A Survey of Indiana Tort Law

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I. Introduction

Although Indiana tort law broke little new ground during the survey period,[1] several subject areas received greater than routine scrutiny by Indiana courts. This article will devote its major emphasis to decisions clustered in six subject areas, including interpretations and applications of (1) the Indiana Comparative Fault Act,[2] ("Act" or "Comparative Fault Act") (2) Indiana's "impact" requirement for recovery of emotional distress damages, (3) punitive damages, (4) premises liability, (5) fraud and estoppel, and (6) liability of unincorporated associations.

II. Comparative Fault

The interpretations of Indiana's Comparative Fault Act made during the survey period are perhaps more significant for their broad application than the novelty of the rulings.

A. Abandoning the Joint Release Rule

Typical of the analytical challenges presented by comparative fault were Judge Barker's decisions in *Fetz v. E & L Truck Rental Co.*[3] and *Gray v. Chacon.*[4] In *Fetz*, a case arising before the effective date of the Comparative Fault Act, the United States District Court for the Southern District of Indiana recognized and applied Indiana's "well-settled rule that the unqualified release of one joint tortfeasor acts to release all joint tortfeasors."[5] Eight months later, the court concluded

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1. Approximately July 31, 1987, to July 31, 1988.
2. Ind. Code §§ 34-4-33-1 to -14 (1988).
3. 670 F. Supp. 261 (S.D. Ind. 1987).
4. 684 F. Supp. 1481 (S.D. Ind. 1988).
5. 670 F. Supp. at 262. Although Judge Barker considered herself bound by the Indiana rule, she made plain her disagreement with the rule even in a contributory negligence case. 670 F. Supp. at 263 n.1 ("[t]here is little persuasive justification for this rule"). The court held that this rule did not bar the plaintiff's claim in *Fetz*, because the court found that the settling parties did not intend to release the alleged joint tortfeasors. 670 F. Supp. at 265.

in *Gray*, an action based on comparative fault, that Indiana's "antiquated" joint release rule "must be abandoned."[6] The difference in the decisions reflected more than a mere change in procedure under comparative fault. The difference reflected the new fault philosophy reflected by the Act.

Gray was injured when his truck collided with a trailer left on the roadway by Bavuso. Bavuso had rented the trailer from Jartran who allegedly failed to provide the trailer with adequate warning lights, reflectors or flares. Gil Chacon and Mieneke Discount Mufflers had sold and installed Bavuso's trailer hitch. Gray settled his claim against Bavuso and executed a release of that claim. In his new lawsuit against the other alleged tortfeasors, Gray admitted the release of Bavuso but opposed the defendants' motion for summary judgment by arguing that the joint release rule was inappropriate under the Act.

The district court, undertaking to determine how the Indiana Supreme Court would decide the issue, explored the rationale for the rule set forth in *Bellew v. Byers*:[7]

> The reasons for this rule are obvious. First, it prevents an unfair prejudice against the defendant by precluding the plaintiff from recovering in excess of his injuries by successively obtaining settlements from the various tort-feasors in return for releases. Second, joint tort-feasors "constitute, in a sense, one entity, each of them being jointly and severally liable for injury to the plaintiff." A release of one joint tort-feasor in effect releases the entire "entity." Accordingly, to release one is to release all of the others.[8]

Unlike joint and several liability as interpreted in negligence context,[9] comparative fault distributes liability among multiple tortfeasors.[10] Because the Act both distributes and separates liability, the court found both traditional foundations for Indiana's release rule eliminated by operation of the Act.[11] The Act ended the risk "that an injured party could receive more than 100% of her damages by successively recovering from multiple tortfeasors."[12] Further, multiple tortfeasors could no longer be considered "one entity" because each defendant would be liable only for his proportionate share of any verdict. The court concluded that

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6. *Gray*, 684 F. Supp. at 1485.
7. 272 Ind. 37, 396 N.E.2d 335 (1979).
8. *Id.* at 39, 396 N.E.2d at 336-37 (citation omitted).
9. *See Gray*, 684 F. Supp. at 1485.
10. IND. CODE § 34-4-33-5 (1988).
11. *Gray*, 684 F. Supp. at 1485.
12. *Id.* at 1484-85. *See* IND. CODE § 34-4-33-5 (1988).

"far from being 'one entity,' joint defendants in Indiana are now as separate and independent from each other as they are from the plaintiff herself."[13]

B. Evidence of Causation by Unnamed Nonparties Is Permissible

In *Moore v. General Motors Corp., Delco Remy Division*,[14] the court declined to exclude causation evidence concerning conduct by persons not named as nonparties under the Comparative Fault Act.[15] Plaintiff sought, through a motion in limine, to exclude such evidence because a nonparty affirmative defense had not been pleaded. The court denied the motion, finding defendants under comparative fault can introduce such evidence without a nonparty defense where the evidence relates to contested causation issues. However, because the jury could not allocate fault to the particular nonparties in the absence of a pleaded defense, the court warned counsel to avoid misleading or confusing the jury regarding such an allocation.[16]

The *Moore* court reasoned that comparative fault did not have "the practical effect of abrogating all pre-existing negligence law," and plaintiff remains obligated to establish the traditional elements of a negligence claim, including causation.[17] Although the Act did not explicitly address presentation of evidence concerning causation by nonparties not designated as such, the Act did expressly preserve the requirement that plaintiff prove causation.[18] The court concluded that defendants were entitled to contest causation by evidence of conduct by a person not pleaded as a "nonparty" under the Act.[19] The court's holding, that that Act "did not materially alter the law of causation,"[20] required such a result.

C. Nonparty as a "Person Who Is, or May Be, Liable to the Claimant"

The Comparative Fault Act permits the defendant to plead the fault of a "nonparty" as an affirmative defense.[21] The Act contains a definition of a "nonparty":

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13. *Gray*, 684 F. Supp. at 1485.
14. 684 F. Supp. 220 (S.D. Ind. 1988).
15. The Comparative Fault Act, as amended in 1984, permits a defendant to "assert as a defense that the damages of the claimant were caused in full or in part by a nonparty." IND. CODE § 34-4-33-10(a) (1988). *See also* IND. CODE § 34-4-33-2(a) (1988) (definition of "nonparty"). However, the defendant "must affirmatively plead the defense," IND. CODE § 34-4-33-10(b) (1988), within the time limitations set forth in the statute. *See* IND. CODE § 34-4-33-10(c), (d) (1988).
16. *Moore*, 684 F. Supp. at 222.
17. *Id.* at 221-22.
18. *Id. See* IND. CODE § 34-4-33-10(b) (1988).
19. *Moore*, 684 F. Supp. at 221.
20. *Id.*
21. IND. CODE § 34-4-33-10(a) (1988).

> "Nonparty" means a person who is, or may be, liable to the claimant in part or in whole for the damages claimed but who has not been joined in the action as a defendant by the claimant. A nonparty shall not include the employer of the claimant.[22]

Three cases have addressed whether a potentially immune defendant is within this definition.

In *Huber v. Henley*,[23] the plaintiff alleged personal injuries from a highway accident. In this opinion, the court granted one defendant leave to amend its answer to assert the State of Indiana as a "nonparty" on the ground that the State was negligent "in the maintenance of the highway and the highway shoulder."[24] Plaintiff could not sue the State because plaintiff had failed to give notice within 180 days as required by the Tort Claims Act.[25]

The court recognized that the current version of the "nonparty" definition was intended to exclude persons who were immune from suit.[26] The court held, however, that the State was a proper nonparty. The court drew a distinction between a person who is immune from suit and a person against whom plaintiff has merely forfeited his claim:

> A reasonable interpretation of the phrase, "a person who is, or may be, liable to the claimant" is one against whom the plaintiff would have had a right to relief. A judge acting within her official capacity would, for example, be outside this definition because against her a claimant would have no right to relief. A state official performing a discretionary function likewise cannot be held liable for errors, mistakes of judgment, or unwise decisions made in the exercise of that discretion. On the other hand, a claimant does generally have a *right* to recover against governmental entities but can forfeit that right by failing to give the prescribed notice.
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> Because the plaintiff had a right to recover against the Department of Highways and merely forfeited that right, the

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22. IND. CODE § 34-4-33-2(a) (1988).

23. 656 F. Supp. 508 (S.D. Ind. 1987), *clarified in* Huber v. Henley, 669 F. Supp. 1474 (S.D. Ind. 1987). *See infra* text accompanying notes 42-50.

24. 656 F. Supp. at 509.

25. *Id* at 510. *See* IND. CODE §§ 34-4-16.5-1 to -21 (1988). In *Huber*, the 180-day period had passed before the defendant filed its original answer. 656 F. Supp. at 512.

26. Under the original Comparative Fault Act, a "nonparty" was defined as "any person who is not a party to the litigation." IND. CODE § 34-4-33-5(b)(1) (Supp. 1983). "The 1984 amendment ameliorated this result somewhat by specifying that a nonparty to whom a jury may attribute fault must be a 'person who is, or may be liable to the claimant.'" 656 F. Supp. at 510.

