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Overview of the State of Indiana Court System

A. Trial Courts

There are three different kinds of trial courts in Indiana: Circuit Courts, Superior Courts and local city or town Courts. Circuit and Superior Courts are administered at the court level.

(1) There are approximately 200 Superior Court Judges that have original jurisdiction in all civil and criminal cases, and appellate jurisdiction over city and town courts. With minor exceptions, Superior Court judges are elected for six-year terms. In Lake and St. Joseph Counties, the Superior Court judges are nominated by a local nominating commission and then appointed by the Governor for six-year terms. Thereafter, they are subject to a retention vote.

(2) There are 114 Circuit Court Judges that have concurrent jurisdiction in all civil and criminal cases. Each Circuit Court Judge is elected to a six year term.

(3) Only Marion County Indiana has a distinct Small Claims Court, though all counties have a small claim docket. Indiana Code 33-29-2-4 provides that the small claim docket has jurisdiction over civil actions in which the amount sought is less than $6,000.

(4) There are 71 City and Town Courts in Indiana. The jurisdiction of these courts varies by location; however, each has jurisdiction over ordinance violations, as well as misdemeanors and infractions. These judges are elected to four year terms.

B. Appellate Courts

The Court of Appeals, Tax Court and the Indiana Supreme Court are all considered appellate courts.

1. The Court of Appeals divides Indiana into five districts of three judges each, though each district exercises statewide jurisdiction and the cases are assigned randomly. Each judge is appointed by the Governor and then subject to a retention vote. Decisions from the Court of Appeals typically take four months after all briefs are submitted.

Rule 5 of the Indiana Rules of Appellate Procedures provides that the Court shall have jurisdiction in all appeals from final judgments of a trial court, interlocutory appeals and appeals from agency decisions. The Appellate Court may decline to exercise jurisdiction over interlocutory appeals.

2. There is a single Tax Court in Indiana consisting of one judge. The Tax Court has exclusive jurisdiction in original tax appeals. Appeals from the Tax Court are taken directly to the Supreme Court.

3. Article Two Section Two of the Indiana Constitution provides that there is a single Indiana Supreme Court comprised of a single chief justice and a minimum of four, and no more than eight, associate justices. At present there are four associate justices. These justices are appointed by the Governor after a nominating process and subject to a retention vote.

4. Article 2 Section 4 of the Indiana Constitution provides that the Supreme Court shall have no original jurisdiction except in attorney admission and disciplinary issues; the discipline, removal and retirement of justices and judges; supervision of the exercise of jurisdiction by the other courts of the State; and issuance of writs necessary or appropriate in aid of its jurisdiction.

5. Article 2 Section 4 of the Indiana Constitution Provides that the Supreme

Court shall exercise its jurisdiction from a judgment imposing a sentence of death.

6. Rule 4 of the Indiana Rules of Appellate Procedure provides that the Indiana Supreme Court has mandatory and exclusive jurisdiction of criminal appeals involving the sentence of death or life imprisonment; final judgments declaring a state or federal statute unconstitutional; appeals involving waiver of parental consent to abortion; and appeals involving mandates requiring the payment of certain court operating funds. This rule provides that the Supreme Court has discretionary jurisdiction over other final decisions of the Indiana Court of Appeals and Tax Court.

7. Rule 18 of the Indiana Rules of Appellate Procedure provides that while no appeal bond is necessary to prosecute an appeal, enforcement of a final judgment or appealable interlocutory order from a money judgment shall be stayed only upon the giving of a bond, an irrevocable letter of credit or other form of security approved by a trial court.

Procedural

A. Venue

1. **According to Indiana Trial Rule 75, Preferred venue lies in the County where:**

(1) the greater percentage of individual defendants included in the complaint resides, or, if there is no such greater percentage, the place where any individual defendant so named resides; or

(2) the land or some part thereof is located or the chattels or some part thereof are regularly located or kept; or

(3) the accident or collision occurred; or

(4) either the principal office of a defendant organization is located or the office or agency of a defendant organization or individual to which the claim relates or out of which the claim arose is located; or

(5) either one or more individual plaintiffs reside, the principal office of a

governmental organization is located, or the office of a governmental organization to which the claim relates or out of which the claim arose is located; or

(6) The county or court fixed by written stipulation signed by all the parties named in the complaint or their attorneys and filed with the court before ruling on the motion to dismiss; or

(7) the individual is held in custody or is restrained, if the complaint seeks relief with respect to such individual's custody or restraint upon his freedom; or

(8) a claim in the plaintiff's complaint may be commenced under any statute recognizing or creating a special or general remedy or proceeding; or

(9) all or some of the property is located or can be found if the case seeks only judgment in rem against the property of a defendant being served by publication; or

(10) either one or more individual plaintiffs reside, the principal office of any plaintiff organization or governmental organization is located, or the office of any such plaintiff organization or governmental organization to which the claim relates or out of which the claim arose is located, if the case is not subject to the requirements of subsections (1) through (9) of this subdivision or if all the defendants are nonresident individuals or nonresident organizations without a principal office in the state. The pleading or motion permitted by this rule must be filed within the time prescribed for the party making it by Rules 6 and 12 and any other applicable provisions of these rules.

2. **Claim or proceeding filed in improper court**:

If a claim is filed in an improper court, a party must make an objection and the court shall order the action transferred to the court in which it should have been filed.

3. Change of Venue: According to Indiana Trial Rule 76:

In order to change from the current venue, a motion must be filed stating the grounds for the change of venue. The motion shall be granted only upon a showing that the county where suit is pending is a party or that the party seeking

the change will be unlikely to receive a fair trial on account of local prejudice or bias regarding a party or the claim or defense presented by a party. A party shall be entitled to only one change of venue from the county. Denial of a motion for change of venue from the county shall be reviewable only for an abuse of discretion. The Rules of Criminal Procedure shall govern proceedings to enforce a statute defining an infraction.

B. Statute of Limitations

1. Statutes of Limitations Generally

Negligence = two years after injury (IC 34-11-2)

Medical Malpractice= two years from date of injury (IC 34-18-7)

Product Liability= two years after suffering injury (IC 34-20-3)

Wrongful Death= two years after date of death (IC 34-23-1)

Contracts for the payment of money = six years after the cause of action accrues (IC 34-11-2-9)

Contracts other than for payment of money= 10 years after the cause of action accrues (IC 34-11-2-11)

2. **Resident Status**: The time during which the defendant is a nonresident of the state is not computed in any of the periods of limitation except during such time as the defendant by law maintains in Indiana an agent for service of process or other person who, under the laws of Indiana, must be served with process as agent for the defendant

3. **Concealment**: If a person liable to an action conceals the fact from the knowledge of the person entitled to bring the action, the action may be brought at any time within the period of limitation after the discovery of the cause of action. (IC 34-11-5)

4. **Disability**: A person who is under legal disabilities when the cause of action accrues may bring the action within two (2) years after the disability is removed

(IC 34-11-6-1)

5. **Age of Contracting Party**: A contract, sale, release, or conveyance executed by a person after reaching the person's eighteenth birthday may not be avoided by the person on the grounds that, at the time the agreement was executed, the person was acting under a legal disability by reason of the person's age. A person who executes an agreement after reaching the person's eighteenth birthday may not assert legal disability by reason of age as a defense in an action to enforce a contract against the person. (IC 34-11-6-2)

6. **Death**: If any person entitled to bring, or liable to, any action, dies before the expiration of the time limited for the action, the cause of action: **(1)** survives to or against the person's representatives; and **(2)** may be brought at any time after the expiration of the time limited within eighteen (18) months after the death of the person. (IC 34-11-7)

C. Time for Filing and Answer

1. Filing an Answer: Ind. R. Trial P. 6(C) provides: A responsive pleading required under these rules, shall be served within 20 days after service of the prior pleading. "The term 'pleading' includes a complaint, an answer, a reply to a denominated counterclaim, an answer to a cross-claim, a third party complaint, and a third-party answer." *Sinn v. Faulkner*, 486 N.E.2d 596 (Ind. Ct. App. 1985) citing to Ind. R. Trial P. 7(A); see 2.

2. Computation: In computing any period of time prescribed or allowed by these rules, the date of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period is to be included unless it is: (1) a Saturday; (2) a Sunday; (3) a legal holiday as defined by state statute, or (4) a day the office in which the act is to be done is closed during regular business hours. (Indiana Trial Rule 6 (A))

3. Enlargement: After a showing of good cause, the court may: (1) order the period enlarged, with or without motion or notice, if request therefor is made before the expiration of the period originally prescribed or extended by a previous order; or (2) upon motion made after the expiration of the specific period, permit the act to be done where the failure to act was the result of excusable neglect; but, the court may not extend the time for taking any action for judgment on the evidence under Indiana Trial Rule 50(A), amendment of findings and judgment under Indiana Trial Rule 52(B), to correct errors under Indiana Trial Rule 59(C), statement in opposition to motion to correct error under Indiana Trial Rule 59(E), or to obtain relief from final judgment under Indiana Trial Rule 60(B), except to the extent and under the conditions stated in those rules. (Indiana Trial Rule 6 (B))

D. Dismissal Re-Filing of Suit

1. Voluntary Dismissal: Pursuant to Indiana Trial Rule 41 a Plaintiff may stipulate to a voluntary dismissal by filing a notice of dismissal at any time before service by the adverse party of any answer or of a motion for summary judgment, whichever comes first or by filing a stipulation of dismissal signed by all of the parties who have appeared in the action. (Indiana Trial Rule 41)

Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state or action based on or including the same claim. The provisions of this subdivision shall not apply if the plaintiff in such action could not effectuate service of process, or otherwise procure adjudication on the merits.

