RECENT DEVELOPMENTS IN INDIANA TORT LAW

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INTRODUCTION

This Article surveys the most significant developments in Indiana tort law from October 1, 2000 through September 30, 2001. The Article is confined solely to the review of court decisions, as the General Assembly did not enact any legislation that significantly affected tort law during the survey period.

I. TORT CLAIMS ACT

In *Porter v. Fort Wayne Community Schools*,[1] the court of appeals addressed the notice requirements under the Indiana Tort Claims Act ("ITCA"). Porter was injured in a motor vehicle collision involving a Fort Wayne Community Schools bus. Porter subsequently hired an attorney who wrote a letter regarding the claim to Fort Wayne Community Schools' insurance carrier.[2]

While the attorney's letter contained specifics about the collision and his client's injuries, he did not mention the ITCA nor the amount of damages sought.[3] Thereafter, Fort Wayne Community Schools moved for summary judgment, which the trial court granted, based on Porter's failure to comply with the notice requirements of the ITCA.[4]

On appeal, the court of appeals initially noted that "[t]he purpose of the ITCA's notice requirements is to provide the political subdivision the opportunity to investigate the facts surrounding an accident so that it may determine its liability and prepare a defense."[5] Further, the court noted that "[s]ubstantial compliance with the notice requirement may be sufficient provided the purpose of the requirement is satisfied."[6] Finally, the court noted that "[w]hen deciding whether there has been substantial compliance, [the appellate court] reviews whether the notice given was, in fact, sufficiently definite as to time, place, and nature of the injury."[7]

In its analysis of the facts, the court of appeals determined that although the attorney's letter did not expressly state that Porter intended to file a claim against

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1. 743 N.E.2d 341 (Ind. Ct. App.), *trans. denied*, 753 N.E.2d 17 (Ind. 2001).
2. *Id.* at 342-43.
3. *See id.* at 343.
4. *Id.*
5. *Id.* at 344 (citing Hasty v. Floyd Mem'l Hosp., 612 N.E.2d 119, 123 (Ind. Ct. App. 1992)).
6. *Id.*
7. *Id.*

Fort Wayne Community Schools, he did state "his representation of Porter's 'interests' and that additional information would be forwarded 'to support his claim.'"[8] Therefore, the court determined that the attorney's letter "adequately informed Fort Wayne [Community Schools] of Porter's intent to make a claim and provided sufficient information about the collision to facilitate Fort Wayne's investigation."[9]

Further, the court noted that "Fort Wayne considered Porter's letter to be notice of a tort claim."[10] Specifically, the court found that "Fort Wayne's insurance company assigned a 'claim number' to Porter's claim and maintained a file 'reflective of [Porter's] condition.'"[11] Therefore, the court found that "Fort Wayne's conduct was inconsistent with its position" that the attorney's letter on behalf of Porter "did not satisfy . . . the purpose of the ITCA notice requirements."[12] Therefore, the court of appeals concluded that the attorney's letter on behalf of Porter "was sufficiently definite as to time, place, and nature of Porter's injuries and, thus, substantially complied with the notice requirements of the ITCA."[13]

In *Metal Working Lubricants Co. v. Indianapolis Water Co.*,[14] the court of appeals addressed whether the Indianapolis Water Company ("IWC") qualified as a "governmental entity" for purposes of immunity. After Metal Working Lubricants' plant was ravaged by fire in 1996, it sued the IWC, maintaining that the fire hydrants in the area provided an inadequate water supply for fire-fighting purposes. The IWC, "a privately-owned water company providing the City of Indianapolis with water for domestic purposes pursuant to a franchise contract between IWC and the City," affirmatively pled immunity pursuant to the ITCA as an affirmative defense.[15] Ultimately, the IWC moved for and was granted summary judgment based upon its immunity defense.[16]

On appeal, the court of appeals addressed the issue of whether the IWC qualified as a "governmental entity." In that regard, the court recognized that IWC is not a "governmental entity" as defined in the ITCA.[17] However, the court noted that the Indiana Supreme Court "has held that when private groups are 'endowed by the state with powers or functions governmental in nature, they become agencies or instrumentalities of the state and are subject to the laws and

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8. *Id.* (alteration by court).
9. *Id.*
10. *Id.* at 345.
11. *Id.* (alteration by court).
12. *Id.* at 345 (citing Delaware County v. Powell, 393 N.E.2d 190, 192 (Ind. 1979) ("finding substantial compliance with tort notice requirements despite lack of any writing within 180 days where defendant's conduct established that purposes of notice statute were satisfied")).
13. *Id.* at 345.
14. 746 N.E.2d 352 (Ind. Ct. App. 2001).
15. *Id.* at 354.
16. *Id.*
17. *Id.* at 355.

statutes affecting governmental agencies and corporations.'"[18]

The court of appeals held that, "[a]s a matter of law," IWC was "an instrumentality of the government."[19] Specifically, the court determined that IWC had "not only been 'endowed . . . with powers or functions governmental in nature,' but it is, in essence, acting in the government's stead."[20] Further, the court noted that "IWC may technically be a 'private' company, but it enjoys very few attributes of a truly private company."[21] Specifically, the court found that IWC "operates by the authority and at the will of the City and [that] it is subject to extensive oversight by the state through the [Indiana Utility Regulatory Commission]."[22] Therefore, the court held that IWC could "be considered a governmental entity."[23] Finally, the court held that failure to provide adequate fire protection is similar to failure to provide police protection and, as such, it held that the IWC was entitled to immunity pursuant to the common law.[24]

In *PNC Bank, Indiana v. State*,[25] the court of appeals addressed the "discretionary function" immunity of the ITCA. PNC Bank, Indiana ("PNC"), as guardian of Marcus Speedy, "filed a negligence action against the State . . . , alleging that the State negligently caused Speedy's injuries by failing to provide a left-turn arrow at the intersection" where Speedy was involved in an automobile collision.[26] The State filed a motion for summary judgment alleging that it was immune from liability pursuant to the "discretionary function" immunity contained in the ITCA.[27] The trial court granted summary judgment and PNC appealed.[28]

On appeal, the State claimed that it was "immune from liability to PNC for Speedy's injuries because its alleged act of negligence (failure to install a left-turn signal) was a discretionary function."[29] Initially, the court of appeals noted that the ITCA "provides that a governmental entity is not liable for loss resulting from 'the performance of a discretionary function.'"[30] The court further noted that the Indiana Supreme Court had "adopted the 'planning-operational test' for assessing whether a governmental entity is immune under the ITCA for the performance of a discretionary function."[31] This test essentially provides that "a

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18. *Id.* at 356 (citing Ayres v. Indian Heights Volunteer Fire Dep't, 493 N.E.2d 1229, 1235 (Ind. 1986)).
19. *Id.* at 357.
20. *Id.* (quoting *Ayres*, 493 N.E.2d at 1235) (citation omitted).
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 359.
25. 750 N.E.2d 444 (Ind. Ct. App.), *trans. denied*, 761 N.E.2d 421 (Ind. 2001).
26. *Id.* at 445.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 446.
31. *Id.* (citing Peavler v. Bd. of Comm'rs of Monroe County, 528 N.E.2d 40 (Ind. 1988)).

governmental entity will not be liable for negligence arising from decisions that are made at a planning level, as opposed to an operational level."[32] Specifically, the court noted that the State had undertaken a lengthy analysis of the intersection in question prior to the collision and that it had exercised its official judgment and discretion, and had weighed alternatives and public policy choices.[33] The court held that "the State's allegedly negligent failure to install a left-turn signal prior to Speedy's accident [was] entitled to immunity because it involved the performance of discretionary function."[34]

In *City of Anderson v. Davis*,[35] the court of appeals addressed the "law enforcement" immunity provision of the ITCA. In May 1995, a Madison County sheriff "observed a teenage male walking along the road."[36] The pedestrian "matched the description of a teenager who had reportedly walked away from the Madison County Juvenile Center, where he was being detained upon charges of auto theft."[37] When the teenager "realized he had been spotted, he retreated into a nearby wooded area."[38] The sheriff "called his office for assistance," and, among the officers who responded to the call was Timothy Davis, the department's chief deputy.[39]

"Davis parked his police vehicle near the edge of the wooded area . . . , and began to search on foot."[40] While Davis was searching the area on foot, Officer Stoops from the Anderson Police Department arrived with his police dog, Chester, and they began searching the same area. At one point, Officer Stoops, believing that Chester was alerted to the scent of the suspect, "deploy[ed] Chester in an off-leash search."[41] Chester bolted, and "when officer Stoops caught up with his dog, he saw [Chester] attacking Davis," causing serious injuries to Davis.[42]

Davis filed a complaint against, inter alia, the City of Anderson and Officer Stoops, alleging that they were negligent in the off-leash deployment of Chester.[43] The defendants "asserted the affirmative defense of governmental immunity under the ITCA."[44] After a bench trial, judgment was entered in favor of Davis and the appeal ensued.[45]

On appeal, the City claimed "that it was immune from liability for Officer

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32. *Id.* at 446 (citing Lee v. State, 682 N.E.2d 576, 578 (Ind. Ct. App. 1997)).
33. *Id.* at 446-47.
34. *Id.* at 447.
35. 743 N.E.2d 359 (Ind. Ct. App.), *trans. denied*, 761 N.E.2d 412 (Ind. 2001).
36. *Id.* at 361.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at 362.
44. *Id.*
45. *Id.*

Stoops' alleged negligence pursuant to the 'law enforcement' immunity provision of the ITCA."[46] Davis contended that the City was not immune because the use of the dog "under the circumstances did not constitute the 'enforcement of law' within the meaning of the Act."[47]

The court of appeals decision was based on the recent Indiana Supreme Court case of *Benton v. City of Oakland City, Indiana*.[48] Pursuant to the *Benton* opinion, the court of appeals determined that it simply needed to decide whether Stoops was acting within the scope of his employment and whether he was engaged in the "enforcement of law" at the time of the incident involving the plaintiff.[49]

There was no allegation or evidence indicating that Stoops was not acting within the course of his employment with the City of Anderson at the time of the incident.[50] Therefore, the court's analysis dwelt on whether he was engaged in the "enforcement of a law" at the time the incident occurred.[51]

Davis contended that the "use of Chester did not constitute law enforcement" because Chester was used despite the knowledge that the dog "had inappropriately attacked people in the past."[52] However, the court found no authority "suggesting that when a police officer performs his duties in a negligent matter, the officer is no longer 'enforcing a law.'"[53] Instead, the court determined that Chester had been deployed "to assist in locating and apprehending an individual who had escaped from a juvenile detention facility . . . and who was evading recapture by the police."[54] Further, the court determined that the "use of Chester under the circumstances plainly constituted an 'activity in which a government entity or its employees compel or attempt to compel the obedience of another to laws, rules or regulations, or sanction or attempt to sanction a violation thereof'. . . ."[55] Therefore, the deployment of Chester "amounted to the 'enforcement of the law' within the meaning of the ITCA."[56]

II. MEDICAL MALPRACTICE

In *Narducci v. Tedrow*,[57] the court of appeals addressed the necessity of expert testimony regarding the requisite standard of medical care in the context

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46. *Id.*
47. *Id.*
48. 721 N.E.2d 224 (Ind. 1999).
49. *Davis*, 743 N.E.2d at 364.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 364-65.
54. *Id.* at 365.
55. *Id.*
56. *Id.*
57. 736 N.E.2d 1288 (Ind. Ct. App. 2000).