Department of Highways can be a nonparty in this case as one "who is, or may be, liable to the claimant."[27]

In *Hill v. Metropolitan Trucking, Inc.*,[28] plaintiffs were State employees who were injured on a State highway. The defendants named other State employees as nonparties.[29] The court held, on two grounds, that these persons were not proper nonparties under the Comparative Fault Act.[30]

First, the court held that the State employees could not be liable to plaintiffs because plaintiffs' sole remedy against them is under the worker's compensation statute.[31] Second, and contrary to the holding in *Huber v. Henley*, the *Hill* court ruled that the State employees could not be nonparties because plaintiffs had failed to give timely notice under the Tort Claims Act:

> Further, it appears that each of the would-be nonparties would fall within the coverage of Indiana's Tort Claims Act IND. CODE 34-4-16.5-1 *et seq* (sic), which requires that notice of intent to sue be given within 180 [days] of the injuries being incurred. IND. CODE 34-4-16.5-7. The would-be nonparties are immune from suit absent such notice. The record does not suggest that the Hills or Mr. Clemons' representatives gave such notice; accordingly, the record does not reflect that the would-be nonparties are or may ever be liable to the plaintiffs.
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> Because Mr. Hill and Mr. Clemons are not, and cannot be, liable to each other for any part of the damages the other claims, and because Mr. Forney, Mr. Shaw and Trooper Rissot are not, and cannot be, liable to either Mr. Hill or Mr. Clemons for any part of the damages either claims, the plaintiffs' motion to strike those portions of the contentions of defendants Rabayev and Metropolitan dealing with the nonparty defenses should be granted.[32]

The nonparty issue arose again in *Farmers & Merchants State Bank v. Norfolk & Western Railway Co.*[33] This was an action by three minor

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27. 656 F. Supp. at 511 (citations omitted).
28. 659 F. Supp. 430 (N.D. Ind. 1987).
29. *Id.* at 431.
30. The court also rejected plaintiffs' argument that no employee of the State could be named as a nonparty because the Act excludes "the employer of the claimant" from the definition of a nonparty. 659 F. Supp. at 434. *See* IND. CODE § 34-4-33-2(a) (1988).
31. *Hill*, 659 F. Supp. at 434.
32. *Id.* at 434-35.
33. 673 F. Supp. 946 (N.D. Ind. 1987).

siblings who were injured in a train crossing accident. The railroad asserted an affirmative defense naming as a nonparty plaintiffs' father, who was driving the car at the time of the accident. Plaintiffs moved to strike the defense, arguing that the father could not be a nonparty because any claim against him was barred by the parental immunity doctrine.[34]

The district court, noting that there was no Indiana state court authority interpreting the nonparty provision, relied upon *Huber v. Henley* and *Hill v. Metropolitan Trucking*.[35] After discussing both cases, the court stated: "The conclusion that Judges Barker and Miller both reached then, was that a person who is *immune* from suit cannot be a nonparty under Indiana's Comparative Fault Statute because such a person cannot be 'a person who is, or may be, liable to the claimant.'"[36] The court did not point out that the two earlier cases reached different results on the specific issue of naming a State entity or employee as a nonparty where no timely notice was given under the Tort Claims Act.

On the facts of the case, the court denied the motion to strike. The court acknowledged that the father could not be a nonparty if he were wholly immune from suit by plaintiffs.[37] Here, however, the father did not have complete immunity. "Indiana's Guest Statute . . . creates an exception to the parent-child immunity doctrine in the case of motor vehicle accidents."[38] Under the Guest Statute, a parent may be liable to a child for "wanton or willful misconduct."[39] Because there was possible parental liability, the court denied plaintiffs' motion to strike the nonparty defense.[40] The court stressed that the defendant would bear the burden of proving at trial that the father was guilty of "wanton or willful misconduct."[41]

The general principle enunciated in the three cases—that the validity of a nonparty defense turns upon whether the nonparty is immune from suit by plaintiff—appears sound. Additional decisions are necessary, however, to demarcate the precise limits of the nonparty defense. In particular the conflict between the specific holdings of *Huber v. Henley* and *Hill v. Metropolitan Trucking* will have to be resolved by the Indiana courts.

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34. *Id.* at 947.
35. *Id.* at 948.
36. *Id.* (emphasis in original) (quoting IND. CODE § 34-4-33-2 (Supp. 1984)).
37. *Id.* at 948-49.
38. *Id.* at 949. *See* IND. CODE § 9-3-3-1(b) (1988).
39. IND. CODE § 9-3-3-1(b)(3) (1988).
40. *Farmers*, 673 F. Supp. at 949.
41. *Id.* at n.2.

D. Nonparties and the Statute of Repose

In the second published *Huber v. Henley* decision,[42] the court clarified its prior decision,[43] discussed in the preceding section, which granted defendants leave to amend their answer to assert a nonparty defense. The defendants claimed fault by the State of Indiana in the design, construction, and maintenance of the roadway on which plaintiff's accident had occurred. Plaintiff's time for a notice of a tort claim against the State had expired. The first *Huber* decision held that "[b]ecause the plaintiff had a right to recover against the Department of Highways and merely forfeited that right, the Department of Highways can be a nonparty" as defined in the Act.[44]

Plaintiff then filed a motion for partial summary judgment on the nonparty defense because Indiana's ten-year statute of repose for improvements to real estate[45] shielded the State from liability, thus taking it outside the Act's definition of a "nonparty."[46] The court's second decision agreed in concept with plaintiff's argument that if an applicable statute of repose barred plaintiff's action the State could not be a nonparty, and distinguished its earlier holding with respect to notice under the Tort Claims Act:

> [T]he statute of repose, had it applied, would have barred the plaintiff's cause of action at the instant of its accrual. The state would not have been "a person who is, or may be, liable" to the plaintiff. The plaintiff would not have forfeited his right to recovery (as he did by not giving tort claim notice within 180 days); he simply would have had no right.[47]

Nonetheless, the court denied the summary judgment motion on the ground that the cited real estate improvement statute of repose did not apply.[48] The statute of repose provides that it may not be raised as a defense "by any person in actual possession or the control of real property, either as owner, tenant or otherwise."[49] The court held that this limitation applied to the State, because "the state stands in the position of owner of the public roadways."[50]

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42. 669 F. Supp. 1474 (S.D. Ind. 1987).
43. 656 F. Supp. 508 (S.D. Ind. 1987).
44. 669 F. Supp. at 1478 (quoting 656 F. Supp. at 511). *See supra* text accompanying notes 23-27 (discussion of the holding in the first *Huber* decision).
45. IND. CODE § 34-4-20-4 (1988).
46. 669 F. Supp. at 1478.
47. *Id.* at 1479.
48. *Id.*
49. IND. CODE § 34-4-20-4 (1988).
50. 669 F. Supp. at 1479.

E. Allocations of Fault to Dismissed Parties

In *Bowles v. Tatom*,[51] the court reversed an allocation of fault that did not reflect evidence of fault by a defendant who had been dismissed from the action at the close of plaintiff's case. Tatom was injured in a car accident after Bowles failed to obey a stop sign covered by dense foliage. Tatom sued Bowles, the City of Bedford, its mayor, and the adjacent property owners.

At trial, plaintiff presented no evidence to establish liability by the city, the mayor, or the adjacent landowners. After plaintiff rested his case, the court dismissed claims against each of those parties pursuant to Indiana Trial Rule 50(A).[52] In her case, however, Bowles testified and introduced evidence of fault by some or all the dismissed parties. Specifically, Bowles produced evidence that the disregarded stop sign had been obscured by foliage. After hearing all evidence, the trial court entered a judgment in favor of Tatom, finding Bowles one hundred percent at fault and assessing damages accordingly.

Bowles' undisputed evidence of the obscured stop sign led the court of appeals to find clearly erroneous the trial court's assessment of one hundred percent fault against Bowles. Although the appellate court held in *Walters v. Dean*[53] that fault may not be allocated to a nonparty where the defense is not properly pleaded, the landowners and city were parties in *Bowles*. Thus, under the plain terms of the statute, a nonparty defense could not have been pleaded against those co-defendants.[54] *Bowles* characterized *Walters* as based on a policy of providing to a plaintiff fair notice of possible empty-chair defenses so those nonparties could be added as defendants if still feasible.[55] *Bowles* distinguished that reasoning from the Act's allocation of fault between named parties in a lawsuit.[56] Because "[a] defendant does not have to point at another pleaded party to invoke the fault allocation process of the Comparative Fault Act," the court found the dismissal of the adjacent landowners and City resulted "merely in a bar to Tatom's obtaining a judgment against those defendants" rather than a finding on the merits that they were not, and could not be, at fault.[57]

In dissent, Judge Conover argued that the city, the mayor, and the adjacent landowners did not meet the statutory nonparty definition.[58]

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51. 523 N.E.2d 458 (Ind. Ct. App. 1988).
52. Ind. R. T. P. 50(A) (1988) (Judgment on the Evidence).
53. 497 N.E.2d 247 (Ind. Ct. App. 1986).
54. Ind. Code § 34-4-33-2(a) (1988).
55. *Bowles*, 523 N.E.2d at 461.
56. *Id.*
57. *Id.*
58. *Id.* at 462 (Conover, J., dissenting).