The court may order a dismissal of the case upon such terms and conditions as the court deems proper. If a counterclaim or cross-claim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the

action shall not be dismissed against the defendant's objection unless the counterclaim or cross-claim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this subsection is without prejudice. (Indiana Trial Rule 41)

2. Involuntary dismissal: After the plaintiff or party with the burden of proof upon an issue, in an action tried by the court without a jury, has completed the presentation of his evidence thereon, the opposing party, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the weight of the evidence and the law there has been shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff or party with the burden of proof, the court, when requested at the time of the motion by either party shall make findings if, and as required by Indiana Rule 52(A). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision or subdivision (E) of this rule and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, operates as an adjudication upon the merits. (Indiana Trial Rule 42)

3. Failure to prosecute civil actions or comply with rules: Whenever there has been a failure to comply with these rules or when no action has been taken in a civil case for a period of sixty (60) days, the court, on motion of a party or on its own motion shall order a hearing for the purpose of dismissing such case. The court shall enter an order of dismissal at plaintiff's costs if the plaintiff shall not show sufficient cause at or before such hearing. Dismissal may be withheld or reinstatement of dismissal may be made subject to the condition that the plaintiff comply with these rules and diligently prosecute the action and upon such terms that the court in its discretion determines to be necessary to assure such diligent prosecution. (Indiana Trial Rule 41).

4. Reinstatement following dismissal: For good cause shown and within a reasonable time the court may set aside a dismissal without prejudice. A dismissal with prejudice may be set aside by the court for the grounds and in accordance with the provisions of Indiana Rule 60(B). (Indiana Trial Rule 41)

Liability

A. Negligence

Common Law Negligence

The elements of a negligence action are: "(1) a duty owed to the plaintiff by the defendant, (2) a breach of the duty, and (3) an injury proximately caused by the breach of duty." *Pfenning v. Lineman*, 947 N.E.2d 392 (Ind. 2011).

Duty is a question of law for the Court. *Id*. In cases where "duty has not already been declared or otherwise articulated," the court may use the test set forth in *Webb v. Jarvis* to evaluate whether a duty of care exists. *Pfenning, 947 N.E.2d at 398; Estate of Short v. Brookville Crossing,* 972 N.E.2d 897, 902 (Ind. Ct. App. 2012). The *Webb* test balances the following factors: "(1) the relationship between the parties, (2) the reasonable foreseeability of harm to the person injured, and (3) public policy concerns." *Id*. (quoting *Webb v. Jarvis*, 575 N.E.2d 992, 995 (Ind. 1991). However, this test is not absolute, and Indiana Courts also acknowledge the truism contained in Prosser & Keaton: "No better general statement can be made than that the courts will find a duty where, in general, reasonable persons would recognize it and agree that it exists." *Gariup Constr. Co. v. Foster*, 519 N.E.2d 1224, 1227 (Ind. 1988) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 53, at 357-59 (5th ed. 1984)).

To establish causation, Plaintiff must prove "causation in fact" also characterized as the "but for" test. "In order for a plaintiff to carry his burden of proof, he must present evidence of probative value based on facts, or inferences to be drawn from the facts, establishing both that the wrongful act was a cause in fact of the occurrence and that the occurrence was a cause in fact of his injury." *Smith v.*

Beaty, 639 N.E.2d 1029, 1033-34 (Ind. Ct. App. 1994). When dealing with medical causation, Plaintiff may require expert testimony to meet his or her burden on this element, particularly when the injury is subjective or complex. *Daub v. Daub*, 629 N.E.2d 873 (Ind. Ct. App. 1994); *Topp v. Leffers*; 838 N.E.2d 1027, 1032 (Ind. Ct. App. 2005).

Contributory/Comparative Negligence

Indiana has enacted the Comparative Fault Act I.C. 34-51-2-1 et seq. Under the Comparative Fault Act, where Defendant pleads comparative fault as an affirmative defense, the fault of Plaintiff, Defendant(s) and any named non-parties will be apportioned by the jury. Under IC 34-51-2-5, any contributory fault of Plaintiff will proportionately reduce his or her award. Where Plaintiff's fault is greater than 50% of the total fault, his or her recovery will be barred. IC 34-51-2-7 and 34-51-2-8.

B. Negligence Defenses

Assumption of the risk / Incurred Risk

In Indiana, "assumption of risk" only applies in Contract cases, while "incurred risk" applies in non-contract cases, such as torts. *Heck v. Robey,* 659 N.E.2d 498, 504 (Ind. 1995). Whether a plaintiff may be found to have incurred the risk of a particular activity depends on his or her actual knowledge, not an objective standard of what he or she should have known. *Id*. Incurred risk does not eliminate Defendant's duty of care to Plaintiff unless Plaintiff expressly consents. *Id*. However, it can factor into the reasonableness of Plaintiff's actions when weighing the fault of the parties under the comparative fault analysis.

Last Clear Chance

In the wake of the Comparative Fault Act, use of this doctrine has significantly declined in the last few decades. It is, however, still available to a Plaintiff where he or she can prove that despite any negligence of Plaintiff, the Defendant "had the last opportunity through the exercise of reasonable care to avoid the injury."

Penn Harris Madison Sch. Corp. v. Howard, 861 N.E.2d 1190, 1196 (Ind. 2007). A jury may not be instructed on "last clear chance" "if the undisputed evidence shows that the opportunity of the plaintiff to avoid the injury was as late or later than that of the defendant." *Id*. (quoting *Indianapolis Traction & Terminal Co. v. Croly*, 96 N.E. 973, 979 (1911)).

Unavoidable Accident

Jury instructions stating that Defendant is not liable where Plaintiff's damages are the result of a "mere," "pure," or "unavoidable" accident are prohibited in Indiana. *Kostidis v. General Cinema Corp. of Indiana*, 754 N.E.2d 563, 572 (Ind. Ct. App. 2001) (citing *Miller v. Alvey,* 207 N.E.2d 633, 636-637 (1965)).

Emergency Situation Doctrine

The "sudden emergency doctrine" is not considered an affirmative defense in Indiana. *Willis v. Westerfield*, 839 N.E.2d 1179**,** 1186 (Ind. 2006). However, the emergent situation and the ability of the Defendant to react and respond are factors which can be taken into consideration when determining the reasonableness of Defendant's actions. *Id*.

Superseding Intervening Causes

The superseding or intervening cause doctrine has been a part of the Indiana common law for many years. See *Control Techniques, Inc. v. Johnson*, 762 N.E.2d 104, 107 (Ind. 2002). The doctrine of superseding/intervening causes provides "when a negligent act or omission is followed by a subsequent negligent act or omission so remote in time that it breaks the chain of causation, the original wrongdoer is relieved of liability." *Id*. See also *Vernon v. Kroger Co.*, 712 N.E.2d 976, 981 (Ind. 1999). An act is considered "superseding" when it follows the original negligent act and the harm resulting from the original act "could not have reasonably been foreseen by the original negligent actor." *Control Techniques Inc*., 762 N.E.2d at 107 (internal quotations omitted).

Other Affirmative Defenses

Pursuant to Indiana Trial Rule 8(c), the following affirmative defenses must be pled in Defendant's initial answer: accord and satisfaction, arbitration and award, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, lack of jurisdiction over the subject-matter, lack of jurisdiction over the person, improper venue, insufficiency of process or service of process, and the same action pending in another state court of this state.

C. Gross Negligence, Recklessness, Willful and Wanton Conduct

Gross negligence, recklessness and willful and wanton conduct are not applicable in a general tort claim.

The concept of willful and wonton conduct does come into play in the context of the Indiana Tort Claims Act. A claimant must prove willful and wanton conduct in negligence claims involving governmental entities and employees acting in their official capacity. I.C. 34-13-3-5(c). See also *Niksich v. Zettie*, 810 N.E.2d 1003 (Ind. 2004).

These standards are also applicable when dealing with claims for punitive damages. Where Plaintiff is seeking punitive damages, he or she must establish that Defendant was willful and wanton or that Defendant acted maliciously, fraudulently, oppressively, or grossly negligent. *Orkin v. Exterminating Co. v. Traina*, 486 N.E.2d 1019 (Ind. 1986); *Bud Wolf Chevrolet, Inc. v. Robertson*, 519 N.E.2d 135 (Ind. 1988); and *Erie Ins. Co. V. Hickman*, 622 N.E.2d 515 (Ind. 1993).

D. Negligent Hiring and Retention

Indiana has adopted the Restatement Second of Torts, section 317 on negligent hiring and retention. Clark v. Aris, 890 N.E2d 760, 763 (Ind. Ct. App. 2008).

The Restatement provides:

> "A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if
>
> (a) the servant
>
> (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or
>
> (ii) is using a chattel of the master, and
>
> (b) the master
>
> (i) knows or has reason to know that he has the ability to control his servant, and
>
> (ii) knows or should know of the necessity and opportunity for exercising such control."

This does not eliminate the general requirements set forth by the Indiana Supreme Court regarding when a duty of care is owed. To determine whether to impose a duty of care, the court considers the relationship between the parties, the foreseeability of the harm, and public policy. *Clark*, 890 N.E.2d at 763-764. "Imposition of a duty is limited to those instances where a reasonably foreseeable victim is injured by a reasonably foreseeable harm." *Webb v. Jarvis*, 575 N.E.2d 992, 995 (Ind. 1991).

E. Negligent Entrustment

To prevail on an action for negligent entrustment against an owner of a vehicle, Plaintiff must establish "1) the owner of the vehicle entrusted her car; 2) to an incapacitated person or one who is incapable of using due care; 3) with actual or specific knowledge that the person is incapacitated or incapable of using due care

at the time of the entrustment; 4) proximate cause; and 5) damages." *Bailey v. State Farm*, 881 N.E.2d 996, 1001 (Ind. Ct. App. 2008). See also *Sutton v. Sanders*, 556 N.E.2d 1362, 1365 (Inc. Ct. App. 1990). The owner must have actual knowledge of the individual's incapacity or intoxication at the time of the entrustment. *Id*.

F. Dram Shop

The Indiana Dram Shop Act provides:

"A person who furnishes an alcoholic beverage to a person is not liable in a civil action for damages caused by the impairment or intoxication of the person who was furnished the alcoholic beverage unless:

(1) the person furnishing the alcoholic beverage had actual knowledge that the person to whom the alcoholic beverage was furnished was visibly intoxicated at the time the alcoholic beverage was furnished; and

(2) the intoxication of the person to whom the alcoholic beverage was furnished was a proximate cause of the death, injury, or damage alleged in the complaint."

