RECENT DEVELOPMENTS IN INDIANA TORT LAW

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This Article discusses developments in tort law in Indiana during the survey period, October 1, 2005 through September 30, 2006. However, this Article does not attempt to contain either a comprehensive or exhaustive examination of all tort cases decided during the survey period.

I. NEGLIGENCE

A. Duty of Care

In *Cox v. Northern Indiana Public Service Co.*,[1] the Indiana Court of Appeals addressed a question of whether a utility that allowed its utility poles to be utilized by other companies, owed a duty to a cable installer who was shocked while working on the utility pole. The installer fell to the ground, suffered electroshock burns to his shoulders and back, and sustained exit wounds to his knees as well as other injuries related to his fall.[2] The utility was Northern Indiana Public Service Company ("NIPSCO") and the cable installer was Wendell Cox ("Cox"). Cox installed cable for Jake's Cable, a contractor for Mediacom, that had pole usage agreements with NIPSCO.

The court recited the three elements of negligence as "(1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; and (3) injury to the plaintiff resulting from the defendant's breach."[3] Additionally, the court restated the Webb test which requires that the following be examined and balanced to determine whether a duty exists: "(1) the relationship between the parties; (2) the reasonable foreseeability of harm to the person injured; and (3) public policy concerns."[4] The court pointed out, though, that the Webb test is inapplicable when the duty of element has been declared or otherwise established under a different test, such as in this case.[5]

The court found that NIPSCO's duty was established by the pole sharing agreement between NIPSCO and Mediacom. NIPSCO "only had a duty to keep its poles and power lines from malfunctioning, a condition of which cable installers would likely be unaware."[6] Therefore, the court stated that "whether there was a malfunction determines the applicable law."[7] Finding that the only evidence of a possible malfunction was from one of Cox's interrogatory answers, which were later contradicted during his deposition, the court held that Cox

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1. 848 N.E.2d 690 (Ind. Ct. App. 2006).

2. *Id*. at 694.

3. *Id*. at 696 (citing Cox v. Stoughton Trailers, Inc., 837 N.E.2d 1075, 1079 (Ind. Ct. App. 2005)).

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

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

6. *Id*. at 697.

7. *Id*. at 698.

"failed to raise a question of fact regarding NIPSCO's duty to him. The trial court properly granted summary judgment to NIPSCO."[8]

Another case examining the element of duty was *Paniaguas v. Endor, Inc.*,[9] in which the court of appeals affirmed the trial court's dismissal of the plaintiffs' negligence and breach of contract claims.[10] In this case, the plaintiffs were property owners in a housing development. The plaintiffs each purchased lots from Aldon Companies, Inc. ("Aldon"), which stimulated covenants and use restrictions for the lots. Aldon thereafter sold its rights and obligations to Endor, Inc. ("Endor"). Plaintiffs complained that Endor subsequently developed homes at a lower quality level than those constructed by Aldon, thus diminishing the value of their homes.[11]

The plaintiffs' tort claim alleged that Aldon "was negligent in failing to adequately protect [the plaintiffs'] interests via the real covenants when the obligations were assigned to Endor."[12] Specifically, the plaintiffs argued "that Aldon had a duty to ensure that its successor developer, Endor, would adequately adhere to the restrictive covenants that applied to the subdivision."[13] The trial court thereafter granted Aldon's motion to dismiss the complaint for failure to state a claim. The court of appeals agreed.

In making its determination, the court of appeals looked to an analogous Indiana Supreme Court case wherein the supreme court held that "[i]f that duty arises from a contract, then 'tort law should not interfere.'"[14] Furthermore, "damages recoverable in tort from negligence in carrying out the contract will be for injury to person or physical damage to property, and thus 'economic loss' will usually not be recoverable."[15]

The court of appeals examined the relationship between the plaintiffs and Aldon, determined whether the type of alleged harm was reasonably foreseeable and balanced public policy concerns. First, the court found that the plaintiffs and Aldon had a purely contractual relationship.[16] Second, the court found that Aldon would not likely have had the knowledge to be able to foresee any possible harm to the existing lot owners.[17] Lastly, public policy considerations fell in favor of Aldon. The court found that the plaintiffs still had an opportunity for relief in contract law, and if an additional cause of action came under tort law, an injured party could "simultaneously hold the current developer and any prior

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8. *Id*.

9. 847 N.E.2d 967 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 593 (Ind. 2006).

10. *Id.* at 973-74.

11. *Id*. at 969.

12. *Id*.

13. *Id*. at 970.

14. *Id*. (quoting Greg Allen Constr. Co. v. Estelle, 798 N.E.2d 171, 172 (Ind. 2003)).

15. *Id*. (quoting *Greg Allen Constr*., 798 N.E.2d at 175); *see also* Essex v. Ryan, 446 N.E.2d 368, 373 (Ind. Ct. App. 1983).

16. *Paniaguas*, 847 N.E.2d at 970-71.

17. *Id*. at 971.

developer liable for a single wrong[.]"[18]

B. Causation

A viable claim of negligence requires causation. A defendant cannot be held liable for negligence if his actions did not at least proximately cause a plaintiff's alleged injuries.[19] In *Hellums v. Raber*,[20] the Indiana Court of Appeals examined the proximate cause element in the context of a hunting accident.

In *Hellums*, the court of appeals reversed the trial court's grant of summary judgment in favor of Alan Raber ("Raber"), who was at the scene of the shooting but was not the hunter who shot Charles Hellums ("Hellums"). Hellums and Raber were hunting deer on the same property, but were with different parties. At the time of the incident, Hellums was on the opposite side of a deer that Raber's party was hunting. Hellums was struck by a bullet which was not Raber's.[21] Hellums sued three of the hunters in Raber's party, including Raber, alleging negligence in "failing to ascertain the presence of other hunters before shooting."[22] Raber filed a summary judgment motion arguing that he did not proximately cause Hellums's injuries because he was not the person who shot Hellums.[23] The trial court agreed with Raber and granted his motion for summary judgment.

The court recited general rules examining proximate cause and found that "[t]he proximate cause of an injury is not merely the direct or close cause, rather it is the negligent act which resulted in an injury which was the act's natural and probable consequence in light of the circumstance and should reasonably have been foreseen and anticipated."[24] Furthermore, the court found that there may be more than one proximate cause of an injury and explained that summary judgment is rarely appropriate for a negligence claim because the decision about proximate cause is a fact question.[25]

After determining that there was no Indiana case on point, the court examined Restatement (Second) of Torts section 876, as urged by Hellums. This section explained the circumstances under which a person is subject to liability for harm to a third person.[26] The court agreed with Hellums and held that "it is possible that [Raber's] shooting in Hellums's direction may have encouraged [the person who shot Hellums] to shoot or believe it was safe to shoot in that

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18. *Id*.

19. Cox v. N. Ind. Pub. Serv. Co., 848 N.E.2d 690, 696 (Ind. Ct. App. 2006).

20. 853 N.E.2d 143 (Ind. Ct. App. 2006).

21. *Id*. at 145.

22. *Id*.

23. *Id*.

24. *Id*. at 146 (quoting Indianapolis Hous. Auth. v. Pippin, 726 N.E.2d 341, 346 (Ind. Ct. App. 2000)).

25. *Id*. (citing *Indianapolis Hous. Auth*., 726 N.E.2d at 346; Correll v. Ind. Dep't of Transp., 783 N.E.2d 706, 707 (Ind. Ct. App. 2002)).

26. *Id*.

direction, and therefore, there is a genuine issue of material fact as to whether [Raber's] actions were a proximate cause of [Hellums's] injuries."[27]

The court then explained what Hellums would need to show to prove that Raber's actions were a proximate cause of Hellums's injuries. The court stated that it adopted the Restatement approach as applied to the facts of the case and explained that Hellums must prove that (1) Raber was acting negligently, (2) it was reasonably foreseeable that Raber's actions encouraged the other hunter to act negligently, and (3) Raber's encouragement was a proximate cause of Hellums's injuries.[28]

In another case addressing causation, *Topp v. Leffers*,[29] the Indiana Court of Appeals affirmed the trial court's ruling that the plaintiff had not proven causation sufficiently to overcome a motion for directed verdict. In this case, Yvonne Topp ("Topp") sought damages for aggravation of her preexisting injuries, alleging that Sarah Leffers ("Leffers") committed negligence when she rear-ended Topp's vehicle.[30]

After the accident, Topp met with Dr. Schreier, who treated Topp approximately ten (10) times. Dr. Schreier wrote that Topp "appear[ed] to have occipital neuralgia from a motor vehicle accident."[31] Over one year after Topp filed her complaint against Leffers, Dr. Mark Reecer conducted an independent medical examination of Topp and reviewed her medical records. Dr. Reecer wrote that Topp "may have had an aggravation of her preexisting spine complaints."[32] Additionally, during his deposition, Dr. Reecer testified that while it appeared that Topp did have some impairment, he could not relate the impairment to the present accident specifically.[33] Neither doctor "testified at the trial, but Dr. Reecer's deposition and written report were entered into evidence as were Dr. Schreier's medical records regarding Topp."[34]

"After Topp rested, Leffers moved for a directed verdict arguing that she had not presented sufficient evidence to prove the causation element of her negligence claim because she had not introduced expert medical testimony to demonstrate that her injuries were caused by the November 2000 accident."[35] The trial court granted Leffer's motion for a directed verdict, finding that causation was lacking because there was no evidence from a doctor "that says that the patient presents with pain and I believe her injuries were causally connected to a reasonable degree of medical certainty to the accident in question."[36] The trial court also denied Topp's motion to correct errors and

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27. *Id*. at 147.
28. *Id*.
29. 838 N.E.2d 1027 (Ind. Ct. App. 2005), *trans. denied*, 855 N.E.2d 998 (Ind. 2006).
30. *Id*. at 1029-30.
31. *Id*. at 1029 (quoting Appellant's App. at 155).
32. *Id*. at 1030 (citing Appellant's App. at 149-50).
33. *Id*. (citing Appellant's App. at 210).
34. *Id*.
35. *Id*.
36. *Id*. at 1031.

found that even Topp's own testimony combined with the evidence from the doctors "[did] not rise to the level of reasonable medical certainty or probability" and therefore proximate cause was still lacking.[37]

On appeal, Topp argued that her testimony alone was sufficient to place the case before a jury.[38] The court of appeals, however, found that "in order for Topp to carry her burden on the element of causation, it was necessary for her to introduce the testimony of an expert medical witness on this issue" because Topp's injuries were subjective in nature, meaning her injury is not directly observable by a doctor.[39] Additionally, because her complaint against Leffers was for aggravation of injuries, Topp needed a medical expert to explain the causal connection between the accident at issue and the prior accidents and injuries.[40]

Along these same lines, the evidence and testimony of Drs. Schreier and Reecer were not sufficient to sustain Topp's burden on the causation element either. As the court explained, "they lack reasonable medical certainty."[41] Both doctors used language that was "couched in terms less than that of a reasonable degree of medical certainty."[42] The trial court also was not convinced that Topp's testimony in conjunction with the doctors' opinions was sufficient to prove causation.[43]

C. Negligent Supervision

During the survey period, the Indiana Court of Appeals decided two (2) cases involving negligent supervision. The first case, *Doe v. Lafayette School Corp.*,[44] involved a sexual relationship between a high school student ("Doe") and her teacher.[45] This civil case was filed against Lafayette School Corporation ("LSC"), the superintendent, and other Jefferson High School officials. Doe claimed that because the defendants were negligent in monitoring the teacher's contact with the students, she suffered emotional distress. Doe alleged that the school corporation and the officials were negligent in handling the matter of the teacher's contact with students after they had knowledge of the problem. Therefore, she argued, the acts and omissions of the defendants were a breach of their duty of care and supervision to her "and were 'a direct and proximate cause of [her] pain, suffering, emotional distress, humiliation, embarrassment and

37. *Id*. (citing Brief of Yvonne Topp at 8).

38. *Id*. at 1033.

39. *Id*. (citing Daub v. Daub, 629 N.E.2d 873 (Ind. Ct. App. 1994)).

40. *Id*. (citing *Daub*, 629 N.E.2d at 877-78).

41. *Id*. at 1034.

42. *Id*. at 1033 (citing Colaw v. Nicholson, 450 N.E.2d 1023, 1030 (Ind. Ct. App. 1983)).

43. *Id*. at 1036.

44. 846 N.E.2d 691 (Ind. Ct. App. 2006).

