but was instead predicated upon negligence and required proof of duty, breach of duty, and injury proximately caused by the breach.<sup>154</sup>

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148. *Id.* The exceptions included situations where (1) the contractor turns over work in a dangerously defective, inherently dangerous, or imminently dangerous condition that is dangerous to human life or where (2) “the thing sold or constructed [is] not imminently dangerous to human life, but may become such by reason of some concealed defect” known to the vendor or constructor and fraudulently concealed. *Id.* (citing *Citizens Gas*, 486 N.E.2d at 1000; *Holland Furnace Co. v. Nauracaj*, 14 N.E.2d 339, 342 (Ind. App. 1938)). The court also noted other exceptions that had not been applied in Indiana. *See id.* at 741 n.5 (citing 41 AM. JUR. 2D *Independent Contractors* § 74 (1995)).

149. *Id.* (quoting *Pierce v. ALSC Architects, P.S.*, 890 P.2d 1254, 1262 (Mont. 1995)).

150. *Id.* at 742 (quoting W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 104A at 723 (5th ed. 1984)) (“It is now the almost universal rule that the contractor is liable to all those who may foreseeably be injured by the structure, not only when he fails to disclose dangerous conditions known to him, but also when the work is negligently done. This applies not only to contractors doing original work, but also to those who make repairs, or install parts, as well as supervising architects and engineers. There may be liability for negligent design, as well as for negligent construction.”).

151. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 385 (1965)) (“One who on behalf of the possessor of land erects a structure or creates any other condition thereon is subject to liability to others upon or outside of the land for physical harm caused to them by the dangerous character of the structure or condition after his work has been accepted by the possessor, under the same rules as those determining the liability of one who as manufacturer or independent contractor make a chattel for the use of others.”).

152. *Id.*

153. *Id.*

154. *Id.* at 737-38.

The court then applied the rule to the facts before it. There, the plaintiff, a guest of the homeowners, sued an independent contractor for negligently installing a ramp access to the home. The ramp had been built and installed at another residence and, after its prior user passed away, the homeowners purchased the ramp and paid the defendant, an independent contractor, to transport the ramp to the homeowner's property and attach it to the front of their house. At the time the ramp was installed, the contractor was aware that it did not meet building codes for a wheelchair ramp, but was unaware of requirements for other types of ramps. After installation, the homeowners' daughter attached carpeting to the ramp. The plaintiff was injured leaving the residence when he slipped and fell on the ramp.<sup>155</sup>

On appeal, the contractor argued that the chain of causation was broken between his action and the plaintiff's injury by (1) the homeowner's control of the ramp, (2) the addition of the carpet to the ramp by the homeowners' daughter, or (3) the lack of evidence that the ramp was likely to cause injury.<sup>156</sup> The court viewed this as a proximate cause issue. Noting a rigorous definition of proximate cause is elusive, the court defined it as "that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the result complained of and without which the result would not have occurred."<sup>157</sup> The foreseeability of an intervening cause and whether the defendant's conduct is the proximate cause of an injury are questions of fact for a jury to decide. Thus, while the court found that the contractor owed a duty of reasonable care, it could not determine as a matter of law either the breach of duty or proximate cause issues and reversed the grant of summary judgment.<sup>158</sup>

#### D. *Res Ipsa Loquitur*

In *Rector v. Oliver*,<sup>159</sup> the Indiana Court of Appeals extensively reviewed the relationship between the doctrine of *res ipsa loquitur* and premises liability. The plaintiff was injured when a light fixture fell from the ceiling of defendant's store and struck the plaintiff on the head and shoulder.<sup>160</sup> The plaintiff's complaint alleged separate claims based on negligence and the doctrine of *res ipsa loquitur*.<sup>161</sup>

The court explained that the doctrine of *res ipsa loquitur* "is a rule of evidence which permits an inference of negligence to be drawn based upon the surrounding facts and circumstances of the injury."<sup>162</sup> The effect of the doctrine is to allow negligence, like any other fact or condition, to be proven by

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155. *Id.*

156. *Id.* at 743.

157. *Id.* (quoting *Orville Milk Co. v. Beller*, 486 N.E.2d 555, 559 (Ind. Ct. App. 1985)).

158. *Id.*

159. 809 N.E.2d 887 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 981 (Ind. 2004).

160. *Id.* at 888.

161. *Id.* at 889.

162. *Id.* (quoting *K-Mart Corp. v. Gipson*, 563 N.E.2d 667, 669 (Ind. Ct. App. 1990)).

circumstantial evidence and requires the plaintiff to establish: “(1) that the injuring instrumentality was within the exclusive management and control of the defendant or its servants, and (2) that the accident is of the type that does not ordinarily happen if those who have the management and control exercise proper care.”<sup>163</sup> The doctrine is designed to allow an inference of negligence to be drawn when direct evidence is lacking, but it does not allow the plaintiff to win by default.<sup>164</sup> The doctrine is not a distinct cause of action.

The court rejected the plaintiff’s argument that premises liability cases referenced by the defendant had no bearing on the issues on appeal, explaining that *res ipsa loquitur* and premises liability are “not entirely unrelated”:

Indeed, it is not hard to imagine that if a plaintiff is injured by an instrumentality in the exclusive control and management of the defendant, that the plaintiff might often be on the premises of the defendant. In other words, premises liability and *res ipsa loquitur* are not two entirely different beasts. The doctrine of *res ipsa loquitur* is not a separate cause of action, but is instead a rule of evidence whereby under certain circumstances, negligence may be inferred. Premises liability is also a concept related to negligence law.

