RECENT DEVELOPMENT IN INDIANA TORT LAW

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INTRODUCTION

Between October 1999 and October 2000, Indiana courts rendered numerous decisions in the area of tort law that have clarified existing rules of law, recognized new theories, and provided guidance not only to lower courts, but to attorneys and litigants. Likewise, legislation adopted by the General Assembly took effect that changes the face of wrongful death law. This Article addresses the past year's cases and legislation and analyzes their effect on the practice of tort law.

I. WRONGFUL DEATH

A. Adult Wrongful Death Statutes

Wrongful death and survival actions are perhaps the most fascinating and rapidly changing aspect of tort law in Indiana. In addition to the highly emotional nature of such cases, wrongful death and survival claims typically present novel and complex legal issues for attorneys and judges.

Under traditional principles of common law in Indiana, there was no right of action or remedy for the wrongful death of another. However, with the passing of the original Wrongful Death Act in 1852, our tort system changed. Since that time, Indiana's Adult Wrongful Death Act has undergone numerous substantive changes. However, our courts continue to apply the principle that, because a cause of action for wrongful death is purely statutory in nature and in derogation of the common law, the Wrongful Death Act must be strictly construed.[1]

Today, the damages recoverable in an action for the wrongful death of an adult are, presumably, based on a strict reading of the statute, and the foundation for measuring these damages is the pecuniary loss suffered by those for whose benefit that action may be maintained; namely, the class of beneficiaries set forth in the statute. Pecuniary loss has been defined as the reasonable expectation of pecuniary benefit from the continued life of the deceased, to be inferred from proof of assistance by way of money, services, or other material benefits rendered by the deceased prior to his or her death.[2] In its present form, Indiana's Adult Wrongful Death Act is comprised of two statutes. The first statute applies

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1. *See* Robinson v. Wroblewski, 679 N.E.2d 1348 (Ind. Ct. App. 1997); Ed Wiersma Trucking Co. v. Pfaff, 643 N.E.2d 909 (Ind. Ct. App. 1994); Southlake Limousine & Coach, Inc. v. Brock, 578 N.E.2d 677 (Ind. Ct. App. 1991).

2. *See* Lustick v. Hall, 403 N.E.2d 1128 (Ind. Ct. App. 1980).

to individuals who do not classify as a "child" pursuant to Indiana Code section 34-23-2-1 and who are either married or leave dependent children or dependent next of kin. The second statute, Indiana Code section 34-23-1-2, applies to unmarried adult persons who leave no dependent children or dependent next of kin. This statute was recently passed by the Indiana General Assembly, and applies only to actions that accrue on or after January 1, 2000. The key to distinguishing which of the two statutes applies is to investigate and analyze the issue of dependency when there is no surviving spouse.

1. Adult Wrongful Death: Dependency.—The first of Indiana's two adult wrongful death statutes allows a personal representative of the decedent's estate to recover both economic and non-economic damages for the death of an individual caused by the wrongful act or omission of another. The non-economic damages inure to the exclusive benefit of the decedent's widow or widower, and to the decedent's dependent children or dependent next of kin.[3]

During the course of this survey period, the Indiana Court of Appeals rendered a number of significant decisions interpreting legislative intent and expanding the scope of recovery under Section 34-23-1-1. However, recognizing the significance and import of the court of appeals' decisions interpreting this wrongful death statute and defining and expanding the scope of recovery under the statute, the Indiana Supreme Court has accepted transfer of each of the cases, and the court of appeals' decisions have been vacated. The supreme court has yet to issue opinions on these cases. For now, the state of the law in this area remains relatively unchanged.

a. Punitive damages.—Traditional wrongful death law provides that pecuniary loss is the foundation of the wrongful death action. Thus, aside from the lost earnings of the decedent, Indiana courts will allow the personal representative of the decedent's estate to recover, on behalf of the decedent's beneficiaries, lost love, care and affection.[4] To the extent that "companionship" refers to a type of love, care and affection, the loss of "companionship" can also be recovered in a wrongful death action.[5] Traditionally, punitive damages were unavailable in a wrongful death action. However, in *Durham v. U-Haul International*[6] and *Burton v. Estate of Davis*,[7] the Indiana Court of Appeals recently reversed this position, and held that the damages provision in the general wrongful death statute was broad enough to allow recovery for punitive damages.[8] Interestingly, the *Burton* court rendered its decision after transfer had been accepted in *Durham*. The *Burton* court recognized that the supreme court had accepted transfer on *Durham* and vacated the opinion and that it could not be cited as authority. Nevertheless, the court of appeals in *Burton* noted that the thorough analysis of this issue included in the *Durham* opinion is informative and

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3. *See* IND. CODE § 34-23-1-1 (2000).
4. *See* Andis v. Hawkins, 489 N.E.2d 78 (Ind. Ct. App. 1986).
5. Challenger Wrecker Mfg., Inc. v. Estate of Boundy, 560 N.E.2d 94 (Ind. Ct. App. 1990).
6. 722 N.E.2d 355 (Ind. Ct. App.), *vacated by* 735 N.E.2d 233 (Ind. 2000).
7. 730 N.E.2d 800 (Ind. Ct. App.), *appeal dismissed by* 740 N.E.2d 850 (Ind. 2000).
8. *Durham*, 722 N.E.2d at 360; *Burton*, 730 N.E.2d at 808.

consistent with its conclusions in *Burton*.[9] The Indiana Supreme Court subsequently accepted transfer in *Burton*, thereby vacating the court of appeals' opinion.

Although the damages recoverable in a wrongful death action may arguably have been altered by the court of appeals' recent decisions, one thing remains constant: punitive damages cannot be awarded in a wrongful death action where the defendant is a governmental entity.[10]

b. Survival of wrongful claim upon death of beneficiary.—In *Bemenderfer v. Williams*,[11] the Indiana Court of Appeals held that the recovery of wrongful death damages by a decedent's estate, for the benefit of the surviving dependent beneficiary (widow or widower, dependent children or dependent next of kin), is not precluded by the death of the beneficiary during the pendency of the wrongful death action. However, the Indiana Supreme Court has accepted transfer of this case and vacated the court of appeals opinion.

c. Independent cause of action for loss of consortium.—In line with its holding expanding the scope of potential recovery under Indiana's Adult Wrongful Death Act, the Indiana Court of Appeals, in two decisions, held that a surviving spouse may maintain his or her own cause of action, independent of a wrongful death action brought by the personal representative of the decedent's estate, for loss of consortium, even if the decedent died instantly. Damages for such a cause of action were found to extend from the date of the decedent's death, to the date the marriage would have ended due to the death of one of the spouses.[12]

The ramification of the court of appeals' recent decision allowing an independent cause of action for the spouse of the decedent under a theory of loss of consortium is significant because it may potentially result in a double recovery. Damages for lost love, care and affection have been allowed under the general wrongful death statute for some time. Arguably, these could be considered similar, if not identical, to damages for loss of consortium. Previously, when consortium damages were only permitted between the time of injury and the time of death, there was a clear theoretical line between the damages apportioned between the two causes of action. Now that line is blurred. However, in *Durham*, the court did suggest that if the surviving spouse elects to pursue both the wrongful death claim and the loss of consortium claim at trial, the trial court must instruct the jury that only a single award is permissible.[13] Nevertheless, because the Indiana Supreme Court has accepted transfer in both *Durham* and *Bemenderfer*, the status of Indiana law remains, in effect, unchanged.

2. Adult Wrongful Death: Non-Dependency.—After years of debate in the

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9. *See* 730 N.E.2d at 808 n.9.