45. The teacher was convicted of child seduction and engaging in deviate sexual conduct. *Id*. at 695.

mental anguish.'"[46]

The appeal involved only the trial court's grant of summary judgment in favor of LSC. In order for LSC to prevail on a motion for summary judgment in a negligence action, LSC had to "demonstrate that the undisputed material facts negate at least one of the elements essential to plaintiff's claim or that the claim is barred by an affirmative defense."[47] Furthermore, as in most negligence decisions involving summary judgment, the court of appeals recited that summary judgment is rarely appropriate for negligence cases.[48]

On appeal, the court of appeals first found that the duty element of Doe's complaint of negligence was satisfied. It held that LSC did in fact owe Doe a "general duty of reasonable care and supervision[.]"[49] The court of appeals next found that whether LSC breached its duty of care was more appropriately a question for the trier of fact because "reasonable persons could differ as to whether there is a sufficient relationship between LSC's general duty to supervise its students and its failure to follow up on the concerns about [the teacher's] email use with his students."[50]

The court of appeals also found that LSC was the proximate cause of Doe's alleged injuries related to her being questioned by a security guard and without a parent present.[51] The "trickier question" for the court of appeals was whether LSC was the proximate cause of Doe's injuries caused by the teacher's conduct.[52] This question, the court of appeals held, was a question of fact appropriate for a jury's determination.[53]

The second case involving a claim of negligent supervision decided by the Indiana Court of Appeals during the survey period, *Davis v. LeCuyer*,[54] involved a jet ski accident on Geist Reservoir. In this case, two boys were driving jet skis owned by one of the boy's parents. At one point during the boys' outing on the

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46. *Id*. at 695-96 (citing Appellant's App. at 30).

47. *Id*. at 698 (citing McClyde v. Archdiocese of Indianapolis, 752 N.E.2d 229, 232 (Ind. Ct. App. 2001)).

48. *Id*.

49. *Id*. at 699 (citing Mangold *ex rel.* Mangold v. Ind. Dept. of Nat'l Res., 756 N.E.2d 970, 975 (Ind. 2001); Roe v. N. Adams Cmty. School Corp., 647 N.E.2d 655, 660 (Ind. Ct. App. 1995)). The court of appeals did state that the fact that the sexual acts occurred off of school property "may have a bearing on the foreseeability component of proximate causation[.]" *Id*. (citing *Mangold*, 756 N.E.2d at 975).

50. *Id*. at 700.

51. *Id*. at 701.

52. *Id.*

53. *Id*. (citing Peters v. Forster, 804 N.E.2d 736, 743 (Ind. 2004) (quoting Conder v. Hull Lift Truck, Inc., 435 N.E.2d 10, 15 (Ind. 1982))). The court of appeals also held that Doe is "free to claim damages for emotional distress" after prevailing on her negligence claim. *Id*. (citing Ryan v. Brown, 827 N.E.2d 112, 118 (Ind. Ct. App. 2005)). And lastly, the court of appeals affirmed the trial court's "conclusion that LSC is not vicariously liable for the acts of its employee, [the teacher], under this set of facts." *Id*. at 702.

54. 849 N.E.2d 750 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 596 (Ind. 2006).

reservoir, Benton LeCuyer ("Benton") made a sharp turn on his jet ski in front of the jet ski being operated by his friend Doug Davis ("Doug"). The collision between the two (2) jet skis resulted in a serious leg injury to Benton.[55] The complaint in this case alleged that Doug was negligent in operating the jet ski he was driving[56] and Doug's parents were negligent in instructing and supervising the boys on the use and operation of the jet skis.[57]

Doug's parents filed a motion for summary judgment, which the trial court denied. Doug's parents then filed a motion either for reconsideration or certification for interlocutory appeal. The motion to reconsider was denied and motion to certify was granted.[58]

As to the allegation of negligent supervision of Doug and Benton, Doug's parents argued on appeal that they were entitled to summary judgment. Doug's parents argued

> that the standard of care that applies "between voluntary co-participants in recreational and sporting activities" is recklessness, rather than negligence. They then argue that they are entitled to summary judgment on the LeCuyers' claims, as no evidence was presented to the trial court that Doug acted intentionally or recklessly while operating the jet ski.[59]

After denying summary judgment in favor of Doug's parents, the trial court certified the question "whether negligent supervision is 'a separate tort in the State of Indiana as to which a person may be liable to a minor in his care.'"[60] The court initially observed "that there is a well-recognized duty in tort law that persons entrusted with children have a duty to supervise their charges."[61]

The court first found Doug's parents' in loco parentis argument unpersuasive because the cases they cited and referred to only dealt with "supervision a parent owes with regard to the conduct of his or her own child."[62] Based upon previous holdings,[63] the court held that "Indiana law recognizes negligent supervision of a minor in one's care as a separate tort[,]" and material fact issues remained with regard to their supervision of Benton.[64]

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55. *Id*. at 752.

56. The opinion addresses this issue as well as the negligent supervision claim, but for the purposes of this article, only the negligent supervision aspects of the court's order are discussed.

57. *Davis*, 849 N.E.2d at 752.

58. *Id*.

59. *Id.*

60. *Id*. at 756 (citing Appellant's App. at 314).

61. *Id*. at 757 (citing Wells v. Hickman, 657 N.E.2d 172, 179 (Ind. Ct. App. 1995)).

62. *Id*.

63. *Id*. (citing Johnson v. Pettigrew, 595 N.E.2d 747, 753 (Ind. Ct. App. 2006); Illinois Farmers Ins. Co. v. Wiegand, 808 N.E.2d 180 (Ind. Ct. App. 2004)).

64. *Id*.

D. Comparative Fault Act and Risk

In *Bowman v. McNary*,[65] a high school student, Kelsey Bowman ("Bowman") sued the Tippecanoe School Corporation, the Tippecanoe School Corporation Board of Trustees (collectively "the School Corporation"), and a fellow student, Alycea McNary ("McNary"), for negligence based upon an incident when the two (2) girls were practicing for their high school golf team and McNary's golf club struck Bowman during a practice swing, causing Bowman to be blind in one eye.[66] Although the opinion discussed negligence and recklessness, only the discussion of incurred risk will be addressed in this article.

"[T]here is 'a duty on the part of school personnel to exercise ordinary and reasonable care for the safety of the children under their authority.'"[67] Nevertheless, the court found that the "Comparative Fault Act does not apply to the School Corporation, a governmental entity[,]" and therefore, the rule that "incurred risk" can be a complete defense to a negligence claim "does not apply to the School Corporation."[68]

Therefore, the key determination involved whether Bowman incurred the risk of her injury. "Incurred risk is a conscious, deliberate, and intentional embarkation upon a course of conduct with knowledge of the circumstances."[69] The required analysis looks to the subjective thoughts of the actor and her knowledge and acceptance of the risk,[70] but does not require "precise foresight that the particular accident and injury that in fact occurred was going to occur."[71] After a review of the facts, the court held that Bowman had actual knowledge of the risk of being at a driving range and she voluntarily accepted the risk.[72] The trial court ruled that Bowman could not pursue a negligence claim against the School Corporation. The court of appeals agreed.

In *Funston v. School Town of Munster*,[73] the Indiana Supreme Court decided a case involving a spectator who was injured on bleachers at a public school. Howard Funston ("Funston") fell backward off of bleachers at Munster High School gymnasium while watching his son play Amateur Athletic Union (AAU) basketball. The school provided the bleachers to AAU by agreement and were

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65. 853 N.E.2d 984 (Ind. Ct. App. 2006).

66. *Id*. at 987.

67. *Id*. at 997 (quoting Beckett v. Clinton Prairie Sch. Corp., 504 N.E.2d 552, 553 (Ind. 1987)).

68. *Id*. (citing IND. CODE § 34-51-2-2 (2004); Heck v. Robey, 659 N.E.2d 498, 504 n.8 (Ind. 1995)).

69. *Id*. (citing *Beckett*, 504 N.E.2d at 554).

70. *Id*. (citing *Beckett*, 504 N.E.2d at 554).

71. *Id*. (citing Mauller v. City of Columbus, 552 N.E.2d 500, 503 n.3 (Ind. Ct. App. 1990)).

72. *Id*. at 998. For another case decided during the survey period that briefly discusses inherent risk, see *Anderson v. Four Seasons Equestrian Center, Inc.*, 852 N.E.2d 576 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 599 (Ind. 2006), which is about horse training and a signed waiver with an exculpatory clause.

73. 849 N.E.2d 595 (Ind. 2006).

five-row, portable aluminum bleachers with no back on the top row.[74] The bleachers were not pushed against any walls.[75] In response to being sued, the school filed a motion for summary judgment arguing that Funston was contributorily negligent. The trial court agreed and granted the school's motion.[76]

Because of Indiana's Comparative Fault Act,[77] the common law defense of contributory negligence is applicable to government defendants, and any small amount of negligence on the injured party's part will completely bar any action against the governmental entity for damages.[78] Contributory negligence results when "the plaintiff's conduct 'falls below the standard to which he should conform for his own protection and safety. Lack of reasonable care that an ordinary person would exercise in like or similar circumstances is the factor upon which the presence or absence of negligence depends.'"[79] Because contributory negligence is a question of fact, the court found that it is not ordinarily appropriate for summary judgment, unless the facts are undisputed and there can be only one inference therefrom.[80]

In this case, it was undisputed that Funston fell off the bleachers when he leaned backward on the top row of bleachers that were not pushed against a wall.[81] The supreme court held that, as a matter of law, Funston was negligent, that negligence was a proximate cause of his own injuries, and found that therefore, the trial court correctly applied the defense of contributory negligence in granting the school's motion for summary judgment.[82]

In addition to two cases decided with contributory negligence analysis because the defendants were exempt from the comparative fault act by reason of them being schools, the court of appeals decided at least one case in which it applied comparative fault analysis, *Gregory & Appel Insurance Agency v. Philadelphia Indemnity Insurance Co.*[83]

In this case, one issue was whether the trial court properly allowed the jury

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74. *Id.* at 598.

75. *Id*.

76. *Id*.

77. IND. CODE § 34-51-2-2 (2004).

78. *Funston*, 849 N.E.2d at 598.

79. *Id*. at 598-99 (quoting Jones v. Gleim, 468 N.E.2d 205, 207 (Ind. 1984)); *see also* Hundt v. La Crosse Grain Co., 446 N.E.2d 327, 329 (Ind. 1983).

80. *Id*. at 599 (citing Butler v. City of Peru, 733 N.E.2d 912, 917 (Ind. 2000); *Jones*, 468 N.E.2d at 207).

81. *Id*.

82. *Id*. at 600. Justice Rucker dissented stating that the facts of this case should have precluded summary judgment. His dissent relies both on the general rule that negligence should rarely be dismissed by summary judgment and because he found the facts of this case to be such that he believed the jury should decide whether more than one inference could be made and whether Funston's alleged negligence was a proximate cause of his injuries. *Id.* at 601 (Rucker, J., dissenting).

83. 835 N.E.2d 1053 (Ind. Ct. App. 2005), *trans. denied*, 855 N.E.2d 1005 (Ind. 2006).

to reduce Philadelphia Indemnity Insurance Company's ("Philadelphia") award by the percentage of fault it attributed to a non-party.[84] The court found, "In an action based on fault, a defendant may assert as a defense that the damages of the claimant were caused in full or in part by a nonparty."[85] Furthermore, "[t]he burden of proof for this defense lies with the defendant."[86]

The jury's allocation of fault in this matter was 0% to Philadelphia, 7% to the non-party, and 93% to Gregory & Appel. Because the court found that the evidence in the record was sufficient to support a jury's determination that the non-party "*was* involved in Philadelphia's claim of negligent investigation and misrepresentation[,]"[87] it concluded that the jury did not err when it determined liability in this matter.

E. Infliction of Emotional Distress

In *Tucker v. Roman Catholic Diocese of Lafayette-in-Indiana*,[88] Debra Tucker ("Tucker") raised claims of breach of contract, promissory estoppel as a defense to statute of frauds, negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress with regard to her allegation that she was sexually abused as a child by her religion teacher, Harry Metzger ("Metzger"), a layperson hired by the Roman Catholic Diocese of Lafayette-in-Indiana ("the Diocese"). This Article will address the Indiana Court of Appeals' decision with regard to Tucker's tort claims.

Tucker alleges that she was sexually abused by Metzger beginning when she was ten (10) years old until she was twelve (12) years old, from 1966 to 1968. Tucker alleged "that the Diocese was negligent in failing to take disciplinary action against Metzger, in failing to warn parents and children, including Tucker, about Metzger, and in failing to report Metzger to authorities as required by law."[89] The court held that to the extent Tucker's negligence claim was based upon her abuse from 1966 to 1968, the claim was barred by the applicable two-year statute of limitations.[90] To the extent the claim was based upon harm caused by Metzger to other children, Tucker's claim failed because she lacked standing.[91]

The court found that negligent infliction of emotional distress "requires that the injured person suffered the injury either through direct impact or direct involvement."[92] Because Tucker's claim of negligent infliction of emotional

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84. *Id*. at 1055.

85. *Id*. at 1065 (quoting IND. CODE § 34-51-2-14 (2004)).

86. *Id*. at 1065-66 (citing IND. CODE § 34-51-2-15 (2004)).

87. *Id*. at 1066 (emphasis in original).

88. 837 N.E.2d 596 (Ind. Ct. App.), *trans. denied*, 855 N.E.2d 1010 (Ind. 2006).

89. *Id*. at 602.

90. *Id*. (citing IND. CODE §34-11-2-4 (2004)).

91. *Id*. (citing Villegas v. Silverman, 832 N.E.2d 598, 604 (Ind. Ct. App. 2005)).