I.C. 7.1-5-10-15.5(b).

While voluntary intoxication was a complete bar to recovery by an intoxicated Plaintiff prior to the comparative fault act, this is no longer the law in Indiana. Currently, Indiana law provides that "no degree of negligence on the part of the plaintiff, including that which may be characterized as willful and wanton, may operate to bar recovery [against the person who furnished alcohol]." *Gray v. D&G, Inc.*, 938 N.E.2d 256, 260-61 (Ind. Ct. App. 2010). Now, under section (c) of the statute, if the intoxicated person is at least 21 years old suffers injury or death proximately caused by his or her intoxication, he or she (or his/her estate) may assert a claim for personal injury or death against the person who furnished the alcohol if subsections(1) and (2) above apply.

G. Joint and Several Liability

Indiana has in place the Comparative Fault Act, which eliminates joint and several liability in most tort actions. I.C. 34-51-2-1 et seq. Under the Comparative Fault Act, Defendants may plead as an affirmative defense that an entity who was not a party to the action was in whole or in part at fault. IC 34-51-2-14. Defendant has the burden of proof with respect to the negligence of any non-party it names. IC 34-51-2-15.

If a non-party defense is known to Defendant at the time he or she answers Plaintiff's Complaint, Defendant must plead the affirmative defense at that time. IC 34-51-2-16. If Defendant later learns of the non-party defense, he may plead it "with reasonable promptness." However, where Plaintiff files his Complaint against Defendant at least 150 days before the expiration of the statute of limitations, Defendant must plead all non-party defenses within 45 days of the running of the statute of limitations. *Id*. The Court does have discretion to vary the time requirements to balance the Defendant's reasonable opportunity to discover the defense and Plaintiff's reasonable opportunity to name the non-party as a defendant. *Id*.

All parties and timely disclosed non-parties to an action are listed on the verdict form. The jury will apportion fault to each entity. Each defendant will only be responsible for the percentage of the damages proportionate to the fault allocated to it by the jury. Plaintiff's total award will be reduced by Plaintiff's own percentage of negligence and the percentage of negligence attributed to any non-party (if any).

The Comparative Fault Act, however, does not apply to all tort actions. It is inapplicable to actions against the State or State actors. I.C. 34-51-2-2. Those actions are governed by I.C. 34-13-3 et seq.

Additionally, the following actions are still subject to joint and several liability:

Intentional torts

The Comparative Fault Act only abrogated the common law rule of joint and several liability for "liability grounded in negligence." *Dallas v. Cessna*, 968 N.E.2d 291, 297-298 (Ind. Ct. App. 2012). On the other hand, intentional torts are still subject to joint and several liability. *Id*.

Medical Malpractice

The Comparative Fault Act does not apply to Medical Malpractice Actions. *Ind. Dep't of Ins. v. Everhart*, 960 N.E.2d 129, 138 (Ind. 2012). *Palmer v. Comprehensive Neurologic Servs., P.C.*, 864 N.E.2d 1093, 1099 (Ind. Ct. App. 2007). As such, defendants in a medical malpractice action are still jointly and severally liable.

Business Relationships

Parties to a partnership or a joint venture are jointly and severally liable. *DLZ Ind., LLC v. Greene County*, 902 N.E.2d 323, 330 (Ind. Ct. App. 2009)

Minor Applicants for Driver's Permit or License

Under I.C. 9-24-9-4, a person who signs an application for a driver's permit or driver's license of an individual less than 18 years of age is jointly and severally liable for any injury or damages caused by the minor "by reason of operation of a motor vehicle" if the minor is found liable for damages. The Indiana Appellate Court held that this section is also applicable to negligent entrustment actions brought against a minor. In *Cedars v. Waldon*, 706 N.E.2d 219 (Ind. Ct. App. 1999), a parent (Waldon) signed her daughter Cherish's application for a license and agreed to be jointly and severally liable under section 9-24-9-4. On the date of the occurrence, Walton entrusted her vehicle to her Cherish, who in turn entrusted it to a friend who was unlicensed. The friend got into a car accident, injuring Cedars. *Id*. at 222. Cedars brought suit against Cherish for negligent entrustment and argued that Waldon was jointly and severally liable for the

negligence of Cherish. *Id*. The Court held that the statute "does not apply solely to a minor who causes damages by personally operating a vehicle," and found Waldon was jointly and severally liable for Cherish's negligent entrustment of the vehicle to her friend. *Id*. at 225.

"Very Duty Doctrine"

A case involving a challenge to joint and several liability was just recently granted transfer to the Indiana Supreme Court. In *Santelli v. Rahmatullah*, Plaintiff's decedent was staying at a motel owned by Rahmatullah, when he was murdered by a former employee of the hotel. *Santelli*, 966 N.E.2d 661, 664 (Ind. Ct. App. 2012). Plaintiff sued Rahmatullah for wrongful death, premised in part upon the negligent hiring of the former employee and negligence in failing to ensure that the former employee did not have access to patron's rooms. Rahmatulla, in turn, named the former employee as a non-party.

Under the Comparative Fault Act, the jury was allowed to apportion fault between the Plaintiff, the Defendant, and the non-party, and it found Santelli 1% liable, Rahmatulla 2% liable, and the non-party who murdered Santelli 97% liable. *Id*. at 664. Under the Comparative Fault Act, because Rahmatulla was found 2% at fault, he should only have been responsible for paying 2% of the verdict. Plaintiff, however, argued that in cases where a criminal act was committed by a non-party, such as it was in this case, that the Defendant and the non-party should be held jointly and severally liable pursuant to the "very duty doctrine." *Id*. at 669. The "very duty doctrine" is set forth in the Restatement (2^{nd}) of Torts and provides: "If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby." *Id*. Defendant argued that the "very duty doctrine" did not survive enactment of the Comparative Fault Act. The Indiana Appellate Court, however, agreed with Plaintiff and found Defendant jointly and severally liable with the non-party. Rahmatullah appealed.

Transfer to the Indiana Supreme Court was granted in December of 2012. Once a case has been grated transfer to the Indiana Supreme Court, the appellate Court decision is no longer controlling law, so parties to actions presently pending cannot cite to *Santelli* in support of the "very duty doctrine."

H. Wrongful Death and/or Survival Actions

Wrongful Death and Survival Actions are separate causes of actions under Indiana Law. Neither was recognized under Indiana Common law, and both are purely statutory.

Unlike some states, a party cannot recover under both a cause of action for wrongful death and a survival action in Indiana. *Cahoon v. Cummings*, 734 N.E.2d 535 (Ind. 2000). While both can be brought concurrently, a jury cannot award damages under both theories and will be instructed that it can only award damages under one theory of negligence. *Id*. This is because in Indiana, a wrongful death action is premised upon the theory that the decedent's death was caused by the negligence of Defendant(s) while a survival action is premised upon the theory that decedent's death was caused by something <u>other than</u> the negligence of Defendant(s).

<u>Wrongful Death</u>

A suit for wrongful death may be brought by the personal representative of decedent within two years after his or her death. I.C. 34-23-1.1 et seq. If the decedent is a child, the action may be brought by the child's father, mother or guardian. I.C. 34-23-2-1(c).

<u>Survival Action</u>

Indiana Code 34-9-3-4 is the Survival Statute. It provides that where a person sustains a personal injury from a wrongful act of another person and subsequently dies from a different cause, "(t)he personal representative of the decedent who

was injured may maintain an action against the wrongdoer to recover all damages resulting before the date of death from those injuries that the decedent would have been entitled to recover had the decedent lived. The damages inure to the exclusive benefit of the decedent's estate." See also *Cahoon v. Cummings*, 734 N.E.2d 535 (Ind. 2000).

I. Vicarious Liability

(1) Vicarious liability may give rise where there is a principal/agent relationship between two parties. *Yost v. Wabash College*, 976 N.E.2d 724 (Ind. Ct. App. 2012). "Agency is a relationship which results from manifestation of consent by one party to another. The elements of agency are consent and control. An agent must acquiesce to the arrangement, and be subject to the principal's control." *Id*. Where apparent authority is at issue, it must be initiated by a manifestation of the principal. In other words, the necessary manifestation is one made by the principal to a third party who in turn is instilled with a reasonable belief that another individual is an agent of the principal. It is essential that there be some form of communication, direct or indirect, by the principal, which instills a reasonable belief in the mind of the third party. Statements or manifestations made by the agent are not sufficient to create an apparent agency relationship." *Id.*

(2) Vicarious liability is imposed upon an employer under the doctrine of *respondeat superior* where the employee has inflicted harm while acting within the scope of employment. *Barnett v. Clark*, 889 N.E.2d 291 (Ind. 2008). "[I]n order for an employee's act to fall "within the scope of employment," the injurious act must be incidental to the conduct authorized or it must, to an appreciable extent, further the employer's business." *Id.* An employee's act is *not* within the scope of employment when it occurs within *an independent course of conduct* not intended by the employee to *serve any purpose of the employer*. *Id.* In certain fact specific circumstances, liability may be imposed upon an employer for intentional or criminal acts of employees. *See, e.g., Stropes v. Heritage House*

Childrens Center, Inc. 547 N.E.2d 244 (Ind. 1989) (employee assault upon incapitated patient); *Southport Little League v. Vaughn*, 734 N.E.2d 261 (Ind. Ct. App. 2000) (equipment manager's molestation of participating youths); *Gomez v. Adams*, 462 N.E.2d 212 (Ind. Ct. App. 1984) (private security officer's assault and battery, forgery, conversion, and theft).

(3) A principal is not liable for the negligence of an independent contractor. *Barnett v. Clark*, 889 N.E.2d 291 (Ind. 2008); *Bagley v. Insight Comm. Co., L.P.*, 658 N.E.2d 584 (Ind. 1995). The question of whether one is an employee or independent contractor is generally a question of fact. *Mortgage Consultants, Inc. v. Mahaney*, 655 N.E.2d 493 (Ind. 1995).

To make this determination, Indiana applies the ten-factor analysis described in the Restatement (Second) of Agency Section 220: (a) the extent of control which, by the agreement, the master may exercise control over the details of the work; by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business;
(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business.