10. *See* IND. CODE § 34-13-3-4 (2000).

11. 720 N.E.2d 400 (Ind. Ct. App. 1999), *vacated by* 735 N.E.2d 233 (Ind. 2000).

12. *See Durham*, 722 N.E.2d at 365; Bemenderfer v. Williams, 720 N.E.2d 400, 408 (Ind. Ct. App. 1998).

13. *See Durham*, 722 N.E.2d at 365 n.10.

legislature, the Indiana General Assembly recently passed legislation allowing a wrongful death claim to be brought by the personal representative of the estate of an unmarried adult with no dependent children or dependent next of kin.[14] The statute is quite restrictive, however. First, it applies only to causes of action that accrue after December 31, 1999. Second, it specifically disallows recovery for grief, lost earnings of the decedent and punitive damages. Third, it requires that a non-dependent parent or non-dependent child who wishes to recover damages under the statute prove that the parent or child had a "genuine, substantial and ongoing relationship" with the adult person before the parent or child may recover. Finally, the statute caps pecuniary damages (loss of the adult person's love and companionship) to an aggregate of $300,000.

In contrast to Section 34-23-1-1, this statute is relatively concise and specifically enumerates those elements of damages which are and are not recoverable. The statute has yet to be interpreted by Indiana's appellate tribunals, but decisions are certain to arise soon. Given the recent decisions by the court of appeals in the context of dependency related wrongful death actions, the new statute may serve to assist the Indiana Supreme Court in determining legislative intent, particularly with respect to punitive damages.

B. Child Wrongful Death Statute

Indiana's Child Wrongful Death Act[15] is something of a misnomer because the Act codifies not only actions for the death of a child, but also for injury to a child. However, actions for injury to a child in the State of Indiana are typically brought under common law principles of negligence and do not necessarily raise issues under the Act. Child wrongful death actions, on the other hand, will generally always be governed by the principles set forth in the Child Wrongful Death Act.

Prior to the adoption of Indiana's Child Wrongful Death Act in 1987, recovery for the wrongful death of a child was limited to actual pecuniary loss. In 1987, the statute was amended to allow a parent to seek recovery for loss of love and companionship as a result of the wrongful death of a child. There was, however, a three-year-cap that limited non-pecuniary damages to $100,000. That cap expired for causes of action that accrued after October 31, 1990.

Since 1987, Indiana's Child Wrongful Death Act has undergone numerous changes. In its present form, the statute attempts to identify who is a child, who may bring the action, what may be recovered and who may recover. During the course of this survey period, the Indiana legislature made no significant changes to the language of the child wrongful death statute. However, the Indiana Court of Appeals rendered two decisions interpreting the legislative intent behind the meaning of the word "child," and in one opinion affirmed the constitutionality of the Act itself.

1. Interpretation of the Term "Child."—As defined by the Child Wrongful

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14. *See* IND. CODE § 34-23-1-2 (2000).

15. *See id.* § 34-23-2-1.

Death Act, "child" means an unmarried individual without dependents who is less than twenty years of age, or less than twenty-three years of age and is enrolled in an institution of higher education or a vocational school.[16] In *Sweet v. Art Pape Transfer, Inc.*,[17] the parents of a twenty-one-year-old woman who was killed brought an action for recovery under the Indiana Child Wrongful Death Statute. At the time of the decedent's death, she was an employee in a vocational program and was pursuing studies in the same vocational program. However, because of her status as an employee at the school, she was not required to complete the ordinarily required paperwork for enrollment until she sought her final diploma. The court of appeals discussed the meaning of the statutory language "enrolled" and recognized the definition of "enroll" provided in *Black's Law Dictionary*: "to register; to make a record; to enter on the rolls of a court; to transcribe."[18] The court found that the decedent had no reason to complete a formal enrollment process because of her employment status and, thus, found that she was enrolled in the program. The court concluded that while written enrollment was absent in this case, it was both superfluous and not required by the statute.[19]

In *Ledbetter v. Ball Memorial Hospital*,[20] the Indiana Court of Appeals was faced with a similar issue. In that case, the parents of a twenty-year-old unmarried woman with no dependents who had died, brought an action under the Child Wrongful Death Statute. At the time of her death, the decedent was not enrolled in any institution of higher education or in a vocational school or program. The defendants moved for summary judgment contending that the decedent was not a child as defined by the Act because she was twenty-years-old and not enrolled in an institution of higher learning. In response, the plaintiffs contended that the decedent was a "child" for purposes of Section 34-23-2-1(a) because she had been impeded from pursuing her degree at a vocational school because of physical and mental handicaps. The plaintiffs further contended that the decedent had continually expressed an intent to return to the vocational program, but that, at the time of her death, she had not because of her alleged handicaps. The plaintiffs designated an affidavit of an instructor for Adult Basic Education in support of this contention.[21]

Although the court of appeals noted that it generally gave a liberal construction to the Child Wrongful Death Act, as evidenced by its decision in *Sweet*, it recognized that in this case there was no link between the decedent and a higher education program.[22] Despite the sympathy the court expressed for the great loss the plaintiffs had sustained as parents, it remarked that it could not in good faith stretch the meaning of the statute as far as suggested by the plaintiffs.

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16. *See id.* § 34-23-2-1(a).
17. 721 N.E.2d 311 (Ind. Ct. App. 1999).
18. *Id.* at 313 (quoting BLACK'S LAW DICTIONARY 624 (4th ed. 1968)).
19. *See id.*
20. 724 N.E.2d 1113 (Ind. Ct. App. 2000).
21. *See id.* at 1114-15.
22. *See id.* at 1116-17.

Thus, it held that "is enrolled" unambiguously means to be registered in a school or *de facto* registered.[23]

2. Constitutionality.—In addition to their arguments with respect to the interpretation of the meaning of the term "child" under the Indiana Child Wrongful Death Act, the *Ledbetter* plaintiffs also challenged the constitutionality of the Act as applied to bar their recovery for the death of their child. Specifically, the plaintiffs argued that the Act violates the privileges and immunities clause of the Indiana Constitution.[24]

Although the court of appeals recognized that the Child Wrongful Death Statute treats parents of children ages twenty to twenty-three and not pursuing post-secondary education differently from the parents of children in the same age bracket who are pursuing post-secondary education, it explained the rationale for such treatment as follows: "[T]he inherent characteristics of the group of 20 to 23-year old still pursuing post-secondary education include a dependence on their parents not generally shared by those who are free to hold jobs at that age."[25]

The court further noted that the preferential treatment is uniformly applicable and equally available to all persons similarly situated, that is to all parents of twenty to twenty-three-year-olds who are enrolled in post-secondary institutions or programs. In addition, the court observed that the court of appeals interpreted "enrolled" liberally while remaining within the clear meaning of the statute. The court concluded that because it must exercise substantial deference to legislative discretion, it is not free to conclude that a better law might have included all children under twenty-three who are, for any reason, dependent on their parents. For these reasons, the court of appeals found that the Child Wrongful Death statue does not violate the Indiana Constitution as applied to the plaintiffs' claim for damages.[26]

II. WRONGFUL BIRTH AND WRONGFUL PROLONGATION OF LIFE

During the course of this survey period, the Indiana Supreme Court and the Indiana Court of Appeals had occasion to determine whether Indiana law recognizes separate causes of action for "wrongful birth" and "wrongful prolongation of life" respectively. In *Bader v. Johnson*,[27] the Indiana Supreme Court determined it unnecessary to characterize a plaintiffs' cause of action as "wrongful birth" because the claims alleged in the complaint were properly governed by the Indiana Medical Malpractice Act.[28] The supreme court noted that "wrongful birth" claims were generally described as causes of actions brought by the parents of a child born with birth defects alleging that, due to negligent medical advice or testing, they were precluded from making an