92. *Id*. (citing Groves v. Taylor, 729 N.E.2d 569, 573 (Ind. 2000); Ryan v. Brown, 827 N.E.2d 112, 122 (Ind. Ct. App. 2005)).

distress was based upon her time-barred claim of negligence, the court held that Tucker failed to state a claim for negligent infliction of emotional distress.

Lastly, the court concluded that an allegation of intentional infliction of emotional distress requires "conduct that is so extreme and outrageous as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community."[93] There has to be intent to emotionally harm someone.[94] The court held that although sexual abuse is extreme and outrageous, Tucker alleged that Meztger caused this harm. Tucker failed to allege that the Diocese had intent to cause her harm, thereby failing to state a valid claim.[95]

In *Lachenman v. Stice*,[96] the Indiana Court of Appeals addressed claims of one dog owner ("Lachenman") against another ("the Stices") for negligent and intentional infliction of emotional distress when Lachenman's dog was fatally injured by one of the Stices' dogs. In this case, the trial court granted summary judgment in favor of the Stices on both claims of negligent and intentional infliction of emotional distress.

The court first recited the elements of intentional infliction of emotional distress, which require extreme and outrageous conduct and intent to harm the plaintiff.[97] The court stated, "The requirements to prove this tort are rigorous."[98] Furthermore, the "conduct [must] exceed[] all bounds usually tolerated by a decent society and causes mental distress of a very serious kind."[99] The court then held that based upon the facts of the case, the Stices' behavior failed to meet the high standard of this tort and there was no proof that the Stices intended to cause Lachenman any emotional distress.[100]

Next, with regard to Lachenman's claim of negligent infliction of emotional distress, the court analyzed its decision under the "impact" rule,[101] which has been evolving in Indiana case law for some time.[102] Importantly, the court found that Lachenman was never directly physically impacted, and she conceded in her appellate brief that she never sustained any bodily harm from the Stices' dogs. Therefore, the court held that Lachenman "fail[ed] to meet the requirements of the modified impact rule."[103] The court further held that Lachenman's position as dog owner does not position her into the bystander rule either. This rule

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93. *Id*. at 603 (citing Powdertech, Inc. v. Joganic, 776 N.E.2d 1251, 1264 (Ind. Ct. App. 2002)).

94. *Id*. (citing Cullison v. Medley, 570 N.E.2d 27, 31 (Ind. 1991)).

95. *Id*. (citing *Cullison*, 570 N.E.2d at 31).

96. 838 N.E.2d 451 (Ind. Ct. App. 2005), *trans. denied*, 855 N.E.2d 1008 (Ind. 2006).

97. *Id.* at 456.

98. *Id*. (citing Branham v. Celadon Trucking Servs., Inc., 744 N.E.2d 514, 523 (Ind. Ct. App. 2001)).

99. *Id*. at 457 (citing *Branham*, 744 N.E.2d at 523).

100. *Id*.

101. *Id*. (citing Ryan v. Brown, 827 N.E.2d 112, 119 (Ind. Ct. App. 2005)).

102. *See id*. at 457-60 (summarizing the impact rule and how it has evolved through case law).

103. *Id*. at 460.

allows persons to claim emotional distress when they witness severe injury to a "spouse, parent, child, grandparent, grandchild, or sibling[, and] 'loved one[s] with a relationship to the plaintiff analogous' to such persons."[104] The court was unwilling to extend this definition to include pets, however.[105]

F. Sudden Emergency Doctrine

In *Willis v. Westerfield*,[106] the Indiana Supreme Court determined that the sudden emergency doctrine is not an affirmative defense that must be pled in an answer or risk being waived by a defendant.[107] This case involved a rear-end vehicle collision in which Christopher Westerfield hit Ann Willis. Westerfield testified at his deposition that prior to the collision, Willis "suddenly and without warning changed lanes and applied her brakes at the intersection and that he was unable to stop his vehicle before it struck Willis's vehicle because of wet pavement and Willis's quick lane change."[108]

On appeal, Willis argued that Westerfield should have included the sudden emergency doctrine in a pleading as an affirmative defense pursuant to Indiana Trial Rule 8(C).[109] "In a negligence cause of action, the sudden emergency doctrine is an application of the general requirement that one's conduct conform to the standard of a reasonable person."[110] The doctrine was created to show that someone who is confronted with an emergency, or sudden and unexpected circumstance, does not have to act as another would under normal circumstances.[111]

Furthermore, "[a]n affirmative defense is a defense 'upon which the proponent bears the burden of proof and which, in effect, admits the essential allegations of the complaint but asserts additional matter barring relief.'"[112] However, the sudden emergency "doctrine does not admit the allegations of the complaint but nevertheless excuse fault. Rather, it 'defines the conduct to be expected of a prudent person in an emergency situation.'"[113] Therefore, the court held that Indiana Trial Rule 8(C) did not bar the trial court giving the sudden emergency doctrine instruction despite it not being pled by Westerfield.[114]

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104. *Id*. (citing Groves v. Taylor, 729 N.E.2d 569, 572 (Ind. 2000)).

105. *Id*. at 461.

106. 839 N.E.2d 1179 (Ind. 2006).

107. *Id*. at 1182 (citing IND. T.R. 8(C)).

108. *Id*. at 1182-83.

109. *Id*. at 1183.

110. *Id*. at 1184.

111. *Id*. (citing W.P. KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 33, at 196 (5th ed. 1984)).

112. *Id*. at 1185 (quoting Paint Shuttle, Inc. v. Continental Cas. Co., 733 N.E.2d 513, 524 (Ind. Ct. App. 2000)).

113. *Id*. at 1185-86 (quoting Brooks v. Friedman, 769 N.E.2d 696, 699 (Ind. Ct. App. 2002)).

114. *Id*. at 1186.

G. Journey's Account Statute

In *Basham v. Penick*,[115] the Indiana Court of Appeals determined that the Journey's Account Statute, found at Indiana Code section 34-11-8-1, applied to the case to save Lori Basham's and Kentucky Farm Bureau Insurance's (collectively "Basham") complaint against Craig Penick ("Penick") despite it being filed after the statute of limitations had run. The Journey's Account Statute states in relevant part that if a plaintiff files suit but the suit fails for any reason other than negligent prosecution, the plaintiff may file a new suit not later than three (3) years after the determination in the first suit.[116] Generally, this statute saves a suit that was dismissed for technical reasons.[117]

This case also involved a question of which statute of limitations applied to the original action, the determination of which would affect whether the Journey's Account Statute would save Basham's complaint. The court held,

> in light of the broad and liberal purpose of the Journey's Account Statute, and the Supreme Court's admonition that the statute not be narrowly construed, we hold that, under the facts of this case, the timeliness of Basham's original complaint, for purposes of the Journey's Account Statute, is determined by Indiana's statute of limitations.[118]

In conclusion, the court reversed that part of the trial court's order granting Penick's motion for judgment on the pleadings.

II. LEGAL MALPRACTICE

A. Negligent Representation

In *Clary v. Lite Machines Corp.*,[119] the Indiana Court of Appeals addressed the issues of proximate cause and the "attorney judgment rule." The court of appeals affirmed the trial court and held that the attorneys, BB & C, failed to research and argue a mitigation of damages issue raised by the defendants in a lawsuit in which BB & C represented Lite Machines Corporation ("Lite").[120] Additionally, the court held that because Indiana has not adopted the attorney judgment rule, BB & C were not relieved from its liability to Lite for failing to research the key issue of mitigation of damages.[121]

In December 1993, Lite, as represented by BB & C, filed a complaint against Techno, Inc. ("Techno") and Designatronics, Inc. (Designatronics"), alleging negligence and breach of warranty based upon a faulty milling and routing

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115. 849 N.E.2d 706 (Ind. Ct. App. 2006).
116. *Id*. at 709.
117. *Id*. at 710.
118. *Id*. at 712.
119. 850 N.E.2d 423 (Ind. Ct. App. 2006).
120. *Id*. at 431.
121. *Id*. at 433.

machine Lite manufactured by Techno, which is a division of Designatronics.[122] Lite sought damages of approximately four million dollars ($4,000,000) for lost profits between 1992 and 1996.[123]

At least a year prior to trial, Techno informed BB & C that it planned to raise the affirmative defense of mitigation of damages. Then, just prior to trial, Techno identified an expert witness who was going to testify on its behalf about mitigation of damages. Furthermore, Techno offered to make the expert witness available for deposition. BB & C basically never addressed the mitigation of damages issue. It did not depose Techno's expert witness, present rebuttal evidence as to the expert's testimony, cross-examine the expert, address the issue of mitigation of damages in Lite's pre-trial brief, or file a post-trial brief.[124]

At the conclusion of the trial, the trial court found that although Lite had "sustained $2,609,608 in net lost profits[,]"[125] it entered judgment against Techno and Designatronics in the amount of $260,000 based upon Lite's failure to mitigate its damages.[126] BB & C did not research the issue of damage mitigation until it was preparing an appeal to the court of appeals of the trial court's denial of Lite's motion to correct errors. During this research, BB & C discovered that at least three cases existed that suggested that Lite would not have had to mitigate its damages.[127] This case law and the accompanying argument were not considered during the appeal because the court of appeals was limited to the evidence in the record.[128]

After the trial court's judgment was affirmed, Lite filed suit against BB & C in December 2000.[129] A jury returned a verdict for Lite in the amount of $3,612,574.00. After the trial court denied BB & C's motion to correct error and renewed motion to correct error, the current appeal ensued.[130]

The court of appeals recited the elements of legal malpractice as: "(1) employment of an attorney, which creates a duty to the client; (2) failure of the attorney to exercise ordinary skill and knowledge (breach of the duty); and (3) that such negligence was the proximate case of (4) damage to the plaintiff."[131] Therefore, in this case, Lite had the burden to prove that "but for BB & C's failure to research and argue the issue of mitigation of damages before and/or during the *Techno* trial, Lite would have received a greater damages award."[132]

BB & C's counter argument was that it should have been granted summary judgment "because there was no genuine issue of material fact regarding the

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122. *Id*. at 428.
123. *Id*.
124. *Id*.
125. *Id*.
126. *Id*.
127. *Id*. at 429.
128. *Id*.
129. *Id*.
130. *Id*.
131. *Id*. at 430 (citing Rice v. Strunk, 670 N.E.2d 1280, 1283-84 (Ind. 1996)).
132. *Id*. at 430-31.

element of proximate cause."[133] BB & C argued that Lite's alleged bases for BB & C's alleged negligence were nothing more than speculation.[134] Nevertheless, the court of appeals found that the trial court's findings of fact, conclusions, judgment following the *Techno* trial, and subsequent findings showed that Lite's failure to respond to Techno's mitigation of damages argument directly resulted in a lesser damage award in Lite's favor.[135] Therefore, the court of appeals held that the trial court properly denied BB & C's motion for summary judgment.[136]

In its appeal, BB & C also argued that the "attorney judgment rule" should have been applied to BB&C's motion for summary judgment in its favor.[137] The "attorney judgment rule," not adopted by Indiana, provides that "an attorney's 'mere errors in judgment' cannot support a legal malpractice claim."[138] Nevertheless, the court of appeals found that even if the "attorney judgment rule" had been adopted in Indiana and applied to this matter, it would not have supported BB & C's motion for summary judgment because even in those states that do apply the rule, attorneys' duties to their clients "encompass[] knowledge of the law and an obligation to perform diligent research and provide informed judgments."[139] The court of appeals held that "the applicable law was settled, the BB & C attorneys failed to research the issue of Lite's duty to mitigate its damages even after it was raised by opposing counsel prior to and during trial, and any of BB & C's professional judgments on the issue were therefore uninformed and would not be entitled to immunity."[140]

B. Duty of Attorney for Receiver

In *KeyBank National Ass'n v. Shipley*,[141] the Indiana Court of Appeals addressed issue of first impression, "whether an attorney for a receiver owes a duty to a creditor."[142] The court of appeals affirmed the trial court when it concluded that "a receiver's attorney does not owe a duty to a creditor and therefore cannot be held liable for negligence. Instead, the creditor's remedy is to sue the receiver, which in turn can sue its attorney for malpractice."[143]

The trial court in *Shipley* granted summary judgment for Grant Shipley ("Shipley"), the attorney for the receiver, and Stephen J. Michael ("Michael") against KeyBank National Association ("KeyBank"), the creditor, based upon its

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133. *Id.* at 431.

134. *Id*.

135. *Id*.

136. *Id*.

137. *Id*.

138. *Id*. (citing Simko v. Blake, 532 N.W.2d 842, 847 (Mich. 1995)).

139. *Id*. at 432 (citing Wright v. Williams, 121 Cal. Rptr. 194, 199 (Ct. App. 1975); Janik v. Rudy, Exelrod & Zieff, 14 Cal. Rptr. 3d 751, 755 (Ct. App. 2004)).

140. *Id*. at 433.

141. 846 N.E.2d 290 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 591 (Ind. 2006).

142. *Id*. at 291.