of the doctrine of res ipsa loquitur. Narducci performed colon surgery on Tedrow and allegedly lacerated his spleen during the procedure.[58] After Tedrow filed a lawsuit against Narducci, Narducci moved for summary judgment and submitted an affidavit of an expert witness who testified that a spleen laceration can occur without negligence on the part of the surgeon.[59] Tedrow did not present any expert opinion in opposition to Narducci's motion for summary judgment.[60] "[T]he trial court found that the doctrines of 'res ipsa loquitur' and 'common knowledge' applied to Tedrow's claims against Dr. Narducci and, thus, Tedrow was not required to present expert testimony regarding the requisite standard of [medical] care in order to establish negligence on the part of Dr. Narducci."[61]

On appeal, Narducci contended that the application of res ipsa loquitur was "improper because the uncontradicted expert testimony stated that a patient's spleen can accidentally be injured during colon surgery absent any negligence on the part of the surgeon."[62] Further, Narducci also claimed that "the 'common knowledge' exception should not apply because the determination of whether Dr. Narducci complied with the requisite standard of [medical] care during the colon surgery require[d] the education, training, and experience of a surgeon and is beyond the common knowledge of a layperson."[63]

The court of appeals noted that "[g]enerally, the mere fact that an injury occurred will not give rise to a presumption of negligence."[64] Further, in order to "establish the applicable standard of [medical] care and to show a breach of that standard, a plaintiff must generally present expert testimony."[65] However, the court recognized that "the doctrine of res ipsa loquitur is a qualified exception to the general rule that the mere fact of an injury will not create an inference of negligence."[66]

The court noted that

> [u]nder the doctrine of res ipsa loquitur, negligence may be inferred where 1) the injuring instrumentality is shown to be under the management or exclusive control of the defendant, . . . and 2) the accident is such as in the ordinary course of things does not happen if those who have management of the injuring instrumentality use proper care.[67]

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58. *Id.*

59. *Id.* at 1291.

60. *Id.*

61. *Id.*

62. *Id.* at 1292.

63. *Id.*

64. *Id.* (citing Baker v. Coca-Cola Bottling Works of Gary, 177 N.E.2d 759, 761 (Ind. App. 1961)).

65. *Id.* (citing Slease v. Hughbanks, 684 N.E.2d 496, 499 (Ind. Ct. App. 1997)).

66. *Id.* (citing *Baker*, 177 N.E.2d at 762).

67. *Id.* at 1292-93 (quoting Vogler v. Dominguez, 624 N.E.2d 56, 61 (Ind. Ct. App. 1993)).

Further, the court noted that "[a] plaintiff relying on res ipsa loquitur may establish the second prong, and show that the event or occurrence was more probably the result of negligence, by relying upon common knowledge or expert testimony."[68] Moreover, "[e]xpert testimony is required only when the issue of care is beyond the realm of the lay person."[69] Finally, the court noted that the "common knowledge" exception "will apply where 'the complained-of conduct is so obviously substandard that one need not possess medical expertise in order to recognize the breach' of the applicable standard of care."[70]

In its analysis of the facts of this case, the court determined that "there [was] no dispute that the first prong of the res ipsa loquitur doctrine [was] satisfied, as Tedrow's spleen was perforated in a setting under the exclusive control of Dr. Narducci . . . ."[71] Relative to the second prong of the doctrine, the court noted that the "undisputed expert testimony" was that Dr. Narducci met the requisite standard of care in her treatment of Tedrow.[72] Despite this testimony, Tedrow asserted that the "common knowledge" exception applied "to satisfy the second prong of the doctrine because it is within the cognitive abilities of a layperson to conclude that removal of one's spleen is not the natural or usual outcome of colon surgery."[73] However, the court concluded that "it [was] not apparent that a fact-finder possesses the knowledge and expertise necessary to render an informed decision on the issue of negligence."[74] Specifically, the court held that "the determination of whether Dr. Narducci . . . met the relevant standard of care in [her] treatment of Tedrow [required] some understanding of the procedures involved in colon surgery, the location in the body of the various organs at issue, and the nature of the spleen."[75] The court found this type information was not within the "common knowledge" of lay people and, thus, expert testimony on this issue was required.[76] As such, the court reversed the trial court's judgment and remanded with instructions to enter summary judgment for Narducci.[77]

In *Patel v. Barker*,[78] the court of appeals addressed the issue of whether each of two breaches of care of the standard occurring during a single surgery constitutes separate "occurrences" for purposes of the Indiana Medical Malpractice Act.

> Baker was diagnosed with a malignancy in her colon and referred to [Dr.] Patel for surgery. Patel performed the surgery, which involved

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68. *Id.* at 1293.
69. *Id* (citing Stumph v. Foster, 524 N.E.2d 812, 815 (Ind. Ct. App. 1988)).
70. *Id.* (quoting Malooley v. McIntyre, 597 N.E.2d 314, 319 (Ind. Ct. App. 1992)).
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at 1293-94.
76. *See id.*
77. *Id.* at 1294.
78. 742 N.E.2d 28 (Ind. Ct. App.), *trans. denied*, 761 N.E.2d 416 (2001).

> resectioning the colon. During the surgery, Patel used hemoclips to control bleeding. At some point following the surgery, it was discovered that Barker's colon was leaking into her abdominal cavity at the point of reattachment.[79]

Further, it was discovered that "a hemoclip had been left on Barker's ureter."[80] Barker filed a medical malpractice suit against Patel and "claimed that Patel breached the standard of [medical] care in two ways: by suturing the colon in such a way that it leaked and by leaving a hemoclip on her ureter."[81] A jury awarded Barker $1.8 million in damages.[82] However, the trial court reduced the award to $1.5 million, in accordance "with the Indiana Medical Malpractice Act limitation of $750,000 . . . per act of malpractice."[83]

On appeal, Patel contended that the acts which Barker complained about "constituted [o]ne 'occurrence' . . . under the Indiana Medical Malpractice Act," entitling Barker to only one recovery of $750,000.[84] Barker argued that "Patel committed two breaches of the standard of [medical] care, and therefore two 'occurrences' by failing to close her colon correctly and by leaving a hemoclip in place."[85]

The court of appeals noted that the Medical Malpractice Act broadly defines malpractice "as a tort or breach of contract based on health care services that were provided or that should have been provided to a patient."[86] Further, the court noted that the Act provided in relevant part:

> (a) The total amount recoverable for an injury or death of a patient may not exceed the following:
> (1) Five hundred thousand dollars ($500,000) for an act of malpractice that occurs before January 1, 1990.
> (2) Seven hundred fifty thousand dollars ($750,000) for an act of malpractice that occurs:
> (A) after December 31, 1989; and
> (B) before July 1, 1999.
> (3) One million two hundred fifty thousand dollars ($1,250,000) for an act of malpractice that occurs after June 30, 1999.
> (b) A health care provider qualified under this article (or IC 27-12 before its repeal) is not liable for an amount in excess of two hundred fifty thousand dollars ($250,000) for an occurrence of

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79. *Id.* at 30 (footnote omitted).
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 31. The limitation of $750,000 in damages per act of malpractice was increased to $1.25 million effective July 1, 1999. *See* IND. CODE § 34-18-14-3 (1998).
84. *Patel*, 742 N.E.2d at 30-31.
85. *Id.*
86. *Id.*

malpractice.[87]

Even though "Barker and Patel debated the meaning of the term 'occurrence,' the court noted that this term occurs only in subsection (b), which discusses" the effect of a claim on the health care provider.[88] By contrast, the court noted that "subsection (a) is concerned with the effect of the limitation on recovery to the patient. This provision addresses the subject in terms of 'injury' and the critical concept is 'an act' of malpractice."[89]

The court noted that Indiana appellate cases have interpreted the Act as allowing only one recovery when multiple breaches lead to a single injury and multiple recoveries when multiple breaches during more than one procedure lead to multiple injuries.[90] However, the court recognized that this was a "unique case [because] multiple breaches during a single procedure lead to multiple injuries."[91] The court found no reason "why this distinction should require a different analysis" than that contained in prior case law.[92] Specifically, the court recognized that "the limitation on recovery applies to 'an injury or death,' not 'an act of malpractice.'"[93] Further, the court found that it was "undisputed that Barker had two distinct injuries from two distinct acts of malpractice to two separate body systems, her digestive and urinary systems."[94] Thus, the court held that "the Indiana Medical Malpractice Act allows for one recovery for each distinct act of malpractice that results in a distinct injury, even if the multiple acts of malpractice occur in the same procedure."[95]

In *Winona Memorial Hospital, Ltd. Partnership v. Kuester*,[96] the court of appeals addressed an issue of first impression in Indiana: "[w]hether a claim against a qualified health care provider for the negligent credentialing of a physician is an action for 'malpractice' subject to the provisions of the Medical Malpractice Act."[97] On interlocutory appeal, Winona contended that "'negligent credentialing' is a tort covered under the Medical Malpractice Act . . . and, as such, an opinion must be obtained from a medical review panel before a complaint may be filed with the trial court."[98] Winona argued that "Kuester's complaint should have been dismissed because she failed to obtain first an opinion from a medical review panel."[99] However, Kuester asserted that

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87. *Id.* (quoting IND. CODE § 34-18-14-3 (1998)).
88. *Id.* at 32.
89. *Id.*
90. *Id.*
91. *Id.* at 33.
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. 737 N.E.2d 824 (Ind. Ct. App. 2000).
97. *Id.* at 825.
98. *Id.*
99. *Id.*

"'negligent credentialing' is administrative in nature and is, therefore, not subject to the requirements of the Act."[100]

The court noted that "[u]nder the Act, 'malpractice' is defined as a tort or breach of contract based on health care or professional services that were provided, or that should have been provided, by a health care provider to a patient."[101] Although the term "'professional services' was not defined in the Act," Winona contended that "the act of credentialing is such a 'professional service,' and therefore, the tortious act of 'negligent credentialing' falls within the meaning of 'malpractice.'"[102] Conversely, Kuester maintained that "in order for conduct to fall within the Act, it must occur in the course of a patient's medical care, treatment, or confinement, and that the Act does not extend to conduct outside this relatively circumscribed timeframe."[103]

In order "[t]o determine whether credentialing of a physician is subject to the Act," the court was "guided by other relevant Indiana statutes" concerning "credentialing of hospital medical staff . . . performed by each hospital's governing board," as well as the medical staff's statutory responsibility.[104] After reviewing the "statutory responsibilities of the . . . governing board and the hospital medical staff," the court concluded that "the credentialing process" involves a blend of both medical and nonmedical personnel and expertise.[105] Therefore, because credentialing was "neither clearly within the Act nor outside of it," the court held that the Act was "ambiguous with regard to whether the physician credentialing process [was] included within its ambit," and, thus, the court was compelled to "construe the Act . . . to give effect to the intention of the General Assembly."[106]

In construing the Act, the court first noted that Indiana appellate courts "have historically determined the applicability of the Act by examining whether the cause of action alleged sounds in medical malpractice or in ordinary negligence."[107] Further, the court of appeals has "consistently held" that "the substance of the claim as pleaded . . . determine[s] the applicability of the Act."[108] After reviewing Kuester's complaint, the court noted that she alleged that two negligent acts proximately caused the injury.[109] Further, for Kuester to prove the tort of negligent credentialing, she must first establish that a negligent act by the treating physician "proximately caused her injury before she could proceed against Winona."[110] As a result, the court found it "inappropriate to look