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23. *Id.* at 1117.
24. *See id.*; *see also* IND. CONST. art. I, § 23.
25. *Ledbetter*, 724 N.E.2d at 1118.
26. *See id.*
27. 732 N.E.2d 1212 (Ind. 2000).
28. *See id.* at 1216.

informed decision about whether to conceive a potentially handicapped child or, in the event of a pregnancy, to terminate it.[29] The court concluded that labeling the plaintiffs' cause of action as wrongful birth "adds nothing to its analysis, inspires confusion, and implies the court has adopted a new tort," which it declined to do.[30]

In *Estate of Taylor v. Muncie Medical Investors, L.P.*,[31] the estate of a former resident of the defendant healthcare institution brought a multi-count complaint against the healthcare institution that included a claim under the theory of wrongful prolongation of life. On appeal from the trial court's entry of summary judgment, the plaintiff argued that although no Indiana courts have directly addressed the issue, it is logical for Indiana to adopt a tort for wrongful prolongation of life. Specifically, the plaintiff argued that if Indiana does not do so, then there is no enforcement mechanism to protect a patient's right to refuse medical treatment and a family's right to make medical decisions for incapacitated relatives.[32] The court of appeals concluded, however, that creation of a new cause was unnecessary because the procedures set forth in Section 16-36-1-8 adequately protect the rights and interests of patients, their families and their healthcare providers and could have protected the rights of the decedent and the estate in this case.[33]

III. MEDICAL MALPRACTICE

Once again during this survey period, the Indiana Supreme Court and Indiana Court of Appeals decided several significant cases concerning medical malpractice.

A. Amounts Recoverable

In *Poehlman v. Feferman*,[34] the Indiana Supreme Court found that, under Indiana's Medical Malpractice Act, the limitations on the amounts recoverable are limitations on damage amounts and do not include collateral litigation expenses. Additionally, the court held that each debtor is individually responsible under the Act for its own collateral litigation expenses associated with its settlement or judgment figure. Finally, the court found that the post-judgment interest statute fully applies to medical malpractice judgments.[35]

In *Poehlman*, the plaintiff received a judgment for $345,263, plus court costs against Dr. Feferman. Dr. Feferman's insurance carrier paid $103,733.09 to the county clerk to satisfy what Dr. Feferman owed pursuant to Indiana's Malpractice Act. This represented the $100,000 the doctor owed, together with

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29. *See id.* at 1216 n.3.
30. *Id.* at 1216.
31. 727 N.E.2d 466 (Ind. Ct. App. 2000).
32. *See id.* at 470.
33. *See* IND. CODE §16-36-1-8 (2000).
34. 717 N.E.2d 578 (Ind. 1999).
35. *See id.* at 582-84.

post judgment interest and court costs. The plaintiff filed a petition for payment of damages from the Patient's Compensation Fund, and a declaration as to the interest liability of Dr. Feferman, his insurance carrier, and the Fund. By stipulation of the parties, $100,000 was released from the county clerk, and the fund paid the remaining judgment of $245,263. What remained to be resolved was the issue of post judgment interest and court costs.[36]

The Indiana Supreme Court disagreed with the court of appeals and held that the Act did not limit collateral financial obligations associated with litigation, such as post-judgment interest and court costs, because these arose separately by operation of law and were regulated by other statutes.[37] The court went one step further and addressed who was responsible for the collateral litigation expenses. The court found that each judgment debtor is individually responsible for its collateral litigation expenses even when those are added to a settlement or judgment figure and the result exceeds the Act's statutory damage limits.[38]

Only one month later, the Indiana Supreme Court in *Emergency Physicians of Indianapolis v. Pettit*,[39] issued a related ruling. In *Pettit*, the court held that a healthcare provider is responsible for prejudgment interest even if the entire amount of the judgment equals the maximum amount recoverable under Indiana's Medical Malpractice Act, thus causing the total judgment debt to exceed the cap.[40]

Thus, after *Poehlman* and *Pettit*, a plaintiff can recover prejudgment interest, post-judgment interest and court costs from a healthcare provider, the provider's insurer, and the fund above and beyond the statutory cap, with the exception that prejudgment interest is not recoverable by statute from the fund. These decisions give plaintiffs a little relief from Indiana's rather stringent medical malpractice damage cap. Nevertheless, in *Indiana Patient's Compensation Fund v. Wolfe*,[41] the court refused to expand the recovery under the Act any further, holding that a parent who has a derivitative claim, based on loss of services, does not constitute a "patient" under the Act to entitle the parents to a separate statutory damage cap.[42]

B. Statute of Limitations

In last year's Survey Edition, it was noted that the Indiana Supreme Court rendered several opinions concerning the constitutionality of the statute of limitations as applied to Indiana's Medical Malpractice Act.[43] The same is true

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36. *See id.* at 580.
37. *See id.* at 581.
38. *See id.*
39. 718 N.E.2d 753 (Ind. 1999).
40. *See id.* at 755.
41. 735 N.E.2d 1187 (Ind. Ct. App. 2000).
42. *See id.*
43. *See* Tammy J. Meyer & Kyle A. Lansberry, *Recent Development in Indiana Tort Law*, 33 IND. L. REV. 1545, 1592-95 (2000).

during this survey period. In *Boggs v. Tri-State Radiology, Inc.*,[44] the Indiana Supreme Court reaffirmed that the statute of limitations is "constitutional as applied to patients who discover the malpractice well before the expiration of the limitations period, but some time after the act of malpractice."[45] The court specifically did not address the situation where the discovery of the malpractice occurs on the eve of the statute of limitations. In that instance, the court left room for the possibility that such a late discovery might run afoul of the Indiana Constitution.[46]

The Indiana Court of Appeals was confronted with another statute of limitations situation which ran afoul of the Constitution in *Ling v. Stillwell*.[47] In *Ling*, the court held that even though the patient had died, it was not known until after the two year statute of limitations that the patient's death was part of a criminal investigation involving a nurse's role in suspicious deaths at the hospital. Therefore, it could not reasonably be expected that the personal representative should have discovered the death to be a result of medical malpractice.[48]

C. Loss of Chance

During this survey period the Indiana Supreme Court issued three opinions concerning the issue of "loss of chance." In *Alexander v. Scheid*,[49] the court was confronted with four key issues surrounding an increased risk of harm and a decreased chance of long-term survival.

First, the court addressed whether a reduced chance of survival, which mathematically equates to a decrease in life expectancy is itself a compensable injury, even when the plaintiff's ultimate injury is uncertain. The court answered this in the affirmative.[50] Second, the court addressed how the injury should be valued. Finding that reduced life expectancy is compensated in other contexts, the court held that application of those same principles was appropriate. Therefore, the injury is valued at the reduction of the patient's expectancy from her pre-negligence expectancy.[51] Third, the court held that the plaintiff could maintain an action for negligent infliction of emotional distress under the modified impact rule—the impact being what the plaintiff suffered (i.e., the

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44. 730 N.E.2d 692 (Ind. 2000).

45. *Id.* at 697.

46. *See id.* at 698. It should also be noted that Justice Sullivan dissented in *Boggs* stating that if the two year statute of limitations applied to those discovering the medical malpractice at the time of the alleged malpractice or within the two year statute of limitations but did not apply to those discovering the malpractice until after the two year statute of limitations, the two year statute of limitations was unconstitutional as applied. *See id.* at 700-01 (Sullivan, J., dissenting).