143. *Id*.

conclusion that there was no privity between Shipley and KeyBank.[144] Essentially, KeyBank's argument on appeal was that it was a third-party beneficiary of the relationship between the receiver and Shipley; therefore, it had a right to directly sue Shipley for negligence.[145] The support for KeyBank's argument came from the third-party beneficiary contract theory adopted in Indiana: "a professional owes a duty to a plaintiff when that professional knew that the services were to be rendered for the benefit of the third party to the transaction."[146]

The court of appeals held, however, that the privity exception set forth in previous Indiana cases does not apply to this matter because "Shipley and the receiver did not enter into an agreement with the intent to confer a direct benefit on KeyBank."[147] The receiver, in fact, owed a duty to all of the creditors, not only KeyBank.[148] Furthermore, part of the rationale of the privity exception is that the beneficiary has no one to recover against for negligence, which the court of appeals found was not the case in this matter.[149]

In conclusion, after reviewing the only other case in the United States that found an attorney for a receiver liable to a creditor and determining that this case was limited in its application and no other states had followed suit,[150] the court of appeals affirmed the grant of summary judgment to Shipley.[151] The court held that because the receiver in this matter owed a duty to all of the creditors, not just KeyBank, Shipley did not intend to confer a direct benefit on KeyBank and KeyBank was not left without a remedy.[152] "KeyBank could have sued Michael, [the receiver,] whose actions were secured by a bond. Michael, in turn, could have sued Shipley for malpractice."[153]

III. MEDICAL MALPRACTICE

During the survey period, the Indiana Supreme Court decided two medical malpractice cases involving statutes of limitations issues and one medical malpractice case involving a question of contributory negligence. The Indiana Court of Appeals also decided medical malpractice cases involving issues related to statutes of limitations, fraudulent concealment, validity of affidavits, effects

144. *Id*. at 295.

145. *Id*. at 296.

146. Walker v. Lawson, 514 N.E.2d 629, 633 (Ind. Ct. App. 1987), *adopted in part by* 526 N.E.2d 968 (Ind. 1988). Another case relying on *Walker*, and discussed by the court of appeals in this matter, is *Hermann v. Frey*, 537 N.E.2d 529 (Ind. Ct. App. 1989). *See Shipley*, 846 N.E.2d at 297.

147. *Shipley*, 846 N.E.2d at 297.

148. *Id*.

149. *Id*.

150. *See id.* at 298-99 (discussing Prescott v. Coppage, 296 A.2d 150 (Md. 1972)).

151. *Id.* at 300.

152. *See id.* at 299.

153. *Id*. at 301.

of medical release, and proximate cause.[154] Some of these cases will be discussed herein.

A. Statutes of Limitations

In February 2006, the Indiana Supreme Court decided a medical malpractice case which involved the application of a statute of limitations when the injured party is a minor.[155] Then, in May 2006, the Indiana Supreme Court decided a medical malpractice case involving the application of a statute of limitations when the injured party is a minor who has died.[156]

In *Ledbetter*, plaintiff sought damages for serious and permanent physical and mental injuries to a child arising from birth complications in November 1974.[157] The child's mother did not file a medical malpractice claim at the time because of her religious beliefs.[158] When the child was seven months shy of twenty years old, the child filed a medical malpractice claim against the hospital and the physicians who attended her birth, Drs. Robert Hunter and Lawrence Benken.[159]

The defendant doctors filed a motion to dismiss based upon the Indiana Medical Malpractice Act's statute of limitations period for minors, which states that claims must be filed before the child's eighth birthday.[160] The trial court granted the motion.[161] The court of appeals, however, reversed the trial court's decision and remanded the case to the trial court to consider the constitutionality of the statute of limitations as applied to the plaintiff under the Privileges and Immunities Clause of the Indiana Constitution.[162]

Shortly thereafter, the injured plaintiff died and her mother was substituted as plaintiff in the case.[163] Nevertheless, on remand, the trial court again dismissed the action, "finding that the plaintiff had failed to demonstrate that the

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154. For discussion of proximate cause, statute of limitations, fraudulent concealment, continuing wrong, and loss of consortium, see *Hasan v. Begley*, 836 N.E.2d 303 (Ind. Ct. App. 2005); *Garneau v. Bush*, 838 N.E.2d 1134 (Ind. Ct. App. 2005), *trans. denied*, 855 N.E.2d 1004 (Ind. 2006); *Palmer v. Gorecki*, 844 N.E.2d 149 (Ind. Ct. App.), *trans. denied*, 680 N.E.2d 597 (Ind. 2006).

155. *See* Ellenwine v. Fairley, 846 N.E.2d 657 (Ind. 2006).

156. Ledbetter v. Hunter, 842 N.E.2d 810 (Ind. 2006).

157. *Id.* at 812.

158. *Id.*

159. *Id*.

160. *Id.*

161. *Id.*

162. *Id*. (citing Ledbetter v. Hunter, 652 N.E.2d 543 (Ind. Ct. App. 1995)). This section of the Indiana Constitution can be found at Article I, Section 23, and states: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which , upon the same terms, shall not equally belong to all citizens."

163. *Id.*

statute was unconstitutional."[164] The plaintiff's argument begins by asserting that under the medical malpractice statute of limitations, minors have two years within which to file a claim, or if they were injured within the first six years of life, they have until they are eight to file a claim. However, minors who are victims of other torts have until two years after the age of majority to file a claim.[165]

The plaintiff's argument further states that there are unequally created classes that are "1) those children injured by medical malpractice; and 2) those children injured by negligence other than medical malpractice."[166] Additionally, the plaintiff argued that two subclasses of minor victims are treated differently: "1) those with parents who seek legal advice and file a claim; and 2) those with parents who chose not to do the same."[167]

The court affirmed the trial court's dismissal of the case.[168] The court held that plaintiff's first argument failed because she did not "negate the legislative basis for unequal treatment of the two identified classes": children injured by medical malpractice and children injured by negligence other than medical malpractice.[169] The court stated, "Demonstrating a lack of substantial evidence supporting a legislative rationale does not affirmatively establish that the rationale is unreasonable."[170] The court also found the plaintiff's argument about the subclasses to be lacking.[171] The court stated, "The children in each of the plaintiff's alleged subclasses share the same statute of limitations regime, with different results occurring only based upon whether or not the child, through her parents, elects to comply with the statutory deadlines."[172]

Ellenwine v. Fairley[173] applied a statute of limitations issue to a medical malpractice case involving a deceased minor. In *Ellenwine*, the Indiana Supreme Court reversed the trial court's grant of summary judgment in favor of the defendant doctor, Dawn Fairley, D.O. ("Dr. Fairley") and held that "the MMA [Medical Malpractice Act] and CWDA [Child Wrongful Death Act] operated together to require the Ellenwines to get their claim on file within the first to expire either of the MMA limitations period ([their child's] eighth birthday) or of the CWDA limitations period (two years from date of death)."[174]

The court's analysis of this case was quite complicated and examined a few possibly applicable statutes of limitations. While pregnant with her son Dustin,

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164. *Id*. (citing Appellant's App. at 28).
165. *Id*. at 813 (citing IND. CODE § 34-11-6-1 (2004)).
166. *Id*. (quoting Brief of Appellant at 10).
167. *Id*. at 813-14 (quoting Brief of Appellant at 11).
168. *Id.* at 815.
169. *Id.* at 814.
170. *Id*.
171. *Id.* at 815.
172. *Id*.
173. 846 N.E.2d 657 (Ind. 2006).
174. *Id.* at 666.

Michelle Ellenwine was treated by Dr. Dawn Fairley ("Dr. Fairley").[175] Within a few days of birth, physicians informed the Ellenwines that due to oxygen deprivation during delivery, Dustin suffered brain damage and experienced seizures.[176] Dustin later died when he was two years old.[177] After filing a proposed medical malpractice complaint against Dr. Fairley with the Indiana Department of Insurance, which issued a unanimous opinion in favor of the Ellenwines, the Ellenwines filed a claim against Dr. Fairley with the trial court under Indiana's Child Wrongful Death Act.[178]

In reaching its conclusion that the case could not be dismissed on summary judgment grounds based upon a statute of limitations, the court examined Indiana's Medical Malpractice Act,[179] Survival Statute,[180] and Child Wrongful Death Act, alone and in conjunction with each other. The court summarized its

> conclusions with respect to a child patient who is the victim of medical negligence prior to the child's sixth birthday who dies prior to the child's eighth birthday. (1) If the death was caused by the malpractice, (a) the malpractice claim (brought by the legal representative of the child) terminates at the child's death, Ind. Code § 34-9-3-1(a)(6) (2004); and (b) any wrongful death claim must be filed within the first to expire of either the MMA limitations period (the child's eighth birthday) or the CWDA limitations period (two years from the date of death). (2) If the death was from a cause other than the malpractice, both (a) the malpractice claim (whether brought by the patient or another as the representative of the patient) and (b) any wrongful death claim must be filed within first to expire either of the MMA limitations period (the child's eighth birthday) or of the CWDA limitations period (two years from date of death).[181]

B. Contributory Negligence

The Indiana Supreme Court decided a contributory negligence issue in *Cavens v. Zaberdac*.[182] In this case, the primary issue was whether the trial court wrongfully prohibited Dr. Robert Cavens ("Dr. Cavens"), the defendant, from asserting a contributory negligence defense based upon the conduct of Peggy Miller ("Miller"), the patient, which occurred prior to the alleged malpractice of Dr. Cravens.[183] The supreme court affirmed the trial court's granting of the

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175. *Id.* at 659.
176. *Id.*
177. *Id*.
178. *Id*. Indiana's Child Wrongful Death Act can be found at Indiana Code section 34-23-2-1.
179. IND. CODE §§ 34-18-1-1 to -18-2 (2004).
180. *Id.* §§ 34-9-3-1 to -5.
181. *Ellenwine*, 846 N.E.2d at 667.
182. 849 N.E.2d 526 (Ind. 2006).
183. *Id*. at 527.

plaintiff's motion for judgment on the evidence as to the issue of contributory negligence.[184]

In *Cavens*, Miller, who was represented in this case by her husband, suffered from severe and persistent asthma.[185] She had a regular doctor who had prescribed medication and informed Miller that she should seek emergency medical care in case she had "significant asthma symptoms."[186] On the day of her death, Miller began suffering from symptoms associated with a severe asthma problem at about 7:00 a.m.[187] She took several doses of her medication, called a friend for help, and by about noon, she called for an ambulance to take her to a hospital. In the emergency room, Miller was treated by Dr. Cravens but went into cardiac arrest and died[188] at approximately 11:45 p.m. that same evening.[189]

Dr. Cavens presented testimony of physicians who argued that Miller aggravated her condition by improperly taking too much of her medication and that Miller unreasonably delayed seeking medical treatment from a physician.[190] The trial court did not allow Dr. Cravens to present these arguments as his defense of contributory negligence.[191] The contributory negligence rule is that, "[a] patient may not recover in a malpractice action where the patient is contributorily negligent by failing to follow the defendant physician's instructions if such contributory negligence is simultaneous with and unites with the fault of the defendant to proximately cause the injury."[192]

Dr. Cravens argued that any doctor treating a patient after that patient was negligent in caring for his/her own condition should not be liable for the patient's injuries or aggravation of injuries, even if the doctor's care is below the applicable standard of care.[193] The court did not agree and cited to the "staple of tort law that the tortfeasor takes her victim as she finds him."[194] The court stated, "To permit healthcare providers to assert their patients' pre-treatment negligent conduct to support a contributory negligence defense would absolve such providers from tort responsibility in the event of medical negligence and thus operate to undermine substantially such providers' duty of reasonable care."[195]

The court eventually found that any alleged negligence on Miller's part "was

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184. *Id*. at 534.

185. *Id.* at 528.

186. *Id*.

187. *Id.*

188. *Id.*

189. *Id*.

190. *Id*.

191. *See id.*

192. *Id*. at 529 (citing Harris v. Cacdac, 512 N.E.2d 1138, 1139-40 (Ind. Ct. App. 1987)).

193. *Id*. at 529-30.

194. *Id*. at 530 (citing Bemenderfer v. Williams, 745 N.E.2d 212, 218 (Ind. 2001)); *see also* Brokers, Inc. v. White, 513 N.E.2d 200, 203-05 (Ind. Ct. App. 1987); Dunkelbarger Constr. Co. v. Watts, 488 N.E.2d 355, 358 (Ind. Ct. App. 1986); Johnson v. Bender, 369 N.E.2d 936, 940 (Ind. App. 1977); RESTATEMENT (SECOND) OF TORTS § 461 (1965).