(4) Indiana common law does not hold a parent liable for the tortuous acts of minor children and has rejected the "family purpose" doctrine. *Moore v. Waitt*, 298 N.E.2d 456 (Ind. Ct. App. 1973); *Wimp v. Anthis*, 396 N.E.2d 918 (Ind. Ct.

App. 1979). There are four common law exceptions to this rule: (1) where the parent entrusts the child with an instrumentality which, because of the child's lack of age, judgment, or experience, may become a source of danger to others; (2) where the child committing the tort is acting as the servant or agent of its parents; (3) where the parent consents, directs, or sanctions the wrongdoing; and (4) where the parent fails to exercise control over the child although the parent knows, or with due care should know, the injury is possible. *Wells v. Hickman*, 657 N.E.2d 172 (Ind. Ct. App. 1995). Additionally, IC §34-4-31-1 imposes strict liability upon a parent for harm or damage to persons or property knowingly, intentionally, or recklessly caused by the child. Actual damages may not exceed $3,000 and the parent is liable if the child is a minor and lives with the parent, and the parent has legal custody of the child.

(5) At least one Indiana Court has noted that a person may be held liable for the injuries that flow from his participation in a joint concerted tortuous activity, if the activity was the proximate cause of the injury. *Buchanan v. Vowell*, 926 N.E.2d 515 (Ind. Ct. App. 2010).

J. Exclusivity of Workers' Compensation

(1) The Worker's Compensation Act is the exclusive remedy for injuries occurring by accident, that arise out of and in the course of a person's employment. See *Knoy v. Cary*, 813 N.E.2d 1170, 1171 (Ind. 2004); IC §22-3-2-2; IC §22-3-2-6. If the act covers any injury, the Court's have no jurisdiction to entertain common law claims against the employer. *Id*.

(2) A parent corporation and its subsidiaries shall each be considered joint employers of the corporation's, the parent's, or the subsidiary's employees for the purposes of IC 22-3-2-6 and IC 22-3-3-31. Indiana Worker's Compensation Statute.

(3) An exception to the exclusivity doctrine applies where the employer intended the injury or had actual knowledge that an injury was certain to occur. *Baker v.*

Westinghouse Elec Corp., 637 N.E.2d 1271 (Ind. 1994); *Foshee v. Shone's Inc.*, 637 N.E.2d 1277 (Ind. 1994). The person intended the injury must be the actual employer or an alter ego of the employer, and not a supervisor, manager or foreman. *Id.*; *Eichstadt v. Frisch's Rests., Inc.*, 879 N.E.2d 1207 (Ind. Ct. App. 2008).

Damages

A. Statutory Caps on Damages

1. **Medical Malpractice:** liability is limited to $250,000.00 per health care provider (*Hematology-oncology of Ind., P.C. v. Fruits*, N.E.2d (2011 Ind. LEXIS 569 (2011)), with a total cap on damages of $1.25 million. (IC 34-18-14-13). The constitutionality of the medical malpractice cap was upheld in Johnson v. St. Vincent Hosp., 273 Ind. 374 (Ind. 1980). In *Plank v. Cmty. Hosps. of Ind*., 956 N.E.2d 731 (Ind. Ct. App. 2011) The Supreme Court of Indiana held that Plaintiff was entitled to an evidentiary hearing on his claim that the statutory cap under the Indiana Medical Malpractice Act, IC 34-18-14-3, violated Ind. Const., art. 1, § 23, although the state's highest court had previously found the Act to be constitutional, a determination of constitutionality under § 23 could be revisited, and plaintiff had the burden to prove that changes in circumstances required reversal of existing case law

2. **Punitive Damages**: In Indiana Code 34-51-3-4 the legislature placed a limit on punitive damages wards of the greater of three times the compensatory damages award in the action or $50,000.00. The amount of punitive damages to be awarded rests within the discretion of the trier of fact. *Hibschman Pontiac, Inc. v. Batchelor*, 266 Ind. 310, 362 N.E.2d 845 (1977).

3. **Wrongful Death:** An adult person who had died and is not married and has no children can be awarded no more than $300,000.00 in damages. (IC 34-23-1-2)

B. Compensatory Damages for Bodily Injury

1. Compensatory damages are an award of monetary damages intended to compensate a plaintiff for economic and non-economic losses and damages. Economic damages can be medical bills, lost wages, or money for damaged or destroyed property. Non-economic damages include pain and suffering, loss of lifestyle, loss of consortium, embarrassment, depression, disfigurement, or loss of emotional support.

2. Jury Instructions for General Damages Award:

If you decide from the greater weight of the evidence that [*defendant*] is liable to [*plaintiff*], then you must decide the amount of money that will fairly compensate [*plaintiff*].

In deciding the amount of money you award, you may consider:

(1) the nature and extent of the [injury][injuries], and the effect of the [injury][injuries] on the [*plaintiff*]'s ability to function as a whole person;
(2) whether the [injury][injuries] [is][are] temporary or permanent;
(3) the value of [lost time][lost earnings][and][loss or impairment of earning capacity];
(4) the physical pain and mental suffering [*plaintiff*] has experienced [and will experience in the future] as a result of the [injury][injuries];
(5) the reasonable value of necessary medical care, treatment, and services plaintiff incurred [and will incur in the future] as a result of the [injury][injuries];
(6) the aggravation of a previous [injury][disease][or][condition];
(7) the [disfigurement][and][or][deformity] resulting from the [injury][injuries]; and
(8) the life expectancy of [*plaintiff*].

3. Jury Instructions for Pain and Suffering

[*Plaintiff*] must prove the nature and extent of [his][her] pain, suffering, mental anguish, or [*insert other damage element for which evidence is not required, such as deformity*]. [He][She] does not have to present evidence of the dollar value of

these types of damages. The dollar value, if any, of these damages is left to your good judgment.

4. Loss of Consortium: The Indiana Court of Appeals in *Greene v. Westinghouse Electric Corp.*, 573 N.E.2d 452 (Ind. Ct. App. 1991) stated: "We fully agree that the law must protect the marital relationship, and we observe that the term loss of consortium . . . can indeed entail significant harm to the spouse of a plaintiff. For example, the foremost element in loss of consortium is disruption in conjugal intercourse, which is a matrimonial benefit of constitutional magnitude. . . . Deprivation of conjugal relations may cause mental anguish to both partners, which is another aspect of damages in loss of consortium actions. Moreover, loss of consortium involves loss of the injured spouse's companionship and services in maintaining the household. These losses may become permanent, depending on the severity of the injury, and are compounded where the couple has dependent children. "Consortium does not consist alone of intangible mental and emotional elements, but embraces within its ambit also services and charges which one partner in the marriage performs for the other and have a monetary and pecuniary value."

Currently Indiana law recognizes loss of consortium claims for couple that were married prior to the accident. The law does not recognize loss of consortium for couples who were engaged or merely cohabitating.

C. Collateral Source

1. Proof of collateral source payments: In a personal injury or wrongful death action, the court shall allow the admission into evidence of:

(1) proof of collateral source payments other than:**(A)** payments of life insurance or other death benefits;**(B)** insurance benefits that the plaintiff or members of the plaintiff's family have paid for directly; or **(C)** payments made by: **(i)** the state or the United States; or **(ii)** any agency, instrumentality, or subdivision of the state or the United States; that have been made before trial to a plaintiff as compensation for the loss or injury for which the action is brought; **(2)** proof of the amount of

money that the plaintiff is required to repay, including worker's compensation benefits, as a result of the collateral benefits received; and **(3)** proof of the cost to the plaintiff or to members of the plaintiff's family of collateral benefits received by the plaintiff or the plaintiff's family. (IC 34-44-1)

The purpose of the statute is to determine the actual amount of a plaintiff's monetary loss and to prevent a plaintiff from recovering more than once from all non-exempt sources for each item of loss sustained in a personal injury or wrongful death case. *Stanley v. Walker*, 906 N.E.2d 852, 855 (Ind. 2009), *re'hrg denied.* Collateral source payments should not reduce a damage award if the payment resulted from plaintiff's own forethought, such as insurance purchased by Plaintiff or government benefits that Plaintiff paid through taxes. *Id.*

2. Payments to be considered by trier of fact: Proof of payments shall be considered by the trier of fact in arriving at the amount of any award and shall be considered by the court in reviewing awards that are alleged to be excessive.

D. Pre-Judgment/ Post Judgment Interest

Prejudgment Interest

Under the Indiana Tort Prejudgment Interest Statute ("TPIS"), a Court has discretion to order payment of prejudgment interest on compensatory damages awarded on a judgment in a tort action. I.C. 34-51-4-1. The TPIS does not require that prejudgment interest be awarded. *Inman v. State Farm Mutual Auto. Ins. Co.*, Slip Op. at 3 (Ind. 2012). The Court has broad discretion as to whether or not to award prejudgment interest and how to calculate it. *Kosarko v. Padula*, Slip Op. (Ind. 2012).

"A prerequisite to the recovery of prejudgment is a settlement letter [written pursuant to 34-51-4-6]." *Alsheik v. Guerro*, Slip Op. at 4-5 (Ind. 2012). Under I.C. 34-51-4-6, the party must make a written settlement offer within one year of a claim being filed. A claim made pre-suit can also be eligible for prejudgment

interest. *Wisner v. Laney,* Slip Op. at 13 (Ind. 2012). The settlement letter must also provide that the payment be made within 60 days of the offer, although courts have held that demands for settlement "now" or "at this time" will meet the requirements of the statute. *Id*.

The Indiana Supreme Court recently held that the TPIS applies in Uninsured Motorist claim disputes. *Inman v. State Farm* (Ind. 2012). It further held that "because prejudgment interest is a collateral litigation expense, it can be awarded in excess of an insured's UIM policy limits." *Id*. It does not apply in claims against the State. I.C. 34-51-4-4. It also does not apply in cases against the Patient Compensation Fund. I.C. 34-51-4-2

Post Judgment Interest

Under I.C. 24-4.6-1-101, interest on judgments will accrue from the date of return of the verdict until the satisfaction of the judgment. Unless the parties agree to an interest rate, the rate of interest is 8%. I.C. 24-4.6-1-101(2).