Furthermore, the position adopted from the Restatement (Second) of Torts in *Burrell* . . . states that 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, the conditions listed therein are met. To say that a premises owner may be liable under the doctrine of *res ipsa loquitur* when they could not be liable under the premises liability standard would seem to fly in the face of the standard adopted in *Burrell*. . . .<sup>165</sup>

In order to establish the applicability of the doctrine to the facts of the case, the plaintiff must demonstrate exclusive control by the defendant *at the time* of the alleged negligent act.<sup>166</sup> The court rejected the requirement that the defendant must have installed the instrumentality in order to establish exclusive control before the jury might infer negligence.<sup>167</sup> Rather, the court explained a jury may weigh facts related to installation as part of its decision whether the negligence was in the installation or maintaining of the instrumentality.<sup>168</sup>

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163. *Id.* at 890 (citing *K-Mart Corp.*, 563 N.E.2d at 669).

164. *Id.* at 891.

165. *Id.* at 894-95 (citing *Burrell v. Meads*, 569 N.E.2d 637, 639-40 (Ind. 1991)).

166. *Id.* at 892 (quoting *Aldana v. Sch. City of E. Chicago*, 769 N.E.2d 1201, 1207 (Ind. Ct. App. 2002)).

167. *Id.* at 891.

168. *Id.* at 892.

## VIII. TORT CLAIMS ACT/GOVERNMENTAL IMMUNITY

## A. Law Enforcement Immunity

The Indiana Court of Appeals handed down several decisions interpreting “law enforcement immunity” under the Indiana Tort Claims Act (“ITCA”). Indiana Code section 34-13-3-3 provides for immunity as follows:

A governmental entity or an employee acting within the scope of the employee’s employment is not liable if a loss results from the following:

...

(8) The adoption and enforcement of or failure to adopt or enforce a law (including rules and regulations), unless the act or enforcement constitutes false arrest or false imprisonment.<sup>169</sup>

In *St. Joseph County Police Department v. Shumaker*, the Indiana Court of Appeals found that the police department was entitled to immunity under this provision in a suit for negligence alleging that the police department released a suspect without requiring him to post a bond that should have been posted, after which he committed several murders.<sup>170</sup> In addressing the immunity issue, the court of appeals first noted that the scope of “law enforcement immunity” has been changed by the courts over the years and outlined the history of the provision’s interpretation since its inception.<sup>171</sup>

The court described the scope of “law enforcement immunity” as follows:

We therefore conclude that the “enforcement” spoken of in what is now Section 3(8) of the ITCA means compelling or attempting to compel the obedience of *another* to laws, rules, or regulations, and the sanctioning or attempt to sanction a violation thereof. It would also, by the plain meaning of the statute, include the failure to do such. However, it does not include compliance with or following of laws, rules, or regulations by a governmental unit or its employees. Neither does it include failure to comply with such laws, rules, or regulations. Moreover, a governmental entity will be immune only for adopting, or enforcing, or failure to adopt or enforce, a law, rule, or regulation within the scope of the entity’s purpose of operational power.<sup>172</sup>

In applying these principles to the facts, the court held that the police department was immune.<sup>173</sup> The court noted that the plaintiffs claimed that the department negligently released an individual without posting the proper bond,

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169. IND. CODE § 34-13-3-3 (2004).

170. 812 N.E.2d 1143 (Ind. Ct. App. 2005).

171. *Id.* at 1146-50.

172. *Id.* at 1150.

173. *Id.* at 1151.

which necessarily alleged that it failed to enforce the law. The court also noted that the department is within the scope of Section 3(8) immunity here because the department's "operational purpose or mission" includes the enforcement of bond orders and running the jail.<sup>174</sup>

In *Daggett v. Indiana State Police*, which was handed down on the same day as *Shumaker*, the Indiana Court of Appeals held the Indiana State Police immune under section 3(8) where the plaintiff claimed that he was injured when police restrained him while responding to an emergency medical call.<sup>175</sup> In *Daggett*, the police were called to the scene by paramedics who were responding to an emergency call because the plaintiff was combative with paramedics such that they could not treat him.<sup>176</sup> In finding the officer's conduct immune, the court reasoned that when law enforcement officers respond to a request to help restrain combative patients, the officers are enforcing the law to the extent they are preventing the patient from injuring himself or the medical personnel.<sup>177</sup> The court rejected the plaintiff's arguments that he could not have formed the intent necessary to commit a crime because he was having a seizure at the time and that no criminal charges were ultimately filed against him. The court responded that section 3(8) does not require that a law enforcement officer first arrest someone before the officer's actions can be immune and that plaintiff's criminal intent (or lack thereof) was irrelevant to whether the officer's actions were immune.<sup>178</sup>

In *Linden v. Health Care 2000, Inc.*, which was decided prior to *Shumaker*, the court of appeals determined that section 3(8) immunity applied where insureds filed a class action suit against various Commissioners of the Indiana Department of Insurance for failing to enforce laws prohibiting Health Care 2000 from operating as an HMO without a certificate of authority.<sup>179</sup> The court also held that law enforcement immunity extended to the plaintiffs' claim of failure to warn them of the HMO's illegal activities.<sup>180</sup>

#### *B. Sufficiency of Tort Claim Notice*

In *Howard County Board of Commissioners v. Lukowiak*, the Indiana Court of Appeals addressed the sufficiency of a tort claims notice.<sup>181</sup> Under the Tort Claims Act, in order to make a claim against a political subdivision, a claimant must provide the political subdivision with notice 180 days after the loss occurs.<sup>182</sup> The notice must include the circumstances in which the loss arose, the extent of the loss, the time and place of the loss, the names of all persons

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174. *Id.* at 1150-51.

175. 812 N.E.2d 1151 (Ind. Ct. App. 2004).

176. *Id.*

177. *Id.* at 1153.

178. *Id.*

179. 809 N.E.2d 929, 935 (Ind. Ct. App. 2004).

180. *Id.*

181. 810 N.E.2d 379 (Ind. Ct. App. 2004).