47. 732 N.E.2d 1270 (Ind. Ct. App. 2000).

48. *See id.* at 1275.

49. 726 N.E.2d 272 (Ind. 2000).

50. *See id.* at 275-81.

51. *See id.* 282-83

destruction of healthy lung tissue because of the failure to diagnose). This, the court held, constituted "direct involvement."[52] Finally, the court found that the plaintiff could maintain a cause of action for the aggravation of her pre-existing condition.[53]

The Indiana Supreme Court touched on the "loss of chance" or "increased risk of harm" once again in *Cahoon v. Cummings*,[54] finding that the damages awarded "are to be proportional to the increased risk attributable to the defendant's negligent act or omission."[55] On the same day that *Cahoon* was decided, the Indiana Supreme Court issued a related opinion in *Smith v. Washington*,[56] holding that the measure of damages, for an act of negligence that increased the risk of an injury that was at least equally likely to occur in the absence of negligence, is to be in proportion to the increased risk attributable to the defendant's negligence.[57]

IV. NEGLIGENCE

A. Analyzing the Scope of the Duty of Care

1. Mental Capacity as a Factor in the Determination of Duty.—The issue of whether a person's mental capacity should be factored into the existence of a legal duty has been an issue that has challenged both courts and litigants for years. In 1998, in *Creasy v. Rusk*,[58] the Indiana Court of Appeals likened this novel issue to that involving the mental capacity of a child. In *Creasy*, Judge Kirsch, writing for the Indiana Court of Appeals, determined that Indiana has indicated a willingness to factor in an adult's mental capacity when determining whether to hold an adult person responsible for negligence. Consequently, it held that a person's mental capacity, "whether that person is a child or an adult, must be factored into the determination of whether a legal duty exists."[59]

In June of 2000, the Indiana Supreme Court accepted transfer in *Creasy* to examine the state of Indiana law in this area. Specifically, the court was called upon to decide the issue of whether the general duty of care imposed upon adults with mental disabilities is the same as that for adults without mental disabilities and whether the facts of the plaintiff's case were such that the general duty of care imposed upon adults with mental disabilities should be imposed upon him.[60] The Indiana Supreme Court initially noted that most jurisdictions the general duty of care imposed on adults with mental disabilities is the same as that for

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52. *See id.*
53. *See id.* at 283-84.
54. 734 N.E.2d 535 (Ind. 2000).
55. *Id.* at 541.
56. 734 N.E.2d 548 (Ind. 2000).
57. *See id.* at 549-51.
58. 696 N.E.2d 442 (Ind. Ct. App. 1998), *rev'd*, 730 N.E.2d 659 (Ind. 2000).
59. *Id.* at 446.
60. *See Creasy*, 730 N.E.2d at 661.

adults without mental disabilities.[61] Thus, the majority of jurisdictions hold that "[a]dults with mental disabilities are held to the same standard of care as that of a reasonable person under the same circumstances without regard to the alleged tort-feasor's capacity to control or understand the consequences of his or her actions."[62]

This general duty of care imposed by the majority of outside jurisdictions differed significantly from that imposed by the court of appeals in *Creasy*. Specifically, the intermediate appellate court in *Creasy* found that, based on its review and analysis of judicial precedent in Indiana, that a person's mental capacity must be factored into the determination of a legal duty's existence.[63]

Although the Indiana Supreme Court agreed that the appellate court accurately stated Indiana law at the time of its ruling, it concluded that the law is in need of revision.[64] In reviewing the Restatement rule that mental capacity does not excuse a person from liability for conduct which does not conform to the standard of a reasonable manner or like circumstances, the court noted that it was founded upon general considerations of public policy.

In deciding whether Indiana should adopt this generally accepted rule, the court turned to an examination of contemporary public policy in Indiana as embodied in enactments of our state legislature.[65] The court then discussed Indiana legislative enactments reflecting a policy to de-institutionalize persons with disabilities and integrate them into society. Although the court recognized that contemporary public policy favors community treatment and integration, and that the Restatement rule may appear to be at odds with those policies, it balanced such considerations with those public policy reasons cited for holding individuals with mental disabilities to a standard of reasonable care in negligence claims, and ultimately rejected the court of appeal's approach in favor of the Restatement rule. Accordingly, the court held that a person with mental disabilities is generally held to the same standard of care as that of a reasonable person under the same circumstances without regard to the alleged tortfeasor's capacity to control or understand the consequences of his or her actions.[66]

However, in applying the Restatement rule to the facts of this particular case, the Indiana Supreme Court held that the relationship between the plaintiff and defendant, coupled with public policy concerns, dictated that the defendant owed no duty of care to the plaintiff. In so finding, the court reasoned that the plaintiff was not a member of the public at large unable to anticipate or safeguard against the harm that she encountered, but instead a caregiver of patients with Alzheimer's disease who was aware of her patients' tendency to exhibit signs of violence and combativeness. It found that the plaintiff was "employed to

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61. *See id.*
62. *Id.*
63. *See Creasy*, 696 N.E.2d at 446.
64. *See Creasy*, 730 N.E.2d at 662.
65. *See id.* at 664 (citing Schornick v. Butler, 185 N.E. 111, 112 (Ind. 1933)).
66. *See id.* at 666-67.

encounter, and knowingly did encounter, just the dangers which injured" her.[67] The court likened this situation to those under the fireman's rule. That rule provides that firemen or other public safety officials responding in emergencies are owed only the duty of abstaining from positive wrongful acts.[68] The court found that public safety officials and caregivers, such as the plaintiff, are similarly situated in that they are "specifically hired to encounter and combat particular dangers," and by accepting such employment assume the risk associated with their respective occupations.[69]

Finally, citing public policy reasons, the court stated that it would be contrary to public policy to hold the defendant owed a duty to the plaintiff when it would place "too great a burden on him because his disorientation and potential for violence is the very reason he was institutionalized and needed the aid of employed caretakers."[70] Accordingly, the Indiana Supreme Court affirmed the trial court's entry of summary judgment in favor of the defendant.[71]

The Indiana Supreme Court's decision in *Creasy* may hinder the defense of an individual who is mentally disabled by exempting evidence of such disability from the determination of the duty of care owed by that individual. However, the supreme court's apparent willingness to set forth an exception to that exemption will likely lead to further issues before our courts on this interesting facet of Indiana law in the near future.

2. Trees and Natural Conditions.—In *Miles v. Christensen*,[72] the parents of a motorcyclist who was killed when he was struck by a dead tree that had fell from the defendant landowners' rural property, brought a wrongful death action against the landowners. The tree that struck the decedent had been dead for a number of years and was visible from the perimeter of the property. The plaintiffs alleged in their complaint that the defendants were negligent in failing to maintain their real estate in a reasonably safe condition and in failing to inspect their land and correct the danger caused by the dead tree. The defendants subsequently moved for summary judgment, claiming in part that they had no duty of care to the plaintiffs' son, and thus could not have incurred liability for his death. The trial court denied the defendants' motion for summary judgment, and the defendants brought an interlocutory appeal.[73]

In determining what, if any, duty is owed by a landowner as to trees and other natural conditions on the land, the Indiana Court of Appeals looked to the Indiana Supreme Court's decision in *Valinet v. Eskew*,[74] in which the Indiana Supreme Court addressed a landowner's liability for injuries resulting from such

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67. *Id.* at 667.