E. Damages for Emotional Distress

Damages for emotional distress can be sought in tort actions under several different theories. Emotional Damages can include mental anguish (*Atl. Coast Airlines v. Cook*, 857 N.E.2d 989 (Ind. 2006)), emotional/mental trauma (*Cullison v.Medley*, 570 N.E.2d 27 (Ind. 1991)); fright (*Kline v. Kline*, 64 N.E. (1902)); or humiliation and mortification (*Harness v. Steele*, 64 N.E. 875 (1902).

Negligent infliction of emotional distress

Indiana has adopted a "modified impact rule" in actions for negligent infliction of emotional distress. *Shaumber v. Henderson*, 579 N.E.2d 452 (Ind. 1991). Under the "modified impact rule," Plaintiff does not have to establish that he or she sustained a physical injury in addition to any emotional injury. Rather, Plaintiff is only required to sustain a direct impact as a result of the negligent conduct, and that as a result, he or she sustained an emotional trauma. *Id*.

Negligent infliction of emotional distress – bystander

Certain bystanders can recover for emotional distress when they come to the scene of an accident soon after an individual has been seriously injured or killed. *Groves v. Taylor*, 729 N.E.2d 569 (Ind. 2000). The bystander must have a relationship with the person who was seriously injured or killed, such as a spouse, parent, child, sibling, or grandparent. *Id*.

Intentional Infliction of Emotional Distress

A party may also seek recovery for intentional infliction of emotional distress. To recover under this theory, Plaintiff must prove that Defendant exhibited extreme and outrageous conduct, and by this conduct, Defendant intentionally or recklessly caused severe emotional distress to Plaintiff. *Branham v. Celadon Trucking Servs.*, 744 N.E.2d 514 (Ind. Ct. App. 2001); *Powdertech Inc. v. Joganic*, 776 N.E.2d 1251 (Ind. Ct. App. 2002); and *Bradley v. Hall*, 720 N.E.2d 747 (Ind. Ct. App. 1999).

F. Wrongful Death and/or Survival Action Damages

As referenced above, if Plaintiff pursues both wrongful death and survival actions, the jury can only award damages under one or the other. The damages available for a wrongful death and survival action are quite different.

Wrongful Death

The damages available under Indiana's Wrongful Death Act vary depending upon several factors, including whether the decedent was an adult or a child and whether the decedent had any dependants. In either case, a recovering Plaintiff is entitled to an award of attorney's fees under the Wrongful Death Act. See *Mccabe v.Comm'r*, 949 N.E.2d 846 (Ind. 2011)

For purposes of the Wrongful Death Act, a child is a person who is either under 20 years old and dies leaving no dependants, or a person under 23 years old who

is enrolled in post secondary or vocational school. I.C. 34-23-2-1. The definition of "child" includes a viable fetus. I.C. 34-23-2-1(b).

Damages for wrongful death of a child include: loss of the child's services; loss of the child's love and companionship; and expenses for medical treatment incurred as a result of the wrongful act that led to the child's death, funeral and burial expenses, counseling for surviving parents and siblings who are minors, and uninsured debts of the child which the parents are obligated to repay. I.C. 34-23-2-1(f).

When an adult dies without a surviving spouse, dependent children, or dependent next of kin, his or her recovery is limited to reasonable medical expenses necessitated by the act causing his or her death, funeral expenses, and the cost of administration, and it is capped at the statutory maximum ($300,000). I.C. 34-23-1-2(e). See also *Shipley v. Daly*, 20 N.E.2d 653 (1939). A party cannot seek punitive damages under this section, however, he can see attorneys fees, which are in addition to the $300,000 cap.

When an adult dies leaving a spouse, or dependent children or kin, the $300,000 cap does not apply, and a jury can also award damages for lost earnings, as well as for emotional damages such as loss of love, care and affection. I.C. 34-23-1-1. See also *Ed Wiersma Trucking Co. v. Pfaff*, 643 N.E.2d 909 (Ind. Ct. App. 1994).

Survival Action

The same damages that would have been available to the decedent had he survived are available to Plaintiff under the survival action. This includes punitive damages if they would have been supported in a claim by the decedent. *Foster v. Evergreen Healthcare, Inc.*, 716 N.E.2d 19, 25-26 (Ind. Ct. App. 1999).

G. Punitive Damages

Punitive Damages may be awarded in a tort action where Plaintiff proves by clear

and convincing evidence that Defendant's misconduct was willful and wanton or that Defendant acted maliciously, fraudulently, oppressively, or grossly negligent. *Orkin v. Exterminating Co. v. Traina*, 486 N.E.2d 1019 (Ind. 1986); *Bud Wolf Chevrolet, Inc. v. Robertson*, 519 N.E.2d 135 (Ind. 1988); and *Erie Ins. Co. V. Hickman*, 622 N.E.2d 515 (Ind. 1993). In addition, Defendant's actions must not have been the result of a mistake of fact; an honest error of judgment; overzealousness; ordinary negligence; or other human failing.

Punitive damages cannot exceed three times the amount of compensatory damages or fifty thousand dollars. I.C. 34-51-3-4 and I.C. 34-51-3-5. See also *Wohlwend v. Edwards*, 796 N.E.2d 781, 785 (Ind. Ct. App. 2003).

It is not a defense to punitive damages that Defendant has been found criminally responsible for the same conduct. See I.C. 34-24-3-3 and *Cheatham v. Pohle*, 789 N.E.2d 467 (Ind. 2003).

H. Diminution in Value of Damaged Vehicle

When a vehicle is damaged, but not completely destroyed, Plaintiff is entitled to the difference between the fair market value immediately before and immediately after the collision; the cost of reasonable repair; or a combination of the two where repairs will not completely restore the proper to its fair market value before the accident. *Wiese –GMC, Inc. v. Wells*, 626 N.E.2d 595 (Ind. Ct. App. 1993).

I. Loss of Use of Motor Vehicle

A party is entitled to the "reasonable value of the loss of use of the property for the reasonable amount of time required for repair or to obtain a replacement." *Persinger v. Lucas*, 512 N.E.2d 865, 868 (Ind. Ct. App. 1987). Generally loss of use is measured by the rental cost in the market where the loss occurred. *Id*.

Evidentiary Issues

A. Preventability Determination

Indiana has not addressed the issue of Preventability Determinations direction in laws or cases; however, general evidence principles will apply. The standard for admissibility of any evidence is governed by Indiana Rule of Evidence 104 which states generally that any piece of Evidence must be relevant to the case at hand. Indiana Rule of Evidence 403 provides that regardless of the relevancy, if the evidence's probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay the evidence can be excluded.
B. Traffic Citation from Accident
Evidence that another court has already determined a motorist violated a safety statute is inadmissible and unfairly prejudicial to a defendant. *Lepucki v. Lake County Sheriff's Dept.*, 801 N.E.2d 636 (Ind. Ct. App. 2003).
C. Failure to Wear a Seat Belt
Indiana Code 9-19-10-2 provides that in a vehicle equipped with a seatbelt, each occupant must have it properly fastened at all times when the vehicle is in motion. Notably, however, there is no common law duty in Indiana for a person to wear a seatbelt. *Morgen v. Ford Motor Co.*, 762 N.E.2d 137 (Ind. Ct. App. 2002) (superseded on other grounds). In Indiana, the "seatbelt defense is not admissible to demonstrate fault under the common law defense of contributory negligence or the Indiana Comparative Fault Act." *Hopper v. Carey*, 716 N.E.2d 566, 567-77 (Ind. Ct. App. 1999).
D. Failure of Motorcyclist to Wear a Helmet
In Indiana, only persons under 18 years of age are required to wear helmets and protective eyewear while riding a motorcycle. I.C. 9-21-10-9. The failure to wear a helmet cannot be introduced to show negligence on the part of Plaintiff. See *State v. Eaton*, 659 N.E.2d 232, 235-36 (Ind. Ct. App. 1995).

E. Evidence of Alcohol or Drug Intoxication

Evidence of a party's intoxication is admissible where it was a proximate cause of the injury. *Colaw v. Nicholson*, 450 N.E.2d 1023, 1026 (Ind. Ct. App. 1983).

A lay witness may give an opinion of another person's intoxication. *Mehidal v. State* 623 N.E.2d 428, (Ind. Ct. App. 1993). Opinions regarding a witness's intoxication may also be given by an expert witness. A treating physician is permitted to testify as to a patient's intoxication based upon laboratory tests (such as blood alcohol tests), even without a chain of custody, under the business records exception to the hearsay rule. *Reeves v. Boyd & Sons*, 654 N.E.2d 864, 869 (Ind. Ct. App. 1995).

F. Testimony of Investigating Police Officer

An individual's status as a police officer does not automatically make him or her qualified to offer certain opinions, such as vehicle speed. *Estate of Hunt v. Board of Comm'rs,* 526 N.E.2d 1230 (Ind. Ct.App. 1988). However, an investigating police officer may offer opinion testimony where he or she is qualified as an expert and has the proper foundation for his or her opinions. A police officer may be "qualified by training, experience, or both, so as to properly testify concerning their opinions in various facets of accident investigation or reconstruction." *Koch v. Greenwood*, 149 Ind. App. 457, 465 (Ind. Ct. App. 1975).