182. *Id.* at 381 (citing IND. CODE § 34-13-3-8).

involved if known, the amount of damages sought, and the residence of the claimant at the time of the loss and the time of the notice.<sup>183</sup> Initially, the court rejected the Board's argument that the plaintiffs did not provide proper notice where the tort claims notice was sent on behalf of the plaintiffs by a claims representative of the plaintiffs' insurer.<sup>184</sup>

The court then addressed whether the tort claims notice provided information regarding the plaintiffs' damages with sufficient specificity. Generally, a tort claims notice is sufficient if it "substantially complies with the content requirements of the statute."<sup>185</sup> The notice provided on behalf of Kellie and Paul Lukowiak stated that they suffered damages to their vehicle and the amount of such damages. It also stated that medical expenses were anticipated, although the notice did not specify the injury. The court found that this put the Board on notice that Kellie suffered an injury and would likely seek compensation for medical treatment. However, the court found that there was no way in which the notice could be construed to include Kellie's claim for lost wages or Paul's claim for loss of consortium.<sup>186</sup> On rehearing, the court clarified that the notice of claim was sufficient to notify the Board of Kellie's claim for medical expenses, but that it was not adequate notice of personal injury damages in excess of medical expenses.<sup>187</sup>

### C. Choice of Law—Dépeçage

*Simon v. United States*<sup>188</sup> presented two certified questions to the Indiana Supreme Court from the Third Circuit Court of Appeals based upon choice of law analysis. The case involved a wrongful death suit related to the crash of a small private aircraft which began its flight in Pennsylvania, included an overnight stop in Ohio, and ended in Kentucky while attempting to land. The plane never flew over Indiana airspace. Two of the passengers lived in Pennsylvania and one lived in Georgia; the pilot lived in New Jersey but worked in Pennsylvania. The plane was owned by a Delaware-based, wholly owned subsidiary of a company incorporated in Pennsylvania, where the plane was hangared.<sup>189</sup> There were four wrongful death complaints filed in federal court; two were later settled. The remaining two were pending on interlocutory appeal when the Third Circuit certified two questions of law to the Indiana Supreme

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183. *Id.* (citing IND. CODE § 34-13-3-10).

184. *Id.* at 381-82. However, the court advised that it did not address whether it is appropriate for a claims representative to "represent" a claimant for purposes of providing a tort claims notice and whether such action constitutes the unauthorized practice of law. *Id.* at 382 n.1. The court stated that if such action does constitute the unauthorized practice of law, it is for the Indiana Supreme Court to enjoin such conduct or the prosecutor to seek criminal charges.

185. *Id.* at 382 (citing *Collier v. Prater*, 544 N.E.2d 497, 499 (Ind. 1989)).

186. *Id.* at 383.

187. *Howard County Bd. of Comm'rs v. Lukowiak*, 813 N.E.2d 391, 393 (Ind. Ct. App. 2004).

188. 805 N.E.2d 798 (Ind. 2004).

189. *Id.* at 800.

Court: (1) whether a true conflict of law exists between Indiana's and the District of Columbia's choice of law rules; and (2) if so, how should a split among the choice of law factors identified in *Hubbard Manufacturing Co., Inc. v. Greeson*<sup>190</sup> be resolved and which jurisdiction's substantive law would Indiana apply under the facts of the case?

Accepting the certification, the court concluded that a true conflict exists between the two jurisdictions because D.C.'s choice-of-law rules permit *dépeçage* and Indiana's do not.<sup>191</sup> Indiana courts apply the *lex loci delicti* rule, applying the law of the state in which the tort was committed.<sup>192</sup> On certification, the plaintiff argued that Indiana liberalized the *lex loci* rule in *Hubbard* and implicitly adopted *dépeçage* by its use of "language similar to that used in the Restatement (Second) of Conflict of Laws" and by reference to factors listed in the Restatement as factors courts might consider.<sup>193</sup> *Dépeçage* is the process of analyzing different issues within the same case separately under the laws of different states.<sup>194</sup> The Indiana Supreme Court rejected the plaintiff's argument, explaining that references to factors from the Restatement were "mere examples" of factors the court might consider and were not an exclusive list. Second, the court noted that using language similar to the Restatement does not amount to an adoption of *dépeçage*, a matter not even contemplated in that appeal.<sup>195</sup> The *dépeçage* issue demonstrated a true conflict of laws between Indiana and D.C.

The court next applied Indiana's choice-of-law analysis to address what law should be applied, explaining that the court must determine preliminarily whether the differences between the laws of the states are "important enough to affect the outcome of the litigation."<sup>196</sup> If such a conflict exists, there is a presumption that *lex loci delicti* will apply; and the court will apply the substantive law of the state where the last event necessary to make an actor liable for the alleged wrong occurs.<sup>197</sup> This presumption may be overcome if the court is persuaded that "the place of the tort 'bears little connection' to this legal action."<sup>198</sup> Although the parties argued that either Indiana or Pennsylvania law should be applied, the court concluded under *lex loci delicti* that Kentucky law should be applied, as that is where the plane crashed and the decedents died.<sup>199</sup> Under the facts, however, Kentucky is insignificant to the action. Therefore, the court considered the second step of the *Hubbard* analysis, applying the law of the state with the most significant relationship to the case.<sup>200</sup> Considering the three factors

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190. 515 N.E.2d 1071 (Ind. 1987).

191. *Simon*, 805 N.E.2d at 803.

192. *Id.* at 802.

193. *Id.*

194. *Id.* at 801.

195. *Id.* at 802.

196. *Id.* at 805 (quoting *Hubbard*, 515 N.E.2d at 1073).

197. *Id.*

198. *Id.* (quoting *Hubbard*, 515 N.E.2d at 1074).

199. *Id.* at 806.