195. *Cavens*, 849 N.E.2d at 530.

not 'simultaneous and cooperating' with the alleged medical negligence of Dr. Cavens."[196] Additionally, because there was no evidence that Dr. Cavens was Miller's treating physician at the time that she allegedly took her medication in excess and delayed in seeking medical treatment, the court found that there was "insufficient evidence supporting the issue of contributory negligence" and that the trial court correctly prohibited "Dr. Cavens from asserting the defense of contributory negligence."[197]

C. Sufficiency of Expert Affidavit

In *Mills v. Berrios*,[198] the Indiana Court of Appeals held that the affidavit of Teresa Mills's ("Mills") medical expert was sufficient to demonstrate the existence of a genuine issue of material fact regarding whether defendants Dr. Carlos Berrios ("Dr. Berrios"), Methodist Hospital, and OrthoIndy (collectively, "Healthcare Providers") complied with the appropriate standard of care.[199] The court of appeals therefore reversed the trial court's entry of summary judgment in favor of the healthcare providers and remanded the case back to the trial court for further proceedings.[200]

Mills had surgery to remove her right knee cap due to chronic pain. However, she continued to experience pain, and within a week after her release she was admitted to the hospital complaining of an inability to urinate and she had pain in her right leg.[201] Mills thereafter underwent several surgeries to remove dead tissue on her heel, which was from a pressure ulcer and then underwent wound care and pain control.[202]

After the Healthcare Providers filed motions for summary judgment, Mills filed her brief in opposition with designated evidence, which included an affidavit of Mills and an affidavit of her expert, Dr. William Pohnert ("Dr. Pohnert").[203] The Healthcare Providers moved to strike Mills's affidavit as it was not executed properly and moved to strike Dr. Pohnert's affidavit because Mills's medical records were not attached thereto, or as designated evidence, and Dr. Pohnert's affidavit was "impermissibly based on Mills's statements and subjective symptoms."[204] The trial court thereafter struck Mills's affidavit, struck

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196. *Id*. at 531.

197. *Id*. at 532. For an additional case decided during the survey period dealing with contributory negligence, see *Carter v. Indianapolis Power & Light Co.*, 837 N.E.2d 509 (Ind. Ct. App. 2005), *trans. denied*, 860 N.E.2d 586 (Ind. 2006). In *Carter*, contributory negligence precluded a wrongful death suit against a county, as the deceased person had assumed the risk of jumping street hills. *Id.* at 524.

198. 851 N.E.2d 1066 (Ind. Ct. App. 2006).

199. *Id.* at 1072.

200. *Id*. at 1072-73.

201. *Id.* at 1068.

202. *Id*.

203. *Id.* at 1068-69.

204. *Id*. at 1069.

portions of Dr. Pohnert's affidavit referring to Mills's affidavit, found the remaining portions of Dr. Pohnert's affidavit insufficient to oppose the designated evidence attached to the Healthcare Providers' motions for summary judgment, and entered summary judgment in favor of the Healthcare Providers.[205]

The court examined the three elements a plaintiff must prove in order to prevail in a medical malpractice case: "(1) a duty on the part of the defendant in relation to the plaintiff; (2) a failure to conform his conduct to the requisite standard of care required by the relationship; and (3) an injury to the plaintiff resulting from that failure."[206] Furthermore, when a medical review panel determines that a doctor's care was within the applicable standard of care, the plaintiff must have an expert to negate the panel's decision.[207]

Mills argued that the remaining portions of Dr. Pohnert's affidavit sufficiently established his credentials as an expert, stated that he reviewed Mills's medical records, and set forth Dr. Pohnert's conclusion that the Healthcare Providers failed to comply with the appropriate standard of care in their treatment of Mills, causing her complained of injury, and was therefore sufficient to raise a genuine issue of material fact preventing summary judgment.[208] The court of appeals agreed.[209]

D. Application of Release

In *Cummins v. McIntosh*,[210] the Indiana Court of Appeals addressed whether a release as between the patient, Joe Cummins ("Cummins") and the manufacturer of an intramedullary nail, Smith & Nephew, applied to release Cummins's doctor, Brent McIntosh ("Dr. McIntosh") from liability for allegedly breaching the applicable standard of care for allowing McIntosh to return to work and full weight bearing without x-raying his bones to determine whether he had fully healed.[211]

The trial court granted summary judgment for Dr. McIntosh, concluding that the release as between Cummins and Smith & Nephew applied to claims against Dr. McIntosh as well.[212] However, the court of appeals determined that a genuine

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205. *Id*. (citing Appellant's App. at 9).

206. *Id*. at 1070 (citing Oelling v. Rao, 593 N.E.2d 189, 190 (Ind. 1992)).

207. *Id*. (citing Bunch v. Tiwari, 711 N.E.2d 844, 850 (Ind. Ct. App. 1999)).

208. *Id*. at 1071.

209. *Id.* at 1072. The Healthcare Providers also argued that Dr. Pohnert's affidavit was insufficient because Mills's medical records were not designated evidence attached to Mills's response to the Healthcare Providers' summary judgment motions, and were not attached to his affidavit. The court disagreed however, and turned to Indiana Evidence Rules 703 and 705, finding that Dr. Pohnert's affidavit was not legally insufficient just because Mills's medical records were not attached or designated. *Id.* For further discussion of this issue in this case, see Jeff Papa, *Recent Developments in Indiana Evidence Law*, 40 IND. L. REV. 863 (2007).

210. 845 N.E.2d 1097 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 594 (Ind. 2006).

211. *Id*. at 1101.

212. *Id*. at 1102.

issue of material fact remained as to whether this was true. The court of appeals recited the current rule with regard to releases: "[A] valid release of one tortfeasor from liability for harm, given by the injured person, does not discharge others liable for the same harm, unless it is agreed that it will discharge them."[213] Therefore, the determination depended upon the language of the release.

After a review of the applicable release, the court determined that the language did not go so far as to specifically limit its applicability to Smith & Nephew only, but it also did not specifically include Dr. McIntosh.[214] Furthermore, Cummins sued Dr. McIntosh at the same time that he sued Smith & Nephew, and the suit against Dr. McIntosh included more allegations than simply the nail breaking, which was the only issue in the suit against Smith & Nephew.[215] In conclusion, the court found factual questions as to the intent of the parties, and stated, "regardless of how we classify Dr. McIntosh in relation to Smith & Nephew, summary disposition was improper as there are factual issues regarding the scope and effect of the release."[216]

IV. PREMISES LIABILITY

During the survey period, the Indiana Supreme Court decided one premises liability case, and the Indiana Court of Appeals decided two. All three cases address different issues related to premises liability.

A. Duty to Warn Successor Tenants and the Effect of "As Is" Provisions on Tort Claims

In *Dutchmen Manufacturing, Inc. v. Reynolds*,[217] the Indiana Supreme Court held that

> tort liability of a tenant who leaves a dangerous item on the leased premises at the expiration of a lease is not extinguished by reason of the expiration of the lease. [And], that a provision in a lease to a successor tenant that the item is acquired "as is" does not of itself bar a tort claim asserted by a non-contracting party.[218]

In *Dutchmen*, Chapman Realty, Inc. ("Chapman") leased a facility to Dutchmen Manufacturing, Inc. ("Dutchmen") for the purpose of working on recreational vehicle travel trailers and fifth wheels. While a tenant, Dutchmen installed scaffolding attached to the ceiling beams. It did this without the consent or knowledge of Chapman. The lease between these parties stated that Dutchmen was to remove all personal property and trade fixtures before vacating the premises, and anything not removed would become the property of Chapman.

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213. *Id*. at 1103 (quoting Huffman v. Monroe County Cmty. Sch. Corp., 588 N.E.2d 1264, 1267 (Ind. 1992) (quoting RESTATEMENT (SECOND) OF TORTS § 885(1) (1977))).

214. *Id*. at 1107.

215. *Id*. at 1107-08.

216. *Id*. at 1108.

217. 849 N.E.2d 516 (Ind. 2006).

218. *Id*. at 518.

The lease also provided that Chapman could require removal of anything left, at Dutchmen's expense.[219]

Initially, near the expiration of Dutchmen's lease, Chapman told Dutchmen to remove the scaffolding or pay for the removal. Chapman also then began negotiations to lease the facility to Keystone RV, Inc. ("Keystone"). Keystone was also a manufacturer of travel trailers, and expressed that it wanted the scaffolding to remain in the facility. Dutchmen offered to sell the scaffolding to Keystone, which offer was refused. Dutchmen then agreed to give the scaffolding to Keystone if Chapman did not charge Dutchmen for its removal.[220]

When Dutchmen left the facility, it also left the scaffolding in place. Two weeks afterward, Keystone signed a lease with Chapman that contained an "as is" provision. About seven months after taking possession of the facility, Chad Reynolds ("Reynolds"), a Keystone employee, was injured when he was struck by scaffolding that had broken loose from its mounting. The employee was rendered paralyzed below the neck. The Keystone injury report and Keystone engineers determined that a weld had failed due to lack of lubricant and "improper welding procedure." The weld was not visible as it was concealed by an outer tube and an end cap.[221]

Reynolds sued both Chapman and Dutchmen. He alleged that Dutchmen was liable for negligence because it constructed and installed defective scaffolding, and that it was liable under Section 388 of the Restatement (Second) of Torts because it supplied a defective chattel. Dutchmen responded that it did not owe Reynolds any duty, it was not negligent per se, the scaffolding was not a chattel, Keystone was aware of the dangers of scaffolding, and Keystone accepted the premises and scaffolding "as is."[222]

The trial court granted summary judgment in favor of Dutchmen on Reynolds's negligence per se claim and all other negligence theories except the Section 388 claim. The court of appeals reversed and remanded, directing the trial court to enter summary judgment for Dutchmen on all theories, including the Section 388 claim.[223] The court of appeals reversed based upon its holding that Reynolds could not recover on its theory that Dutchmen supplied a defective chattel because the scaffolding merged with the real estate at the expiration of Dutchmen's lease.[224]

The only issue on appeal to the supreme court was Reynolds's Section 388 claim. Section 388 provides:

> One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to

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219. *Id*.

220. *Id*.

221. *Id*.

222. *Id*. at 518-19.

223. *Id*. at 519 (citing Dutchmen Mfg., Inc. v. Reynolds, 819 N.E.2d 529, 533 (Ind. Ct. App. 2004)).

224. *Id*. (citing Dutchmen Mfg., Inc. v. Reynolds, 831 N.E.2d 750 (Ind. 2005)).

> use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.[225]

The court found that the parties agree that the scaffolding is a trade fixture, which is defined as "personal property put on the premises by a tenant which can be removed without substantial or permanent damage to the premises."[226] Therefore, because chattel is "movable or transferable property; personal property[,]"[227] the scaffolding was a chattel at the time Dutchmen occupied the facility.[228]

Dutchmen, however, argued that Section 388 is not applicable to the matter because the scaffolding was not a chattel at the time of Reynolds's accident because it had merged with the reality and title to the scaffolding vested with Chapman after Dutchmen left the facility and before Keystone signed its lease.[229] Reynolds, on the other hand, argued that an agreement to transfer ownership of the scaffolding to Keystone with the consent of Chapman was completed before Dutchmen left the facility.[230]

The court agreed that "a trade fixture installed by a tenant merges with the realty and thereby becomes the property of the landlord if it is left on the premises after the tenant leaves the premises[,]" however, there was no mention of the scaffolding in the agreements between Chapman and Keystone, and Chapman "disclaimed ownership of the scaffolding and demanded its removal which, if not done, would be performed at the tenant's expense."[231]

The court was not persuaded by any argument about who owned the scaffolding, however, and found that tort liability under Section 388 fall onto the party who caused the loss.[232] The court therefore held that when drawing factual inferences in favor of the non-movant, as required in a summary judgment analysis, summary judgment could not be affirmed in Dutchmen's favor because the designated evidence supports "the inference that the intention of all three parties involved was that Keystone would obtain ownership of the scaffolding if

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225. *Id*. (quoting RESTATEMENT (SECOND) OF TORTS § 388 (1977)).

226. *Id*. at 520 (quoting 14 IND. LAW ENCYCLOPEDIA, FIXTURES §14 at 137 (West 2004)).

227. *Id*. at 519 (quoting BLACK'S LAW DICTIONARY 251 (8th ed. 2004)).

228. *Id*. at 520.

229. *Id*.

230. *Id*.

231. *Id*.