G. Expert Testimony

1. Testimony by experts: (a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. (b) Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable. (Indiana Rule of Evidence 702)

2. Bases of opinion testimony by experts: The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. Experts may testify to opinions based on inadmissible evidence, provided that it is of the type reasonably relied upon by experts in the field. (Indiana Rule of Evidence 703)

3. 702 and the Frye Test: Federal Rule of Evidence 702 has been criticized for failing to address the continuing validity of the "general acceptance" standard of *Frye v. United States,* 293 Fed. 1013 (D.C. Cir. 1923). Judge Edward R. Becker of the United States Court of Appeals for the Third Circuit calls this failure to clarify the standard for admitting novel scientific evidence "the greatest single oversight in the rules." *Edward R. Becker and Aviva Orenstein, Is the Evidence All In? A Proposal for Revising the Federal Rules, A.B.A. J.,* October 1992, at 84. Part (b) of Indiana Rule of Evidence 702 clarifies that standard for Indiana. For novel scientific evidence, the judge is to hold a separate hearing on the reliability of the proposed scientific evidence. "In part (b), we adopted the "reliability" standard in preference to the *Frye* test because it is more consistent with existing Indiana law governing the admissibility of novel scientific evidence, and because it is the test preferred by scholarly commentators." See *Becker & Orenstein, supra,* at 84; *J. Alexander Tanford et al., Novel Scientific Evidence of Intoxication: Acoustic Analysis of Voice Recordings from the Exxon Valdez,* 82 *J. Crim. L. & Criminology* 579, 591-95 (1991). "The Advisory Committee on Civil Rules has proposed that expert testimony be admissible if it is "reasonably" reliable. We agree with Judge Becker & Prof. Orenstein, *supra* at 84, that adding the undefined word "reasonably" before "reliable" invites a return to the ill-advised *Frye* test." Indiana Rule of Evidence 702 *Committee Commentary*.

H. Collateral Source

IC §34-44-1-2. Proof of collateral source payments.

In a personal injury or wrongful death action, the court shall allow the admission into

evidence of:

(1) proof of collateral source payments other than:

(A) payments of life insurance or other death benefits;

(B) insurance benefits that the plaintiff or members of the plaintiff's family have paid for directly; or

(C) payments made by:

(i) the state or the United States; or

(ii) any agency, instrumentality, or subdivision of the state or the United States; that have been made before trial to a plaintiff as compensation for the loss or injury for which the action is brought;

(2) proof of the amount of money that the plaintiff is required to repay, including worker's compensation benefits, as a result of the collateral benefits received; and

(3) proof of the cost to the plaintiff or to members of the plaintiff's family of collateral benefits received by the plaintiff or the plaintiff's family.

The collateral source statute does not bar evidence of discounted amounts in order to determine the reasonable value of medical services and, so long as the defendant does not reference insurance, trial courts should allow the admission of evidence of the amount of medical expenses actually paid after discounts are applied. *Stanley v. Walker*, 906 N.E.2d 852 (Ind. 2009).

I. Recorded Statements

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require at that time the introduction of any other part or any other writing or recorded statement which in fairness ought to be considered contemporaneously with it. (Indiana Rule of Evidence 106)

J. Prior Convictions

1. Impeachment by evidence of conviction of crime: For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or an attempt of a crime shall be admitted but only if the crime

committed or attempted is (1) murder, treason, rape, robbery, kidnapping, burglary, arson, criminal confinement or perjury; or (2) a crime involving dishonesty or false statement. (Indiana Rule of Evidence 609)

2. Time limit: Evidence of a conviction under this rule is not admissible if a period of more than ten (10) years has elapsed since the date of the conviction or, the date of the release of the witness from the confinement unless the court determines, in the interests of justice, that the probative value of the conviction substantially outweighs its prejudicial effect. Evidence of a conviction more than ten years old is not admissible unless the proponent gives sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence. (Indiana Rule of Evidence 609)

3. Effect of pardon, annulment, or certificate of rehabilitation: Evidence of a conviction is not admissible if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence. (Indiana Rule of Evidence 609).

K. Driving History

Generally, in Indiana, a party's driving record is inadmissible *to prove that either party drove negligently at the time of the accident*. However, these records can be admitted *for other purposes*.

First, a person's driving record can be admitted into evidence to show that that person had notice of the fact that their license was suspended. *Quarles v. State,* 763 N.E.2d 1020, 1023 (Ind. Ct. App. 2002)*; DeSantis v. State, 760 N.E.2d 641,*

646 (Ind. Ct. App. 2001).

Following general evidence principles, a person's driving record could also be introduced to impeach a driver's credibility. For example, if the defendant testifies at trial that he is a good driver, he has just opened the door for his bad driving record to be entered into evidence to counter that assertion. Also keeping with general evidence rules, a party's driving record can be admitted if it includes a felony conviction that occurred within the last ten years. These convictions would be admissible to impeach the defendant's overall credibility. All convictions for felonies or "misdemeanors involving dishonesty" (such as fraud) are admissible against any party to impeach credibility.

A defendant's bad driving record can be admitted into evidence when the defendant was operating a vehicle for his employer at the time of the accident. Where an employer has hired or retained a delivery person with a bad driving record, the employer can be sued for (1) negligent hiring, if the employee had the bad record before he was first hired or (2) negligent retention, if the employee developed the bad driving record *after* he was hired. In these cases, the bad driving record would be introduced to prove that the employer was negligent because it either knew or should have known that the employee was unfit to be a delivery driver, *not* to prove that the employee negligently caused the accident.

According to *Frink v. State*, 568 N.E.2d 535, 537 (Ind. 1991), evidence of prior crimes is inadmissible to prove commission of the crime charged. However, as the Court of Appeals noted, (1) the jury was admonished to disregard the prior offenses listed on the record which was in evidence merely to prove that Frink's license was suspended, and (2) the jury evidently followed the admonishment because it acquitted Frink on the DWI charge, despite the two prior DWIs listed on the driving record. Because no prejudice resulted, the Supreme Court agreed with the Court of Appeals' resolution of this issue, but also stated that the better practice would be to conceal the surplus information regarding prior offenses

prior to the documents being passed to the jury.

L. Fatigue

Drivers must follow the Hours of Service Regulations if they drive a commercial motor vehicle. A complete version of the Hours of Service of Drivers Final Rule can be found at http://www.fmcsa.dot.gov/rules-regulations/topics/hos/index.htm.

M. Spoliation

Spoliation is "The intentional destruction, mutilation, alteration, or concealment of evidence, usually a document. If proved, spoliation may be used to establish that the evidence was unfavorable to the party responsible." *Allen v. LTV Steel Co.,* 68 Fed. Appx. 718 (7th Cir. 2003). The Indiana Supreme Court has held that the negligent or intentional destruction or discarding of evidence relevant to a tort action does not give rise to an independent claim for spoliation of evidence. *Gribben v. Wal-Mart Stores, Inc.*, 824 N.E. 2d 349 (Ind. 2005); *see also Meridian Sec. Ins. Co. v. Hoffman Adjustment Co.*, 933 N.E.2d 7, 14 (Ind. Ct. App. 2010 and *Glotzbach v. Froman*, 854 N.E.2d 337, 338 (Ind. 2006).

This means that the plaintiff cannot sue somebody he has already sued with an additional count for spoliation. However, a claim against a third party, i.e. someone who is not directly involved and sued by the plaintiff, may have some exposure.

There can be no third-part spoliation claim against an employer because there is no duty in the employer-employee context to preserve evidence. If found that certain other remedies, such as contempt sanctions, are still available against a third party. *Meridian Sec. Ins. Co. v. Hoffman Adjustment Co.*, 933 N.E.2d 7 (Ind. Ct. App. 2010).

On the other hand, a third party spoliation claim was permitted against a defendant's insurer, finding that insurers are not strangers to litigation, and it

"strains credulity to posit . . . that a liability carrier could be unaware of the potential importance of physical evidence." *Thompson v. Owensby*, 704 N.E.2d 134 (Ind. Ct. App. 1998).

Settlement

A. Offer of Judgment

Indiana Trial Rule 68. Offer of judgment

At any time more than ten (10) days prior to trial, a defendant may serve a written offer to allow judgment to be taken against the defendant. If accepted in writing within ten (10) days, either party may then file the offer and notice of acceptance with the court. If the offer is rejected and the judgment obtained is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

Qualified Settlement Offers - IC §34-50-1 et seq.

A qualified settlement offer may be made at any time after a complaint is filed, but not less than thirty (30) days prior to trial. The offer must resolve all claims and defenses at issue between the offeror and the recipient. IC 34-50-1-3. It must be in writing, signed by the party or attorney, designed a qualified settlement offer on its face, set forth the complete terms of the proposed settlement, and expressly revoke any prior offers. IC 34050-1-4. Acceptance must be unconditional, in writing, signed and delivered not more than thirty (30) days after receipt. IC 34-50-1-5. If rejected and the final judgment is less favorable than the qualified settlement offer, the court shall aware attorney's fees, costs and expenses incurred after the rejection, at a rate of $100 per hour, not to exceed $1,000. IC 34-50-1-6. The motion seeking fees and costs must be made within thirty (30) days after entry of judgment and include a supporting affidavit.

B. Liens

1. Hospital Lien Law – IC 33-33-4 eq seq.

The Hospital Lien Law provides that a hospital has "a lien for all reasonable and necessary charges for hospital care" where there is a cause of action, suit or claim that relates to the treatment. The lien must be recorded within 180 days after discharge. The lien is reduced by any amounts recovered from medical insurance, which the hospital must make reasonable efforts to recover. The lien is inferior to all claims for attorney's fees, court costs and expenses. If the settlement amount would result in the plaintiff incurring less than twenty percent (20%) of the settlement if the lien were paid in full, the hospital lien must be reduced on a pro rata basis to allow such recovery.

2. Worker's Compensation Lien – IC 22-3-2-13.

The employer or worker's compensation insurance carrier may recover amounts it has paid to the injured employee or his family, subject to a reduction for its pro rata share of all costs and expenses and a fee of twenty-five (25%) percent if collected pre-suit and thirty-three and one-third percent (33 1/3%) if collected through suit, for attorneys' fees. The employer and worker's compensation carrier are given the right to intervene in any action. If they fail to intervene and the jury is not instructed on the amount that is to be repaid for the lien, the employer or carrier may lose the ability to recover. *Travelers Indem. Co. of America v. Jarrells*, 927 N.E.2d 374 (Ind. 2010).

3. Indiana Medicaid Lien – IC 12-15-8 et seq.

Indiana Medicaid may recover amounts it has paid on behalf of a Medicaid recipient, subject to a reduction for its pro rata share of all costs and expenses and a fee of twenty-five (25%) percent if collected pre-suit and thirty-three and one-third percent (33 1/3%) if collected through suit, for attorneys' fees. Medicaid is permitted by statute to waive this lien.