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100. *Id.*
101. *Id.* at 826 (citing IND. CODE § 34-18-2-18 (1998)).
102. *Id.*
103. *Id.*
104. *Id.* at 826-27 (citing IND. CODE §§ 16-21-2-5, -7 (1998 & Supp. 2001)).
105. *Id.* at 827.
106. *Id.*
107. *Id.*
108. *Id.*
109. *See id.* at 827-28.
110. *Id.* at 828.

only to the credentialing conduct alleged in the complaint to determine whether it sound[ed] in malpractice or in a[] . . . common law cause of action."[111] Moreover, the court stated that "[t]he credentialing process alleged must have resulted in a definable act of medical malpractice that proximately caused injury to . . . Kuester or [she] is without a basis to bring the suit for negligent credentialing."[112]

The court determined that when "both alleged negligent acts required to recover (i.e., both the credentialing and the malpractice)" are considered, it was clear that the "*General Assembly intended that all actions the underlying basis for which is alleged medical malpractice are subject to the [A]ct.*"[113] Specifically, because "credentialing and appointing licensed physicians to its medical staff is a service rendered by the hospital in its role as a health care provider," the court determined that "inclusion of negligent credentialing under the Act is consistent with use of the medical review panel to establish the standard of care owed by Winona in credentialing."[114]

The court stated that "[t]he composition and function of medical review panels supports the inclusion of negligent credentialing within the purview of the Act."[115] Further, the court held that "the Act applies to conduct, curative or salutary in nature, by a health care provider acting in his or her professional capacity, and is designed to exclude only conduct which is unrelated to the promotion of a patient's health or the provider's exercise of professional expertise, skill, or judgment."[116] Therefore, the court held that "credentialing was directly related to the provision of health care" and thus was not excluded from the Medical Malpractice Act.[117]

In *Sherrow v. GYN, Ltd.*,[118] the court addressed the permissibility of including legal argument in an evidentiary submission to a medical review panel. "Sherrow filed a proposed complaint with the Indiana Department of Insurance for personal injuries and wrongful death" against, inter alia, GYN, Ltd. ("GYN").[119] "A medical review panel was convened . . . and the parties [gave] their evidentiary submissions to the panel" pursuant to the Medical Malpractice Act.[120] The submission given on behalf of GYN, contained a legal argument, which included the following phrase: "Nor is a physician liable for errors in

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111. *Id.*

112. *Id.*

113. *Id.* (quoting Lee v. Lafayette Home Hosp., Inc., 410 N.E.2d 1319, 1324 (Ind. Ct. App. 1980) (emphasis by court)).

114. *Id.* (citing Methodist Hosp. of Ind., Inc. v. Ray, 551 N.E.2d 463, 468 (Ind. Ct. App. 1990), *adopted on trans.*, 558 N.E.2d 829 (Ind. 1990) (per curiam).

115. *Id.*

116. *Id.* (quoting *Ray*, 551 N.E.2d at 466).

117. *Id.*

118. 745 N.E.2d 880 (Ind. Ct. App. 2001).

119. *Id.* at 881.

120. *Id.*

judgment or honest mistakes in the treatment of a patient."[121] Taking exception to the inclusion of legal discussion in the evidentiary submission, Sherrow requested that all legal citations and argument be redacted.[122] The panel chairperson rejected Sherrow's request, leading Sherrow to file "a motion for preliminary determination of law in the trial court."[123] While the trial court did order a slight modification of the submission, it did not require "complete redaction of all legal discussion."[124]

On appeal, the court began by noting that "[p]arties are permitted to submit evidence to the [medical review] panel" and that such evidence "may consist of 'medical charts, x-rays, lab tests, excerpts of treatises, . . . depositions of witnesses including parties, and any other form of evidence allowable by the medical review panel.'"[125] The court noted that GYN's submission contained discussion of the applicable legal standards.[126] Pursuant to statute, the court concluded that "legal argument is inappropriate in evidentiary submissions because [it] is not 'evidence.'"[127] Specifically, the court found that neither of the applicable statutes authorized parties "to submit their interpretations of guiding legal precedent to the [medical review] panel."[128] Moreover, the court recognized that the medical review panel chairperson, an attorney, "bears the responsibility for advising the three medical professionals on the panel" relative to any legal question involved in the review proceeding.[129] Finally, according to the court, "if parties want the panel to be advised" on any legal issues that may arise, "they should submit a request to the . . . chairperson" and not attempt to include legal arguments in their evidentiary submissions.[130] As a result, the court of appeals determined that "the trial court erred by not redacting all legal argument" from GYN's evidentiary submission.[131]

In *Blevins v. Clark*,[132] the court of appeals addressed whether an attending nurse during a patient's labor and delivery is covered by the physician-patient privilege. After prolonged labor, Blevins was forced to undergo an emergency Caesarian section performed by Dr. Clark.[133] During that procedure, Dr. Clark discovered that her uterus had ruptured, and the baby had entered her abdomen.[134]

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121. *Id.*
122. *Id.*
123. *Id.* at 881-82.
124. *Id.* at 882.
125. *Id.* at 884 (quoting IND. CODE § 34-18-10-17 (1998)).
126. *Id.* at 885.
127. *Id.*
128. *Id.*; *see also* IND. CODE §§ 34-18-10-17, -21 (1998).
129. *Sherrow*, 745 N.E.2d at 885.
130. *Id.*
131. *Id.*
132. 740 N.E.2d 1235 (Ind. Ct. App. 2000), *trans. denied*, 753 N.E.2d 16 (Ind. 2001).
133. *Id.* at 1237.
134. *Id.*

Unfortunately, the baby died only a few days later.[135] Blevins filed a complaint against Dr. Clark alleging that Dr. Clark failed to meet the standard of care.[136] "During the pre-trial phase, Dr. Clark submitted a witness list, identifying three nurses who had treated [Blevins] during her labor and delivery."[137] When counsel for Blevins attempted to interview these nurses, they were informed that "Dr. Clark's counsel . . . had instructed them not to discuss Blevins' treatment with anyone other than Dr. Clark's counsel."[138] As a result, Blevins' counsel "[filed a] motion requesting sanctions against Dr. Clark's counsel and exclusion of the nurses' testimony."[139] After the trial court denied the motion, Blevins appealed.[140]

At trial and on appeal, Blevins contended that "Dr. Clark's counsel interviewed nurses covered by a physician-patient privilege."[141] Based on *Cua v. Morrison*,[142] Blevins contended that "Dr. Clark's attorney improperly conducted *ex parte* interviews with nurses who attended [Blevins] during her delivery.[143] The court noted that to decide whether *Cua* applied, it must first be determined "whether the nurses who assisted [Blevins] during her pregnancy were covered by the privilege."[144]

The court recognized that the Indiana Supreme Court has extended the physician-patient privilege "to third persons who aid physicians or transmit information to physicians on behalf of patients."[145] Further, the court stated that in order to "determine whether a nonphysician health care provider is covered by extension of the privilege," the court "must examine 'the nature and degree of control exercised' by the physician over the health care provider under the circumstances . . . ."[146] The court determined that Blevins failed to show that "Dr. Clark's degree of control or supervision over the nurses require[d] application of the privilege."[147] Specifically, the court found that "[t]he nurses exercised a certain degree of independence in assessing and monitoring [Blevins'] condition, given Dr. Clark's periodic absences throughout the day of delivery."[148] Therefore, the court was unwilling to find that "the trial court abused its discretion in denying [Blevins'] motion to exclude the nurses'

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135. *Id.*
136. *See id.*
137. *Id.*
138. *Id.*
139. *Id.* at 1237-38.
140. *Id.* at 1238.
141. *Id.* at 1239.
142. 636 N.E.2d 1248 (Ind. 1994).
143. *Blevins*, 740 N.E.2d at 1239.
144. *Id.*
145. *Id.* (citing Springer v. Byram, 36 N.E. 361, 363 (1894)).
146. *Id.* at 1240 (quoting *In re* C.P., 563 N.E.2d 1275, 1278 (Ind. 1990)).
147. *Id.*
148. *Id.*

testimony."[149]

In *Harlett v. St. Vincent Hospitals & Health Services*,[150] the court of appeals addressed the appropriateness of a nurse serving as a member on a medical review panel. "The Harletts filed their proposed complaint with the Indiana Department of Insurance, alleging that St. Vincent nurses were negligent in failing to protect Harlett from developing a bedsore . . . and for failing to treat the bedsore once it became apparent."[151] Thereafter, the panel chairman provided two striking panels, one composed of nurses and one composed of physicians. The parties struck from the striking panels, resulting in the selection of one nurse and one physician as panel members.[152] These panelists "twice selected a physician as the third panelist, but the Harletts objected."[153] Then, "the chairman listed a striking panel of nurses, and the parties alternatively struck, leaving one panelist. The chairman then certified the panel to the Indiana Department of Insurance as consisting of two nurses and one physician.[154]

St. Vincent asked the chairman "to excuse the two nurses and replace them with physicians."[155] The chairman denied this request, and St. Vincent filed a "motion for a preliminary determination of law, requesting that the trial court order that the medical review panel be comprised of at least two physicians and that any nurse panelist be limited in the opinions that she might render."[156] After the trial court "ordered the chairman to excuse one of the registered nurse panelists" and submit "a striking panel consisting of three [physicians]," the Harletts appealed.[157]

The Harletts contended that the trial court erred in removing the nurse from the panel because the trial court misinterpreted *Long v. Methodist Hospital of Indiana, Inc.*,[158] "which formed the basis for the trial court's decision."[159] The court of appeals noted that under *Long*, "nurses are not qualified to offer expert testimony as to the medical cause of injuries or as to increased risk of harm."[160] The court also noted that no opinion was expressed in *Long* whether a nurse is qualified "to serve on a medical review panel."[161]

In its analysis of the case, the court noted that the Medical Malpractice Act provides that "all health care providers in Indiana . . . who hold a license to practice in their profession shall be available for selection as members of the

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149. *Id.*
150. 748 N.E.2d 921 (Ind. Ct. App.), *trans. denied*, 761 N.E.2d 422 (Ind. 2001).
151. *Id.* at 923.
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. 699 N.E.2d 1164 (Ind. Ct. App. 1998).
159. *Harlett*, 748 N.E.2d at 924.
160. *Id.* at 925 (citing *Long*, 699 N.E.2d at 1169-70).
161. *Id.*

medical review panel."[162] Further, the court recognized that "the Act includes 'registered or licensed practical nurses' in its definition of the term 'health care provider.'"[163] Therefore, the court considered that the Medical Malpractice Act allows nurses, "as health care providers, . . . to serve on a medical review panel" and thus held that "the trial court erred in expanding the specific holding of *Long* to exclude the nurse from the medical review panel."[164]

III. PREMISES LIABILITY

In *Merchants National Bank v. Simrell's Sports Bar & Grill, Inc.*,[165] the court of appeals addressed a tavern owner's duty to protect a patron from the criminal acts of a third person. Christopher Merchant entered Simrell's Sports Bar and "remained inside the bar until closing time at approximately 3:30 a.m. . . . Another group of patrons, including Theodore Brewer, had left the bar several minutes earlier."[166] After Merchant left Simrell's, "an altercation erupted involving Merchant and Brewer on the sidewalk outside the bar where Brewer shot and killed Merchant."[167] The administrator of Merchant's estate filed a wrongful death suit against Simrell's Sports Bar.[168] Simrell's moved for, and was granted, summary judgment on the grounds that "it owed no duty to Merchant as a matter of law."[169]

On appeal, the court of appeals first noted that Indiana has "long recognized the duty of a tavern owner, engaged in the sale of intoxicating beverages, to exercise 'reasonable care to protect guests and patrons from injury at the hands of irresponsible persons whom they knowingly permit to be in and about the premises.'"[170] However, the court also noted that the duty to "anticipate and to take steps against a criminal act of a third-party arises only when the facts of the particular case make it reasonably foreseeable that a criminal act is likely to occur."[171] Moreover, the court noted that "[p]articular facts, which make it reasonably foreseeable, include the prior actions of the assailant either on the day of the act or on a previous occasion."[172]

The court also noted that the Indiana Supreme Court recently held that Indiana courts, when "confronted with the issue of whether a landowner owes a

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162. *Id.* (quoting IND. CODE § 34-18-10-5 (1998) (omission by court)).