200. *Id.*

*Hubbard* suggests might be relevant—“(1) the place [or places] where the conduct causing the injury occurred; (2) the residence or place of business of the parties; and (3) the place where the relationship is centered”—the court concluded the “gravamen of this case is the allegedly negligent conduct.”<sup>201</sup> Thus, the most important relevant factor is where the conduct causing the injury occurred because an individual’s actions and the recovery based on those actions should be governed by the law in the state in which he acts.<sup>202</sup> Here, the negligent conduct occurred in both Indiana and D.C., but the conduct in Indiana was more proximate to the harm, so Indiana law would apply.<sup>203</sup>

#### IX. WORKERS’ COMPENSATION

During the survey period, the Indiana Supreme Court addressed the application of the Worker’s Compensation Act<sup>204</sup> on four significant occasions. The court first addressed authorization of medical care and then, in a trilogy of cases handed down on one day, clarified standards for determining whether injuries “arose out of” and “in the course of” employment under the Worker’s Compensation Act.

##### *A. Authorization for Medical Care*

In the first case, *Daugherty v. Industrial Contracting & Erecting*,<sup>205</sup> an employee injured on the job underwent knee replacement surgery without prior approval from the employer. Although the Worker’s Compensation Board found the surgery was reasonable and appropriate, it declined to award payment for it since the employee did not have his employer’s authorization before the surgery.<sup>206</sup> The employee appealed and a divided panel of the Indiana Court of Appeals affirmed.

Granting transfer, the supreme court reversed. After quoting the relevant statute, the court recited the general rule that an employee is not free to elect at his employer’s expense additional treatment or other doctors not tendered by the employer.<sup>207</sup> Nevertheless, the court noted three circumstances under which the employee may select medical treatment: “(1) in an emergency; (2) if the employer fails to provide needed medical care; or (3) for other good reason.”<sup>208</sup> The court recognized that an employee who pursues other treatment than that provided by the employer does so at his or her own peril and risks not being reimbursed. The mere fact that the additional medical treatment is an acceptable

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201. *Id.*

202. *Id.* at 807.

203. *Id.*

204. IND. CODE § 22-3-1-1 to -12-5 (2004).

205. 802 N.E.2d 912 (Ind. 2004).

206. *Id.* at 914.

207. *Id.* at 915 (citing IND. CODE § 22-3-3-4).

208. *Id.* at 916 (citing IND. CODE § 22-3-3-4(d); *Richmond State Hosp. v. Walden*, 446 N.E.2d 1333, 1336 (Ind. Ct. App. 1983)).

method of treatment does not mean that the employer should be required to pay.<sup>209</sup> Instead, the court adopted a test set out by the Virginia Court of Appeals, applying a similar Worker's Compensation Statute to a case where the injured employee sought treatment without a referral where there was no emergency:

[I]f the employee, without authorization but in good faith, obtains medical treatment different from that provided by the employer, and it is determined that the treatment provided by the employer was inadequate treatment for the employee's condition and the unauthorized treatment received by the claimant was medically reasonable and necessary treatment, the employer should be responsible, notwithstanding the lack of prior approval by the employer. These legal principles which provide a basis for the payment of unauthorized medical treatment are part of the "other good reasons test."<sup>210</sup>

In addition to adopting this test, the court noted it was consistent with the longstanding rule in this state that the Act should be liberally construed to "effectuate the humane purposes of the Act."<sup>211</sup> Although reimbursement for care not authorized should be a rare exception, if the employee can demonstrate good reason for the unauthorized care, then subject to the approval of the Board, the employer will be held responsible for payment.<sup>212</sup> On the evidence in the record, the unauthorized medical care fell under the "other good cause" exception because the employee still suffered pain and was unable to return to work after the approved treatment (showing the treatment was inadequate), he sought approval before he acted (showing his good faith), and, although it refused to direct payment, the Board had found the care "reasonable and appropriate."<sup>213</sup>

#### *B. Injuries "Arising Out Of" and "In The Course Of" Employment*

In *Bertoch v. NBD Corp.*,<sup>214</sup> a security guard suffered a fatal heart attack while working in that position in a building where a fire had occurred. The guard's body was found by firefighters on the landing between the tenth and eleventh floors. There was evidence on the twelfth floor of a fire in the elevator-switching panel that had "self-extinguished."<sup>215</sup> His widow filed an Application for Adjustment of Claim with the Worker's Compensation Board. A single member of the Board heard the claim and awarded full death benefits, finding that the death occurred as a result of the guard's response to a fire alarm in the building, which produced a "psychological shock, which required unusual

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209. *Id.* at 917.

210. *Id.* at 918 (quoting *Shenandoah Prods., Inc. v. Whitlock*, 421 S.E.2d 483, 486 (Va. Ct. App. 1992)).

211. *Id.* at 919 (quoting *Talas v. Correct Piping Co.*, 435 N.E.2d 22, 28 (Ind. 1982)).

212. *Id.*

213. *Id.*

214. 813 N.E.2d 1159 (Ind. 2004).

215. *Id.* at 1160.

physical exertion beyond his routine employment.”<sup>216</sup> The employer requested review. The Board reversed the single member, finding the timing of the heart attack was “coincidence,” and concluded that the guard’s death did not arise out of his employment.<sup>217</sup> The Indiana Court of Appeals affirmed in an unpublished opinion. The Indiana Supreme Court granted transfer and reversed.

The Act provides for compensation of injury or death arising out of and in the course of employment.<sup>218</sup> The court of appeals had determined that the evidence regarding the location of the guard’s body supported an inference that he had been investigating the fire without waiting for the fire department, an act beyond his required duties as his job description required him to call 911 in the event of a fire.<sup>219</sup>

The Indiana Supreme Court rejected this analysis, explaining that “[a]n action that directly or indirectly advances an employer’s interest or is for the mutual benefit of the employer and employee may be incidental to and arise in the course of employment.”<sup>220</sup> The court further explained that an employee is acting within the scope of his employment “when he does something that a reasonable person would do or would be expected to do under the circumstances.”<sup>221</sup> Rescue and emergency responses are often found to be within the scope of employment, even if they are not specific duties of the employee. Thus, a response to the fire was within the scope of the guard’s employment. Although there was no direct evidence that the guard was responding to the fire, the circumstances certainly suggested it and that was the conclusion the Board drew. Thus, the injury arose “in the course of employment.”