68. *See id.* at 668 (citing Heck v. Robey, 659 N.E.2d 498, 501 (Ind. 1995); Sands v. Wesley, 647 N.E.2d 382, 384 (Ind. Ct. App. 1995)).

69. *Id.*

70. *Id.* at 669.

71. *See id.* at 670.

72. 724 N.E.2d 643 (Ind. Ct. App.), *trans. denied*, 735 N.E.2d 237 (Ind. 2000).

73. *See id.* at 644-45.

74. 574 N.E.2d 283 (Ind. 1991).

natural conditions. In *Valinet*, the court adopted Section 363 of the Restatement (Second) of Torts which addresses harm caused by natural conditions of land and imposes liability for harm only when that land is urban in nature.[75]

The defendants in *Miles,* basing their argument upon the language of the Restatement, asserted that the law does not impose a duty on the owners of rural land to remove or inspect for dead trees located adjacent to a public roadway. Observing that their land was located in a rural area and that the dead tree that fell was a natural condition of their land, the defendants argued that they were not liable for his death because they owed no duty to exercise reasonable care for the prevention of harm that a natural condition of their rural land might cause.[76]

While accepting the defendants' argument rested on a distinction between urban and rural land, the court of appeals found that the determination of a landowner's duty does not hinge solely upon the urban/rural distinction. First, the court found no language in *Valinet* indicating that the distinction may alone form a basis for determining whether a duty exists. Rather, *Valinet* called for a more sophisticated analysis of the duty question, requiring a consideration of factors such as traffic patterns and land use. Additionally, *Valinet* did not purport to set forth every factor that is pertinent to a determination of the landowner's duty. The court stated that although classification of land as either urban or rural may provide a useful starting point for determining a landowner's duty of care as to natural conditions, it could not conclude that *Valinet* intended the duty inquiry to consist solely of making such a classification.[77]

Second, the court of appeals took into account public policy considerations that weighed in favor of recognizing that a landowner may owe a duty of reasonable care as to natural land conditions that threaten outsiders. In this regard, the court observed that virtually every usable piece of property in Indiana is adjacent to a roadway or highway. As such, the court felt that sound public policy dictated that keeping roadways free from obstructions and hazards is effectuated by imposing, under certain circumstances, a duty of reasonable care as to those who, while outside of the land, suffer harm from the land's natural conditions. Thus, the court abrogated the urban/rural distinction with respect to whether a landowner owes a duty to remove decaying or dead trees located on their land so as to protect people traveling on a public highway.[78]

3. Ingress and Egress.—On the same date that the Indiana Court of Appeals rendered its decision in *Miles*, it rendered a second decision with respect to a landowner's duty of care in relation to a roadway adjacent to his or her property. In *Sizemore v. Templeton Oil Co.*,[79] the plaintiff fell and injured himself on a piece of asphalt at the edge of a large pothole located in the right of way when the state road adjacent to the landowner's business gave way underneath him. The plaintiff subsequently sued the landowner and town alleging that all three

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75. *See id.* at 285.

76. *Miles*, 724 N.E.2d at 646.

77. *See id.* at 646.

78. *See id.* at 646-47.

79. 724 N.E.2d 647 (Ind. Ct. App. 2000).

entities negligently caused his injuries. The trial court entered summary judgment in favor of the town and landowner, and the plaintiff subsequently appealed.[80]

The plaintiffs argued on appeal that the landowners' duty to provide a safe means of ingress and egress to its premises included a duty with respect to the pothole. However, the court of appeals disagreed. Specifically, the court of appeals found no precedent standing for the proposition that a duty to provide safe ingress and egress to a commercial property extends to a duty with regard to the condition of the adjacent highway right-of-way when that condition was not created by or related to a defendant's use of his own property. On the contrary, the court noted that current Indiana law indicates the opposite result.[81]

B. Comparative Fault Act

The Indiana Comparative Fault Act[82] applies generally to damages actions based on fault that occurred on or after January 1, 1985. The primary objective of the Act was to modify the common law rule of contributory negligence under which a plaintiff was barred from recovery where he or she was only slightly negligent.[83] The Act seeks to achieve this result through proportional allocations of fault, in showing that each person at fault contributed to cause injury bears his or her proportionate share of the total fault contributing to the injury.[84] Since its inception, the Indiana Comparative Fault Act has been the subject of numerous court decisions analyzing its scope and interpreting its provisions. During this survey period, Indiana courts rendered a number of decisions clarifying the intent of the legislature and interpreting the Act in relation to fundamental principals of common law and public policy considerations.

1. Credits/Set-offs.—In *Mendenhall v. Skinner & Broadbent Co.*,[85] the Indiana Supreme Court addressed the issue of whether a defendant who suffers judgment in a tort case is entitled to credit for money paid by a settling co-defendant who has not been added back under the non party provisions of the Comparative Fault Act. The supreme court held that the party suffering the judgment is not so entitled.[86]

Indiana courts have traditionally followed the one satisfaction principal, which holds that a court should recognize settlement agreements and credit the funds received by the plaintiff towards the judgment against a co-defendant. The

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80. *See id.* at 649.

81. *Id.* at 653 (citing State v. Flanigan, 489 N.E.2d 1216, 1217 (Ind. Ct. App. 1996) (holding that the owner of commercial premises adjacent to a public highway has no duty to a patron who was injured when struck by an automobile as that patron was crossing or walking along such highway)).

82. IND. CODE § 34-51-2-1 (2000).

83. *See* IPALCO v. Brad Snodgrass, Inc., 578 N.E.2d 669 (Ind. 1991).

84. *See* Bowles v. Tatom, 546 N.E.2d 1188 (Ind. 1989).

85. 728 N.E.2d 140 (Ind. 2000).

86. *See id.* at 145.

principal behind this credit is that the injured party is entitled to only one satisfaction for a single injury and the payment by one joint tortfeasor inures to the benefit of all.[87] This policy was articulated long before enactment of the Comparative Fault Act, and in *Mendenhall* the supreme court was faced with the task of determining whether the Act necessitates change in this common law practice.[88]

The plaintiffs argued that the amounts received in settlement did not survive the Comparative Fault Act and that the Act makes the non-party defense the defendants' sole method for reducing liability when another party settles. Conversely, the defendants maintained that credits or set-offs did survive the Act. The court recognized the absence of controlling precedent and based its decision in *Mendenhall* on public policy considerations As could be anticipated, each of the parties urged differing public policy concerns in their determination of whether credits survived the Comparative Fault Act. The plaintiffs asserted that the court should consider the risks that a plaintiff incurs when settling and argued that, depending on the accuracy of a plaintiff's predictions about the amount of damages a jury may find, or the percentage of fault that the jury will assign to the settling defendant, a plaintiff may suffer a penalty or gain a windfall. On the other hand, the defendants argued that if non-settling defendants did not receive credits, plaintiffs would be unjustly enriched if they both receive a favorable verdict and receive partial or full recovery from settling co-defendants.[89]

After discussing the potential for double recovery under our system of comparative fault, the supreme court found that the ability of courts to implement the common law policy of credit under the Comparative Fault Act is best served by a rule that obliges defendants to name the settling non-party if they are to seek credit for settlement.[90] The supreme court concluded that "the one satisfaction rule and the benefits of settlement are best advanced to affording litigating defendants a credit where a thorough allocation of damages by the jury provides the court with a respectable basis upon which to adjust a judgment to avoid a double credit."[91] Thus, it held that to request a credit, the litigating defendant must add the settling defendant as a non-party under the Comparative Fault Act. In light of the fact that the defendant had not named the settling co-defendant as a non-party for purposes of comparative fault allocation, the court determined that the defendant was not entitled to receive a credit for the amount of the plaintiff's settlement with the co-defendant.[92]

For practicing attorneys, the import of the supreme court's ruling in *Mendenhall* is clear. If you intend to seek a credit for the amount for which a plaintiff has settled with a co-defendant, you must name that individual or entity as a non-party defendant for purposes of comparative fault allocation.