163. *Id.* (citing IND. CODE § 34-18-2-14 (1998)).

164. *Id.*

165. 741 N.E. 2d 383 (Ind. Ct. App. 2000).

166. *Id.* at 386.

167. *Id.*

168. *Id.* at 385.

169. *Id.*

170. *Id.* at 386 (quoting Ember v. B.F.D., Inc., 490 N.E.2d 764, 769 (Ind. Ct. App. 1986), *modified on denial of reh'g*, 521 N.E.2d 981 (Ind. Ct. App. 1988)).

171. *Id.* at 386-87 (citing Welch v. R.R. Crossing, Inc., 488 N.E.2d 383, 388 (Ind. Ct. App. 1986)).

172. *Id.* at 387.

duty to take reasonable care to protect an invitee from the criminal acts of a third party, should apply the 'totality of the circumstances' test" in determining whether the crime was foreseeable.[173] The Indiana Supreme Court in *Delta Tau Delta* provided that when considering whether the totality of the circumstances supports the imposition of a duty, courts should look to "all of the circumstances surrounding an event, including the nature, condition, and location of the land, as well as prior similar incidents, to determine whether a criminal act was foreseeable."[174] Further, the *Delta Tau Delta* opinion provided that "[a] substantial factor in the determination of duty is the number, nature, and location of prior similar incidents, but the lack of prior similar incidents will not preclude a claim where the landowner knew or should have known that the criminal act was foreseeable."[175]

In its analysis of the facts of this case, the court found that there was "no evidence of any prior or similar shooting incidents outside of the tavern that would have alerted Simrell's to the likelihood that Brewer would shoot Merchant."[176] Further, the only evidence of prior incidents was "testimony by a tavern employee that fights occurred outside the tavern."[177] The court found this evidence "insufficient to demonstrate that Merchant's shooting death was foreseeable."[178] Moreover, the court found that in the record nothing indicated that "Simrell's had any knowledge that Brewer had the propensity to commit a criminal act," and also, nothing revealed that "Merchant and Brewer had any contact while inside the tavern on the night in question to indicate any hostility" between them.[179] Under the totality of the circumstances presented, the court concluded that "Simrell's did not have a duty to protect Merchant" from Brewer's unforeseeable criminal act.[180]

IV. WRONGFUL DEATH DAMAGES

In *Durham v. U-Haul International*,[181] the Indiana Supreme Court addressed whether punitive damages are recoverable in a wrongful death action and whether there is an independent claim for consortium damages in a wrongful death action. Kathy Wade died as a result of injuries sustained in a vehicle collision with a U-Haul truck.[182] Durham, the father of Kathy's children, and Bill

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173. *Id.* (quoting Delta Tau Delta, Beta Alpha Chapter v. Johnson, 712 N.E.2d 968, 973 (Ind. 1999)).

174. *Delta Tau Delta*, 712 N.E.2d at 972.

175. *Id.* at 973.

176. *Merchants Nat'l Bank*, 741 N.E.2d at 387.

177. *Id.*

178. *Id.* at 387-88.

179. *Id.* at 388.

180. *Id.*

181. 745 N.E.2d 755 (Ind. 2001).

182. *Id.* at 757.

Wade, her husband, sued as co-executors of Kathy's estate.[183] Wade asserted a separate claim for loss of consortium.[184] The defendants "moved for partial summary judgment on the issues of punitive damages and Wade's loss of consortium claim."[185] The defendants argued that

> no punitive damages are recoverable under the wrongful death statute and that Wade was limited to a wrongful death claim and [could] not pursue a separate loss of consortium claim for Kathy's death. The trial court held that . . . Wade's loss of consortium claim could proceed, including a claim for punitive damages . . . .[186]

The trial court further held that "punitive damages were not recoverable under the wrongful death statute. The court of appeals affirmed the holding that a consortium claim could be asserted but reversed the grant of summary judgment on the issue of punitive damages," holding that "statutory construction, case law, and policy support[ed] recovery of punitive damages in a wrongful death claim."[187]

On transfer, a narrow 3-2 majority of the Indiana Supreme Court held that punitive damages may not be recovered in wrongful death actions in Indiana.[188] Further, the supreme court also held that while there is no independent claim for consortium damages in death claims, such damages are a proper element of wrongful death damages.[189] Finally, the supreme court held that because the consortium damages are merely an element of wrongful death damages and not a separate cause of action, punitive damages are not recoverable on consortium claims.[190]

V. STATUTE OF LIMITATIONS

In *DeGussa Corp. v. Mullens*,[191] the Indiana Supreme Court addressed the application of statute of limitations when the plaintiff had been exposed to chemicals in the workplace for a prolonged period of time. The plaintiff, Mullens, began working for Grow Mix on September 4, 1990.[192] Mullens' "primary responsibilities included the physical mixing of liquid and dry ingredients to make animal feeds," a process that "generated a great deal of dust."[193] Several months into her job, Mullens began experiencing a persistent

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183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.* at 757-58.
187. *Id.*
188. *Id.* at 766.
189. *See id.*
190. *See id.*
191. 744 N.E.2d 407 (Ind. 2001).
192. *Id.* at 409.
193. *Id.*

cough and was eventually evaluated by her personal physician, Dr. Watkins, on March 17, 1992.[194] Although she was diagnosed with bronchitis, Dr. Watkins informed Mullens that her respiratory problems were possibly work-related.[195] Moreover, Dr. Watkins opined that if Mullens' problems were work-related, he "was unsure whether her symptoms were caused, or merely aggravated by, the conditions at work."[196]

On March 26, 1992, Mullens was examined by one of her two pulmonary specialists and was treated through March 1994, at which point she "received the first unequivocal statement . . . that her lung disease was caused by exposure to chemicals consistent with those at Grow Mix."[197] Mullens filed suit on March 25, 1994, "alleging negligence in the sale of, and her exposure to, products that caused lung damage."[198] Defendants moved for summary judgment, claiming that Mullens had not asserted her claims within the two-year statute of limitations applicable to product liability actions.[199] The trial court denied this motion and defendants appealed.[200] "The Court of Appeals concluded that Mullens failed to file her claims within the statute of limitations period and reversed the trial court . . . ."[201]

On transfer, the supreme court examined the applicable statute of limitations, which provides in relevant part that "any product liability action in which the theory of liability is negligence or strict liability in tort . . . must be commenced within two (2) years after the cause of action accrues."[202]

The court noted that "[t]he statute is silent as to the meaning of 'accrues.'"[203] The court observed that a discovery rule had been adopted "through case law for the accrual of claims arising out of injuries allegedly caused by exposure to a foreign substance."[204] Pursuant to the discovery rule, the "two-year statute of limitations begins 'to run from the date the plaintiff knew or should have discovered that she suffered an injury or impingement, and that it was caused by the product or act of another.'"[205] DeGussa argued that "the statute of limitations had started to run when Dr. Watkins examined Mullens on March 17, 1992," and opined that "her exposure to chemicals at work was one of a number of possible

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194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 409-10.

198. *Id.* at 410.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* (quoting IND. CODE § 33-1-1.5-5 (1993)). The court noted that Indiana Code section 33-1-1.5 "has been recodified, without substantive change," at Indiana Code section 34-20-3-1.

203. *Mullens*, 744 N.E.2d at 410.

204. *Id.*

205. *Id.* (quoting Barnes v. A.H. Robins Co., 476 N.E.2d 84, 87-88 (Ind. 1985)); *see also* Wehling v. Citizens Nat'l Bank, 586 N.E.2d 840, 842-843 (Ind. 1992) (extending *Barnes*' discovery analysis to all tort cases).

causes" of her symptoms.[206] Therefore, given that Mullens' claim was eight days late when filed on March 25, 1994, Mullens responded by asserting that the statute of limitations had not begun to run "until sometime after March 25, 1992, if not as late as March 1994 when she received the first [unequivocal] diagnosis from a physician that her lung disease was caused by exposure to chemicals at work."[207]

In evaluating when Mullens "knew or should have discovered that she suffered an injury" relative to her products liability claim, the court turned to case law regarding medical malpractice claims, as such cases are "instructive because medical and diagnostic issues are common between the two actions, the statute of limitations for both claims is two years, and discovery is sometimes at issue in determining whether the respective statutes of limitation have been triggered."[208] The court stated that it "is often a question of fact" when the plaintiff in a medical malpractice action "discovered facts which, in the exercise of reasonable diligence, should lead to the discovery of the medical malpractice and resulting injury."[209] However, the court went on to address when a physician's diagnosis is sufficient to constitute discovery; specifically, "[o]nce a plaintiff's doctor expressly informs the plaintiff that there is a 'reasonable possibility, if not a probability' that an injury was caused by an act or product, then the statute of limitations begins to run and the issue may become a matter of law."[210]

While the *Van Dusen* opinion provided the court with a background relative to the discovery of an injury, the court declined to extend its holding to the facts of the case at hand. Instead, the court held that "[a]lthough 'events short of a doctor's diagnosis can provide a plaintiff with evidence of a reasonable possibility that another's' product caused his or her injuries, a plaintiff's mere suspicion or speculation that another's product caused the injuries is insufficient to trigger the statute."[211] The court reasoned that, because Mullens had not received a definitive diagnosis relative to the cause of her symptoms until March 1994, any previous assertions by her physicians that her work environment may have been a cause of her illness only provided her with mere speculation as to the actual cause of her injuries.[212] Moreover, the court averred that the ongoing medical consultation and diagnostic testing further evinced Mullens' confusion as to the actual cause of her injuries.[213] Consequently, the court affirmed the trial court's order denying the defendants' motions for summary judgment on the

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206. *Mullens*, 744 N.E.2d at 410.

207. *Id.*

208. *Id.*

209. *Id.* at 410-11 (quoting Van Dusen v. Stotts, 712 N.E.2d 491, 499 (Ind. 1999)).

210. *Id.* at 411 (quoting Van Dusen, 712 N.E.2d at 499).

211. *Id.* (quoting Evenson v. Osmose Wood Preserving Co. of Am., 899 F.2d 701, 705 (7th Cir. 1990) (applying Indiana law)).