Next the court considered whether it arose “out of” employment. “An injury ‘arises out of’ employment when a causal nexus exists between the injury or death and the duties or services performed by the injured employee.”<sup>222</sup> Because the evidence showed the guard had a pre-existing heart condition, the court of appeals reasoned that he “must demonstrate that his heart failure was either preceded by some untoward or unexpected incident, or resulted from the aggravation of a previously deteriorated heart or blood vessel.”<sup>223</sup> The supreme court rejected this as “too restrictive,” reiterating its previous rejection of the “untoward or unexpected incident”<sup>224</sup> requirement in *Evans v. Yankeetown Dock Corp.*<sup>225</sup> Even when an employee has a pre-existing condition that contributes to his injury, the employee is still “entitled to recover for the full extent of the injury, including an aggravation or triggering of a pre-existing injury, causally

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216. *Id.*

217. *Id.*

218. *Id.* at 1160-61 (citing IND. CODE § 22-3-2-2 (1998)).

219. *Id.* at 1161.

220. *Id.* (citing *Ind. & Mich. Elec. Co. v. Morgan*, 494 N.E.2d 991, 994 (Ind. Ct. App. 1986)).

221. *Id.* (citing *Prater v. Ind. Briquetting Corp.*, 251 N.E.2d 810, 813 (Ind. 1969)).

222. *Id.* (citing *Milledge v. The Oaks*, 784 N.E.2d 926, 929 (Ind. 2003)).

223. *Id.* at 1162.

224. *Id.*

225. 491 N.E.2d 969, 974 (Ind. 1986).

connected with the employment.”<sup>226</sup> Finally, the court explained that the dispositive question is not “whether an injury resulted from an unusual event,” but rather is “merely whether the injury itself was unexpected.”<sup>227</sup>

The court found that the evidence led to a result contrary to the Board’s findings and concluded: “[a]lthough [the guard] suffered from a severe preexisting condition, the expert medical opinions and the circumstances surrounding his death are compelling evidence that the fire and his attempted response to it aggravated his condition and ultimately contributed to his fatal heart attack.” Therefore, his claim was compensable under the Act.<sup>228</sup>

In *Global Construction, Inc. v. March*,<sup>229</sup> the employee was leaving the foundry where he was assigned by his employer when he was injured by strikers.<sup>230</sup> The evidence showed that, when the employee was leaving work after finishing his shift, a large number of picketing strikers were congregated in a parking lot across from the employee exit, shining headlights at the gate to impair the vision of those trying to exit the foundry. Shortly after the employee exited the gate, his vision was blinded and his vehicle was struck by an object. When a second object struck and cracked the employee’s windshield, he stopped his vehicle, backed up, and either got out or was pulled out of his vehicle. A verbal confrontation ensued, followed by an attack on the employee, who was repeatedly struck with a 2 x 4 board and, as a result, suffered significant injuries.<sup>231</sup> The employee filed a claim for workers’ compensation, and the Board entered judgment for the employee, finding the injuries arose out of and in the course of his employment. The court of appeals reversed, finding that the injury neither “arose out of” nor occurred “in the course of” his employment.<sup>232</sup> The Indiana Supreme Court granted transfer and reversed the court of appeals.

Here, the employer argued that the injuries did not fall within the scope of the Act because the employee “was not on the employer’s premises, had already completed his work, and was not performing any employment duties.”<sup>233</sup> Noting that, in general, injuries sustained en route to or from the workplace are not covered by the Act, the court explained that employment “necessarily includes a reasonable amount of time and space before and after ceasing actual employment, having in mind all the circumstances connected with the accident.”<sup>234</sup> Referencing cases where parking lots, private drives, and even streets separating a work place from an employer-provided parking lot have all been held to be extensions of work premises for purposes of the Act due to the

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226. *Bertoch*, 813 N.E.2d at 1162 (citing *Hansen v. Von Duprin, Inc.*, 507 N.E.2d 573, 576 (Ind. 1987)).

227. *Id.* (citing *Evans*, 491 N.E.2d at 975; *Hansen*, 507 N.E.2d at 577).

228. *Id.* at 1163.

229. 813 N.E.2d 1163 (Ind. 2004).

230. *Id.* at 1165.

231. *Id.*

232. *Id.* at 1166.

233. *Id.*

234. *Id.* at 1167 (quoting *Reed v. Brown*, 152 N.E.2d 257, 259 (Ind. App. 1958)).

employer's control,<sup>235</sup> the court concluded similar reasoning applied to this case. Here, the employee "was injured while leaving work using the only available means of egress from the employer's parking lot . . . [which] exposed him to a danger specifically related to [his] employment—passing through a group of agitated striking workers."<sup>236</sup> Rejecting the employer's argument that the risk of injury was not peculiar to the employee, but instead posed a threat to all who used the street, the court stated "it [was] obvious that a worker exiting a plant under picketing is at greater risk than a passing motorist" and concluded, "[u]nder these circumstances, the area where the strikers [were] gathered [was] for all practical purposes an extension of the workplace" and the employee "was not on his own time until he was freed of the stress of exiting."<sup>237</sup>

Similar to its process in *Bertoch*, the court considered whether the employee's response was "within the range of reasonable responses," concluding that even if the employee's act of getting out of his truck was contrary to orders, it was "a predictable response to a plainly stressful situation created by the circumstances of his employment," and strict conformance to formal instructions is not required "when faced with sudden and intentional wrongful conduct from others."<sup>238</sup> The court acknowledged that, although "arising from" and "in the course of" are usually discussed as independent factors, "in practice the two 'are not, and should not be, applied entirely independently.'"<sup>239</sup>