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87. *See id.* at 141.
88. *See id.*
89. *See id.* at 143.
90. *See id.* at 144.
91. *Id.* at 145.
92. *See id.*

2. Non-Party Defense.—The issue of whether one defendant may assert a challenge to a summary judgment ruling that operates to dismiss another defendant from a case under the Indiana Comparative Fault Act was addressed by the court of appeals in *U-Haul International, Inc. v. Nulls Machine & Manufacturing Shop*.[93] In *U-Haul*, the defendant was sued by the estate of a driver killed in an automobile accident caused by the defendant's driver. Investigation by the defendants led to a determination that alleged manufacturing defects in certain valves may have been a cause for the accident. U-Haul named the manufacturer of the valves as a non-party defendant for purposes of comparative fault allocation, and the plaintiffs subsequently amended their complaint and brought a products liability action again each of the valve manufacturers. The valve manufacturers filed motions for summary judgment that were opposed by U-Haul. Ultimately, the trial court granted summary judgment in favor of the valve manufacturers and against the plaintiffs. U-Haul filed a motion to correct error challenging the ruling, which was denied by the trial court. U-Haul subsequently appealed the decision.[94]

On appeal, the valve manufacturers contended that U-Haul lacked standing to challenge a grant of summary judgment in their favor. To challenge the dismissal of the valve defendants, the court noted that U-Haul must demonstrate that it had a stake in the outcome of the ruling.[95] To demonstrate a personal stake, a party must prove that it is in immediate danger of sustaining a direct injury as the result of the conduct at issue.[96] Generally, a "defendant does not have standing to appeal a judgment rendered in favor of a co-defendant unless the defendant suffered some prejudice as a result of the entry of judgment in favor of the co-defendant."[97] Thus, the court determined that for U-Haul to have standing, it must demonstrate that it was prejudiced by the valve manufacturers' summary dismissal from the case.

U-Haul contended that it was prejudiced by the summary dismissal because of the application of Indiana's Comparative Fault Act. Specifically, it argued that having been dismissed from the action, the valve manufacturers could not be named as non-parties and any fault the jury would have allocated to them would be allocated instead to U-Haul. As a result, U-Haul contended it was prejudiced by the valve manufacturers summary dismissal because it exposed it to a chance of greater liability for damages resulting from the accident.[98]

The Indiana Court of Appeals noted that this was a case of first impression. After examining rulings from courts in other jurisdictions, the court of appeals determined that two approaches could govern the determination of this issue.[99]

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93. 736 N.E.2d 271 (Ind. Ct. App. 2000).

94. *See id.* at 273-74.

95. *Id.* at 275 (citing Shand Mining, Inc. v. Clay County Bd. of Comm'rs., 671 N.E.2d 477 (Ind. Ct. App. 1996)).

96. *See id.*

97. *Id.* at 279.

98. *See id.* at 275.

99. *See id.* at 275-78.

Under the first analysis, a remaining co-defendant would have standing to challenge the dismissal of a co-defendant via summary judgment so long as the remaining co-defendant can demonstrate that the dismissal of the co-defendant negatively impacted the complaining party's interest in the litigation.[100] Under the second analysis, before considering the nature of the complaining co-defendants interest, the court must determine whether that party preserved the issue of standing.[101] The court next examined Indiana law with an eye toward which of the two approaches is more compatible with that taken by Indiana courts in similar circumstances. The court determined that in Indiana a defendant must demonstrate that it has a stake in the outcome and will potentially suffer prejudice as a result of a co-defendant's dismissal. Because the dismissal of a co-defendant from a case subjects a remaining defendant to greater potential liability under the Comparative Fault Act, the court agreed with those courts that determined that this is sufficient to confer standing upon a co-defendant to appeal such a ruling.[102]

The court of appeals noted, however, that the remaining co-defendant must also preserve the error at the trial court level. Because U-Haul opposed the valve manufacturer's motions for summary judgment in the trial court by filing a brief in opposition to the motion and by filing a motion to correct error following the ruling, it concluded that U-Haul had standing to appeal summary judgment in favor of the valve manufacturers.[103]

3. Municipality Initiating Suit.—In *Warrick County v. Waste Management of Evansville,*[104] Warrick County filed suit against a waste management company and its driver alleging that the driver negligently operated a heavy truck and damaged a county bridge. The defendants moved for summary judgment on the basis that the county did not suffer damages as a result of their alleged negligence. Specifically, they argued that the bridge that was destroyed by the garbage truck had no value and that, because it needed to be replaced, the county did not suffer any damages when it was required to re-route traffic and replace the bridge. The trial court granted summary judgment in favor of the defendants.[105]

On appeal, the county argued that the Indiana Comparative Fault Act is not applicable to the present cause of action due to the "governmental entities and public employee exception." This provision makes the Act inapplicable to tort claims against governmental entities or public employees under Indiana's Tort Claims Act.[106] The court of appeals disagreed. Although the court recognized that there are inequalities occasioned by the application of the governmental

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100. *See, e.g.*, Hammond v. N. Am. Asbestos Corp., 565 N.E.2d 1343 (Ill. App. Ct. 1991); Koller v. Liberty Mut. Ins. Co., 546 N.W.2d 799 (Wis. Ct. App. 1994).

101. *See, e.g.*, Tinker v. Kent Gypsum Supply, Inc., 977 P.2d 627 (Wash. Ct. App. 1999).

102. *See id.* at 280.

103. *See id.*

104. 732 N.E.2d 1255 (Ind. Ct. App. 2000).

105. *See id.* at 1257-58.

106. IND. CODE § 34-51-2-2 (2000).

entity exception contained in the Comparative Fault Act, it stated that the legislature accepted the applicability of the Act only for those cases against governmental entities under the Tort Claims Act.[107] Thus, the court found that exception to Indiana's Comparative Fault Act has no application to the situation at hand where the governmental entity has sued a private entity.[108]

As to the issue of damages, the court noted that the issue concerning the proper measure of damages when a bridge is damaged is a question of first impression in Indiana. It further noted that determination of this issue is further complicated because the cost of the replacement bridge will reflect the cost of modern design with maximum load capacity and safety features that were not present in the damaged bridge. After analyzing rulings of other jurisdictions on this issue, the court concluded that:

> when a bridge must be replaced as a result of the negligent acts of another, the governmental entity is injured to the extent of the value of the bridge, when considering such factors as the original cost, the age of the property, its use and utility from both economic and social viewpoint, its condition, and the cost of restoration or replacement.[109]

C. Mitigation of Damages

In *Medlock v. Blockwell*,[110] the Indiana Court of Appeals attempted to clarify the issue of a injured party's duty to mitigate his or her damages. The plaintiffs brought suit against the defendant for personal injuries as the result of an automobile accident. Following the accident the plaintiffs were taken to a local emergency room where they were treated for their injuries. However, after the accident they failed to seek and follow through with recommended medical treatment. The evidence also established that the couple resumed their normal activities.[111]

Following a jury verdict in favor of the plaintiffs where they were assigned forty-nine percent comparative fault, the plaintiffs filed a motion to correct error and a motion for a new trial, both of which were denied by the trial court. On appeal, the plaintiffs claimed that the jury verdict finding them forty-nine percent at fault was clearly erroneous and could only have been reached as a result of confusion, inattention, corruption, passion or prejudice. The defendant argued that the jury properly applied the law instructed with respect to mitigation of damages and fault, and contended that the plaintiffs' failure to minimize their injuries and to avoid aggravating their injuries made them at fault for their damages. The court of appeals agreed with the defendant.[112]

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107. *See Waste Mgmt.*, 732 N.E.2d at 1261; IND. CODE § 34-51-2-2 (2000).
108. *See Waste Mgmt.*, 732 N.E.2d at 1261.
109. *Id.* at 1260.
110. 724 N.E.2d 1135 (Ind. Ct. App. 2000).
111. *See id.* at 1136.
112. *See id.* at 1137.