212. *Id.*

213. *See id.*

statute of limitations issue.[214]

VI. RELEASE

In *Estate of Spry v. Greg & Ken, Inc.*,[215] the court of appeals addressed whether a release agreement signed by the plaintiff and one of the defendants effectively released any claims against another potential tortfeasor. Kelly Spry was killed in an automobile accident.[216] Thereafter, Kelly's father, James, who had been appointed administrator of the estate, settled with the negligent driver's insurance carrier, GRE Insurance Group ("GRE").[217] Upon executing that settlement agreement, a release was signed which provided in relevant part that "any other person, firm or corporation" charged with "responsibility or liability" for Kelly's death was thereafter released and forever discharged relative to any responsibility or liability.[218]

Following the execution of that release agreement, Kelly's widow "was substituted as Special Administratrix of the estate" and a new attorney was hired.[219] A dramshop suit was then filed on behalf of the estate against Greg & Ken, Inc., owners of the tavern at which the negligent driver had become intoxicated prior to causing the collision.[220] The tavern moved for summary judgment, claiming that the general release form signed in the settlement with GRE and the negligent driver "had released the Tavern from any possible claims of liability."[221] After the motion was granted, the estate appealed.[222]

The only issue on appeal was whether the release agreement executed between the estate and GRE effectively barred claims against the tavern. The estate argued that "the intentions of the Estate and GRE were to release only [the driver] and GRE from future claims and liability arising from the accident that killed Kelly," while the tavern argued that the release barred the estate's claim against it.[223]

In evaluating the parties' arguments, the court noted that "[n]early a decade ago, our supreme court abrogated the common law rule that "the release of one joint tortfeasor released all of the other joint tortfeasors."[224] Consequently, the court held that "the release of [the driver] and GRE did not release the Tavern as a matter of law"; therefore, the court had to look at the language of the release

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214. *Id.* at 414.

215. 749 N.E.2d 1269 (Ind. Ct. App. 2001).

216. *Id.* at 1271.

217. *Id.*

218. *Id.* at 1271-72.

219. *Id.* at 1272.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 1272-73.

224. *Id.* at 1273 (citing Huffman v. Monroe County Cmty. Sch. Corp., 588 N.E.2d 1264 (Ind. 1992)).

itself to determine whether or not the tavern was immune from liability.[225]

The court relied on the Indiana Supreme Court's opinion in *Huffman v. Monroe County School Corp.*[226] for the standard employed in reviewing releases. Specifically, the *Huffman* opinion held that

> a release executed in exchange for proper consideration works to release only those parties to the agreement unless it is clear from the document that others are to be released as well. A release, as with any contract, should be interpreted according to the standard rules of contract law. Therefore, from this point forward, release documents shall be interpreted in the same manner as any other contract document, with the intention of the parties regarding the purpose of the document governing.[227]

The court further noted that "[o]ne standard rule of contract interpretation is that if the language of the instrument is unambiguous, the intent of the parties is to be determined by reviewing the language contained between the four corners of that instrument."[228] The court concluded that the release executed between the plaintiff and GRE was subject to "four corner" analysis.[229] Moreover, the court noted that language releasing "all" people "is clear unless other terms in the instrument are contradictory"; thus, the court reasoned that because there was no other language in the release contradicting "the notion that all possible defendants [were] to be released, the tavern was not subject to any claims of liability asserted by the Estate."[230] Nevertheless, the estate maintained that the court was obligated to reverse the grant of summary judgment "by applying the contemporaneous writing rule, by following public policy, or by reforming the contract."[231]

The court was not swayed by any of the estate's arguments. First, relative to the contemporaneous writing rule, the court held that the rule did not apply as neither of the two documents the estate cited to were contemporaneous pursuant to the requirements of the rule.[232] Specifically, the court found that the three documents "were not executed on the same day," and the petition and order were not a part of the original transaction between GRE and Taylor but were, instead, a separate transaction between the estate and the trial court.[233]

Next, in disposing of the estate's public policy argument and holding that the plain language of the document should prevail, the court stated that "[i]f judges

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225. *Id.*

226. 588 N.E.2d 1264 (Ind. 1992).

227. *Estate of Spry*, 749 N.E.2d at 1273 (citing *Huffman*, 588 N.E.2d at 1267).

228. *Id.* (citing Dobson v. Citizens Gas & Coke Util., 634 N.E.2d 1343, 1345 (Ind. Ct. App. 1994)).

229. *See id.*

230. *Id.*

231. *Id.*

232. *Id.* at 1273-75.

233. *Id.* at 1274-75.

could interpret a release to mean something that is contrary to the plain language because one party intended for it to mean something else, then parties would be discouraged from signing releases because they could not have confidence that a court would enforce the release's plain language."[234]

Finally, the court declined to reform the release because the language of the release was plain and "the Estate's mistake was regarding the effect of the release, not its terms."[235] Consequently, the court held that it "may not reform the release to correct the Estate's mistake of law."[236]

VII. INDEMNITY

In *Hagerman Construction Corp. v. Long Electric Co.*,[237] the court of appeals addressed whether a general contractor is liable for injury to a subcontractor's employee when a contract for indemnification exists between the two. The court held that under the parties' agreement, while the subcontractor was liable for the employee's injuries to the general contractor to the extent of the subcontractor's negligence, it was not liable to the extent of the general contractor's negligence.[238]

Scott was an employee of a subcontractor, Long Electric Company ("Long"), on a construction project on the campus of Indiana University-Purdue University Fort Wayne, when he sustained injury by being "struck on the head by a falling light pole."[239] Thereafter, Scott filed suit against the general contractor, Hagerman Construction Corp. ("Hagerman"). "Hagerman subsequently filed a third party action against Long based upon an indemnity clause contained in the form contract between [them]."[240] Hagerman moved for summary judgment, arguing that under the parties' contract, "Long was required to indemnify Hagerman for any losses Hagerman suffered in the Scott litigation."[241] The trial court, finding that "Hagerman was not entitled to indemnification" for its own negligence, denied Hagerman's motion.[242]

In relying on *Moore Heating & Plumbing, Inc. v. Huber, Hunt & Nichols*[243] the court noted that "[a]bsent prohibitive legislation, no public policy prevents parties from contracting as they desire."[244] Moreover, the court, in relying on the *Moore Heating* holding, asserted that a party is free to "contract to indemnify another for the other's negligence"; however, this indemnification "may only be

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234. *Id.* at 1275.
235. *Id.* at 1276.
236. *Id.*
237. 741 N.E.2d 390 (Ind. Ct. App. 2000), *trans. denied*, 761 N.E.2d 422 (Ind. 2001).
238. *Id.* at 393-94.
239. *Id.* at 391.
240. *Id.*
241. *Id.*
242. *Id.*
243. 583 N.E.2d 142 (Ind. Ct. App. 1991).
244. *Hagerman Constr.*, 741 N.E.2d at 392 (citing *Moore Heating*, 583 N.E.2d at 145).

done if the party knowingly and willingly agrees" to it.[245] Further, such indemnification provisions are to be strictly construed "and will not be held to provide indemnification unless it is so stated in clear and unequivocal terms."[246] Finally, the court found that such clauses are disfavored "because we are mindful that to obligate one party to pay for the negligence of another is a harsh burden that a party would not lightly accept."[247]

The court noted that a two-step analysis is necessary in determining "whether a party has knowingly and willingly accepted" such a burden.[248] The first step is that the "indemnification clause must expressly state in clear and unequivocal terms that negligence is an area of application where the indemnitor (. . . Long) has agreed to indemnify the indemnitee (. . . Hagerman)."[249] Then, "[t]he second step determines to whom the clause applies"; specifically, the indemnification clause must state in clear and unequivocal terms that "it applies to indemnification of the indemnitee (. . . Hagerman) by the indemnitor (. . . Long) for the indemnitee's own negligence."[250] The indemnification clause utilized by the parties provided:

> To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or otherwise reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this paragraph 4.6.[251]

In addressing the first step of its analysis, the court found that the language of the clause clearly defined negligence "as an area of application in clear and unequivocal terms"; specifically, the court cited the use of terms such as "claims,

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245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.* at 392-93.

damages, losses and expenses attributable to bodily injury."[252] Finally, the court stated that "[t]hese words, taken in this context, are the language of negligence, and, as such, clearly and unequivocally demonstrate that the indemnification clause applies to negligence."[253]

Concluding that the first step of analysis had been met, the court determined that the clause did not state, in clear and unequivocal terms, that it applied "to indemnify Hagerman for its own negligence."[254] In making this determination, the court looked to a previous case, *Hagerman Construction, Inc. v. Copeland*,[255] where the court was asked to interpret an indemnification clause identical to the one in question. In *Copeland*, the court stated in dicta that the indemnification provision "appears to provide for indemnification for Hagerman's own negligence."[256] However, the *Copeland* court concluded that "because the jury found that Crown-Corr was zero percent at fault for the accident, and therefore Crown-Corr need not indemnify Hagerman" interpretation of the indemnification clause was unnecessary.[257] Consequently, the court held that Hagerman's reliance on the dicta in *Copeland* was misguided.[258]

Long argued that the phrase "but only to the extent caused in whole or in part by negligent acts or omissions of the Subcontractor" limited the scope of Long's liability to only those losses that were "caused by the negligence of the sub-contractor or its agents."[259] The court agreed.[260] In explaining its reasoning, the court noted that the inclusion of the phrase "to the fullest extent permitted by law" was "not necessarily inconsistent" with the inclusion of the phrase "but only to the extent."[261] The court held that the phrase "to the fullest extent permitted by law" was a preservation clause preserving Hagerman's rights under the law "to the extent that Long and/or its sub-contractors, etc. are negligent."[262] Therefore, so held the court, Hagerman was entitled to "pursue its rights to the fullest extent of the law as long as, and to the measure of, Long's negligence."[263] The court further reasoned that the phrase "regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder" contradicted the other language of the indemnification clause limiting Long's liability to Hagerman.[264] The court interpreted that phrase to be limited to Long's inability to "disregard its duty to indemnify Hagerman for Long's

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252. *Id.* at 393.
253. *Id.*
254. *Id.*
255. 697 N.E.2d 948 (Ind. Ct. App. 1998).
256. *Hagerman*, 741 N.E.2d at 393 (quoting *Copeland*, 697 N.E.2d at 962).
257. *Id.*
258. *Id.*
259. *Id.*
260. *See id.* at 394.
261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.*

negligence merely because Hagerman may [have] also [been] negligent under the circumstances."[265] Therefore, the court concluded that "the indemnification clause does not expressly state, in clear and unequivocal terms, that it applies to indemnify Hagerman for its own negligence."[266] The clause clearly indemnifies Hagerman for the acts of Long and its sub-contractors, employees and "anyone for whom it may be liable, but it does not explicitly state that Long must indemnify Hagerman for its own negligent acts."[267]

VIII. INTENTIONAL TORTS

In *Branham v. Celadon Trucking Services, Inc.*,[268] the court of appeals considered whether or not a plaintiffs' claims for invasion of privacy, libel, intentional infliction of emotional distress, negligent supervision, and loss of consortium were viable when the incident giving rise to the suit occurred when the plaintiff was asleep. The court held that all of the claims failed primarily because the plaintiff was asleep.[269]

The plaintiff, Lawrence Branham, was an employee of the defendant, Celadon, and was on a break on Celadon's property when he fell asleep. One of the defendants, Bruce Edwards, and another employee, Adam Deaton, found Branham sleeping. The two men then procured a camera.[270] Deaton lowered his pants, remained in his underwear, stood beside the plaintiff and posed with his hand held suggestively in front of his genital area. Edwards took a picture of the scene, which he placed on the table in the break room, where it was seen by several employees of Celadon. Branham was subsequently teased, which ultimately caused him to secure employment elsewhere.[271]

The plaintiffs, Branham and his wife, filed suit against the defendants, alleging "invasion of privacy, libel, intentional infliction of emotional distress, negligent supervision, and loss of consortium. Celadon filed a motion to dismiss" the complaint, contending that the trial court did not have jurisdiction "because the claim was governed by the Indiana Worker's Compensation Act."[272] The motion was denied.[273] Celadon and Edwards subsequently moved for summary judgment on all of the plaintiffs' claims. The trial court granted summary judgment relative to the negligent supervision claim against Edwards; however, the trial court denied the motion as to the rest of the Branhams' claims.[274]

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265. *Id.*
266. *Id.* at 393.
267. *Id.*
268. 744 N.E.2d 514 (Ind. Ct. App.), *trans. denied*, 753 N.E.2d 16 (Ind. 2001).
269. *See id.*
270. *Id.* at 518-19.
271. *Id.*
272. *Id.*
273. *Id.*
274. *Id.* at 519.