Finally, the court considered whether there was a causal connection between the injury and the worker's employment, which is necessary to establish a compensable injury under the Act. The employer argued that the injury occurred because of the employee's decision to get out of his truck and confront the strikers. Although the court agreed that if an employee involved in an altercation is found to be the aggressor, he may be denied compensation, it disagreed with the application of this rule in this case as the Board found that the employee did not instigate a physical confrontation.<sup>240</sup> The court explained that "[o]ne basis to establish a causal connection is to show the injury resulted from a risk specific to the employment."<sup>241</sup> "The pivotal question is whether the person's employment increased the hazard that led to the injury."<sup>242</sup> Thus, the court concluded that "the same chain of events that place[d] [the employee] in the course of his employment also establishe[d] that his injuries arose from his

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235. *Id.* (citing *Clemans v. Wishard Mem'l Hosp.*, 727 N.E.2d 1084, 1087 (Ind. Ct. App. 2000); *Reed*, 152 N.E.2d at 259).

236. *Id.*

237. *Id.*

238. *Id.* at 1168.

239. *Id.* (quoting ARTHUR LARSON & LEX K. LARSON, *LARSON'S WORKERS' COMPENSATION LAW* § 29.01, at 29-1 (2004)).

240. *Id.* (quoting *Berryman v. Fettig Canning Corp.*, 399 N.E.2d 840, 843 (Ind. Ct. App. 1980)).

241. *Id.* at 1169 (quoting *Wine-Settergren v. Lamey*, 716 N.E.2d 381, 389 (Ind. 1999)).

242. *Id.* (quoting *Segally v. Ancerys*, 486 N.E.2d 578, 581 (Ind. Ct. App. 1985)).

employment.”<sup>243</sup>

In the third of the trilogy of cases, *Knoy v. Cary*,<sup>244</sup> the Indiana Supreme Court considered employer-sponsored activities. In this case, the employer adopted a “master plan” which had as one of its goals to work with local environmental groups. Toward this goal, it coordinated a “clean up project” at a local park, posted notice of the project on a company bulletin board, and supplied equipment, work gloves, food, and beverages to those working the project. The company publicized the event in the newspaper.<sup>245</sup> The plaintiff sued his co-worker for injuries incurred when a tractor driven by the co-worker malfunctioned during the after-hours community service project. The co-worker moved to dismiss based upon the theory that the plaintiff’s exclusive remedy was through the Worker’s Compensation Act.<sup>246</sup>

Comparing cases in which the courts have found injuries incurred during company-sponsored “social” events, such as parties and recreational outings, to be compensable under the Act as they are intended to foster goodwill among the employees, the court noted that events such as the company-sponsored clean up project are calculated to foster a business benefit, namely goodwill within the community.<sup>247</sup> Although attendance was not mandatory, it was encouraged through the posting of notices and invitations to participate, as well as by providing the tools and refreshments. The court rejected the court of appeals’ focus on the voluntary nature of the activity and concluded that mandatory attendance is not required.<sup>248</sup> Noting the Act requires broad construction and the benefits that an employer’s public image may gain from participation in such projects, the court expressed its intent not to discourage such activities and concluded, “[i]f that construction is thought to inhibit corporate participation in charitable and community events unduly, that balance is one for the legislature to adjust.”<sup>249</sup>

#### X. PUNITIVE DAMAGES

As an issue of first impression, in *Wohlwend v. Edwards*, the Indiana Court of Appeals considered whether evidence of a tortfeasor’s behavior after the event giving rise to the tort claim is admissible to establish punitive damages.<sup>250</sup> In that case, the Edwardses filed a suit against Wohlwend, alleging negligence in causing a motor vehicle accident. The evidence revealed that Wohlwend, who was intoxicated, crossed the center line and collided head-on with the Edwards’ vehicle. Wohlwend was arrested and convicted for operating while intoxicated.

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243. *Id.*

244. 813 N.E.2d 1170 (Ind. 2004).

245. *Id.*

246. *Id.*

247. *Id.* at 1172.

248. *Id.*

249. *Id.* at 1173.

250. 796 N.E.2d 781 (Ind. Ct .App. 2003).

The trial court admitted evidence that after the accident with Edwards, Wohlwend was twice arrested for operating while intoxicated.<sup>251</sup>

On appeal, the court of appeals held that the trial court erred in allowing the evidence of Wohlwend's post-accident conduct.<sup>252</sup> The court reasoned that any relevance of such post-accident conduct would be outweighed by the danger that the jury would punish Wohlwend for this conduct instead of his conduct related to the Edwards' injuries.<sup>253</sup> The court also reasoned that allowing such evidence would conflict with the requirement that punitive damages be connected to and proportional to actual damages.<sup>254</sup> The court noted that the law requires compensatory damages as a prerequisite for punitive damages and that punitive damages are capped at the greater of \$50,000 or three times the compensatory damages.<sup>255</sup>

The court also discussed recent developments in the law of punitive damages and constitutional law, including the United States Supreme Court decision in *State Farm Mutual Automobile Insurance Co. v. Campbell*, in which the Supreme Court broadened the due process protections in the context of punitive damages.<sup>256</sup> The Supreme Court stated that courts should consider three factors in assessing claims that the amount of a punitive damages award constitutes a deprivation of property without due process: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages; and (3) the difference between the punitive damages awarded and the civil penalties authorized or imposed in similar cases.<sup>257</sup> Thus, as the court noted, both Indiana law and the U.S. Constitution require some degree of proportionality between punitive and actual damages.<sup>258</sup>

## XI. PARENTAL IMMUNITY

In *C.M.L. v. Republic Services, Inc.*, the court addressed, as a matter of first impression, whether the doctrine of parental immunity applies in the context of a stepparent relationship.<sup>259</sup> In this case, a stepchild of Kenneth Brabant was injured while he accompanied Brabant on his garbage collection route for Republic. The boy was asleep under a blanket on the passenger seat, but after Brabant exited the truck to collect garbage, the boy got out of the truck to urinate near the truck. Not realizing that the boy had exited the truck, Brabant then

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251. *Id.* at 782-83.