In its jury instruction defining the element of fault, the trial court instructed the jury that the doctrine of mitigation of damages imposes a duty on an injured party to exercise reasonable diligence and ordinary care in attempting to minimize his or her damages or avoid aggravating his or her injury. The trial court further instructed the jury that the injured party is required to use the same care and diligence as a person of ordinary prudence under like circumstances. The trial court went on to instruct the jury on fault allocation under Indiana's Comparative Fault Act, which defines "fault" as including an "unreasonable failure to . . . mitigate damages."[113] On appeal, the plaintiffs relied upon the court of appeals' holding in *Deible v. Poole*,[114] to support their claim that the verdict was against the weight of the evidence. In *Deible*, the plaintiff was stopped at a traffic light when the defendant's car struck her car from behind. The defendant admitted that he was responsible for the collision at trial and the plaintiff was entitled to some damages, yet maintained that the plaintiff had failed to mitigate her damages. On appeal, the *Deible* court held that the failure to mitigate damages is a defense to the amount of damages the plaintiff is entitled to recover once a defendant has been found to have caused injury, but it is not a defense to the ultimate issue of liability.[115]

In *Medlock*, the court explained that *Deible* was limited to the unique situation where a defendant admits liability for a tort and admits that the plaintiff is entitled to recovery. It went on to state that this case is a distinguishable from *Deible* in that the jury's verdict did not go to the ultimate issue of liability. The court noted that the Indiana General Assembly decided that, under our comparative fault system, "fault" includes a failure to mitigate damages. While the court stated that it believed that the better policy would be to treat mitigation of damages as a damage issue rather than a fault allocation issue, it recognized that the legislature has rejected this approach.[116]

It appears evident from the *Metlock* decision that the panel of the court did not agree with the Legislature's mandate that failure to mitigate damages be treated as a fault allocation issue. However, the court did not seem overly troubled by the legislative mandate, finding that in cases such as this, where there is evidence of a failure to mitigate damages, the end product of the damage calculation remains the same.[117]

D. Loss of Opportunity

Federal courts in Indiana are often called upon to render opinions interpreting Indiana law on issues that remain unresolved by either the Indiana Supreme Court or its appellate courts. During the course of this survey period, the District Court for the Southern District of Indiana was called upon to do just

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113. *Id.* (quoting IND. CODE § 34-6-2-45 (2000)).

114. 691 N.E.2d 1313 (Ind. Ct. App. 1998), *aff'd*, 702 N.E.2d 1076 (Ind. 1998).

115. *See id.* at 1316.

116. *See id.* at 1138.

117. *See id.*

this in the context of the lost chance doctrine.

In *Wright v. St. Mary's Medical Center of Evansville, Inc.*,[118] a patient sued the defendant hospital that had removed the patient's malfunctioning artificial heart valve but failed to preserve it for her use. The plaintiff had requested that the hospital hold the valve so that it could be evaluated by an independent laboratory to determine whether its condition qualified the plaintiff for benefits under a settlement agreement reached with the valve manufacturer pursuant to a class action lawsuit. Unfortunately, the hospital lost the valve and was unable to give it to the plaintiff, who then filed a complaint against the hospital for having negligently lost her heart valve.[119]

The district court began its analysis of whether the plaintiff was entitled to damages for loss of the opportunity to recover under the settlement agreement by noting that the plaintiff's claim raises the issue of whether the court should apply the much-debated "loss of a chance" doctrine. The court explained that:

> [t]raditional causation principles utilize an *ex post* test which requires courts to contemplate what would have probably happened "but for" the defendant's breach of contract or breach of duty and tort. The "loss of chance" doctrine, by contrast, is based upon the value of an opportunity itself determined *ex ante*.[120]

The court noted that some courts review chances as interests for the protection in their own right, while others have rejected the theory.[121]

The district court recognized that the issue of whether the loss of a chance is compensable in Indiana has only been addressed in the medical malpractice context. In *Mayhue v. Sparkman*,[122] the Indiana Supreme Court rejected the loss of chance doctrine in the medical malpractice setting in favor of the "Restatement approach," which "does not recognize chances of being worthy of protection in their own right."[123] Given that the Indiana Supreme Court rejected the loss of chance doctrine in the medical malpractice setting, the District Court for the Southern District of Indiana determined that it was unlikely that they would recognize it in the case at hand. First, the court found that the supreme court's conclusion in *Mayhue* indicated a reluctance to carve out a new doctrine of recovery for plaintiffs in this area.[124] Second, the court found that recognition of a loss of chance doctrine is more compelling where the law is compensating the loss of a chance at life, rather than a loss of a chance at, as here, some purely economic gain. The court concluded that "[b]ecause Indiana law has not recognized the loss of an opportunity as damages in a negligence or breach of contract action, and because the Indiana Supreme Court has explicitly rejected

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118. 59 F. Supp.2d 794 (S.D. Ind. 1999).
119. *See id.* at 796-98.
120. *Id.* at 801.
121. *See id.*
122. 653 N.E.2d 1384 (Ind. 1995).
123. *Id.* at 1388.
124. *See Wright*, 59 F. Supp.2d at 801.

the doctrine in medical malpractice situations . . . the doctrine is unavailable in Indiana."[125]

The district court's opinion in *Wright*, although not a conclusive statement of Indiana law, is highly persuasive authority for an argument that the loss of chance doctrine will not be applicable in negligence cases brought in Indiana. However, until the Indiana Court of Appeals or Indiana Supreme Court speaks to this issue, the opportunity for a loss of chance cause of action remains. Nevertheless, practicing attorneys should be cautious to bring such an action unless the circumstances of the particular case rise to a level that may influence a state court to disagree with the findings of the Federal District Court in *Wright*, and distinguish the Indiana Supreme Court's holding in *Mayhue*.

V. STATUTE OF LIMITATIONS DEFENSE—FRAUDULENT CONCEALMENT

In *Doe v. Shults-Lewis Child & Family Services, Inc.*,[126] the Indiana Supreme Court clarified issues concerning the Statute of Limitations when an adult plaintiff asserts a claim for tortuous conduct committed against him or her as a child and brings an action beyond the statute of limitations against a defendant who is not a parent. In *Shults-Lewis*, two women who had been foster children at the Shults-Lewis home sued the home for repeated sexual abuse suffered at the hands of one of the home's employees. Both women left the home in the late 1960s and did not bring suit until 1990, well into adulthood. Plaintiff Jane F. did not bring suit until 1990 because, until then, she did not realize the connection between the abuse and her psychological distress. Plaintiff Jane I., however, did not bring suit until 1990 because she did not remember anything regarding the abuse until that year, after having had several conversations with Jane F. and other members of the group home about the abuse.[127] The defendant subsequently filed a motion for summary judgment, arguing that the plaintiffs' claims were time barred, and the trial court entered judgment in the defendant's favor.