On appeal, the court briefly discussed Celadon's mistaken reliance on the Worker's Compensation Act. Specifically, the court held that since the heart of Branham's injury was emotional, not physical or disabling in quality, the Act did not apply.[275]

Next, the court first evaluated the libel claim.[276] The court averred that libel "is a species of defamation under Indiana law."[277] Moreover, to maintain a defamation action, a plaintiff must prove that the communication at issue met the following four elements: (1) "defamatory imputation"; (2) "maliciousness"; (3) "publication"; and (4) "damages."[278] Alternatively, a communication is defamatory per se "if it imputes: (1) "criminal conduct"; (2) "a loathsome disease"; (3) "misconduct in a person's trade, profession, office, or occupation"; or (4) "sexual misconduct."[279] Branham asserted that "the picture was defamatory per se because it showed him engaged in criminal sexual conduct."[280] The court rejected that argument because the picture merely depicted him sleeping with Deaton standing nearby.[281] The court concluded that because Branham was in fact asleep, the picture was "not defamatory as a matter of law," as it evinced a truthful representation of Branham's state at the time of the incident.[282]

Next, the court discussed the merits of Branham's intentional infliction of emotional distress claim.[283] To sustain an action for the intentional infliction of emotional distress, a plaintiff must show that the defendant engaged in extreme and outrageous conduct that intentionally or recklessly caused severe emotional distress.[284] Furthermore, the issue of whether the conduct in question rises to the level of an intentional tort, in some cases, is a matter of law.[285]

The court decided that, as a matter of law, the defendants' conduct did not constitute intentional infliction of emotional distress.[286] In reaching that

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275. *Id.* at 519-20 (quoting IND. CODE § 22-3-6-1 (Supp. 2001)). "'Injury' and 'personal injury' mean only injury by accident arising out of and in the course of the employment and do not include a disease in any form except as it results from the injury." *Id.*

276. *See id.* at 522.

277. *Id.* (citing Ind. Ins. Co. v. N. Vermillion Cmty. Sch. Corp., 665 N.E.2d 630, 635 (Ind. Ct. App. 1996)).

278. *Id.* (citing Davidson v. Perron, 716 N.E.2d 29, 37 (Ind. Ct. App. 1999); N. Ind. Pub. Serv. Co. v. Dabagia, 721 N.E.2d 294, 301 (Ind. Ct. App. 1999); Samm v. Great Dane Trailers, 715 N.E.2d 420, 427 (Ind. Ct. App. 1999)).

279. *Id.* (citing Daugherty v. Allen, 729 N.E.2d 228, 237 n.8 (Ind. Ct. App. 2000) (citing RESTATEMENT (SECOND) OF TORTS § 570 (1977)); Levee v. Beeching, 729 N.E.2d 215, 220 (Ind. Ct. App. 2000); Rambo v. Cohen, 587 N.E.2d 140, 145 (Ind. Ct. App. 1992)).

280. *Id.*

281. *Id.*

282. *Id.*

283. *See id.* at 522-24.

284. *Id.* at 523 (citing Bradley v. Hall, 720 N.E.2d 747, 752 (Ind. Ct. App. 1999)).

285. *Id.* (citing Conwell v. Beatty, 667 N.E.2d 768, 775-77 (Ind. Ct. App. 1996)).

286. *See id.* at 524.

conclusion, the court relied on the testimony of Edwards and Deaton that there was no intent to harm Branham.[287] Both testified that the incident was meant only as a joke and that everyone viewing the photograph interpreted the incident as a joke as well.[288] Further, Branham himself testified that Deaton had joked with him in the past and that Edwards had sincerely apologized for the incident and stated it was meant to be a joke.[289] Due to that testimony, the court concluded that there was absolutely no evidence presented that the defendants intended to harm Branham.[290] Therefore, the court granted summary judgment on that claim.[291]

Next, the court addressed Branham's invasion of privacy claim.[292] Generally, the tort has four variations: "(1) unreasonable intrusion upon the seclusion of another; (2) publicity that unreasonably places another in a false light before the public; (3) unreasonable publicity given to another's private life; and (4) appropriation of another's name or likeness."[293] Branham claimed that the invasion of privacy was an intrusion into seclusion and false light publicity. To establish that claim, Branham would have had to show that there was an intrusion upon his "physical solitude or seclusion, as by invading his home or other quarters."[294] For such an incident to give rise to a valid claim, "the intrusion must be something which would be offensive or objectionable to a reasonable person."[295]

Branham's physical intrusion claim failed because, as the court noted, he had fallen asleep in a break room utilized by all employees.[296] Thus, his physical space, as a matter of law, was not invaded.[297] The court held that Branham's emotional privacy intrusion claim failed as well because he was asleep at the time of the incident; therefore, "he could not have suffered emotional disturbance from it."[298] Moreover, any joking alleged to have occurred by other co-workers could not "be imputed to Deaton and Edwards."[299] Thus, "the defendants were entitled to summary judgment."[300]

Finally, the court held that Branham's claim for false light publicity failed

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287. *See id.* at 523.

288. *Id.*

289. *Id.* at 523-24.

290. *See id.*

291. *Id.* at 524.

292. *See id.* at 524-25.

293. *Id.* at 524 (citing Doe v. Methodist Hosp., 690 N.E.2d 681, 684 (Ind. 1997)).

294. *Id.* (quoting Ledbetter v. Ross, 725 N.E.2d 120, 123 (Ind. Ct. App. 2000) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 117, at 854 (5th ed. 1984))).

295. *Id.* (quoting *Ledbetter*, 725 N.E.2d at 123).

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

as well.[301] Noting that the tort is similar to that of defamation, but differs as to the nature of the protected interest, the court explained that "[d]efamation reaches injury to reputation; privacy actions involve injuries to emotions and mental suffering."[302] As such, the court concluded that as was the case with the defamation claim, "there was no false light because the picture [was] not false."[303] Branham was asleep and a partially clad co-worker was standing beside him. "The picture was accurate, not false, and the defendants are entitled to summary judgment on Branham's false light publicity claim."[304]

IX. LEGAL MALPRACTICE

In *Douglas v. Monroe*,[305] the court of appeals addressed a plaintiff's claim against an attorney for malpractice based on advice obtained from the defendant via a third party. The court concluded that no attorney-client relationship had ever existed between the plaintiff and the defendant.[306]

Carol Douglas brought suit on behalf of herself and as the administratrix of her son's estate.[307] Douglas' son drowned at the Indiana University-Purdue University Indianapolis Natatorium. Several months later, Douglas considered filing a wrongful death suit.[308] Due to her ongoing grief, Douglas' brother, Lionel, "looked into the possibility of bringing suit."[309] While working at his job as a bank security guard, Lionel happened upon a woman he knew to be an attorney, Monroe, although she had never represented him.[310] He approached Monroe and explained the nature of his nephew's death and indicated that the family was considering filing a lawsuit.[311] Lionel specifically inquired into whether or not a time limit existed regarding filing suit. While Monroe informed Lionel that suit needed to be filed within two years, she did not mention the 180-day limit barring the filing of tort claims notices nor did she indicate that Lionel should rely on this advice.[312]

The two had a second conversation, again in the bank lobby, at some point after Monroe told him of the two-year statute of limitations.[313] Based on these two conversations, Lionel did not believe that Monroe represented either him or

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301. *Id.* at 825.

302. *Id.* at 824 (citing Near E. Side Comm. Org. v. Hair, 555 N.E.2d 1324, 1335 (Ind. Ct. App. 1990)).

303. *Id.* at 525.

304. *Id.*

305. 743 N.E.2d 1181 (Ind. Ct. App. 2001).

306. *See id.*

307. *See id.*

308. *Id.* at 1183.

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

Douglas. Lionel conveyed the two-year statute of limitations information to Douglas.[314] Later that year, after the 180-day time limit expired, Douglas engaged the services of another attorney who informed Douglas that her claim expired. Douglas then filed a suit, inter alia, against Monroe, alleging that her "failure to inform Lionel of the 180-day tort claims notice requirement" caused her wrongful death suit to be barred.[315] Monroe denied the allegations and successfully moved for summary judgment on the grounds that no attorney-client relationship existed between the parties.[316]

On appeal, Douglas argued that there was a question of fact about the existence of an attorney-client relationship. Further, Douglas asserted theories of detrimental reliance and agency. The court noted that, to prevail on a legal malpractice claim, a plaintiff must show: (1) "employment of an attorney"; (2) "failure by the attorney to exercise ordinary skill and knowledge"; (3) "proximate cause"; and (4) "loss to the plaintiff."[317] In discussing the creation of the attorney-client relationship, the court averred that an important factor is the client's subjective understanding;[318] "[h]owever, 'the relationship is consensual, existing only after both attorney and client have consented to its formation.'"[319]

The court concluded that the requisite attorney-client relationship had never existed because Douglas had never spoken to Monroe; Douglas never made any attempt to contact or schedule an appointment with Monroe; and Douglas never "consented to the formation of an attorney-client relationship" with Monroe.[320] Moreover, Douglas never "entered into a contract for legal services with Monroe," never "paid for advice from her," and "never thought Monroe was representing her in the matter of [her son's] death."[321] When she was contacted by her current counsel, she said she was not already represented by counsel.[322] Finally, there was "no evidence indicating that Monroe believed she was in any way representing [Douglas] or that [she] consented to the formation of an attorney-client relationship."[323] To the contrary, "Monroe's brief statement regarding the statute of limitations appears to have been fostered by sympathy, not by any desire to provide professional services to a woman she did not know."[324]

In addressing Douglas' detrimental reliance claim,[325] the court noted that

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314. *Id.*

315. *Id.* at 1183-84.

316. *Id.* at 1184.

317. *Id.* (quoting Bernstein v. Glavin, 725 N.E.2d 455, 462 (Ind. Ct. App. 2000) (quoting Fricke v. Gray, 705 N.E.2d 1027, 1033 (Ind. Ct. App. 1999))).

318. *Id.* (citing *In re* Anonymous, 655 N.E.2d 67, 70 (Ind. 1995)).

319. *Id.* (citing *In re* Kinney, 670 N.E.2d 1294, 1297 (Ind. 1996)).

320. *Id.* at 1186.

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.* (footnote omitted).

325. *See id.*

only a few cases have held a defendant-attorney liable, and "liability has been found only when the attorney undertook, gratuitously or otherwise, to complete an affirmative act for the party who later brought suit."[326] Further, the plaintiff-client must offer proof that he had a prior, continuous relationship with the defendant or that the defendant agreed to represent the plaintiff-client relative to the transaction.[327] The court averred that the evidence in this case did not meet the requirements of detrimental reliance because Lionel, not Douglas, had a brief conversation at his place of business with a woman he knew to be an attorney.[328] Thus, "[u]nder the circumstances, Monroe did not know Carol would rely on [that] isolated statement, and any reliance Carol placed on the statement was not reasonable. Thus, we find Carol's detrimental reliance theory unavailing."[329]

Finally, the court addressed Douglas' agency argument.[330] The court easily disposed of the argument, given that no evidence was adduced tending to prove that Douglas instructed her brother to seek an attorney's advice, much less Monroe's.[331] Moreover, no evidence was advanced demonstrating that Douglas told her brother "when or where to speak with Monroe, gave him questions to ask her, outlined potential terms of employment, or gave him the power to bind her to an agreement."[332] Specifically, Douglas' own deposition testimony revealed that she never believed Monroe "was representing her in the matter of [her son's] death."[333] Thus, her agency theory failed, and summary judgment in favor of Monroe was affirmed.[334]

X. MISTRIAL

In *Stone v. Stakes*,[335] the court of appeals addressed whether or not a reference made by the plaintiff as to the defendant's connection to the liability

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> In certain cases, an attorney-client relationship may also be created by a client's detrimental reliance on the attorney's statements or conduct. An attorney has in effect consented to the establishment of an attorney-client relationship if there is "proof of detrimental reliance, when the person seeking legal services reasonably relies on the attorney to provide them and the attorney, aware of such reliance, does nothing to negate it."