The Act defines a "nonparty" as "a person who is, or may be, liable to the claimant."[59] Judge Conover stated that the trial court's Trial Rule 50(A) judgment "amounted to a determination of zero percent fault as to each such defendant as a matter of law."[60] Accordingly, Judge Conover reasoned that those parties could not be nonparties because they could not be liable to the claimant.[61]

The authors of this Article believe that *Bowles* was correctly decided. As the court noted, dismissal at the close of plaintiff's case is only a ruling that plaintiff cannot recover from the dismissed defendant. The apportionment of fault is an analytically different issue, which remains whether or not the defendant is dismissed. In addition, Judge Conover's position could lead to unfair results. The co-defendant cannot control plaintiff's presentation of evidence. There is no reason to penalize the co-defendant—who may have ample evidence that the dismissed defendant was at fault—because plaintiff failed (or chose not) to present that evidence.[62] The result, under the dissent's analysis, would be to exempt the dismissed defendant from the allocation of fault. Apart from the possible unfairness to co-defendants, this does not seem to square with the Legislature's intent in passing the Comparative Fault Act—to apportion fault among all persons involved in an accident.[63]

F. Inconsistent Allocations of Fault on Related Claims

The effect of inconsistent allocations of fault was at issue in *Paul v. Kuntz*.[64] Mark Paul and Bill Kuntz, both minors, were injured when the automobile in which they were riding struck a tree. Paul sued Kuntz,

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59. IND. CODE § 34-4-33-2(a) (1988).

60. 523 N.E.2d at 462 (Conover, J., dissenting).

61. *Id.*

62. One can imagine how a plaintiff could take unfair advantage of the dissent's position. Assume there are four possible parties at fault. Three are judgment-proof; the fourth is a deep pocket. The plaintiff sues all four but purposely presents no evidence at trial as to the impecunious trio, all of whom are dismissed at the close of plaintiff's case. The solvent defendant would be deprived of the opportunity of reducing his liability by establishing the fault of the co-defendants.

63. Moreover, Trial Rule 50(A) can be applied reasonably and fairly in a comparative fault action. The ultimate reduction in plaintiff's recovery made possible where a dismissal is granted need not foreclose the granting of such a motion at the close of a plaintiff's case. Plaintiff's burden is merely to produce sufficient evidence from which a particular co-defendant could be found liable for at least some fault allocation. Such a threshold is not high, but a judgment on the evidence should be granted for failure to meet the threshold. Thorough discovery should reveal whether one defendant claims that another defendant is at fault and what evidence, if any, exists of that fault. Accordingly, plaintiff's failure to present adequate proof of a defendant's fault can fairly result in a Trial Rule 50(A) dismissal.

64. 524 N.E.2d 1326 (Ind. Ct. App. 1988).

claiming Kuntz had been driving the automobile. Kuntz counterclaimed, claiming that Paul had been driving. Trial was to the court, which made special findings of fact on the complaint and counterclaim. The trial court determined Kuntz was the driver, but on Paul's complaint determined that Paul was 54 percent at fault and Kuntz 38 percent at fault. A non-party was assigned 8 percent fault. On the Kuntz counterclaim, the court determined that Kuntz was 54 percent at fault and Paul was 46 percent at fault. Accordingly, the court entered judgment against Paul on his complaint and against Kuntz on his counterclaim, so that neither party was awarded any recovery.

On appeal, Paul argued the inconsistent fault allocations were erroneous. Kuntz defended the allocations, arguing the findings of fault on the counterclaim were not binding as findings of fault on the complaint.

Finding the judgment to contain irreconcilable differences arising from a common set of facts, the court of appeals reversed, reasoning that "a factfinder on a single set of facts and circumstances cannot reach two different conclusions of fact as expressed in its findings or verdicts that will support valid judgments if the opposite, inconsistent conclusions are irreconcilable."[65] Because the trial court's special findings and conclusions failed to disclose any factual basis for the facial discrepancy in the allocations of fault, the appellate court held that new findings of fact and a consistent allocation of fault were required.[66]

The same principle would seem to apply in a jury trial. The Comparative Fault Act has a specific provision on inconsistent verdicts, but it addresses "verdicts in which the ultimate amounts awarded are inconsistent with [the jury's] determinations of total damages and percentages of fault."[67] The statute directs the trial court to inform the jury of the inconsistencies and to direct the jury to resume deliberations to cure them.[68] This would appear to be the correct approach in the trial court if the jury returns verdicts that are "inconsistent" in the different sense at issue in *Paul v. Kuntz*. If, however, the trial court discharges the jury without correcting inconsistent allocations of fault on different claims arising from the same incident, then it appears that a new trial would be necessary.

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65. *Id.* at 1329 (citing Fanning v. McCarry, 2 Ill. App. 3d 650, 275 N.E.2d 897 (1971)).

66. 524 N.E.2d at 1329.

67. IND. CODE § 34-4-33-9 (1988). *See also* IND. CODE § 34-4-33-5 (1988) (describing how the jury allocates fault and determines damages); IND. CODE § 34-4-33-6 (1988) (forms of verdicts).

68. IND. CODE § 34-4-33-8 (1988).

III. Recovery of Damages for Emotional Distress

Despite continued adherence to the formal rule that emotional distress damages may be awarded only where the plaintiff suffers a contemporaneous physical injury, Indiana courts slowly but steadily have expanded the number of cases in which plaintiff can recover emotional distress damages. In 1976, Indiana created an exception to the rule for cases involving intentional infliction of emotional distress where circumstances indicated emotional trauma was foreseeably and "inextricably intertwined" with the deliberate wrong.[69] This exception has been applied to an increasingly broad range of conduct, including fraud actions where no physical sign of mental distress was shown.[70]

In 1978, the Indiana Court of Appeals questioned the soundness of the contemporaneous physical injury rule while holding that a needle prick satisfied the requirement of contemporaneous physical injury.[71] The rule quickly became known as an "impact rule" rather than solely as a "physical injury rule."[72] At least one subsequent interpretation left open the question of whether only "impact," rather than injury, is required.[73] In 1981, Justice Hunter noted in a dissent to denial of transfer that only five other American jurisdictions regard the impact rule "as a viable proposition of law."[74] Since 1981, at least two of those jurisdictions have abandoned the rule.[75]

During the survey period, the "impact rule" was interpreted in a decision holding that one suffering an impact could recover for the emotional distress caused by witnessing injury to another[76] and in a decision allowing recovery in a "garden variety" fraud case where plaintiffs presented no evidence of physical symptoms of mental anguish.[77] A third decision took a more conservative view of the impact rule.[78]

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69. Charlie Stuart Oldsmobile v. Smith, 171 Ind. App. 315, 327, 357 N.E.2d 247, 254 (1976), *vacated in part on other grounds on reh'g*, 175 Ind. App. 1, 369 N.E.2d 947 (1977). *See infra* text accompanying note 99.

70. Groves v. First Nat'l Bank of Valparaiso, 518 N.E.2d 819 (Ind. Ct. App. 1988).

71. Kroger Co. v. Beck, 176 Ind. App. 202, 208 n.5, 375 N.E.2d 640, 645 n.5 (1978) (the needle was in a steak; plaintiff's injury was a throat puncture wound).

72. Little v. Williamson, 441 N.E.2d 974, 975 (Ind. Ct. App. 1982).

73. *Id.* at n.3 (avoiding issue of whether the rule "requires actual harm or if mere physical contact is sufficient").

74. Elza v. Liberty Loan Corp., 426 N.E.2d 1302, 1308 (Ind. 1981) (Hunter, J., dissenting to denial of transfer).

75. *See* Pieters v. B-Right Trucking, Inc., 669 F. Supp. 1463, 1471-72 (N.D. Ind. 1987).

76. *Id.*

77. Groves v. First Nat'l Bank of Valparaiso, 518 N.E.2d 819 (Ind. Ct. App. 1988).

78. Wishard Memorial Hosp. v. Logwood, 512 N.E.2d 1126 (Ind. Ct. App. 1987).

Discussion of these decisions follows, but reconciliation will require further court interpretation.

A. Recovery for Witnessing Injury to Another

The impact rule was interpreted to allow damages for the mental distress suffered in witnessing injury to another in *Pieters v. B-Right Trucking, Inc.*[79] Karey Pieters and her fiancee were in a car that crashed, in the dark, into a truck parked on the road. The truck had been abandoned in the traveled portion of the road apparently without flares, reflectors, or other types of warning devices behind or beside the trailer. Karey Pieters suffered a broken thumb and injured hip. Her fiancee died several hours after the crash.

Shortly before trial, defendant filed two motions in limine seeking to exclude emotional distress evidence. After an extensive analysis of the history and policy foundations for the impact rule, the court held that plaintiff could recover damages for the emotional distress she suffered from witnessing her fiancee's death and thus denied the motions in limine.