On appeal, the court of appeals reversed the trial court's entry of summary judgment in favor of the defendant as to plaintiff Jane I. only, finding that fraudulent concealment had been sufficiently invoked by Jane I. The Indiana Supreme Court subsequently granted transfer to address the circumstances in which a plaintiff could bring a claim of childhood sexual abuse against a non-parent outside of the statute of limitations.[128]

The supreme court began its analysis by noting that fraudulent concealment is an equitable doctrine that "operates to estop a defendant from asserting the statute of limitations as a bar to a claim whenever the defendant, by his or her own actions, prevents the plaintiff from obtaining the knowledge necessary to

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125. *Id.* at 803.

126. 718 N.E.2d 738 (Ind. 1999).

127. *See id.* at 742-43.

128. *Id.*

pursue a claim."[129] The court then went through a lengthy analysis of its prior decision in *Fager v. Hundt*,[130] where it addressed those circumstances in which a plaintiff could bring a claim of childhood sexual abuse against a parent outside of the statute of limitations.[131] In *Fager*, the supreme court held that the doctrine of fraudulent concealment "should be available to the plaintiff to estop a defendant from asserting the statute of limitations 'when he has, either by deception or by a violation of duty, concealed from the plaintiff material facts thereby preventing the plaintiff from discovering a potential cause of action.'"[132] The *Fager* court concluded that when this occurs, equity will toll the statute of limitations until the equitable grounds cease to operate as a reason for delay.[133]

Specifically, the *Fager* court's framework for analysis provided that where an adult plaintiff alleges that a parent engaged in tortuous conduct against the plaintiff as a child, the plaintiff has the burden of establishing that the parent engaged in intentional felonious conduct and must invoke the equitable doctrine by pointing to facts "showing that her lack of memory resulted from a concealment caused by the defendant's deception or breach of duty."[134] The equitable grounds cease as a reason for delay when that "person, once becoming an adult, knows or should have discovered that a childhood injury was sustained as a result of the defendant's tortuous conduct."[135] The *Fager* court concluded that a plaintiff claiming that repressed memory caused the delay in filing suit against his or her parent must show that the defendant's breach of duty or wrongful conduct caused them to repress the memory of the intentional felonious conduct. The plaintiff must also show that the claim was brought within a reasonable amount of time after the memories were recovered.[136]

Although the Supreme Court cited its previous holding in *Fager* with approval, it distinguished the present case, finding that the defendant served as plaintiffs' foster care parents/guardians and not their adoptive or biological parents. After analyzing Indiana law with respect to guardianship of minors, the court concluded that when an adult plaintiff asserts a claim for tortuous conduct committed against him or her as a child, and brings an action beyond the statute of limitations against the defendant who is not a parent, the plaintiff is required to:

> (1) show his or her parent(s) did not know of the tortuous conduct, or the parent(s) knew of the tortuous conduct and colluded to conceal the tortuous conduct; (2) prove the tortious act alleged; (3) show that the defendant, through his own actions, breached a duty to inform or

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129. *Id.* at 744 (citing Fager v. Hundt, 610 N.E.2d 246 (Ind. 1993)).
130. 610 N.E.2d at 246.
131. *See Doe*, 718 N.E.2d at 744-45.
132. *Fager*, 610 N.E.2d at 251.
133. *See id.*
134. *Id.* at 252.
135. *Id.* at 251.
136. *See id.* at 251-52.

> engaged in wrongful conduct which prevented the plaintiff from discovering the cause of action within the statutory period; (4) provide expert opinion evidence which supports the validity of the phenomenon of repressed memory and opines that plaintiff actually repressed memory of the abuse; and (5) show that the plaintiff exercised due diligence in commencing her action after the equitable grounds ceased to operate (i.e., recovered her memories), and therefore brought the claim within a reasonable time after recovering memories of the events.[137]

Applying this standard to the plaintiffs' claims, the court held that Jane F.'s claims were barred because: "where the plaintiff actually retains memories of the events, there is nothing to cause the delay of the commencement of the cause of action. There was nothing to prevent [Jane F.] from bringing the claim when her legal disability ended at age 18."[138] In contrast, Jane I.'s claims were not time-barred because she had no memory of the events that presented sufficient acts to invoke the equitable doctrine of fraudulent concealment, which tolled the statute of limitations.[139]

VI. EMOTIONAL DISTRESS

In last year's Survey Edition, *Groves v. Taylor*,[140] was addressed since the case refused to expand Indiana's impact rule.[141] Rather, the Indiana Court of Appeals in *Groves* invited the Indiana Supreme Court to modify and expand Indiana law concerning the impact rule and claims for emotional distress.[142] During this survey period, the Indiana Supreme Court accepted the court of appeals' invitation, granted transfer, vacated the trial court judgment and the court of appeal's opinion, and remanded the case to the trial court. The Indiana Supreme Court held that where the direct impact test is not met, a bystander may establish "direct involvement" by proving that the plaintiff witnessed or came on the scene soon after the death or severe injury of a loved one.[143]

One further expansion of the tort of emotional distress may be on the horizon as predicted by the United States District Court for the Northern District of Indiana in *Patel v. United Fire & Casualty Co.*[144] In *Patel*, the district court predicted that Indiana law would permit an insured injured by the bad faith conduct of an insurer is entitled to recover damages based upon traditional tort principles of compensation for resultant injuries actually suffered, including emotional distress.[145] Should Indiana appellate courts adopt such a position, this

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137. *Shults-Lewis*, 718 N.E.2d at 746 (citations omitted).
138. *Id.* at 747 n.3.
139. *See id.* at 748.
140. 711 N.E.2d 861 (Ind. Ct. App. 1999), *vacated by* 729 N.E.2d 569 (Ind. 2000).
141. *See* Meyer & Lansberry, *supra* note 43, at 1572.
142. *See* 711 N.E.2d at 864.
143. *See* 729 N.E.2d at 569.
144. 80 F. Supp. 2d 948 (N.D. Ind. 2000).
145. *See id.* at 958.

could have a significant impact upon the law of bad faith in Indiana.

VII. MALICIOUS PROSECUTION

In a case of first impression, the Indiana Court of Appeals held in *City of New Haven v. Reichhart*,[146] that where a qualified petitioner brings a legitimate claim against a governmental entity in the manner prescribed by law, that entity is prohibited from pursuing a malicious prosecution claim against the petitioner regardless of the petitioner's motivation in bringing the petition.[147]

The court found that the United States Supreme Court's treatment of "sham" litigation under the Sherman Anti-Trust Act was instructive.[148] The court of appeals noted that the Supreme Court has repeatedly found that evidence of anti-competitive intent or purpose alone does not transform otherwise legitimate activity into a sham. Similarly, the court of appeals pointed out that pursuant to the National Labor Relations Act, even an improperly motivated lawsuit could not be enjoined as an unfair labor practice unless such litigation is baseless.[149]

In conclusion, the court of appeals held that the First Amendment protects a citizen's right of petition regardless of merit. So, when a qualified petitioner brings a legitimate claim against a governmental entity in the manner prescribed by law, that entity cannot pursue a malicious prosecution claim regardless of the motivation behind the institution of the claim.[150]

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146. 729 N.E.2d 600 (Ind. Ct. App. 2000).

147. *See id.* at 606.

148. *See id.* (citing Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 58 (1993)).

149. *See id.*

150. *See id.*