Id. (quoting Hacker v. Holland, 570 N.E.2d 951, 956 (Ind. Ct. App. 1991) (quoting Kurtenbach v. TeKippe, 260 N.W.2d 53, 56 (Iowa 1977))).

326. *Id.* (citing *Hacker*, 570 N.E.2d at 956).

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.*

331. *See id.* at 1187.

332. *Id.*

333. *Id.*

334. *Id.*

335. 749 N.E.2d 1277 (Ind. Ct. App.), *aff'd on reh'g*, 755 N.E.2d 220 (Ind. Ct. App.), *trans. denied*, 2002 Ind. LEXIS 182 (2001).

insurance carrier during voir dire warranted a mistrial. The court held that it did not.[336]

Stone and Stakes were involved in an automobile collision. Stakes subsequently filed a complaint, which Stone failed to answer. A default judgment was entered relative to liability, and a trial on the issue of damages was scheduled.[337] Mr. Foos entered his appearance for Stone and filed a motion in limine for the exclusion of any references to insurance coverage. The motion was granted, with the exception that references to insurance may be made during voir dire.[338]

At the commencement of voir dire, Mr. Lloyd also entered an appearance for Stone that contained his address, which referenced the insurance company for which his firm was a captive law firm. During voir dire, Stakes' attorney questioned the prospective jurors as to their familiarity with defense counsels' firm, thereby indicating that Stone carried liability insurance.[339] Stone moved for a mistrial, which was denied. An appeal ensued.[340]

The sole issue on appeal was whether reference to the jury pool of defense counsel's affiliation with an insurance company was sufficient to reverse the refusal of the trial court to grant a mistrial. The court declined to hold as such.[341]

In addressing Stone's contention, the court noted that it has long been held that evidence of a defendant's insurance coverage is "not allowed in a personal injury action and that its admission is prejudicial."[342] Rule 411 of the Indiana Rules of Evidence generally excludes references to a defendant's liability insurance coverage; however, this "does not require the exclusion of evidence . . . when offered for another purpose, such as . . . ownership, or control, or bias or prejudice of a witness."[343] Therefore, the court concluded that a question about a juror's relationship to a specific insurance company as it relates to bias or prejudice, if asked in good faith, is within the exception provided by Rule 411.[344] Moreover, the motion in limine granted to Stone on the matter of insurance specifically excluded voir dire.[345]

Finally, Stone argued that the reference to insurance made by Stakes' attorney "was a deliberate attempt to interject the notion of insurance into the

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336. *Id.* at 1282.

337. *Id.* at 1278.

338. *Id.* at 1278-79.

339. *See id.* at 1279.

340. *Id.*

341. *See id.* at 1278.

342. *Id.* at 1279 (citing Rausch v. Reinhold, 716 N.E.2d 993, 1002 (Ind. Ct. App. 1999)); *see also* Pickett v. Kolb, 237 N.E.2d 105, 107 (Ind. 1968); Martin v. Lilly, 121 N.E. 443, 445 (Ind. 1919).

343. *See id.* at 1281 (omission by court) (quoting IND. EVIDENCE RULE 411 (stating that "evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully")).

344. *Id.* (citing Rust v. Watson, 215 N.E.2d 42, 52-53 (Ind. Ct. App. 1966)).

345. *Id.* at 1280.

jurors' minds."[346] The court rejected that argument, stating:

> [W]e do not believe that Stakes' counsel, reading from an appearance form handed to him that morning which, for the first time, identified Stone's counsel as a member of a captive law firm of Warrior Insurance, was deliberately attempting to inform the jury that Stone was covered by liability insurance and prejudice the venire in favor of a verdict for his client.[347]

Thus, the verdict for Stakes was affirmed.[348]

XI. JURY QUESTIONS AND INSTRUCTIONS

In *Rogers v. R.J. Reynolds Tobacco Co.*,[349] the Indiana Supreme Court accepted transfer of the case for determination as to whether the trial judge committed reversible error by communicating ex parte with the jury.[350] Rogers, the widow of a now-deceased smoker, along with her husband, brought a product liability action against cigarette manufacturers and distributors.[351] After the first trial ended in a mistrial, a second trial resulted in a verdict for several tobacco companies.[352] "The Court of Appeals reversed and remanded the case for a new trial because the trial" court had responded to a jury inquiry "without first informing counsel."[353] The supreme court granted transfer to decide whether the trial court committed reversible error when it responded to a question from the deliberating jury without first informing counsel.[354] Rogers argued that a new trial was necessary because the jury was improperly influenced by ex parte communication.[355]

On transfer, the supreme court initially noted that "[c]ontrol and management of the jury is an area generally committed to the trial court's discretion."[356] Moreover, regarding judicial communications to a deliberating jury, the court stated that "[t]he proper procedure is for the judge to notify the parties so that they may be present in court and informed of the court's proposed response to the jury before the judge ever communicates with the jury."[357] However, the court

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346. *Id.* at 1281.

347. *Id.* at 1282.

348. *Id.* at 1283.

349. 745 N.E.2d 793 (Ind. 2001).

350. *Id.* at 795.

351. *Id.* at 795 & n.1.

352. *Id.* at 795.

353. *Id.*

354. *Id.*

355. *Id.*

356. *Id.* (citing Norton v. State, 408 N.E.2d 514, 531 (Ind. 1980); Morris v. State, 364 N.E.2d 132, 139 (Ind. 1977)).

357. *Id.* (citing Grey v. State, 553 N.E.2d 1196, 1197 (Ind. 1990); Morgan v. State, 544 N.E.2d 143, 149 (Ind. 1989); Moffatt v. State, 542 N.E.2d 971, 975 (Ind. 1989); Martin v. State,

further noted that the rule is tempered, in that while an ex parte communication may "create[] a presumption of error," it "does not constitute per se grounds for reversal."[358] In making a determination as to whether the presumption of harm has been rebutted, the court noted that the reviewing court must "evaluate the nature of the communication to the jury and the effect it might have had upon a fair determination" of the case.[359]

The question posed by the jury in this case was whether the judge would allow the jury to hold a press conference after the completion of the trial.[360] The bailiff relayed the jury's question to the judge, who did not share the question with counsel. Rather, the judge responded affirmatively to the jury via the bailiff. No further information was provided to the jury by the judge or bailiff.[361]

The supreme court looked to the decision in *Smith v. Convenience Store Distributing Co.*[362] for guidance on the impact the communication might have had on the jury.[363] In *Smith*, the Indiana Supreme Court held that "[t]he effect of the communication may be gauged by the reaction of the jury. A short time interval between the judge's comments and the verdict tends to support the presumption of error."[364] In *Smith*, the jury had declared itself deadlocked after six hours of deliberation. However, the jury returned a verdict within ten minutes of the ex parte communication.[365] Therefore, the court reasoned that judge's comments might have influenced the verdict.[366]

In this case, the jury was in its second day of deliberations when it posed its question to the judge. Following the judge's response, the jury deliberated for seven more hours before returning a verdict, which the court noted was "hardly a sudden turn of events."[367] Therefore, the court concluded that, while "it would have been better practice" for the judge to have conferred with counsel before responding to the jury's question, the presumption of error had been rebutted under these circumstances.[368] In addition, the jury's inquiry had related to a "matter of trial administration," not to any "substantive issues pending for its determination."[369] Consequently, "the ensuing length of deliberations provides a strong indication that the response did not substantially influence the verdict, if at all. We find no reversible error on this issue."[370]

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535 N.E.2d 493, 497 (Ind. 1989)).

358. *Id.* (citing Bouye v. State, 699 N.E.2d 620, 628 (Ind. 1998); *Grey*, 553 N.E.2d at 1198)).

359. *Id.* (citing Smith v. Convenience Store Distrib. Co., 583 N.E.2d 735, 738 (Ind. 1992)).

360. *Id.*

361. *Id.*

362. 583 N.E.2d 735 (Ind. 1992).

363. *See Rogers*, 745 N.E.2d at 795.

364. *Id.* (citing *Smith*, 583 N.E.2d at 738).

365. *Id.*

366. *Id.* at 795-96 (citing *Smith*, 583 N.E.2d at 738).

367. *Id.* at 796 (citing Nesvig v. Town of Porter, 668 N.E.2d 1276, 1288 (Ind. Ct. App. 1996)).

368. *Id.*

369. *Id.*

370. *Id.*

In *Executive Builders, Inc. v. Trisler*,[371] the court of appeals reviewed the trial court's decision not to provide the jury with copies of its final instructions and held that the decision did not constitute reversible error.[372]

The suit arose when Executive Builders, Inc. ("Executive"), filed suit against Trisler, alleging intentional interference with business. Trisler filed a counterclaim and a complaint against Executive, alleging "defamation, invasion of privacy, abuse of process and frivolous litigation."[373] The trial court entered summary judgment for Trisler with respect to Executive's suit; however, that decision was vacated. The court of appeals reversed and remanded with instruction that the trial court's summary judgment be reinstated. The trial court eventually entered full judgment for Trisler on its claims. Executive appealed.[374]

Executive appealed on several grounds; specifically, it asserted "that the trial court erred in refusing its request to amend the pleadings to conform to the evidence."[375] According to Executive, "the issue of 'probable cause' regarding the malicious prosecution claim should not have been submitted to the jury."[376] Furthermore, Executive alleged that "it was denied a fair trial when the judge refused to provide the jury with a copy of the final twenty-two instructions;"[377] and it also complained about erroneous jury instructions relative to the interference action,[378] that the evidence was insufficient to support the verdict,[379] that "the award of punitive damages was erroneous,"[380] and that a new trial was warranted "because of the existence of poor acoustics and the amount of 'diffused sunlight' that was shining in counsel's face throughout the trial."[381] The court was not swayed by any of Executive's arguments.[382] However, this Article will be limited to reviewing the court's opinion as to the jury instruction issue.

Executive argued that it was "denied a fair trial" when the trial judge declined to provide the jury with a copy of its final instructions, which were read to the jury.[383] Additionally, Executive claimed that it was entitled "to reversal because the trial judge erred in not clarifying certain portions of the instructions during deliberations."[384] Specifically, when the jury propounded questions to the

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371. 741 N.E.2d 351 (Ind. Ct. App. 2000), *trans. denied*, 761 N.E.2d 412 (Ind. 2001), and *cert. denied*, 122 S. Ct. 814 (2002).

372. *See id.* at 357-58.

373. *Id.* at 354-55.

374. *Id.* at 355.

375. *Id.*

376. *Id.* at 356.

377. *Id.* at 357.

378. *Id.* at 358.

379. *Id.* at 358-59.

380. *Id.* at 359.

381. *Id.* at 358.

382. *See id.* at 361.

383. *See id.* at 357.