252. *Id.* at 789.

253. *Id.* at 787.

254. *Id.* at 785.

255. *Id.* at 786 (citing *Sullivan v. Am. Cas. Co.*, 605 N.E.2d 134, 140 (Ind. 1992); IND. CODE §§ 34-51-3-4, 34-51-3-5).

256. *Id.* (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003)).

257. *Campbell*, 538 U.S. at 418.

258. *Wohlwend*, 796 N.E.2d at 797.

259. 800 N.E.2d 200 (Ind. Ct. App. 2003).

started to pull the truck forward and struck him. As a result, C.M.L. filed a complaint against Brabant and Republic alleging negligence. The trial court granted summary judgment for Brabant, on grounds that the parental immunity doctrine and the Guest Statute barred the negligence claim.<sup>260</sup>

The Indiana Court of Appeals reversed, holding that parental immunity does not apply to a stepparent, at least not under these circumstances. Initially, the court noted that the parental immunity doctrine, although it has received criticism and has been eroded by numerous exceptions in many jurisdictions, still bars claims based on negligent acts by a custodial parent or by a non-custodial parent with joint custody.<sup>261</sup> In rejecting immunity in this context, the court reasoned that it makes sense to provide some immunity to parents because they have a legal obligation to support their children and are also obligated to exercise control, discipline, and responsibility over their children. However, that reasoning does not necessarily extend to stepparents.<sup>262</sup> The court stated that “in order to benefit from the parental immunity doctrine, a stepparent must take the formal step of becoming ‘invested with the rights and charged with the duties of a parent.’”<sup>263</sup> In other words, the stepparent must take some action such as adopting the stepchild. Here, although Brabant had voluntarily provided financial support for his stepson, he had not adopted him so parental immunity did not apply. The court also held that parental immunity would not apply under these circumstances for the additional reason that Brabant was engaged in a business activity as Republic’s employee at the time of the accident.<sup>264</sup>

## XII. CLASS ACTIONS

The class action, although obviously used in contexts other than torts, is significant in the torts context and continues to undergo substantial change. Rule 23 of the Federal Rules of Civil Procedure was modified effective December 1, 2003,<sup>265</sup> affecting subsections (c), (e), (g) and (h). The Amendment addressed five significant areas: (1) timing for class certification; (2) notice provisions; (3) process for reviewing class action settlements; (4) criteria for the appointment of class counsel; and (5) procedure for setting attorney fee awards.

### A. *The Timing of Class Certification*

Under the old Rule 23(c), the court was required to determine whether to

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260. *Id.* at 201-02.

261. *Id.* at 206.

262. *Id.*

263. *Id.* at 207 (quoting *Treschman v. Treschman*, 61 N.E. 961, 962 (Ind. App. 1901)).

264. *Id.*

265. FED. R. CIV. P. 23(c)(1)(A). Additional changes in the class action context became effective February 18, 2005, as part of the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4. Although these amendments are beyond the scope of this survey Article, the class action practitioner should review these changes before filing or responding to any new class action matter.

certify a class “as soon as practicable after the commencement of an action.”<sup>266</sup> The 2003 amendment replaces this language with a requirement that the determination be made “at an early practicable time.”<sup>267</sup> This change reflected both prevailing practice and the “many valid reasons that may justify deferring the initial class certification decision.”<sup>268</sup> Although this change recognizes that collection of information may be necessary before a class certification decision can be made, the commentary acknowledges that evaluation of the merits is not properly part of the certification decision. Rather, active judicial supervision should be used to achieve an effective balance that “expedites an informed certification determination without forcing an artificial and ultimately wasteful division between ‘certification discovery’ and ‘merits discovery.’”<sup>269</sup> Other considerations in making this change included time needed to explore designation of class counsel under Rule 23(g) or the desire to resolve certain legal issues as to individuals before expanding the case to the class.

An additional change to Rule 23(c) eliminates “conditional” class certification. The commentary states that if a court “is not satisfied that the requirements of Rule 23 have been met [it] should refuse certification until they have been met.”<sup>270</sup> The rule is also amended to set the cut-off point for alteration or amendment of an order granting or denying class certification to be at “final judgment” rather than at “the decision on the merits.”<sup>271</sup> The commentary indicates this is intended to avoid ambiguity. This final judgment “is not the same as the concept used for appeal purposes, but it should be, particularly in protracted litigation.”<sup>272</sup>

### *B. Notice Provisions*

Rule 23(c)(2) was amended to call attention to the court’s authority to “direct notice of certification to a Rule 23(b)(1) or (b)(2) class,” where the old rule required notice only to actions certified under Rule 23(b)(3).<sup>273</sup> Although the amendment allows a court to direct notice for (b)(1) or (b)(2) classes, the comments note that this authority “should be exercised with care,” especially where the characteristics of the class reduce the need for formal notice.<sup>274</sup> The comments suggest the court balance the risk that notice costs may deter the pursuit of class relief against the benefits of notice and act with discretion and flexibility when notice is directed. The comments open the possibilities of notice to “informal” methods that might prove effective, such as a “simple posting in a

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266. FED. R. CIV. P. 23(c)(1) (2002) (revised 2003).