232. *Id*. at 521.

and when it signed its lease with Chapman[,]"[233] essentially allowing the Dutchmen to leave the scaffolding at the Chapman facility until and if Keystone signed a lease for the Chapman facility. If Keystone and Chapman had not entered into a lease agreement, Dutchmen would have been required to remove the scaffolding or pay for its removal.[234] Therefore, there was no merger between the scaffolding and the facility, and it remained Dutchmen's chattel until Keystone signed a lease with Chapman, thereby "it was a chattel at the time it was supplied to Keystone and is susceptible to a Section 388 claim."[235] After a discussion of the elements of a Section 388 claim, the court held that "the evidence viewed in a light most favorable to Reynolds permits the inference that Dutchmen negligently welded the scaffolding, and also failed to conduct a reasonable inspection of the scaffolding and ensure adequate lubricant[,]" sufficiently supporting a denial of Dutchmen's summary judgment motion.[236]

Dutchmen next argued that it is not liable under Section 388 because Keystone accepted the facility and scaffolding "as is" pursuant to its contract with Chapman.[237] The court found that "[t]he implications of such a disclaimer as to third party tort claims are not clearly spelled out and. . . , are not made clear by settled judicial precedent."[238] The court found little case law on the effects an "as is" clause might have on the liability of third parties and found the cases cited by Dutchmen, in its support, were not applicable to the facts of this case.[239] Therefore, none of Dutchmen's arguments barred Reynolds's Section 388 claim.[240]

B. Invitee Versus Licensee

The second premises liability case during the survey period, decided by the court of appeals, addressed the issue of whether the plaintiff was a licensee or invitee for purposes of determining the duty he was owed and whether the alleged defect was latent. These two issues were considered in *Rhoades v. Heritage Investments, LLC*,[241] after the trial court granted summary judgment in favor of Heritage Investments, LLC and Timothy E. Moll ("Moll") (collectively "Heritage") and against Edward and Jayne Rhoades ("Rhoades").[242]

In this matter, Rhoades accompanied a friend ("Maier") to a building that had been renovated by Heritage. Rhoades drove himself and Maier to the building and walked into the building with Maier. Moll, who was a friend to Maier, was

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233. *Id.* at 522.
234. *Id*. (citing Merrell v. Garver, 101 N.E.2d 152, 156 (Ind. App. 1913)).
235. *Id*.
236. *Id*. at 523.
237. *Id*.
238. *Id*.
239. *Id*. at 524-25.
240. *Id*. at 525.
241. 839 N.E.2d 788 (Ind. Ct. App. 2005), *trans. denied*, 860 N.E.2d 584 (Ind. 2006).
242. *Id.* at 790.

waiting inside the building. Rhoades was not invited into the building, and did not participate in the conversations between Moll and Maier. Additionally, Rhoades was not asked to leave the building, believed he had permission to be in the building, and noticed that the building was "big, empty, and dimly lit."[243]

At one point, Rhoades followed Moll and Maier to the second level of the building, but then decided to descend the stairs before Moll and Maier because he was uncomfortable on the second level without guardrails and with poor lighting. When Rhoades reached the landing of the staircase, he believed himself to be at the bottom of the stairs, so he took a step to what he thought was the bottom of the stairs. In fact, Rhoades had not reached the bottom of the stairs, stepped off the landing, and broke his arm and glasses in the fall.[244]

The trial court dismissed Rhoades's negligence suit against Heritage on summary judgment because Rhoades was a licensee who entered the property out of curiosity and took the property as he found it, and

> Heritage did not will fully or wantonly injure Rhoades or act in a manner to increase his peril and that it did not breach its duty to warn Rhoades of any latent danger on the premises because Rhoades recognized . . . that it was a work area, and he noticed all of the alleged defects before falling.[245]

On appeal, Rhoades argued that he was either expressly an invitee or Maier's invitee status should extend to him.[246] The court of appeals first rejected his argument that he was an invitee and found the following facts in support of their conclusion: he took no part in the conversations between Moll and Maier (who was invited), he was not asked to leave, he believed he had permission to be there, no one invited him to the second level, and he went to the second level out of curiosity. The court held, "no reasonable person could conclude that Moll extended an invitation to Rhoades to enter the building or to go upstairs. Rather, the evidence most favorable to Rhoades established that Moll merely gave Rhoades permission to enter the building and to go upstairs. This mere permission made Rhoades a licensee."[247]

The court of appeals also rejected Rhoades's argument that he was a invitee based solely upon Maier's status as an invitee. The court found that the important facts in this issue were that the only purpose Rhoades had at the building was to accompany Maier, Moll did not treat Rhoades as he did Maier, and he was not invited into the building or up the stairs. "Rhoades was properly considered a licensee."[248]

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243. *Id*.

244. *Id*. at 790-91.

245. *Id*. at 791.

246. *Id.* at 793.

247. *Id.*

248. *Id*. at 794 (citing Henry H. Cross Co. v. Simmons, 96 F.2d 482, 486 (8th Cir. 1938) ("One who accompanies an invitee to the premises of another for his own pleasure or for his own purpose in not an invitee."); Howard v. The Gram Corp. 602 S.E.2d 241, 243 (Ga. Ct. App. 2004)).

Having determined that the trial court did not err in its determination that Rhoades was a licensee, the court of appeals then addressed whether the trial court properly found that Heritage did not breach the duty it owed Rhoades as a licensee. "A landowner's only duties to a licensee are to refrain from willfully and wantonly injuring the licensee and to warn the licensee of any latent danger on the premises of which the owner has knowledge."[249] The court of appeals found that Rhoades did not attempt to show that Heritage renovated the building with the intent to wantonly or willfully injure Rhoades or anyone else. Furthermore, the court found that it did not agree with Rhoades that the staircase was a latent defect. "Latent is defined as concealed or dormant."[250] Rhoades himself admitted that he knew the building was dimly lit and the staircase had no guardrails or handrails. Therefore, the court agreed with the trial court that Heritage did not breach any duty it owed to Rhoades as a licensee.[251]

C. Negligent Misrepresentation

The third and last notable case dealing with premises liability decided during the survey period is *Thomas v. Lewis Engineering, Inc.*[252] In this case, the Indiana Court of Appeals affirmed the trial court and held that Lewis Engineering, Inc. ("Lewis Engineering") did not owe a duty to Deann Thomas ("Thomas"), a landowner with which Lewis Engineering had not contracted.[253]

In this case, Thomas sued Lewis Engineering alleging negligent misrepresentation based upon a survey retracement it did for a property owner adjacent to Thomas when that property owner hired Lew Engineering for the purpose of locating a west boundary line so that the adjacent property owner could erect a fence.[254] In a subsequent quiet title action, however, judgment was entered in favor of Thomas and against the adjacent property owner.[255]

Despite Thomas's allegation that Lewis Engineering negligently misrepresented the boundary line to the adjacent property owner, based upon Restatement (Second) of Torts, section 552, the court found that Indiana has adopted this tort only in the context of an employment relationship.[256] The court has held in the past "that a professional owes no duty to one with whom he has no contractual relationship unless the professional has actual knowledge that such third person will rely on his professional opinion."[257]

As the rule was applied in this matter, the court found no evidence that Lewis

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249. *Id*. (citing Wright v. Int'l Harvester Co., 528 N.E.2d 837, 839 (Ind. Ct. App. 1988)).

250. *Id*. (citing BLACK'S LAW DICTIONARY 898 (8th ed. 2004)).

251. *Id*.

252. 848 N.E.2d 758 (Ind. Ct. App. 2006).

253. *Id*. at 762.

254. *Id*. at 759.

255. *Id*.

256. *Id*. at 760 (citing Eby v. York-Division, Borg-Warner, 455 N.E.2d 623 (Ind. Ct. App. 1983); Tri-Professional Realty, Inc. v. Hillenburg, 669 N.E.2d 1064, 1068 (Ind. Ct. App. 1996)).

257. *Id*. (citing *Eby*, 455 N.E.2d at 623; *Tri-Professional*, 669 N.E.2d at 1068).

Engineering knew Thomas would rely on Lewis Engineering's survey.[258] In fact, Thomas did not rely on the survey.[259] Rather, Thomas argued that the survey was inaccurate.[260] Therefore, because there was no contractual agreement between Thomas and Lewis Engineering and Lewis Engineering did not know that Thomas would rely on its survey, the court held that Thomas failed to state a claim under Indiana law against Lewis Engineering.[261]

V. INDIANA TORT CLAIMS ACT

During the survey period, the Indiana Supreme Court was asked to answer certified questions from the United States District Court, Northern District of Indiana, in *Cantrell v. Morris*.[262] The certified questions, and response, address issues related to the Indiana Tort Claims Act ("ITCA"). The court's response was as follows:

> 1) we do not resolve whether Article I, Section 9 of the Indiana Constitution imposes any restrictions on government officials in dealing with political activity or affiliation of public employees; 2) to the extent that tort doctrines give a civil damage remedy to a public employee terminated for political activity or affiliation in violation of Article I, Section 9 of the Indiana Constitution, any such wrongful discharge claim is governed by the Indiana Tort Claims Act (ITCA); and 3) the Indiana Constitution does not of itself give rise to any such claim, and does not prevent the ITCA from applying to such a claim.[263]

In *Cantrell*, the plaintiff below, John Cantrell, was appointed as a public defender by a judge who did not seek reelection. Cantrell, nevertheless, supported the candidacy of someone who was not elected. Thirty days after Judge Sonya A. Morris ("Morris") was elected and took office, Cantrell was terminated.[264] Cantrell then sued Morris alleging that she terminated him for his support of her opponent and asserted that his termination gave rise to a claim under 42 U.S.C. § 1983 and independent claims for violation of his free speech

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258. *Id*. at 761.

259. *Id.* at 762.

260. *Id*.

261. *Id*. The court also discussed, and disagreed with, Thomas's argument that Lewis Engineering had a duty to Thomas based upon the three factors discussed in *Webb v. Jarvis*, 575 N.E.2d 992 (Ind. 1991), wherein the Indiana Supreme Court set forth the formula to determine the existence of a duty in an ordinary negligence claim. *Thomas*, 848 N.E.2d at 761. The *Thomas* court held that the *Webb* formula did not apply because Thomas claimed negligent misrepresentation, and even if it were to apply to Thomas's claim, her claim "would still fall short[]" because Thomas did not have any relationship with Lewis Engineering and because public policy analysis would not favor such a broad duty. *Id.*

262. 849 N.E.2d 488 (Ind. 2006).

263. *Id*. at 490.

264. *Id.*

and association rights under both the U.S. and Indiana Constitutions.[265] More specifically, Cantrell sought compensatory and punitive damages for violation of his free speech rights under Indiana Constitution Article I, Section 9. Cantrell also sought reinstatement of his employment.[266] After denying Morris's motion to dismiss Cantrell's claim, the district court certified questions to the Indiana Supreme Court.

The court summarized it conclusions as follows:

> [W]e expressly decline to address whether termination of a public employee may give rise to a violation of the Indiana Constitution. If a violation of Section 9 can supply the invasion of a right necessary for a wrongful discharge claim, the civil damages remedy against the government for a wrongful discharge is limited by the ITCA, and the individual official is entitled to immunity and indemnity to the extent provided by the ITCA.[267]

Just one week before the court's opinion in *Cantrell*, the Indiana Supreme Court handed down decisions in *Patrick v. Miresso*[268] and *City of Indianapolis v. Garman*.[269] In both cases the court held that governmental immunity under the ITCA does not act to immunize police officers and cities from liability when an officer allegedly operates his vehicle negligently while attempting to enforce laws.[270] Additionally, the trial courts in both cases denied the defendants' motions for summary judgment based upon governmental immunity in the ITCA, and the defendants appealed.[271]

The defendants argued that because the officers were engaged in law enforcement at the time of the accidents, the officers and the cities were immune from liability pursuant to the ITCA, which provides that a government entity or employee that is acting within the scope of his employment is not liable for loss resulting from the enforcement of a law.[272] However, as the trial courts noted, Indiana Code section 9-21-1-8 requires also that emergency vehicles be operated with "due regard for the safety of all persons."[273] Therefore, the ITCA was found to not grant immunity to government agencies or employees that breach their duty of reasonable care, outlined in Indiana Code section 9-21-1-8.[274] Furthermore, whether the officers breached the statutory duty of care was a

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265. *Id.*

266. *Id*. at 490-91.

267. *Id.* at 507.

268. 848 N.E.2d 1083 (Ind. 2006).

269. 848 N.E.2d 1087 (Ind. 2006).

270. *Patrick*, 848 N.E.2d at 1086; *Garman*, 848 N.E.2d at 1088.

271. *Patrick*, 848 N.E.2d at 1084; *Garman*, 848 N.E.2d at 1088. This Article will only reference and cite to the *Patrick* case because in *Garman* the court basically recited the facts briefly and then restated its holding in *Patrick*. The court's analysis is contained in the *Patrick* opinion.

272. *Patrick*, 848 N.E.2d at 1084 (quoting IND. CODE §34-13-3-3 (2004)).

273. *Id*. (quoting Appellant's App. at 8).

274. *Id*. at 1085.

genuine issue of material fact precluding summary judgment.[275]

During the survey period, the Indiana Court of Appeals also handed down a few decisions involving the ITCA. In *Orndorff v. New Albany Housing Authority*,[276] the court of appeals found that the New Albany Housing Authority ("NAHA") is a municipal corporation, and thereby a political subdivision that is subject to the notice provisions of the ITCA. The court further concluded that plaintiff, Victor Orndorff ("Orndorff"), did not comply with the notice provisions, and the trial court properly granted the NAHA's motion to dismiss.[277]

In this case, Orndorff was a resident of the NAHA in Floyd County. While on NAHA's property, Orndorff was shot by a non-resident. While the police were investigating the incident that same evening, NAHA employees were assisting the police and present at the property, but did not conduct its own independent investigation.[278] After Orndorff filed a complaint against the NAHA, the NAHA filed a motion to dismiss arguing that Orndorff did not comply with the notice requirements of the ITCA.

After a review of a few statutes defining political subdivisions and municipal corporations[279] and the manner by which the NAHA was created, the court of appeals held that the NAHA is a municipal corporation, which is a political subdivision subject to the notice provisions of the ITCA.[280] Lastly, the court found that even though in some instances Indiana courts have allowed substantial compliance with the ITCA notice requirements,[281] there was no substantial compliance in this case where Orndorff sent no notice to the NAHA but relied solely on the NAHA's presence at the scene the night of the shooting for his argument of substantial compliance with the notice provisions.[282]

In *Oshinski v. Northern Indiana Commuter Transportation District*,[283] the Indiana Court of Appeals decided a case under the ITCA in which the plaintiff sued under the Federal Employer's Liability Act ("FELA"). Thomas Oshinski sued his then employer, the Northern Indiana Commuter Transportation District ("NICTD") for allegedly negligently failing to provide him with proper safety equipment.[284] The trial court granted the NICTD's motion for summary judgment based upon NICTD's sovereign immunity and ITCA affirmative defenses.[285] On appeal, Oshinski argued that he was not required to comply with

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275. *Id*.