384. *Id.*

judge, he responded to them with a note indicating that all he could do was re-read the final instructions.[385]

In evaluating Executive's assertions, the court noted that a trial court's failure to answer questions propounded by the jury during deliberation is not error per se.[386] Rather, "the trial court must exercise discretion in determining whether certain inquiries of the jury should be answered."[387] Furthermore, "[i]n criminal cases, our supreme court has determined that the generally accepted procedure in answering a jury's question on a matter of law is for the trial court to re-read all the instructions and not to qualify, modify, or explain its instructions in any way."[388] The court further noted that several "favorable results had been reached" when a trial court provides the deliberating jury with written or taped instructions.[389] However, in *Taylor v. Monroe County*,[390] the court of appeals held that "the practice of providing copies of the jury instructions to the jury [was] not recommended."[391]

Nonetheless, noting that, the "preferred method" would have been sending copies of the final instructions to the jury following their questions, the court declined to "condemn his response to the questions made in accordance with [the court's] decision in *Taylor*."[392] Therefore, the court concluded that "in light of our decision today, we find it acceptable for a trial judge to either re-read the instructions as suggested in *Taylor*, or to send unmarked copies of them to the jury room."[393]

XII. ATTORNEY FEES

In *Davidson v. Boone County*,[394] the court of appeals addressed whether a trial court is authorized to award sua sponte attorney fees without being requested to do so by the prevailing party.[395] The court held that an award of attorney fees is within the discretion of the trial judge.[396]

The Davidsons had filed suit against the county, alleging that local building

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385. *Id.* at 358.

386. *Id.* at 357.

387. *Id.* (citing Bituminous Fire & Marine Ins. Co. v. Culligan Fyrprotexion, Inc., 437 N.E.2d 1360, 1364 (Ind. Ct. App. 1982)).

388. *Id.* (citing Riley v. State, 711 N.E.2d 489, 492 (Ind. 1999)).

389. *Id.* (citing AMER. BAR. ASS'N, COMM'N ON JURY STANDARDS, *Standards Relating to Juror Use and Management* 148 (rev. ed. 1993) (commenting on Standard 16(c)(ii) that "[s]uch a practice aids juror comprehension, and the ABA standards specifically call for such a procedure of making the instructions available to the jury during deliberations").

390. 423 N.E.2d 699 (Ind. Ct. App. 1981).

391. *Executive Builders*, 741 N.E.2d at 357 (citing *Taylor*, 423 N.E.2d at 701).

392. *Id.* at 358.

393. *Id.*

394. 745 N.E.2d 895 (Ind. Ct. App. 2001).

395. *See id.* at 900.

396. *Id.* at 898.

codes were being applied against them "in an arbitrary and discriminatory manner."[397] Specifically, the Davidsons and the county had been engaged in a dispute because the Davidsons had consistently failed to obtain a building permit or comply with sewage and electrical codes relative to construction on their rental property.[398]

Following a bench trial, the trial court entered judgment in favor of the county on all counts.[399] The trial court "further found that the Davidsons had filed an unreasonable, groundless, and frivolous action"; therefore, the trial court ordered that they pay the county's "attorney fees, costs, and expenses incurred in defending the action."[400] The Davidsons appealed the judgment; however, that appeal was dismissed on procedural grounds because the trial court had not yet entered "final judgment on the amount of attorney fees."[401] After a hearing, the trial court awarded the county "$79,085.02 in attorney fees, costs and expenses."[402]

On appeal, the Davidsons argued that "the trial court abused its discretion" when it awarded attorney fees sua sponte to the county; specifically, they asserted that the county never alleged that the suit was groundless, unreasonable, or frivolous, nor had the county requested such an award of fees.[403]

The court explained that litigants are generally required to "pay their own attorney fees."[404] However, in Indiana, an award of attorney fees is allowed pursuant to statute if the litigation is found to be "in bad faith," "frivolous, unreasonable, or groundless."[405] Specifically, Indiana Code section 23-52-1-1 provides in relevant part:

> (b) In any civil action, the court may award attorney's fees as part of the cost to the prevailing party, if the court finds that either party:
> (1) brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless;
> (2) continued to litigate the action or defense after the party's claim or defense clearly became frivolous, unreasonable, or groundless; or
> (3) litigated the action in bad faith.[406]

Moreover, pursuant to the statute, an award of attorney fees is justified "upon a finding of any one of these elements."[407]

The Davidsons contended that the trial court did "not have the power to

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397. *See id.* at 896-98.
398. *Id.* at 898.
399. *Id.*
400. *Id.*
401. *Id.*
402. *Id.*
403. *Id.* at 898-99.
404. *Id.* at 899 (citing Kintzele v. Przybylinski, 670 N.E.2d 101 (Ind. Ct. App. 1996)).
405. *Id.*
406. IND. CODE § 34-52-1-1 (1998).
407. *Davidson*, 745 N.E.2d at 899.

award attorney fees *sua sponte*."[408] However, the court held that because the Davidsons had failed to support that contention "with any argument or citation to authority," it was "waived for failure to present cogent argument."[409]

Despite the Davidsons' failure to present the court with argument relative to the trial judge's power to award attorney fees sua sponte, the court went on to address the issue by interpreting the language of the governing statute, Indiana Code section 34-52-1-1, which "provides that the court 'may' award attorney fees if the court finds that either party has litigated in bad faith or pursued a frivolous, unreasonable or groundless claim."[410] Moreover, the court noted that "the statute does not specifically require that the injured party move for an award of attorney fees under the statute before the trial court can exercise its discretion in this regard."[411] Therefore, the court held that a trial court has the power to award attorney fees even in the absence of a prior request from the prevailing party.[412]

Finally, the court addressed the Davidsons' argument that the county had waived any claim to attorney fees by not having requested them.[413] The court found that argument "unavailing," given that the county was under no obligation "to file a claim for attorney fees pursuant to [Indiana Code section] 34-52-1-1 prior to final adjudication."[414] Additionally, the court averred that since the trial court had awarded the attorney fees "in its final adjudication," any claim the county may have filed thereafter for attorney fees was rendered moot; therefore the county could not have waived such a claim that "had already been awarded by the trial court."[415]

XIII. EMPLOYER-EMPLOYEE RELATIONSHIP

In *GKN Co. v. Magness*,[416] the Indiana Supreme Court accepted transfer and addressed the exclusivity of the Worker's Compensation Act ("Act") when the plaintiff had alleged employment by a non-party.

GKN Company ("GKN"), was the general contractor on a highway construction project that entered into a written contract with Starnes Trucking, Inc. ("Starnes"), to "haul various materials to and from a GKN job site."[417] Starnes hired Magness to drive one of the cement trucks from the GKN site "to various highway construction sites."[418] Magness was injured by a retaining wall, constructed and maintained by GKN, that collapsed while he was standing on the

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408. *Id.* at 900.
409. *Id.* (citing Choung v. Iemma, 708 N.E.2d 7 (Ind. Ct. App. 1999)).
410. *Id.*
411. *Id.*
412. *Id.*
413. *See id.*
414. *Id.*
415. *Id.*
416. 744 N.E.2d 397 (Ind. 2001).
417. *Id.* at 399-400.
418. *Id.* at 400.

wall to fuel his truck.[419] Thereafter, Magness received worker's compensation benefits from Starnes and filed a complaint against GKN, alleging negligence in maintenance and construction of the wall.[420] GKN filed a motion to dismiss for lack of subject matter jurisdiction, maintaining that Magness was an employee of GKN; thus, the exclusive remedy was the Act.[421] "The trial court denied the motion without reciting its reasons . . . ."[422] However, on interlocutory appeal, "the Court of Appeals reversed the judgment of the trial court."[423] Magness filed a petition to transfer, and the supreme court accepted review.[424]

On transfer, the court explained that the Act "provides the exclusive remedy for recovery of personal injuries arising out of . . . employment"; however, Indiana Code section 22-3-2-13 provides that a person may bring suit "against a third-party tortfeasor" as long as the "third-party is neither the plaintiff's employer nor a fellow employee."[425] In this case, Magness never contended that GKN was his employer; rather, he alleged that Starnes was his employer, thereby enabling him to bring a negligence action against GKN. GKN, on the other hand, contended that Magness was a "dual employee" of both GKN and Starnes.[426] Moreover, the Act contemplates that a worker may have two employers simultaneously.[427]

The court held that the Indiana Supreme Court's holding in *Hale v. Kemp*[428] was controlling as to the factors considered in the determination of whether an employment relationship exists.[429] Specifically, those factors are: "(1) right to discharge; (2) mode of payment; (3) supplying of tools or equipment; (4) belief of the parties in the existence of an employer-employee relationship; (5) control over the means used in the results reached; (6) length of employment; and, (7) establishment of the work boundaries."[430]

The court went on to hold that the *Hale* factors should be "weighed against each other as a part of a balancing test" instead of a "formula where the majority wins."[431] Moreover, the court held that in the application of the balancing test, a trial court is to "give the greatest weight to the right of the employer to exercise control over the employee."[432] The court's reasoning was that control suggests a certainty relative to "economic interdependency and implicates the employer's

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419. *Id.*
420. *Id.*
421. *Id.*
422. *Id.*
423. *Id.*
424. *See id.*
425. *Id.* at 401-02 (citing IND. CODE § 22-3-2-13 (Supp. 2001)).
426. *Id.* at 402.
427. *Id.* (citing IND. CODE § 22-3-3-31 (1998)).
428. 579 N.E.2d 63 (Ind. 1991).
429. *See GKN*, 744 N.E.2d at 402 (citing *Hale*, 579 N.E.2d at 67).
430. *Id.* (citing *Hale*, 579 N.E.2d at 67).
431. *Id.*
432. *Id.*

right to establish work boundaries, set working hours, assign duties, and create job security."[433]

Next, the court addressed who bears the burden of proof in such a case.[434] Generally, the party challenging subject matter jurisdiction bears "the burden of establishing that jurisdiction does not exist."[435] However, given the "public policy favoring coverage of employees under the Act," the court noted multiple decisions holding that "once an employer raises the issue of exclusivity of the Act, the burden [then] automatically shifts to the employee."[436] However, the court disagreed with that proposition, maintaining that "public policy is not advanced" if third-party tortfeasors and their liability insurance carriers are immunized.[437] Moreover, the court noted that the Indiana Supreme Court had "never endorsed the proposition that an employee automatically bears the burden of proof" relative to a question of jurisdiction raised in a worker's compensation claim.[438]

In conclusion, the court held that an employer who challenges the trial court's jurisdiction will bear "the burden of proving that the employee's claim falls within the scope of the Act unless the employee's complaint demonstrates the existence of an employment relationship."[439] However, if the employee's complaint does demonstrate the existence of an employment relationship, the burden will shift to the employee to show some ground for taking the case outside of the Act.[440] Hence, the court found that Magness' complaint failed to demonstrate an employment relationship; therefore, the burden remained with GKN.[441] Finally, after balancing all of the *Hale* factors and "giving considerable weight" to the control element, the court reasoned that "there was sufficient evidence before the trial court to show that Magness was not an employee of GKN" and affirmed the trial court's judgment.[442]

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433. *Id.* at 403.

434. *Id.*

435. *Id.* at 404 (citing Methodist Hosp. of Ind., Inc. v. Ray, 551 N.E.2d 463, 467 (Ind. Ct. App. 1990), *opinion adopted by* 558 N.E.2d 829 (Ind. 1990) (per curiam)).

436. *Id.*

437. *Id.*

438. *Id.*

439. *Id.*

440. *Id.*

441. *Id.*

442. *Id.* at 407.