267. FED. R. CIV. P. 23(c)(1)(A) (current).

268. FED. R. CIV. P. 23 advisory committee’s note.

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

place visited by many class members, directing attention to a source of more detailed information.”<sup>275</sup>

### *C. Review of Class Action Settlements*

Rule 23(e) was amended to strengthen the process of reviewing proposed class action settlements. First, the amendment expressly recognizes the power of a class representative to settle claims, issues, or defenses on behalf of the class.<sup>276</sup> Second, the new rule requires court approval of individual settlements by putative class representatives only if the claims, issues, or defenses of a certified class are resolved by a settlement, voluntary dismissal, or compromise.<sup>277</sup> When a putative class has not been certified, the court may impose terms that protect potential class members who may have relied upon the class allegation, including directing notice to the putative class. Notice is required when the settlement binds the class through claim or issue preclusion, but is not required when the settlement binds only the individual class representatives.

Other changes to Rule 23(e) require individual notice if class members are required to take action—such as by filing a claim—in order to participate in the judgment or if the court orders a settlement opt out under Rule 23(e)(3).<sup>278</sup> The changes also confirm and mandate the “already common practice of holding hearings as part of the process of approving settlement, voluntary dismissal, or compromise that would bind members of a class.”<sup>279</sup> In addition, the rule now provides the standard for approving a proposed settlement that would bind class members: “fair, reasonable, and adequate.”<sup>280</sup> The court must enter findings that support its conclusion in sufficient detail to explain to class members and appellate courts the factors that bear on applying the standard. The rule also requires a party seeking approval to file a statement identifying any agreement or understanding made in connection with the settlement. The concern this change reflects is the possibility that something unwritten impacts the terms of the settlement, for example “trading away possible advantages for the class in return for advantages for others.”<sup>281</sup> The court may direct the parties to provide a copy of any agreement or take appropriate action to restrict access where the details may raise confidentiality concerns that need to be addressed by the court.

Rule 23(e)(3) gives the court authority, within the court’s discretion, to refuse to approve a settlement unless it affords a new opportunity to “opt out” of

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275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.* For a review of factors that “may deserve consideration,” the committee recommends *In re Prudential Insurance Co. of America Sales Practice Litigation*, 148 F.3d 283, 316-24 (3d Cir. 1998).

281. FED. R. CIV. P. 23 advisory committee’s note.

a previously certified class action at the point of settlement. This change implicitly recognizes the fact that individuals may not know enough (or care enough) to make a decision early on, but once settlement terms are known, a decision to remain in the class is likely to be more carefully considered and better informed.

Once a class has been certified, provisions of Rule 23(e)(4) allow any class member to object to a proposed settlement, voluntary dismissal or compromise, but only on his or her own behalf, not on behalf of other class members by way of another class action. Once an objection is entered, its withdrawal requires court approval.<sup>282</sup>

#### *D. Appointment of Class Counsel*

Subdivision (g) is a newly added section of Rule 23 and sets forth standards regarding appointment of class counsel. These changes recognize the reality that the selection and activity of class counsel are often critically important to the successful handling of a class action.<sup>283</sup> The new rule requires the court to appoint class counsel if it certifies a class<sup>284</sup> and requires counsel to fairly and adequately represent the interests of the class.<sup>285</sup> The comments on this amendment note that this clarifies the responsibility to the class, rather than to the individual members of it. As part of this, the comments note that class representatives do not have an unfettered right to fire class counsel, nor can class representatives command class counsel to accept or reject a settlement proposal.<sup>286</sup>

The rule sets forth a procedure that should be followed in appointing class counsel, identifying certain things which a court *must* consider in appointing class counsel: (1) the work counsel has done in identifying or investigating potential claims in the action; (2) counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action; (3) counsel's knowledge of the applicable law; and (4) the resources counsel will commit to representing the class.<sup>287</sup> It also *permits* the court to consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class<sup>288</sup> and gives the court the power to direct counsel to provide information pertinent to its decision<sup>289</sup> and to make other orders in connection with the appointment.<sup>290</sup> The rule also allows a court to appoint interim class

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282. FED. R. CIV. P. 23(e)(4).

283. FED. R. CIV. P. 23 advisory committee's note.

284. FED. R. CIV. P. 23(g)(1)(A).

285. FED. R. CIV. P. 23(g)(1)(B).

286. FED. R. CIV. P. 23 advisory committee's note.

287. FED. R. CIV. P. 23(g)(1)(c)(1).

288. FED. R. CIV. P. 23(g)(1)(C)(ii).

289. FED. R. CIV. P. 23(g)(1)(C)(iii).

290. FED. R. CIV. P. 23(g)(1)(C)(iv).

counsel to act on behalf of the class before certification.<sup>291</sup>

*E. Setting Attorney Fee Awards*

Subdivision (h) to Rule 23 is also new. This provision addresses attorneys' fees and provides that a court "may award reasonable attorney fees and nontaxable costs authorized by law or by agreement."<sup>292</sup> A claim for attorneys' fees must be made by motion under Rule 54(d)(2) and notice of the motion must be served on all parties.<sup>293</sup> Class members and parties from whom payment is sought may object to the motion,<sup>294</sup> and the court *may* hold a hearing and *must* enter findings of fact and conclusions of law under Rule 52(a).<sup>295</sup> The court may refer issues related to the amount of an award to a special master or magistrate judge.<sup>296</sup>

Notably, the rule does not create new grounds for an award of attorneys' fees. Rather, it provides a format for addressing attorneys' fees when they are authorized by law or by agreement between the parties. The rule also does not address whether the "lodestar" or percentage method of determining a fee is the preferable approach. In the comments to the rule, it is noted that, even in the absence of objections, the court bears responsibility to assure that the amount and mode of payment of attorneys' fees are fair and proper.<sup>297</sup>

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291. FED. R. CIV. P. 23(g)(2)(A).

292. FED. R. CIV. P. 23(h).

293. FED. R. CIV. P. 23(h)(1).

294. FED. R. CIV. P. 23(h)(2).

295. FED. R. CIV. P. 23(h)(3).

296. FED. R. CIV. P. 23(h)(4).

297. FED. R. CIV. P. 23 advisory committee's note.