Pieters discussed the three different rules utilized by state courts in deciding whether emotional distress damages should be awarded: (1) the zone of danger rule, (2) the foreseeability rule, and (3) the impact rule.[80] The zone of danger rule allows emotional distress damages to be recovered only by plaintiffs who were within the range of ordinary physical peril. The foreseeability analysis is the least restrictive and allows recovery if defendant should have foreseen the possibility of fright or shock severe enough to cause substantial injury in a normal person. The impact rule requires contemporaneous physical injury before emotional distress damages may be recovered.[81]

Indiana adopted the impact rule in 1897,[82] and it "has steadfastly been adhered to since."[83] There was no dispute that plaintiff had suffered contemporaneous physical injuries.[84] The issue was whether she could recover damages for the emotional distress caused by the fact that she witnessed the injuries to her fiancee. The court held that:

> A thorough review of Indiana's other impact cases convinces the court that the impact rule, as applied by Indiana courts,

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79. 669 F. Supp. 1463, 1466 (N.D. Ind. 1987).

80. *Id.*

81. *Id.*

82. *Id.* (citing Kalen v. Terre Haute & I.R.R., 18 Ind. App. 202, 47 N.E.2d 694 (1897)).

83. 669 F. Supp. at 1466 (citing, Captain & Co., Inc. v. Stenberg, 505 N.E.2d 88, 100 (Ind. App. 1987)).

84. 669 F. Supp. at 1467.

> has not been used to preclude recovery for emotional distress due to another's injuries when the plaintiff has suffered an impact and contemporaneous physical injury and when the other injuries and the plaintiff's injuries result from the same impact.[85]

In addition to discussing the prior cases,[86] the court noted that its holding was consistent with the three policies underlying the impact rule:

> First, courts feared that absent impact, claims for emotional distress would flood the courts with litigation. Second, courts feared that the absence of an impact requirement would spawn fraudulent claims. Third, courts feared that it would be too difficult to prove the causal connection between the damages claimed and the defendant's negligence.[87]

Here, "[t]he plaintiff already has a claim for emotional distress for her own injuries,"[88] "[t]here is no suggestion that her claim is fraudulent,"[89] and "[p]roving damages will be no more difficult if she recovers for the distress caused by her fiance's injuries and death."[90] The court concluded that, "the recovery [under the court's holding] will certainly be more accurate and complete, which is precisely the kind of recovery the law ought to give."[91]

The court then surveyed cases from other jurisdictions, noting that most jurisdictions would allow plaintiff to recover emotional distress damages based upon the injuries suffered by her fiancee.[92] "The trend in this area of the law clearly favors recovery."[93]

Until Indiana state courts address the *Pieters* holding, the decision will remain controversial. The defendants in *Pieters* argued that *Boston v. Chesapeake & Ohio Railway*,[94] an Indiana Supreme Court decision,

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85. 669 F. Supp. at 1469 (citations omitted); *see also id.* at 1473 (holding restated).
86. *Id.* at 1467-70.
87. *Id.* at 1470.
88. *Id.* at 1470-71.
89. *Id.* at 1471.
90. *Id.*
91. *Id.* The court also noted that "scholars agree that the fears which form the foundation of the [impact] rule have little basis in reality." *Id.* (citations omitted).

> The court simply points out the fact that the reasons for the rule, even if taken as true, do not prevent recovery in this case. The reasons for the rule essentially relate to the question of when damages for emotional distress are recoverable, *i.e.*, upon impact. Once a plaintiff meets this test the reasons for the rule fall away and cannot be resurrected to raise an artificial wall. It makes no sense to use the rule in that way.

Id.
92. 669 F. Supp. at 1471-73.
93. *Id.* at 1473.
94. 223 Ind. 425, 61 N.E.2d 326 (1945).

limited mental anguish damages to those directly resulting from the physical injury suffered. The *Pieters* court correctly noted that *Chesapeake* does not expressly exclude damages arising from witnessing injury to another.[95] Such a result, however, can be fairly inferred from the *Chesapeake* ruling.[96] Indeed, only one month before the *Pieters* decision, the Indiana Court of Appeals in *Wishard Memorial Hospital v. Logwood*,[97] stated the impact rule as follows: "In Indiana, the general rule is that a person can recover damages for mental anguish only when it is accompanied by, *and results from*, a physical injury."[98]

The distinction between allowing damages which "result from" an impact, as described in *Logwood* and *Chesapeake*, and allowing an action for all mental distress caused after impact is the issue upon which *Pieters* will remain controversial. Only further clarification of Indiana's impact rule will settle the issue of whether recoverable damages for mental distress are those directly arising from the injuries suffered.

B. Recovery of Emotional Distress Damages in Intentional Tort Actions

Indiana's exception to the rule for some intentional torts originated in *Charlie Stuart Oldsmobile, Inc. v. Smith*,[99] where the court recognized an exception to the general rule of the requirement of an impact:

> Indiana courts have awarded compensatory damages for mental anguish unaccompanied by physical injury in certain tort actions involving the invasion of a legal right which by its very nature

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95. 669 F. Supp. at 1469.

96. The *Chesapeake* court stated that "the complete rule would add that before recovery can be had for mental injury, including every form of distress, brooding, or fright, *it must appear to be the natural and direct result of the physical injury*, and not merely a remote consequence thereof." 223 Ind. at 428-29, 61 N.E.2d at 327 (emphasis added).

97. 512 N.E.2d 1126 (Ind. Ct. App. 1987).

98. *Id.* at 1127 (emphasis added) (citing Boston v. Chesapeake & O. Ry., 223 Ind. 425, 428-29, 61 N.E.2d 326, 327 (1945)). *Pieters*, ironically, appears to recognize a right to recovery that would not be allowed in California, the jurisdiction long considered the most liberal in allowing emotional distress damages. In Elden v. Sheldon, 46 Cal. 3d 267, 758 P.2d 582, 250 Cal. Rptr. 254 (1988), the California Supreme Court held a plaintiff could not recover damages for witnessing the death of a live-in girlfriend because there was no legally-recognized family relationship between the parties. The *Elden* court specifically disapproved the holding in Ledger v. Tippitt, 164 Cal. App. 3d 625, 210 Cal. Rptr. 814 (1985), allowing emotional distress damages based upon injury to a fiancee. 46 Cal. 3d at ____, 758 P.2d at 588, 250 Cal. Rptr. at 260. In *Pieters*, the court did not expressly consider a requirement of family relationship.

99. 171 Ind. App. 315, 357 N.E.2d 247 (1976), *vacated in part on other grounds on reh'g*, 175 Ind. App. 1, 369 N.E.2d 947 (1977).

> is likely to provoke an emotional disturbance. False imprisonment and assault actions are examples of instances in which a disagreeable emotional experience would normally be expected to be inextricably intertwined with the nature of the deliberate wrong committed, thereby lending credence to a claim for mental disturbance. The conduct of defendant in such circumstances is characterized as being willful, callous, or malicious, which may produce a variety of reactions, such as fright, shock, humiliation, insult, vexation, inconvenience, worry, or apprehension.[100]

In *Baker v. American States Insurance Co.*,[101] the court added fraud to the type of actions in which damages could be recovered for mental anguish absent a showing of contemporaneous physical injury.[102]

During the survey period, the Indiana Court of Appeals allowed recovery of damages for mental anguish in a fraud case without a contemporaneous physical injury, and without subsequent physical symptoms, although the court ultimately reversed the $100,000 award for mental anguish as excessive.

The plaintiffs in *Groves v. First National Bank of Valparaiso*[103] had purchased real estate from the First National Bank of Valparaiso. The Bank had represented that it had clear title to the realty. The Groves invested substantial time and money making improvements to the realty and were "frightened and angry" when they learned they had not received good title.[104] However, the Groves did not introduce "any evidence that they experienced any physical manifestations, sleeplessness, depression, or other observable indicia of emotional distress."[105] Despite the lack of physical symptoms, the court concluded emotional distress damages properly could be awarded, although "in the absence of evidence of any physical or psychological manifestation of mental anguish, the award

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100. *Id.* at 327, 357 N.E.2d at 254.

101. 428 N.E.2d 1342 (Ind. Ct. App. 1981).

102. The *Baker* court reversed the dismissal of an action claiming fraud in connection with a workers compensation claim. On the claim for emotional distress, the court stated:

> The tort of fraud, if proven, would clearly constitute an invasion of a legal right. Furthermore, the question of whether this kind of intentional invasion of a legal right is likely to cause an emotional disturbance is for the trier of fact. We cannot say as a matter of law that Baker could not, under the allegations of his amended complaint, show that his claim falls within the exception to the impact rule.

428 N.E.2d at 1349-50. Fraud had been mentioned in *Charlie Stuart* as one of the examples of intentional torts for which other jurisdictions allowed recovery. 171 Ind. App. at 327, 357 N.E.2d at 254.

103. 518 N.E.2d 819 (Ind. Ct. App. 1988).

104. *Id.* at 831.