4. Lien Reduction Statute – IC 34-51-2-19

If a subrogation claim or other lien or claim that arose out of payment of medical

expenses or other benefits exists in respect to a claim for personal injuries or death and the claimant's recovery is dimished:

(1) by comparative fault; or

(2) by reason of the uncollectibility of the full value of the claim for personal injuries or death resulting from limited liability insurance or from any other cause; the lien or claim shall be diminished in the same proportion as the claimant's recovery is diminished. The party holding the lien or claim shall bear a pro rata share of the claimant's attorney's fees and litigation expenses.

An unpaid hospital lien is not subject to this statute. *National Ins. Ass'n v. Parkview Memorial Hosp.*, 590 N.E.2d 1141 (Ind. Ct. App. 1992).

C. Minor Settlement

Generally, anyone wishing to settle a claim with an person less than eighteen (18) years of age, who is not emancipated, must file a petition requesting the court's approval. IC 29-3-1-10; IC 29-3-9-7. If a guardian has been appointed and the settlement exceeds $10,000, the guardian must compromise the claim. *Id.* Otherwise, the parent may compromise the claim. *Id.* IC 29-3-3-1, provides that any person who is indebted to a minor, or who has possession of a minor's property valued at less than $10,000, may pay the dept or deliver the property without a court order or appointment of a guardian. Such payment may be made to any person having are and custody of the minor with whom the minor resides. IC 29-3-3-1. This provision does not apply if the person paying the debt is aware a guardian has been appointed, or that proceedings to appoint such guardian are pending. IC 29-3-3-1(c). The person who delivers the property or pays the debt is not responsible for its proper allocation. IC-29-3-3-1(d).

If the amount of the compromise is greater than $10,000, or a guardian has been appointed, or proceedings to make such appointed are pending, the court will require that a guardian be appointed, and that the settlement be delivered to the guardian upon terms directed by the Court. IC 29-3-9-7(b).

D. Negotiating Directly with Attorneys

Direct settlement negotiations between an attorney and claim adjuster are a regular practice in Indiana. However, in *Fink v. Peden*, 17 N.E.2d 95 (Ind. 1938), it was found that a claim adjuster negotiating a settlement on behalf of an injured party constituted the unauthorized practice of law, and he could not recover a fee. The Indiana State Bar Association has also opined that while a paralegal can perform certain tasks related to settlement under the supervision of an attorney, a paralegal may not attend mediation on the injured party's behalf, as this constitutes the unauthorized practice of law. Ind. State Bar Assoc. Ethics Op No. 1 (1997).

E. Confidentiality Agreements

"Agreements between litigants governing the treatment of information exchanged *between them* are well recognized as fostering multiple objectives, including reduction of litigation costs, protection of legitimate trade secrets, and protection of recognized forms of privilege. Trial court orders confirming such agreements can likewise help secure these benefits." *Travelers Cas. & Sur. Co. v. United States Filter Corp.*, 895 N.E.2d 114 (Ind. 2008). However, such confidential documents, once filed, are not shielded from public access. As a result, to prevent disclosure, the parties must seek a specific court order. *Id.*

F. Releases

Settlement agreements are governed by the same general principles of contract law as any other agreement. *Zuckerman v. Montgomery*,945 N.E.2d 813 (Ind. Ct. App. 2011). Unambiguous language of a contract is conclusive and binding on the parties and the court, and the parties' intent is determined from the four corners of the document. *Id.* To be valid and enforceable, a contract must be reasonably definite and certain. All that is required to render a contract enforceable is reasonable certainty in the terms and conditions of the promises made, including by whom and to whom; absolute certainty in all terms is not required. *Id.* To be enforceable, contracts must be sufficiently definite, and

amounts and prices must be fixed or subject to some ascertainable formula or standard. *Id.*

G. Voidable Releases

1. Mutual Mistake of Fact

A release may be voidable where there is a mutual mistake as to a material fact in a settlement agreement. *Indiana Bell Tec. Co. v. Mygrant*, 471 N.E.2d 660 (Ind. 1984). A mutual mistake is one which involves an independent mistake made by both parties. *Automobile Underwriters, Inc. v. Smith*, 133 N.E.2d 72 (Ind. Ct. App. 1956). A court will consider all circumstances relating to the signing of the release when determining whether a mutual mistake was made. *Mygrant*, 471 N.E.2d at 663. One example of a material fact justifying rescission is where the parties to the settlement are of the belief that the injuries are "trivial and temporary, when as a matter of fact they are serious and permanent…." *Id.*

2. Fraud in the Inducement

A release may also be avoided or a separate cause of action may exist for fraud against an insurer if the insurer "knowingly misrepresents the contents of a writing or if it is established that the signee was lulled by fraud and deceit into omitting to read the document." *Farm Bureau Mut. Ins. Co. v. Seal*, 179 N.E.2d 760, 766 (Ind. Ct. App. 1962); see also *Tru-Cal, Inc. v. Conrad Kacsik Instrument Sys.*, 905 N.E.2d 40, 44-45 (Ind. Ct. App. 2009). The elements of fraud are (1) a material representation of a fact which, (2) was false, (3) was made with knowledge or reckless ignorance of its falsity, (4) was made with intent to deceive, (5) was justifiably relied upon, and (6) proximately caused injury. *Tru-Cal, Inc.*, 905 N.E.2d at 44-45. "Fraudulent inducement occurs when a party is induced through fraudulent misrepresentation to enter into a contract." *Id.* (citing *Lightning Litho, Inc. v Danka Idus.*, 776 N.E.2d 1238 (Ind. Ct. App. 2002)). Fraud in the inducement may exist even where the release includes language stating "CAUTION! READ BEFORE SIGNING." *Seal*, 179 N.E.2d at 765.

Transportation Law
A. State DOT Regulatory Requirements
Commercial Vehicles engaged in interstate commerce are governed by the Federal Motor Carrier Safety Regulations (FMCSR) Title 49, Parts 350-399. FMCSR 392.2 states that "every commercial motor vehicle must be operated in accordance with laws, ordinances, and regulations of the jurisdiction in which it is being operated." Indiana has codes and case law regulating the operation of any vehicle. Indiana's DOT regulatory information can be found at http://www.in.gov/indot/. The Indiana Department of Public Safety has adopted Title 49, Parts 382-384 and 390-399 of FMCSR. The Indiana Department of Public Safety has adopted Part 395 of the FMCSR, with two exceptions. (1) Part 395 does not apply to farm trucks or vehicles operated in intrastate construction; and the maximum driving and on-duty times do not apply to intrastate drivers of agricultural commodities or farm supplies for agricultural purposes, as long as the transportation is limited to an area within a 100 air mile radius. The Indiana Department of Public Safety has adopted Part 395 of the FMCSR, with one exception: private carriers of property or carriers of property while employed in the construction industry driving intrastate are exempt from the written requirement of the condition of the vehicle.
B. State Speed Limits
A. Governing Authority: Indiana's speed limits are governed by IC 9-21-5, which provides in pertinent part that it is unlawful to operate a motor vehicle in excess of the following speed limits: 1. Thirty (30) miles per hour in an urban district 2. Fifty-five (55) miles per hours, except as provided in subdivisions (1), (3), (4),

(5), (6), and (7).

3. Seventy (70) miles per hour on a highway on the national system or intestate and defense highways located outside of the urbanized area with a population of at least fifty thousand (50,000), except as provided in subdivision (4).

4.Sixty-five (5) miles per hour for a vehicle (other than a bus) having a declared gross weight greater than twenty-six thousand (26,000) pounds on a highway on the national system of interstate or defense highways located outside an urbanized area with a population of at least fifty thousand (50,000).

5. Sixty-five (65) miles per hour on:

a. U.S. 20 from the intersection of U.S. 20 and County Road 17 in Elkhart County to the intersection of U.S. 20 and U.S. 31 in St. Joseph County;

b. U.S. 31 from the intersection of U.S. 31 and U.S. 20 in St. Joseph County to the boundary line between Indiana and Michigan; and

c. A highway classified by the Indiana Department of Transportation as an INDOT Freeway.

6. On a highway that is the responsibility of the Indiana finance authority established by IC 4-4-11:

seventy (70) miles per hour for:

(i) a motor vehicle having a declared gross weight of not more than twenty-six thousand (26,000) pounds; or

(ii) a bus; or

sixty-five (65) miles per hour for a motor vehicle having a declared gross weight greater than twenty-six thousand (26,000) pounds.

7. Sixty (60) miles per hour on a highway that:

(A) is not designated as a part of the national system of interstate and defense highways;

(B) has four (4) or more lanes;

(C) is divided into two (2) or more roadways by:

(i) an intervening space that is unimproved and not intended for vehicular travel;

(ii) a physical barrier; or

(iii) a dividing section constructed to impede vehicular traffic; and

(D) is located outside an urbanized area (as defined in 23 U.S.C. 101) with a population of at least fifty thousand (50,000).

8. Fifteen (15) miles per hour in an alley.

C. Overview of State CDL Requirements

1. **When is a CDL required-The Classes of CDL and the commercial motor vehicles that they authorize the operation of are as follows:**

All driers of Commercial Motor Vehicles (CMV) must have a Commercial Driver's License (CDL). A CDL is required to operate:

- Any single vehicle with a gross vehicle weight rating (GVWR) of 26,001 pounds or more.
- A trailer with a GVWR of 10,0001 pounds or more, if the gross combination weight rating (GVWR) is 26,001 pound sor more
- A vehicle designed to transport 16 or more passengers (including the driver)
- Any size vehicle which requires hazardous materials placards or is carrying material listed as a select agent or toxin in 42 CFR 73. Federal regulations through the Department of Homeland Security require a background check and fingerprinting for the Hazardous Materials endorsement.

2. To obtain a CDL, the driver must pass knowledge tests, a skills test and a DOT physical examination.

Knowledge Tests: you will have to take one or more knowledge tests, depending on which class of license and what endorsement you need.