276. 843 N.E.2d 592 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 584 (Ind. 2006).

277. *Id*. at 596-97.

278. *Id*. at 593.

279. *Id*. at 594-95 (citing IND. CODE §§ 34-13-3-22 (2004), 34-6-2-110 (2004), 36-1-2-10 (2006)).

280. *Id*. at 595-96.

281. *Id*. at 596 (citing Howard County Bd. of Comm'rs v. Lukowiak, 810 N.E.2d 379, 382 (Ind. Ct. App.), *clarified on reh'g*, 813 N.E.2d 391 (Ind. Ct. App. 2004)).

282. *Id.*

283. 843 N.E.2d 536 (Ind. Ct. App. 2006).

284. *Id*. at 537-38.

285. *Id*. at 538.

the ITCA notice requirements because under the facts of this case, "Indiana has given its 'blanket consent' to be sued."[286]

The court of appeals found that the "ITCA operates as an unequivocal statement of Indiana's consent to be sued in tort provided certain qualifications--including notice--are fulfilled."[287] The court then concluded that Indiana's qualified consent to tort suits under the ITCA is properly extended to FELA claims because FELA claims are tort claims.[288] Therefore, FELA claims against the State of Indiana "remain available to workers who comply with ITCA's qualifications."[289]

In another ITCA case, *Beck v. City of Evansville*,[290] the Indiana Court of Appeals affirmed the trial court's grant of summary judgment in favor of the City of Evansville ("City") on the plaintiffs' ("homeowners") claims of negligence and nuisance because the City was immune from liability pursuant to the ITCA.[291] Specifically, the homeowners alleged that the City negligently failed to control flooding in their neighborhood, which allegedly resulted in loss of use of the homeowners' residences.[292]

The ITCA provision applicable in this case provides in part that a government entity is not liable for loss resulting from the performance of discretionary functions.[293] The City argued on appeal that any acts performed in this case were discretionary and therefore immune from liability.[294] The court found that whether an act is discretionary is a question of law for the court to decide and "[t]he essential inquiry is whether the challenged act is the type of function that the legislature intended to protect with immunity."[295]

The court then reviewed the facts of the case and determined that the City was performing discretionary acts when it commissioned a Stormwater Master Plan, and therefore, the trial court properly granted summary judgment on the homeowners' negligence and nuisance claims in favor of the City based upon governmental immunity.[296] Furthermore, the court noted that "[n]otwithstanding governmental immunity, . . . the homeowners failed to present any evidence to support their allegation that the City negligently operated and maintained the sewer system."[297]

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286. *Id*. at 539.

287. *Id*. at 544 (citing Raygor v. Regents of the Univ. of Minn., 534 U.S. 533 (2002)).

288. *Id*.

289. *Id*. at 545.

290. 842 N.E.2d 856 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 594 (Ind. 2006).

291. *Id*. at 857-58.

292. *Id*. at 859.

293. *Id*. at 861 (quoting IND. CODE § 34-13-3-3 (2004)).

294. *Id*.

295. *Id*. at 861-62 (citing Peavler v. Monroe County Bd. of Comm'rs, 528 N.E.2d 40, 46 (Ind. 1988)).

296. *Id*. at 863.

297. *Id*.

VI. WORKER'S COMPENSATION

In the survey period, the Indiana Supreme Court addressed the issue of whether an employee may continue to pursue a worker's compensation claim after reaching a settlement for damages with a co-employee. Additionally, the Indiana Court of Appeals decided one case of note, regarding the application of the statute of limitations as applied to medical services.

A. Pursuit of a Claim After Settlement

In *DePuy, Inc. v. Farmer*,[298] the Indiana Supreme Court was faced with the issue of whether an employee who had already settled a claim for intentional injury against another employee could continue to pursue a worker's compensation claim against his employer. In this case, Anthony Farmer ("Farmer") began to clock out at the end of his work shift when he brushed against another employee, Wynn Swindel ("Swindel"), at their place of employment, DePuy Manufacturing, Inc. ("DePuy").[299] Swindel pinned Farmer against a machine and bent Farmer over backward, causing severe injuries to Farmer's back, which resulted in lost work, surgery, and medical bills.[300]

Farmer thereafter requested worker's compensation benefits for medical expenses, temporary total disability, and permanent disability. He also filed suit against Swindel for battery and DePuy for negligence.[301] The negligence claim against DePuy was dismissed as barred by the Worker's Compensation Act ("WCA"). Swindel settled the suit against him with a $3,000 payment to Farmer. In the meantime, DePuy filed a motion to dismiss the worker's compensation claim and, after Farmer settled with Swindel, a renewed motion to dismiss based upon the settlement between Farmer and Swindel.

The Worker's Compensation Board found that the worker's compensation claim could continue, but directed Farmer to remit the $3000 settlement to DePuy as a condition to maintaining the worker's compensation claim.[302] The court of appeals agreed that the settlement between Farmer and Swindel did not bar the worker's compensation claim against DePuy, but also held that "Farmer's injuries 'although sustained in the course of his employment, [did] not arise out of his employment with DePuy.'"[303]

On transfer, the Indiana Supreme Court found that Farmer's injuries were sustained when he was at work and while clocking out at the end of his shift, which was "clearly 'in the course of' his employment."[304] The court also found that Farmer was not participating in horseplay, which would mean Farmer would

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298. 847 N.E.2d 160 (Ind. 2006).

299. *Id*. at 163.

300. *Id*.

301. *Id*.

302. *Id*.

303. *Id*. (quoting DePuy, Inc. v. Farmer, 815 N.E.2d 558, 565 (Ind. Ct. App. 2004)).

304. *Id*. at 164 (citing Global Constr., Inc. v. March, 813 N.E.2d 1163, 1166 (Ind. 2004); Bertoch v. NBD Corp., 813 N.E.2d. 1159, 1161 (Ind. 2004)).

not be entitled to worker's compensation benefits, and that Swindel lost control and proceeded with an unprovoked attack on Farmer.[305] Furthermore, the court found that "because the incident was the product of no fault on the part of either Farmer or his employer, it occurred 'by accident' as far as DePuy is concerned."[306]

The principal issue in this case "is the extent to which the rules developed under the specific language of section 13 [of the WCA] as to third part torts also apply to intentional torts by fellow employees."[307] To begin, the court agreed with the court of appeals and the Board that section 13 did not bar Farmer's worker's compensation claim against DePuy because section 13 does not apply to Farmer's suit against Swindel.[308]

The court then addressed the issue of Farmer possibly receiving double recovery by being able to maintain his worker's compensation claim despite already settling with Swindel. The court found that because the Board required Farmer to remit his $3000 settlement sum to DePuy as a condition to continuing his worker's compensation claim, the goal to avoid double recovery had been met.[309] Furthermore, the court agreed with the application of common law subrogation rights to achieve this goal.[310]

B. Statute of Limitations

In *Colburn v. Kessler's Team Sports*,[311] the Indiana Court of Appeals held that the statute of limitations under the Worker's Compensation Act ("WCA"), which requires worker's compensation claims be filed within two years of a work related injury,[312] applies to claims for medical services, thereby affirming the Worker's Compensation Board's dismissal of Bill Colburn's ("Colburn") Application for Adjustment of Claim ("Claim").[313]

In this case, Colburn was injured on August 12, 2002 and filed an application for adjustment of claim against Kessler on December 13, 2004, more than two years from the date of his injury. His arguments against the dismissal of his application were that the worker's compensation statute of limitations does not

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305. *Id*. at 165.

306. *Id*.

307. *Id*. at 169.

308. *Id*. at 166, 169. Section 13 of the WCA includes a provision that explicitly or by judicial construction allow an employee to sue a third party. "Third party" is defined in this section as someone who is not the employer or a fellow employee. IND. CODE § 22-3-2-13 (2004). Therefore, by definition, section 13 does not apply to the civil suit between Farmer and Swindel.

309. *DePuy*, 847 N.E.2d at 169.

310. *Id*. at 170. The court lastly increased the award per statute by ten percent (10%) because it had been over a decade since Farmer was injured and he had not yet received any worker's compensation benefits. *Id*. at 172.

311. 850 N.E.2d 1001 (Ind. Ct. App. 2006).

312. IND. CODE § 22-3-3-3 (2004).

313. *Colburn*, 850 N.E.2d at 1003.

apply to claims for medical services and the limitations period tolled because there was no "qualifying disagreement" during the two years after his injury.[314]

The court of appeals first found that "because an adjudication of permanent impairment must be made within the two-year statute of limitations under Indiana Code section 22-3-3-3, an employer's obligation to pay medical expenses does not extend beyond two years from the accident date absent an agreement or Board decision otherwise."[315] Because there was no temporary total disability or adjudication of permanent impairment within two years from the date of Colburn's injury, Kessler was not obligated to pay for Colburn's medical services after August 12, 2004.[316]

The court then disagreed with Colburn's argument that Kessler had a duty to get a permanent partial impairment ("PPI") determination with two years from the date of Colburn's injury.[317] Although the court found that employer's must pay for a PPI assessment as part of an employee's medical treatment, it also found that Colburn did not show any reason why he did not resolve or preserve his claim prior to the end of the two year period, despite Colburn's doctors recommending surgery shortly after suffering his injury.[318] Lastly, the court held that the Board's dismissal of Colburn's application for adjustment of claim did not violate public policy.[319]

VII. DEFAMATION AND TORTIOUS INTERFERENCE

A. Defamation and Tortious Interference with Employment

In *Trail v. Boys and Girls Clubs of Northwest Indiana*,[320] the Indiana Supreme Court was faced with issues surrounding claims for defamation and tortious interference with an employment at will relationship by Eddie Trail ("Trail") against his former employer, its board members and executive committee. Trail alleged that the executive committee "contrived a study of the Club . . . to discredit Trail and justify his termination."[321] He also alleged that this report was biased and "cast him in a negative light."[322] The defendants moved to dismiss the complaint for failure to state a claim under Indiana Rule of Procedure 12(B)(6), which was granted by the trial court. The court of appeals thereafter reversed the trial court's dismissal of Trail's claim for tortious interference against the Executive Committee and Trail's defamation claims. The Indiana Supreme Court granted transfer and affirmed the trial court's

314. *Id*. at 1005.
315. *Id*. at 1006.
316. *Id*.
317. *Id*. at 1007.
318. *Id*. at 1007-08.
319. *Id*.
320. 845 N.E.2d 130 (Ind. 2006).
321. *Id*. at 133. Trail also alleged breach of contract. *Id.*
322. *Id*. at 133-34.

dismissal of the defamation and interference claims.[323]

The court found that to establish a claim for defamation, "a plaintiff must prove the existence of 'a communications with defamatory imputation, malice, publication, and damages.'"[324] The defamatory statement must also be false.[325] The two allegedly defamatory communications were the transmission of the report by the individual defendants to other directors or officers of the Club and those discussions as between the individual defendants and other clubs to whom Trail applied for employment.[326]

The court quickly determined that the first alleged defamatory communication was privileged as between the persons making the communication because they were made "to a person having a corresponding interest or duty."[327] Furthermore, Trail inadequately alleged bad faith on the part of the individual defendants, which if Trail had proven bad faith, could have overcome the privilege defense.[328]

As to the second alleged defamatory communication, Trail specifically alleged that "defendants have refused to say anything about the report" to the other clubs to which he applied for employment.[329] He continued that this lack of saying anything leads other clubs to assume Trail was dismissed for "commit[ing] grave personal improprieties with the children they serve or financial misdeeds such as embezzlement."[330] The court found that "the allegation merely refers to the speculative effect the defendants' non-actionable silence had on Trail's reputation. It would be an odd use of the defamation doctrine to hold that silence constitutes actionable speech."[331]

As to Trail's claim of tortious interference with his employment, the court found that Trail "must not only allege the basic elements of tortious interference and those special elements related to employees at will, he must also allege some interfering act by officers or directors that rests outside their authority as agents of the corporation."[332] Trail alleged that the investigation and evaluation by the directors, as well as the power to terminate him, were outside the scope of their authority and that the directors' actions were based upon ill will, rather than anything corporate in nature.[333] Nevertheless, the court found that basic corporate agency law supports giving directors a wide range of powers,[334] the

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323. *Id.* at 134.

324. *Id*. at 136 (quoting Davidson v. Perron, 716 N.E.2d 29, 37 (Ind. Ct. App. 1999)).

325. *Id*. (citing Doe v. Methodist Hosp., 690 N.E.2d. 681, 687 (Ind. 1997)).

326. *Id*. at 136-37.

327. *Id*. at 136 (quoting Bals v. Verduzco, 600 N.E.2d 1353, 1356 (Ind. 1992) (citations omitted)).