105. *Id.*

of nearly $100,000 is so high as to demonstrate passion or prejudice on the part of the jury."[106]

As the *Groves* decision points out, damages for emotional distress have "no precise standards of measurement."[107] Further, "[p]hysical and mental pain are, by their very nature, not readily susceptible to quantification, and, therefore, the jury is given very wide latitude in determining these kinds of damages."[108] Despite the range of jury discretion permitted, *Groves* demonstrates that an appellate court can retain control of excessive awards. After consideration of similar damage awards and the extent of the emotional distress evidence presented, the court reversed the jury's award for mental anguish.[109]

Groves is notable for allowing recovery in an ordinary fraud case in the absence of physical indicia of mental distress. Emotional distress damages awarded on this basis are, in effect, a type of punitive damages. The authors believe that emotional distress damages should be reserved for cases where there is probative evidence of a true emotional trauma. Requiring proof of some physical effect is a reasonable requirement, particularly where the alleged mental distress arises from a commercial transaction. Misapplication of the *Charlie Stuart* exception opens emotional distress to virtually any action in which some type of intentional or willful misconduct is alleged.

IV. Punitive Damages

In *Bud Wolf Chevrolet, Inc. v. Robertson*,[110] the supreme court held that proof of malice is not an essential element in recovering punitive damages in Indiana, under either tort or contract theories.[111] The court further approved a punitive damages instruction given to the jury and affirmed a substantial punitive damages award.[112]

The Robertsons had purchased a truck from Bud Wolf Chevrolet after being told it was "new" and had only been used by a salesman to drive back and forth to work. The Robertsons were not told that the truck had been involved in an accident prior to sale which had bent the frame cross rail and resulted in numerous other repairs. After a jury trial in the Marion Circuit Court, judgment was entered for the Robertsons in the amount of $3,500 in compensatory damages and

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106. *Id.* at 832.
107. *Id.* at 831.
108. *Id.*
109. *Id.* at 832. The court ordered a new trial on the issue of damages.
110. 519 N.E.2d 135 (Ind. 1988).
111. *Id.* at 137.
112. *Id.* at 138.

$75,000 in punitive damages.[113] The court of appeals initially affirmed the compensatory damage award and reversed the punitive damage award.[114] The appeals court held: "The evidence, though permitting a conclusion of tortious conduct sufficient to support compensatory damages, does not permit a conclusion of malice sufficient to support an award of punitive damages."[115] On rehearing,[116] the court of appeals reinstated the punitive damage award, on the ground that Bud Wolf Chevrolet had not objected to the punitive damages instruction and the award was appropriate under that instruction.[117] The appeals court acknowledged that this change in result created a conflict with the decision of another district.[118]

The supreme court granted defendant's petition to transfer,[119] vacated the court of appeals' ruling on punitive damages,[120] and affirmed the trial court on this issue.[121] The court noted that existing Indiana law relating to recovery of punitive damages in a contract action requires (1) proof of "a serious wrong, tortious in nature,"[122] (2) proof that "the public interest will be served by the deterrent effect of the punitive damages,"[123] and (3) "further evidence 'inconsistent with the hypothesis that the tortious conduct was the result of a mistake of law or fact, honest error of judgment, overzealousness, mere negligence or other noniniquitous human failing.'"[124] The supreme court rejected the court of appeals' holding on malice, stating that: "[I]n both tort and contract actions, while proof of malice may be relevant to show the obduracy necessary for punitive damages, the element of malice is a mere alter-

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113. *Id.* at 135.

114. Bud Wolf Chevrolet, Inc. v. Robertson, 496 N.E.2d 771, 777 (Ind. Ct. App. 1986), *modified on reh'g*, 508 N.E.2d 567 (Ind. Ct. App. 1987).

115. 496 N.E.2d at 777.

116. Bud Wolf Chevrolet, Inc. v. Robertson, 508 N.E.2d 567 (Ind. Ct. App. 1987), *vacated*, 519 N.E.2d 135 (Ind. 1988).

117. 508 N.E.2d at 570-71.

118. *Id.* at 571 (noting the conflict with Martin Chevrolet Sales, Inc. v. Dover, 501 N.E.2d 1122 (Ind. Ct. App. 1986)).

119. *See* IND. R. APP. P. 11(B)(2)(c) ("[e]rrors upon which a petition to transfer shall be based may include . . . that there is a conflict between the opinion or memorandum decision and a prior opinion of the Court of Appeals").

120. 519 N.E.2d at 138.

121. *Id.*

122. *Id.* at 136 (quoting Vernon Fire & Casualty Ins. Co. v. Sharp, 264 Ind. 599, 608, 349 N.E.2d 173, 180 (1976)).

123. 519 N.E.2d at 136-37 (quoting Art Hill Ford, Inc. v. Callender, 423 N.E.2d 601, 602 (Ind. 1981)).

124. 519 N.E.2d at 137 (quoting Travelers Indem. Co. v. Armstrong, 442 N.E.2d 349, 362 (Ind. 1982)).

native, not an essential prerequisite, to obtain punitive damages."[125] The court went on to decide:

> In the present case, the jury could have found by clear and convincing evidence both (1) that Bud Wolf's conduct, even if not proven to be malicious, nevertheless constituted fraud, gross negligence or oppressiveness, and (2) that Bud Wolf's conduct was inconsistent with any contention of mistake of law or fact, honest error of judgment, overzealousness, mere negligence, or other such noniniquitous human failing.[126]

The court also addressed the "public interest" issue, and it appears clear from its discussion that the court considered this an important issue in light of the facts of the case: "We agree with Robertson that public policy cannot condone a dealer taking a vehicle that has been extensively damaged, repair it so as to conceal the damage, and then sell it as new at full price with impunity."[127]

Also noteworthy in the *Bud Wolf Chevrolet* decision is the Indiana Supreme Court's approval of a jury instruction which includes a definition of "clear and convincing evidence," the standard of proof necessary to recover punitive damages. Under the approved instruction: "[c]lear and convincing evidence may be defined as an intermediate standard of proof greater than a preponderance of the evidence and less than proof beyond a reasonable doubt and requires the existence of a fact be highly probable."[128]

Although the supreme court affirmed a punitive damage award in *Bud Wolf Chevrolet*, the authors do not believe that the decision itself made any fundamental change in Indiana punitive damages law. The facts in *Bud Wolf Chevrolet* appear to have been egregious. The supreme court's ruling on those facts, therefore, is consistent with the recent trend of supreme court cases holding, in substance, that punitive damage awards are to be limited to the relatively few cases where extreme wrongful conduct is clearly proved.[129]

V. Premises Liability

Perhaps the most remarkable feature of premises liability law in Indiana is the amount of attention and time required from Indiana

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125. 519 N.E.2d at 137.
126. *Id.*
127. *Id.*
128. *Id.* at 138 (quoting trial court's jury instructions).
129. *See, e.g.*, Orkin Exterminating Co. v. Traina, 486 N.E.2d 1019, 1022-23 (Ind. 1986); Travelers Indem. Co. v. Armstrong, 442 N.E.2d 349, 358-61 (Ind. 1982).

courts to interpret it.[130] During the survey, probably as much appellate court energy was devoted to interpreting Indiana's law of premises liability as to any other substantive area of tort law. One reason the topic might take so much judicial time could be Indiana's cumbersome three-part duty analysis, which requires classification of persons as invitees, licensees or trespassers. The harshness of Indiana's rule that a landowner owes a licensee only the duty to keep from willfully or wantonly hurting him has spurred considerable judicial effort in creating "implied invitees,"[131] "business visitors,"[132] "public invitees,"[133] "business invitees,"[134] and fact issues over whether a person is an invitee.[135]

A. Prior Law: "Intention" Versus "Foreseeability" in Determining Premises Liability

The confusing and convoluted nature of Indiana law on the topic is illustrated by *J. C. Penney Co. v. Wesolek*.[136] Ruth Wesolek fell on an escalator that malfunctioned in a J. C. Penney Store. The trial court instructed the jury on the duty owed to a licensee. After the jury returned a verdict for J. C. Penney, the trial court granted a new trial, ruling that it should have instructed the jury that Wesolek was an invitee. The difference in classification was vital—if Wesolek was a licensee, J. C. Penney needed only to refrain from willfully or wantonly injuring her; if an invitee, J. C. Penney had to exercise due care to keep its property in a reasonably safe condition for her. On appeal, rather than adopting a position that all customers or potential customers are invitees, the *Wesolek* court found that the question of whether plaintiff was an invitee or a licensee depended in part on her purpose for being in the store.[137]

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130. At least seven appellate decisions were published on this subject in the survey period. In addition to the cases discussed below, *see generally* Morris v. Scottsdale Mall Partners, Ltd., 523 N.E.2d 457 (Ind. Ct. App. 1988); Sowers v. Tri-County Tel. Co., 512 N.E.2d 208 (Ind. Ct. App. 1987); Howard v. H. J. Ricks Constr. Co., 509 N.E.2d 201 (Ind. Ct. App. 1987).

131. *See, e.g.*, Hoosier Cardinal Corp. v. Brizuis, 136 Ind. App. 363, 371, 199 N.E.2d 481, 485 (1964).

132. *See, e.g.*, Fleischer v. Hebrew Orthodox Congregation, 504 N.E.2d 320, 322 (Ind. Ct. App. 1987) (citing Mullins v. Easton, 176 Ind. App. 590, 376 N.E.2d 1178 (1978); RESTATEMENT (SECOND) OF TORTS § 332 (1965)).

133. *See, e.g.*, City of Bloomington v. Kuruzovich, 517 N.E.2d 408, 412-13 (Ind. Ct. App. 1987).

134. *See, e.g.*, Sowers v. Tri-County Tel. Co. Inc., 512 N.E.2d 208, 210 (Ind. Ct. App. 1987).

135. *See, e.g.*, J.C. Penney Co. v. Wesolek, 461 N.E.2d 1149, 1152-53 (Ind. Ct. App. 1984).

136. 461 N.E.2d 1149 (Ind. Ct. App. 1984).

137. *Id.* at 1153. Plaintiff's status also depended in part upon J.C. Penney's purpose for holding its store open to the public and whether plaintiff's purpose for entering the premises corresponded with that purpose. *Id.*

Consequently, "[w]hether Ruth made a purchase in Penney's before her fall is crucial to the determination of her status at the time of her fall. . . . [i]f not, her status was that of a licensee."[138]

The *Wesolek* decision avoided the more difficult issue: whether stores should owe a reasonable duty of care to all persons in traveled areas during business hours. The *Wesolek* decision reduced the determination to an examination of whether the customer was browsing, shopping, or just passing through. Yet, whether Ruth Wesolek make a purchase or was just passing through the store to a common mall area, the danger she encountered was the same. More importantly, there is no question that J. C. Penney encouraged, and benefited from the presence of, persons entering or passing through the store for any reason. In addition, because there are "invitees" in J. C. Penney's stores throughout the business day, the finding that some shoppers are mere "licensees" would do nothing to reduce the cost to J. C. Penney of meeting its duty to protect invitees. For all of these reasons, the shopper's intention does not appear to be a rational basis for determination of the store's liability concerning the danger.

Not all Indiana cases rely on artificial distinctions as the court did in *Wesolek*. In *Ember v. BFD, Inc.*,[139] the court of appeals ruled that premises liability could be extended for a condition off the premises of the landowner.[140] A bar patron sued after being injured and assaulted in a parking lot across from the bar. The bar's co-manager admitted receiving complaints prior to the assault concerning excessive noise, crowd problems, and criminal activity on the streets adjacent to the bar. The bar's management also had been aware of at least five or six violent incidents inside or outside the tavern. The bar employed two uniformed police officers, including one posted outside the bar. To quell neighborhood complaints, the bar distributed a flyer to the local neighborhood advising individuals to call the bar regarding problems or to call city police if their complaint concerned a serious incident. The bar did not own or lease the parking lot on which the assault occurred.[141]

The trial court granted summary judgment for the bar. The court of appeals reversed, basing its decision on two alternative grounds: (a) the bar gratuitously might have assumed the duty to patrol adjacent areas; and (b) the responsibility of a landowner could extend beyond the land owned.[142]

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138. *Id.*
139. 490 N.E.2d 764 (Ind. Ct. App. 1986).
140. *Id.* at 772.
141. *Id.* at 766-68.
142. *Id.* at 773.

As to the latter ground, the court held that "[a] duty of reasonable care may be extended beyond the business premises when it is reasonable for invitees to believe the invitor controls premises adjacent to his own or where the invitor knows his invitees customarily use such adjacent premises in connection with the invitation."[143] The court further found that

> "[w]hen the activities conducted on the business premises affect the risk of injury off the premises, the landowner may be under a duty to correct the condition or guard against foreseeable injuries. . . . *The polestar of liability, as in other negligence actions, is the foreseeable risk of harm created by the invitor's activities.*[144]

Perhaps the most interesting aspect of *Ember* is its reliance on the "polestar" of foreseeability. Foreseeability plays only a limited role in Indiana's traditional analysis of a landowner's duty. Proof of foreseeability is of absolutely no assistance to a trespasser and of only limited solace to a licensee.[145] Yet, *Ember* concludes that foreseeability plays a central role in premises liability analysis where plaintiff is held to be an invitee.

B. Adoption of the "Public Invitee" Test

In *City of Bloomington v. Kuruzovich*,[146] the Fourth District of the Indiana Court of Appeals adopted the "public invitee" test as set forth in the Restatement (Second) of Torts. Under the Restatement provision: "A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public."[147] The "public invitee" test, adopted by the Third District of the Indiana Court of Appeals in *Fleischer v. Hebrew Orthodox Congregation*,[148] expands the definition of potential invitees by recognizing

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143. *Id.* at 772.

144. *Id.* (emphasis added).

145. Trespassers and licensees take the premises as found. *See* Gaboury v. Ireland Rd. Grace Brethen, 446 N.E.2d 1310, 1314 (Ind. 1983); Barbre v. Indianapolis Water Co., 400 N.E.2d 1142, 1146 (Ind. Ct. App. 1980). In addition, some Indiana cases suggest a landowner has only the duty not to injure a trespasser after discovering his presence. Chicago, S.S. & S.B.R. v. Sagala, 140 Ind. App. 650, 654, 221 N.E.2d 371, 374 (1966); Standard Oil Co. of Indiana, Inc. v. Scoville, 132 Ind. App. 521, 524, 175 N.E.2d 711, 713 (1961).

146. 517 N.E.2d 408 (Ind. Ct. App. 1987).

147. RESTATEMENT (SECOND) OF TORTS § 333(2) (1965).

148. 504 N.E.2d 320 (Ind. Ct. App. 1987). In *Fleischer*, the plaintiff had been injured while attending a service in a synagogue. *Id.* at 321. The court of appeals reversed summary judgment for the defendant synagogue on the ground that the plaintiff was a "public invitee." *Id.* at 324.

a landowner can be liable under the invitee standard to one whose presence on the property is not necessarily for the economic benefit of the landowner.

In *Kuruzovich*, plaintiff was injured while warming up for a softball game on property maintained as a park by the City of Bloomington. While backing up to catch a fly ball, Kuruzovich tripped over a raised manhole cover located near the ball field. After concluding that the City of Bloomington retained control over the park, the court addressed Kuruzovich's status on the property. The court noted that the facts presented the issue of whether one could ever be an invitee absent an economic benefit to the defendant.[149] The court declared that *Fleischer*'s adoption of the public invitee rule was a "salutary development in the law of this state,"[150] and held that "when one invites the public or a large segment thereof, on to property for a particular purpose, he is liable to those he invites on to the land for any hazardous conditions he causes or negligently allows to remain on the land."[151]

Adoption of the public invitee doctrine was crucial to the outcome of the *Kuruzovich* case. If *Kuruzovich* had been found to be a licensee, the City of Bloomington should have prevailed because a licensee takes the premises as found. The City of Bloomington would have had no affirmative duty to keep the property safe for Kuruzovich, and the unconcealed nature of the raised manhole would have been his responsibility to detect and heed.

In another court of appeals decision, the first district addressed, but did not expressly adopt the "public invitee" test.[152] The Supreme Court of Indiana will ultimately have to decide whether the "public invitee" doctrine is recognized by Indiana law. Although neither court of appeals' decision addressed the issue specifically, there seems to be little doubt that adoption of the "public invitee" doctrine would reject the rationale and overrule the result of cases like *J. C. Penney Co. v. Wesolek*.[153] As noted in a comment to the Restatement:

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149. 517 N.E.2d at 413.

150. *Id.*

151. *Id.*

152. French v. Sunburst Properties, Inc., 521 N.E.2d 1355 (Ind. Ct. App. 1988). *See* the discussion of *French* in Part V(E), *infra* notes 166-72 and accompanying text. In *French*, the court rejected the plaintiff's claim that he was a public invitee because he had entered the defendant's apartment complex (chasing his dog) "for his own convenience," *id.* at 1356, and not "for a purpose for which the land is held open to the public," as required by section 332(2) of the Restatement. RESTATEMENT (SECOND) OF TORTS § 332(2) (1965). In light of this holding, it was not necessary for the court to decide whether it would adopt the "public invitee" doctrine, but nothing in the opinion indicated any inclination to reject it.

153. 461 N.E.2d 1149 (Ind. Ct. App. 1984).

> [T]he fact that a building is used as a shop gives the public reason to believe that the shopkeeper desires them to enter or is willing to permit their entrance, not only for the purpose of buying but also for the purpose of looking at goods displayed therein or even for the purpose of passing through the shop. This is true because shopkeepers as a class regard the presence of the public for any of these purposes as tending to increase their business.[154]

Future decisions from the Indiana courts will determine the standards applicable to determining "invitee" status, and will thereby establish the extent of landowners' duties.