328. *Id*.

329. *Id.* at 137.

330. *Id*.

331. *Id*.

332. *Id*. at 139.

333. *Id*.

334. *Id*. (citing Ind. Dep't of Pub. Welfare v. Chair Lance Serv., Inc., 523 N.E.2d 1373, 1377

corporation's by laws and articles of incorporation supported their ability to terminate Trail,[335] and that "motives could not affect whether [their] actions were within the scope of [their] duties."[336]

B. Defamation Claim Against Newspaper

In *Shepard v. Schurz Communications, Inc.*,[337] the Indiana Court of Appeals was presented with issues related to claims of defamation by an attorney, Clifford Shepard ("Shepard") against Steven Litz ("Litz"), the Monrovia town attorney, and Schurz Communications, Inc. d/b/a Mooresville/Decatur Times ("the Times"), a newspaper. Shepard obtained a list of sewer customers who were allegedly delinquent in paying their sewer bills from Litz. Shepard then sent a letter to each of the persons on the list stating that Litz revealed their names to him. The Times thereafter wrote an article including language from Shepard's letter to the sewer customers, and Litz's response that "Cliff Shepard is a liar. His statement is false."[338]

The trial court granted a motion to dismiss filed by the Times, denied Litz's motion to dismiss, and denied a motion for summary judgment by Shepard. At a subsequent hearing, the trial court also awarded the Times attorney fees and costs.[339] The court of appeals addressed the appeal by Shepard of the trial court's dismissal of claims against the Times.

The trial court's dismissal of Shepard's claim of defamation against the Times was based in part upon the anti-SLAPP statute found at Indiana Code section 34-7-7-1, which, in general, protects a person's right to free speech about public issues or issues of public interest, defines "acts in furtherance," sets forth conditions when the rights can be invoked as a defense, and sets forth the procedures for filing a motion to dismiss based upon the statute. The court found at the outset that "it is uncontroverted that a mater of public interest is implicated here."[340] And found that "Indiana Code Section 34-7-7-9 does not supplant the Indiana common law of defamation, but provides that the movant must establish that his or her speech was 'lawful.'"[341]

The court found that "[a]ctual malice exists when the defendant publishes a defamatory statement 'with knowledge that it was false or with reckless disregard of whether it was false or not.'"[342] Furthermore, any statement actionable for

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(Ind. 1988)).

335. *Id*. at 140.

336. *Id*. (quoting Leslie v. St. Vincent New Hope, Inc., 873 F. Supp. 1250, 1257 (S.D. Ind. 1995)).

337. 847 N.E.2d 219 (Ind. Ct. App. 2006).

338. *Id*. at 222.

339. *Id*. at 222-23.

340. *Id*. at 224.

341. *Id*. (citing IND. CODE § 34-7-7-9(d) (2004)).

342. *Id*. at 225 (citing Journal-Gazette Co. v. Bandido's, Inc. 712 N.E.2d 446, 456 (Ind. 1999)).

defamation must be false in addition to defamatory.[343] Lastly, the complaint must include the alleged defamatory statement.[344]

In this case, the problem for Shepard, as against the Times, was that in his complaint Shepard did not identify a statement in the article written by the Times that was false and defamatory. Rather, he attached the entire article to his complaint. The only statements treated by Shepard as false were those of Litz, as quoted in the Times article.[345] In conclusion, the court found that the Times adequately proved that "it acted without malice and merely reported statements that were essentially rhetorical hyperbole by an opposing attorney, statements incapable of being proved true or false by the Times."[346] Therefore, the court held that the Times was entitled to summary judgment as against Shepard.[347]

C. Tortious Interference with Business Relationship

In the survey period, the court of appeals decided a case involving a claim for tortious interference with a business relationship in *Geiger & Peters, Inc. v. Berghoff*.[348] In this matter, Geiger & Peters, Inc. ("G&P") and Carl L. Peters ("Peters") appealed the trial court's grant of summary judgment for third-party defendants Michael R. Berghoff ("Berghoff") and Lenex Steel Company ("Lenex Steel").

Peters was part owner of G&P and also a shareholder of Ferguson Steel Company, Inc. ("FSC"). G&P and FSC were competitors in the steel fabricating business.[349] In March 2002, Peters and the other owner of FSC appointed Berghoff as the President of FSC. Thereafter, in November 2002, Berghoff became a part owner and officer of Lenex Steel, which is also in the steel fabricating business.[350] Prior to December 2002, Marvin E. Ferguson ("Ferguson"), who served as a director of FSC and was also an officer and owner of Marvin E. Ferguson, Inc. ("MEFI"), entered into a consulting agreement with FSC to, among other things, maintain FSC's then existing business relationship with Duke Construction Company and Duke/Weeks companies ("Duke") and develop future work for FSC with Duke.[351]

FSC began having money problems and eventually defaulted on its line of credit. Thereafter, in January 2003, the bank began the liquidation process of

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343. *Id*. (citing Trail v. Boys and Girls Clubs of Nw. Ind., 845 N.E.2d 130, 136 (Ind. 2006)).

344. *Id*. (citing *Trail*, 845 N.E.2d at 136).

345. *Id*.

346. *Id*. at 226.

347. *Id*. The court also determined that pursuant to the anti-SLAPP statute, the Times was entitled to an award of attorneys' fees, that the trial court did not abuse its discretion with regard to the award of attorneys' fees, and that the Times was also entitled to appellate attorneys' fees. *Id*. at 226-27.

348. 854 N.E.2d 842 (Ind. Ct. App. 2006).

349. *Id*. at 844.

350. *Id*.

351. *Id*.

FSC. FSC blames its default and liquidation on the fact that Duke, who "accounted for well in excess of 50% of the FSC business at all relevant times[,]"[352] began withdrawing work from FSC in fall 2002. Then in 2003, Lenex successfully bid on two projects from Duke, which later became Lenex's largest customer.[353]

After the bank filed suit against G&P as the guarantor on the FSC line of credit, G&P filed a third party complaint against Berghoff, Lenex, Ferguson, and MEFI. Its third party claims included one for tortious interference with FSC's contracts and business relationships with Duke.[354] G&P also assigned all of its rights and privileges to Peters with regard to the bank guaranty. Therefore, the analysis of the case began using Peters in place of G&P.[355] Peters's tortious interference claim was based upon his allegation that Berghoff and Lenex solicited work from Duke.[356]

The court listed the elements of tortious interference with a business relationship as: "(1) the existence of a valid relationship; (2) the defendant's knowledge of the existence of the relationship; (3) the defendant's intentional interference with that relationship; (4) the absence of justification; and (5) damages resulting from the defendant's wrongful interference with the relationship."[357] The tort also requires an "independent illegal action."[358]

The court then found that even assuming Berghoff and Lenex diverted Duke business from FSC to Lenex, there was no designated evidence demonstrating that Berghoff and Lenex did anything illegal and Peters never argued that Berghoff and Lenex did anything illegal.[359] Rather, Peters argued that Berghoff depleted FSC cash flow, tried to get ownership in FSC at a discount, and "diverted work from FSC to Lenex."[360] Therefore, the court held that the trial court properly granted summary judgment to Berghoff and Lenex on Peters's claim for intentional interference with business relationship.[361]

VIII. PUNITIVE DAMAGES

As an issue of first impression, in *Crabtree ex el. Kemp v. Estate of Crabtree*,[362] the Indiana Supreme Court held that "Indiana law does not permit

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352. *Id*. at 845.

353. *Id*. at 846.

354. *Id*. at 847.

355. *Id*. at 846.

356. *Id*. at 852-53.

357. *Id*. at 853 (quoting Felsher v. Univ. of Evansville, 755 N.E.2d 589, 598 n.21 (Ind. 2001)).

358. *Id*. (quoting Brazauskas v. Fort Wayne-South Bend Diocese, Inc., 796 N.E.2d 286, 291 (Ind. 2003); Watson Rural Water Co. v. Ind. Cities Water Corp., 540 N.E.2d 131, 139 (Ind. Ct. App. 1989)).

359. *Berghoff*, 854 N.E.2d at 853.

360. *Id*.

361. *Id*.

362. 837 N.E.2d 135 (Ind. 2005).

recovery of punitive damages from a decedent's estate."[363] In this case, the plaintiffs, who were children of the decedent (their father), were passengers in the decedent's car at the time that he had a car accident while intoxicated. After the decedent died of causes unrelated to the car accident, the children sued his estate for compensatory and punitive damages.[364]

The trial court in this case granted the estate's motion to dismiss the punitive damages claim, and the compensatory damages claim was tried by a jury with a positive result for the children.[365] The trial court thereafter reduced the award by the amount that an insurance company had already paid to the children's medical service providers. The children appealed both the dismissal of the punitive damages claim and the reduction in their award.[366] The discussion of this case will only address the punitive damages issue.

On the appeal of the dismissal of the punitive damages claim, the court of appeals reversed and held that the punitive damages claim survived the father's death. The plaintiffs argued to the supreme court that section 1 of Indiana's Survival Statute[367] overrules the common law rule that claims are gone with the death of a defendant, and therefore, their claim of punitive damages should not have been dismissed.[368] The statute provides in part, "if 'an individual who is . . . liable in a cause of action dies, the cause of action survives . . . .'"[369] The supreme court, however, points out that the statute "does not address the issue of punitive damages one way or the other. It contains no explicit mention of punitive damages. This itself can be viewed as an implicit rejection of punitive damages, which ordinarily are recoverable under a statutory cause of action only by explicit statutory authorization."[370]

Then on the silence of the Survival Statute on the issue of punitive damages, the supreme court considered interpretation and precedent in its decision. After review of the split of authority in other jurisdictions, the supreme court concluded that it was more persuaded by the majority view, that recovery for punitive damages from the estate of a deceased tortfeasor is not permitted.[371] The court explained that the purpose of punitive damages is to punish the wrongdoer and deter future tortious conduct, not to reward and compensate plaintiffs.[372] Furthermore, the court found that "[t]he effect of a punitive damages award against an estate is that the punishment will ultimately be borne by the heirs who are presumably wholly innocent of any wrongdoing."[373]

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363. *Id*. at 136.
364. *Id*.
365. *Id*. at 137.
366. *Id*.
367. IND. CODE § 34-9-3-1 (2004).
368. *Crabtree*, 837 N.E.2d at 137.
369. *Id*. at 137 (quoting IND. CODE § 34-9-3-1(a) (2004)).
370. *Id*. (citing Ind. Civil Rights Comm'n v. Alder, 714 N.E.2d 632, 638 (Ind. 1999)).
371. *Id*. at 138-39.
372. *Id*. at 139.
373. *Id*.

A second case decided in the review period, albeit by the Indiana Court of Appeals, also dealt with an issue related to punitive damages: *Williams v. Younginer*.[374] In this case, the court of appeals was faced partially with a question of whether it was wrong for the trial court to decide the issue of punitive damages as a matter of law or whether it should have left the question to be answered by the jury.

The facts of this case are centered on a home purchase and leaking basement walls. The issues in the case before the trial court and jury were related to warranties, breaches of warranties, constructive fraud, breach of contract, and negligence.[375] Prior to trial, the parties agreed to bifurcate the issues of punitive damages and attorneys' fees.[376] After the jury returned a verdict in favor of the Younginers with damages found to be $62,305.77, the trial court, upon motion by the defendants, granted judgment on the evidence as to the punitive damages claim.

The law on the issue of punitive damages, as recited by the court of appeals, is that a punitive damages question is usually a question of fact for the fact finder to decide, but may be decided as a matter of law.[377] And, just because a tort has been committed, there is not necessarily a right to punitive damages.[378] "Punitive damages may be awarded only if there is clear and convincing evidence that defendant 'acted with malice, fraud, gross negligence, or oppressiveness which was not the result of a mistake of fact or law, honest error or judgment, overzealousness, mere negligence, or other human failing.'"[379]

The court of appeals found that after the four day trial concluded, the trial court did "'not believe that the evidence is adequate or close to being adequate to prove by clear and convincing evidence the elements and the evidence that the [Younginers] would have to prove to justify an award of punitive damages in this matter.'"[380] The court of appeals also found that on appeal the Younginers attempted to "equate constructive fraud with the conduct required to support a claim for punitive damages[,]"[381] without directing the court of appeals to any evidence indicating "malice, fraud, gross negligence, or oppressiveness."[382] Therefore, on this issue, the court of appeals held that it was not error for the trial court to remove the question of punitive damages from the jury and decide it as a matter of law.[383]

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374. 851 N.E.2d 351 (Ind. Ct. App. 2006).
375. *Id*. at 355.
376. *Id*.
377. *Id*. at 358 (quoting Reed v. Cent. Soya Co., 621 N.E.2d 1069, 1076 (Ind. 1993)).
378. *Id*. (citing Erie Ins. Co. v. Hickman by Smith, 622 N.E.2d 515, 520 (Ind. 1993)).
379. *Id*. (quoting *Erie Ins*., 622 N.E.2d at 520).
380. *Id*. at 358-59.
381. *Id*. at 359.
382. *Id*. (quoting *Erie Ins.*, 622 N.E.2d at 520).
383. *Id*.