C. "Ongoing Business Relation" Makes Plaintiff an Invitee

In *Stainko v. Tri-State Coach Lines, Inc.*,[155] a salesman for a company selling bus maintenance items sued after injury in a bus terminal. Stainko had an ongoing relationship with Tri-State and had visited its garage several times to solicit business and make deliveries. Typically, Stainko entered the garage through a side door or an overhead door and walked to the parts department to meet Tri-State's purchasing agent. After the meeting, Stainko would leave by the same route.[156]

On January 27, 1982, Stainko made a sales call to the Tri-State garage. The purchasing agent was not in his usual place at the parts department, but his secretary told Stainko to go out in the garage to find him. The garage was dark. The only light provided was far to the back of the garage where a mechanic was working. Stainko had done business with that mechanic before and began to walk towards him. On his way, Stainko fell into an uncovered, unlighted and unguarded pit.[157] The trial court granted summary judgment for Tri-State. The court of appeals reversed.

Tri-State argued that Stainko was a mere licensee as a matter of law. Because a licensee under Indiana law "takes the premises as he finds them,"[158] Tri-State argued Stainko was barred from recovery. The court rejected that proposition, on the ground that "Stainko and Tri-State had an ongoing business relationship to the economic benefit of *both* parties."[159] The "ongoing business relationship" was sufficient to

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154. Restatement (Second) of Torts § 332 comment c (1965).
155. 508 N.E.2d 1362 (Ind. Ct. App. 1987).
156. *Id.* at 1363.
157. *Id.*
158. *Id.* at 1364. *See also* Barbre v. Indianapolis Water Co., 400 N.E.2d 1142, 1146 (Ind. Ct. App. 1980).
159. *Stainko*, 508 N.E.2d at 1364.

allow Stainko to be considered an invitee regardless of the fact that he was not on the property to buy a ticket or to ride a bus, the primary business of Tri-State.[160]

D. "Fireman's Rule" Extended to Police Officers

In *Sports Bench, Inc. v. McPherson*,[161] the court extended the "fireman's rule" to policemen. The "fireman's rule" provides that "professionals, whose occupations by nature expose them to particular risks, may not hold another negligent for creating the situation to which they respond in their professional capacity."[162] Plaintiffs, who were deputy sheriffs, were shot by a patron of the defendant bar while they were off duty. Plaintiffs had arrived at the bar and were told that the assailant had been there earlier and had threatened to return with a gun. When the assailant returned, plaintiffs attempted to arrest him. The court of appeals reversed the trial court's denial of defendant's motion for summary judgment. The court characterized the fireman's rule as classifying firemen, policemen and other officers who responded in their official capacities as licensees for purposes of landowner liability.[163] "Accordingly, firemen, policemen, and other officers incur the inherent risks of the situation when they act in their professional capacities."[164] Because in Indiana the determination of whether or not an officer is performing official, professional duties "does not depend on whether he is on or off duty,"[165] the court used the fireman's rule to apply licensee status to plaintiffs even though they had been off duty at the time of the incident.

E. Licensee Bears Risk of Dangers on Property

In *French v. Sunburst Properties, Inc.*,[166] the court considered the scope of public invitation for property left open to the public. French was injured when he tripped over a cable strung between a series of posts on the edge of an apartment complex. French was not a resident of the apartment complex but had entered the complex during early-morning darkness to search for his lost dog. The trial court determined that French was a mere licensee and granted summary judgment for the defendant apartment complex.

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160. *Id.*
161. 509 N.E.2d 233 (Ind. Ct. App. 1987).
162. *Id.* at 235 (quoting Keohn v. Devereaux, 495 N.E.2d 211, 215 (Ind. Ct. App. 1986)).
163. 509 N.E.2d at 235.
164. *Id.*
165. *Id.*
166. 521 N.E.2d 1355 (Ind. Ct. App. 1988).

On appeal, the court affirmed. First the court rejected the plaintiff's claim that he was a "public invitee" under the Restatement (Second) of Torts.[167] Without expressly adopting the "public invitee" doctrine, the court held that the plaintiff failed to meet the criteria of a "public invitee":

> [T]he test "require[s] that the visitor enter the premises for the particular purpose for which the occupant has encouraged the public to do so." If the visitor meets the requirement of a public invitee, then the occupant owes him a duty of reasonable care to keep the premises safe for him.[168]

The court concluded that "the trial court properly determined, as a matter of law, that [plaintiff] enjoyed only licensee status."[169]

The court noted the definition of the duty owed a licensee:

> The only affirmative duty a landowner owes to a licensee is to refrain from willfully or wantonly injuring him or acting in a way which would increase the licensee's peril. A showing by the licensee of mere negligence on the part of the landowner will not be enough to insure him recovery.[170]

The court stated that because there was no evidence that the apartment complex "impliedly invited or encouraged pet owners from surrounding areas to enter its premises in order to engage in the nocturnal pursuit of their wayfaring pets,"[171] French was a mere licensee. Considering the licensee status, the court stated: "[U]nless Sunburst acted to create a concealed danger, unavoidable even by the exercise of reasonable skill and care, it cannot be held liable for French's injuries."[172]

Landowner liability cases decided during the survey period continued to apply Indiana's traditional distinctions based on the plaintiff's status upon the property at the time of the accident. Although *Ember* appeared to signal a change in landowner liability law toward giving greater consideration to the foreseeability of injury, subsequent decisions have not expanded that analysis.

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167. *Id.* at 1356-57 (discussing RESTATEMENT (SECOND) OF TORTS § 332 (1965)). See the discussion of the "public invitee" issue in Part V(B), *supra* notes 146-54 and accompanying text.

168. 521 N.E.2d at 1356 (quoting Fleischer v. Hebrew Orthodox Congregation, 504 N.E.2d 320, 323 (Ind. Ct. App. 1987)).

169. 521 N.E.2d at 1356-57.

170. *Id.* at 1356 (quoting Barbre v. Indianapolis Water Co., 400 N.E.2d 1142, 1146 (Ind. Ct. App. 1980)).

171. 521 N.E.2d at 1356.

172. *Id.* at 1357.

VI. Fraud and Estoppel

The Indiana Court of Appeals addressed the elements of constructive fraud from two different perspectives during the survey period. In *Sanders v. Townsend*,[173] the court considered the elements of constructive fraud in the context of an attorney-client relationship. In *Reeve v. Georgia-Pacific Corp.*,[174] the court addressed the elements of a claim for equitable estoppel based on a misrepresentation of law, which it stated were essentially the same as the elements for constructive fraud.

A. Constructive Fraud

The Sanders were disgruntled personal injury plaintiffs who sued their former attorneys, alleging that "they were coerced into an inadequate and unfair settlement."[175] The trial court granted summary judgment for defendants.

On appeal, the court upheld the dismissal of the negligence claims because plaintiffs failed to present evidence that any settlement or verdict award without the alleged negligence would have been greater than the settlement actually received.[176] The court reversed, however, the lower court's summary judgment on the constructive fraud claim.

In considering the elements of constructive fraud, the court discussed the standard of care for those in a fiduciary relationship as much higher than parties who negotiate at arm's length. The court stated:

> In cases of constructive fraud, intent to deceive is not required because the parties involved are not at arm's length. The element of intent is replaced by the element of the special relationship between the parties as, for example, the fiduciary relationship. Thus, although the tort of actual fraud vindicates the moral principle, one should refrain from representations intended to work a fraud, the tort of constructive fraud vindicates the principle that, in the special relationship encompassed within the purview of the tort, the dominant party must take care not to injure, even inadvertently, the rights of the weaker party, who has relied on the dominant party for expertise, skill, abilities and guidance in an area in which the weaker party is unversed.[177]

Having thus distinguished constructive fraud and legal malpractice, the court further distinguished the type of damage suffered: "[I]n a

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173. 509 N.E.2d 860 (Ind. Ct. App. 1987).
174. 510 N.E.2d 1378 (Ind. Ct. App. 1987).
175. *Sanders*, 509 N.E.2d at 862.
176. *Id.* at 863-65.
177. *Id.* at 866.

legal negligence claim, the injury is the loss of the worth of the underlying claim; but, with respect to constructive fraud where fiduciary duties are breached, the primary injury is the loss of rights belonging to the weaker party."[178]

Although the court found the injury suffered to be "the deprivation of the right to choose between trial or settlement, or rejection of one settlement offer in hopes of a better offer,"[179] the court gave little guidance in deciding how to value such damage. The court noted that loss of value of the underlying claim is not the exclusive measure of damages and that nominal damages may be awarded.[180] The court also noted, however, that "more than nominal damages may be appropriate. For example, forfeiture of attorneys fees may be appropriate."[181] In *dicta*, the court described a Minnesota case finding an attorney who breaches a fiduciary duty to a client forfeits his right to compensation without any requirement that the client prove special damages and without regard to whether the fraud was intentional or only constructive.[182]

B. Equitable Estoppel

In *Reeve v. Georgia-Pacific Corp.*,[183] the court noted that the elements which comprised the equitable estoppel defense are "essentially those which would give rise to a claim for actual or constructive fraud."[184] The court stated that negligence can be the basis of estoppel.[185] Furthermore, although the general rule is that estoppel arises on misrepresentation of past or existing facts and not upon promises to be performed in the future, expressions of opinion, or misrepresentations as to the state of the law, the court held that "[o]ne of the exceptions to the general rule is where a party expressing the opinion claims or expresses a special knowledge,"[186] and "[e]xpression of an opinion as to the law is part of the rule concerning expressions of opinion."[187]

Georgia-Pacific had entered into an agreement to pay Reeve and her minor son based on the work-related death of Reeve's husband. The payments were to continue over time until the son achieved majority or finished school. In the spring of 1983, Reeve inquired of Georgia-

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178. *Id.*
179. *Id.* at 867.
180. *Id.*
181. *Id.*
182. *Id.* (discussing Rice v. Perl, 320 N.W.2d 407 (Minn. 1982)).
183. 510 N.E.2d 1378 (Ind. Ct. App. 1987).
184. *Id.* at 1382.
185. *Id.* at 1383.
186. *Id.*
187. *Id.*

Pacific what affect, if any, remarriage would have on her and her son's benefits. Georgia-Pacific wrote a letter telling Reeve her son would continue to receive benefits. Four months later, Reeve remarried, and Georgia-Pacific subsequently tried to revoke payments.[188]

The Industrial Board found the benefits could be revoked; the court of appeals reversed. Because Georgia-Pacific had superior knowledge as to the rights to benefits, the appellate court held that Reeve could assert equitable estoppel based on Georgia-Pacific's admitted misrepresentation of law.[189] The appellate court also rejected arguments by Georgia-Pacific that estoppel was not applicable because the misrepresentation was not one of existing fact or condition but was a future promise. Noting that "[t]he doctrine of promissory estoppel exists in Indiana. . . [a]s an exception to the general rule,"[190] the court held that Reeve's remarriage in reliance on Georgia-Pacific's representations was sufficient to give rise to estoppel.[191]

VII. Pre-Existing Mental Weakness

In *Brokers, Inc. v. White*,[192] the Indiana Court of Appeals held that a tortfeasor is responsible for complications resulting from a pre-existing mental weakness as well as pre-existing physical weaknesses.

White fell in a supermarket and was taken to a hospital complaining of neck and lower back pain and numbness in the lower extremities. Her doctor observed a bruise on her lower back but found no spinal injury which would prevent her from walking. Nevertheless, White left the hospital in a wheelchair and claimed to be unable to walk. White was examined eventually by a psychiatrist, who concluded that she was suffering from a "conversion reaction." The psychiatrist testified at trial that a person manifesting a "conversion reaction" or "conversion hysteria" turns her mental anxiety into a physical disturbance such as paralysis of the arms or legs.[193] Other expert witnesses testified that White was predisposed to a conversion reaction.[194]

After a jury verdict for the grocery store, White moved to correct errors based on the refusal of the trial court to give an instruction that a negligent party is not relieved from liability merely because of a pre-existing condition of the injured party which made her more susceptible

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188. *Id.* at 1379-80.
189. *Id.* at 1384.
190. *Id.*
191. *Id.*
192. 513 N.E.2d 200 (Ind. Ct. App. 1987).
193. *Id.* at 202.
194. *Id.*

to injury. The trial court granted the motion to correct errors and the grocery store appealed.[195]

On appeal, the grocery store argued that the pre-existing condition rule applied only to pre-existing physical weaknesses rather than mental weaknesses.[196] The court affirmed the granting of a new trial, concluding that the pre-existing condition rule applies to mental weaknesses as well as physical weaknesses. The court analyzed the issue as a question of proximate cause: "[I]f the negligent conduct causes any physical injury, and if there is any evidence that a mental condition resulted therefrom, the issue whether the mental illness is a natural and direct result of such physical injury is a question of fact."[197] The court noted that: "The jury question of proximate cause remains even where the jury is instructed that the defendant is not relieved from liability merely because a pre-existing condition of the plaintiff makes him more susceptible to injury."[198]

Brokers does not appear to extend the law concerning pre-existing weaknesses, but clarifies that such arguments apply to both mental and physical conditions.

VIII. Liability of an Unincorporated Association to Its Members

During the survey period, the Indiana Supreme Court in *Calvary Baptist Church v. Joseph*[199] reaffirmed the common law rule that a member of an unincorporated association cannot sue the association for tortious conduct of another member. Although the court recognized certain limited exceptions to this rule, the court overruled an Indiana Court of Appeals precedent to the contrary that had stood for ten years.[200]

James Joseph was a member and deacon of the Calvary Baptist Church. Joseph volunteered to help other members of the church fix

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195. *Id.*

196. *Id.* at 204. The grocery store relied on the following language: "It is clear that a tortfeasor takes the person he injures as he finds him. The tortfeasor is not relieved from liability merely because a pre-existing *physical* condition of the injured party makes him more susceptible to injury." *Id.* (quoting Johnson v. Bender, 174 Ind. App. 638, 644, 369 N.E.2d 936, 940 (1977) (emphasis added)).

197. 513 N.E.2d at 204. The court cited and relied upon emotional distress cases, noting that there was no dispute that plaintiff had suffered a contemporaneous physical injury. *Id. See also* Part III of this Article, *supra* notes 69-109 and accompanying text.

198. 513 N.E.2d at 205.

199. 522 N.E.2d 371 (Ind. 1988).

200. *Id.* at 373, *overruling* O'Bryant v. Veterans of Foreign Wars, 176 Ind. App. 509, 376 N.E.2d 521 (1978).

the roof of the church building. While on the roof, another member moved the ladder to the roof and apparently left it on an unsolid footing. When Joseph stepped on the ladder to descend, he fell and was injured. The trial court granted summary judgment to the defendant church, and the court of appeals reversed. The supreme court vacated the court of appeals and affirmed the trial court.[201]

The court of appeals, although noting that the common law rule followed by a majority of jurisdictions would bar the plaintiff's suit by a member against an unincorporated association, followed *O'Bryant v. Veterans of Foreign Wars*,[202] which held that Indiana had rejected the common law rule.[203] *O'Bryant* had considered the effect of Indiana Trial Rule 17(B) and 17(E), which both provide that an "unincorporated association may sue or be sued in its common name."[204] Because the rules were adopted by both the legislature and the Indiana Supreme Court, *O'Bryant* reasoned that the rules changed prior contrary substantive Indiana law on the issue.[205]

In *Calvary Baptist Church v. Joseph*,[206] the Indiana Supreme Court expressly overruled *O'Bryant* and followed the common law principle that a member of an unincorporated association cannot recover in a tort action from the association. The court explained the rationale of the rule:

> The theory of the general rule is that the members of an unincorporated association are engaged in a joint enterprise. The negligence of each member in the prosecution of that enterprise is imputable to each and every other member so that the member who has suffered damages through the tortious conduct of another member of the association may not recover from the association for such damages. It would be akin to the person suing himself as each member becomes both a principal and an agent as to all other members for the actions of the group itself.[207]

In rejecting the basis of the *O'Bryant* holding, the court stated: "We do not see that it was the intention of the legislature nor this court in authorizing [Trial Rules 17(B) and 17(E)] to change the substantive rule

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201. *Id.* at 372.

202. 176 Ind. App. 509, 376 N.E.2d 521 (1978).

203. Joseph v. Calvary Baptist Church, 500 N.E.2d 250, 252 (Ind. Ct. App. 1986).

204. Ind. R. T. P. 17(B) (Capacity to Sue or Be Sued) and 17(E) (Partnerships and Unincorporated Associations).

205. 176 Ind. App. at 513, 376 N.E.2d at 523.

206. 522 N.E.2d 371 (Ind. 1988).

207. *Id.* at 374-75.

of non-liability of association to members for torts committed by other members."[208]

Although the supreme court held that the common law rule is still in effect in Indiana, the court noted that exceptions to the rule are possible: "[W]e recognize the wisdom of applying an exception to the general rule in the case of large unincorporated associations such as labor unions having a hierarchy of structure that drastically changes the relationship of membership to association and the control that a member has in its affairs."[209]

The *Calvary Baptist Church* decision relied heavily on a theory that members of an unincorporated association are engaged in a "joint enterprise."[210] To the extent that factual issues arise in a case as to whether or not the unincorporated association falls within the rules, a practitioner would be well advised to look to arguments concerning whether the "joint enterprise" policy basis of the rule has been met.

IX. Conclusion

During the survey period, interpretations of the Comparative Fault Act continued to be the most-watched developments in Indiana's tort law. The decisions during the survey period help in interpreting the Act, but numerous questions remain and substantial uncertainty exists with respect to nonparty practice and other issues.

In other areas of tort law, there were no decisions announcing fundamentally new tort doctrines. In the areas of recovery for emotional distress and premises liability, Indiana courts continued to explore the limits of older doctrines and suggested that those doctrines may have to be recast. Indeed, that process already may be underway. On the other hand, the supreme court rejected an attempt by the court of appeals to adopt a new rule on liability of unincorporated associations, reaffirming the traditional legal rule. The year's decisions in tort cases thus demonstrated the ebb and flow of the common law, the constant process of accretion by which legal doctrines are formed and changed.

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208. *Id.* at 373.
209. 522 N.E.2d at 375.
210. *Id.* at 374.