The CDL knowledge tests include:

- The general knowledge test taken by all applicants
- The passenger transport test taken by all bus driver applicants
- The air brake test if your vehicle has air brakes, including air over hydraulic brakes
- The hazardous materials test if you want to haul hazardous materials or waste in amounts that require placarding or any quantity of a material listed as a select agent or toxin in 42 CFR 73. To obtain

this endorsement you are also required to pass a Transportation Security Administration (TSA) background check.

- The tanker test if you want to haul a liquid or liquid gas in a permanently mounted cargo tank rated at 119 gallons or more or a portable tank rated at 1,000 gallons or more.
- The double/triples test if you want to pull double or triple trailers
- The School Bus test if you want to drive a school bus.

Skills Test: If you pass the required knowledge test(s), you can take the CDL skills tests. There are three types of general skills that will be tested: pre-trip inspection, basic vehicle control, and on-road driving. You must take these tests in the type of vehicle for which you wish to be licensed. Any vehicle that has components marked or labeled cannot be used for the Pre-Trip Inspection Test.

- Pre-Trip Vehicle Inspection: You will be tested to see if you know whether your vehicle is safe to drive. You will be asked to do a pre-trip inspection of your vehicle and explain to the examiner what you would inspect and why.
- Basic Vehicle Control: You will be tested on your skill to control the vehicle. You will be asked to move your vehicle forward, backward, and turn in within.

3. Requirements

(1) A driver must have a valid Indiana operator's license

(2) A driver must have a valid United State Social Security card.

(3) A driver must pass a DOT physical examination prior to applying for a CDL. The driver must file a valid DOT physical examination with the BMV to maintain commercial driving privileges

(4) A driver must obtain a CDL learner permit from the Bureau of Motor Vehicles. To obtain a CDL learner permit, a driver must pass one or more of the knowledge tests: (1) a general knowledge test for all drivers, (2) The passenger transport test by all bus drivers. (3) The air brakes test by

any driver of a vehicle with air brakes (4) The combination vehicle test for combination vehicles (5) The hazardous material test if a driver is required to haul hazardous waste or hazardous materials requiring vehicle placards (6) The double/triples test for a driver required to pull double or triple trailers (7) The school bus endorsement test by all school bus drivers

(5) After a driver has acquired a CDL learner permit, the driver then must pass a skills test in a vehicle representative of the class of license which the driver will receive. The skills test must be taken at an approved state test site and will consist of three parts (A) Pre-trip inspection test, (B) Basic control skills test, (C) Road trip test.

(6) After a driver has passed all tests, the driver must take his/her operator license and CDL learner permit to any BMV license branch.

4. Classes

(1) Class A: any combination of vehicles with a GCWR of 26,001 or more pounds provided the GVWR of the vehicle(s) being towed is in excess of 10,000 pounds.

-Knowledge Tests Required: general knowledge, combination vehicles, air brakes (if equipped), passenger transport (if applicable)

-Skills Tests Required: vehicle inspection, basic control skills, road

(2) Class B: Any single vehicle with a GVWR of 26,001 or more pounds or any such vehicle towing a vehicle not in excess of 10,000 pounds GVWR.

-Knowledge Tests Required: general knowledge, air brakes (if equipped), passenger transport (if applicable), school bus (if applicable)

-Skills Tests Required: vehicle inspection, basic control skills, road

(3) Class C: Any single vehicle, or combination of vehicles, that does not meet the definition of group A or group B as contained herein, but that either is designed to transport 16 or more passengers including the driver, or is placarded for hazardous materials.

-Knowledge Tests Required: general knowledge, air brakes (if equipped), hazardous materials (if applicable), passenger transport (if applicable),

school bus (if applicable)

-Skills tests required: vehicle inspection, basic control skills, road.

(4) Endorsement T: Combination vehicles with double or triple trailers.

-Knowledge Tests Required: Doubles/Triples

(5) Endorsement N: Vehicles used to haul liquids or gaseous materials in permanent tanks or in portable tanks having a rating capacity of 1,000 gallons or more.

5. Knowledge Tests Required: Tank Vehicle

(e) CDL Manual-Indiana's CDL Manual can be found at: http://www.in.gov/bmv/files/CDL_Manual.pdf

Insurance Issues

A. State Minimum Limits of Financial Responsibility

Indiana's minimum responsibility law applies to persons who register or operate a motor vehicle on a public highway. IC 9-24-4-1. It does not apply to electric personal assistive mobility devices. *Id.* A motor vehicle means a vehicle that is self-propelled on upon a highway in Indiana. It does not include a farm tractor. IC 9-13-2-105(c).

1. Motor Vehicles Other than Recovery Vehicles – IC 9-25-4-5

Sec. 5. Except as provided in section 6 of this chapter, the minimum amounts of financial responsibility are as follows:

(1) Subject to the limit set forth in subdivision (2), twenty-five thousand dollars ($25,000) for bodily injury to or the death of one (1) individual.

(2) Fifty thousand dollars ($50,000) for bodily injury to or the death of two (2) or more individuals in any one (1) accident.

(3) Ten thousand dollars ($10,000) for damage to or the destruction of property in one (1) accident

2. Recovery Vehicles – IC 9-25-4-6

Sec. 6. (a) The minimum standards for financial responsibility for a Class A

recovery vehicle are a combined single limit of seven hundred fifty thousand dollars ($750,000) for bodily injury and property damage in any one (1) accident or as follows:

(1) Subject to the limit set forth in subdivision (2), five hundred thousand dollars ($500,000) for bodily injury to or the death of one (1) individual.

(2) One million dollars ($1,000,000) for bodily injury to or the death of two (2) or more individuals in any one (1) accident.

(3) One hundred thousand dollars ($100,000) for damage to or the destruction of property in one (1) accident.

(b) The minimum standards for financial responsibility for a Class B recovery vehicle are a combined single limit of three hundred thousand dollars ($300,000) for bodily injury and property damage in any one (1) accident or as follows:

(1) Subject to the limit set forth in subdivision (2), one hundred thousand dollars ($100,000) for bodily injury to or the death of one (1) individual.

(2) Three hundred thousand dollars ($300,000) for bodily injury to or the death of two (2) or more individuals in any one (1) accident.

(3) Fifty thousand dollars ($50,000) for damage to or the destruction of property in one (1) accident.

A Class A recovery vehicle is a truck specifically designed for towing disabled vehicles and has a gross weight rating greater than 16,000 pounds. IC 9-13-2-26. A Class B recovery vehicle has a gross vehicle rating equal to or less than 16,000 pounds. IC 9-13-2-27.

B. Uninsured & Underinsured Motorist Coverage

1. Application - An insurer shall make available in each automobile or motor vehicle liability policy which is delivered or issued for delivery in Indiana, with respect to a vehicle registered or principally garaged in Indiana, insurance against loss resulting from liability for bodily injury or death and for injury or destruction to property of others arising from the ownership, maintenance or use of a motor

vehicle. IC 27-7-5-2.

When uninsured or underinsured coverage is written to apply to one or more motor vehicles under a single policy, the coverage applies only to the operation of those motor vehicles for which a specific uninsured or underinsured premium charge has been made, and does not apply to motor vehicles insured under the policy or owned by the named insured where a premium has not been charged. IC 27-7-5-5(b).

2. Definition of Uninsured and Underinsured – An uninsured motor vehicle means a motor vehicle without liability insurance, a motor vehicle covered by insurance that fails to meet the applicable minimum financial responsibility law, or a motor vehicle insured by an insolvent insurance carrier. IC 27-7-5-4(a). Unless greater coverage is afforded by the policy, the insolvency coverage applies only to accidents occurring when the uninsured's policy is in effect, and where such insolvency occurs within two years after the accident. IC 27-7-5-4(c). An underinsured motor vehicle means a motor vehicle where the combined limits of all available coverage are less than the limits of the insured underinsured coverage at the time of the accident, but does not include an uninsured vehicle. IC 27-5-4(b).

3. Limits – The minimum uninsured or underinsurance limits for bodily injury or death for injury to or destruction of personal property, must meet the minimum standards set forth in IC 9-25-4-5 of Indiana's Minimum Financial Responsibility Law. IC 27-7-5-2(a). If the liability coverage afforded is greater than the minimum limits, then the insurance must provide uninsured and underinsured coverage equal to those limits, unless rejected by the insured. However, underinsured coverage must be made available in limits of not less tan $50,000 and no insurance policy may be delivered with underinsured limits less than this amount. *Id.* The insured may chose to offer uninsured or uninsured limits in excess of the liability limits. *Id.*

The maximum amount payable for bodily injury under uninsured or underinsured motorist coverage is the lesser of the difference between the amount paid in damages to the insured by the tortfeasor and the per person limit of uninsured or underinsured motorist coverage provided by the insured policy; or the difference between the total amount of damages incurred by the insured and the amount paid by any person for the insured's bodily injury. IC 27-7-5-5(c).

The insured must also offer uninsured property damage coverage without any deductible and may offer uninsured property damage coverage with a deductible not more than $300. IC 27-7-5-3(a). The deductible shall be waived for damage resulting from collision if the insured vehicle is parked and unoccupied when it is involved in a collision. *Id.* The insured must be able to provide information identifying the at-fault operator and any information to establish the at-fault operator is an insured driver. IC 27-7-5-3(c).

4. Rejection - The named insured on an automobile policy may reject in writing uninsured or underinsured coverage, either jointly or severally. IC 27-5-2(b). A rejection by the named insured constitutes a rejection for all insureds or persons entitled to coverage under the policy. *Id.* Following rejection, the insured need not offer uninsured or underinsured coverage in renewals, replacements or supplements, unless otherwise requested in writing. *Id.* To be effective, a rejection must specify the named insured is rejecting the uninsured and/or underinsured coverage, and the effective date of the rejection. IC 27-5-2(c). A rejection of coverage on a underlying commercial policy is also a rejection on any commercial umbrella or excess policy. IC 27-5-2(d).

5. Exceptions – Uninsured and underinsured coverage need not be made available for commercial umbrella or excess liability policies issued to a motor carrier that meets the federal minimum responsibility levels set forth in 49 CFR Part 387. IC 27-5-2(d). A motor carrier means a common carrier, contract carrier or carrier certified by the Indiana Department of State Revenue. IC 8-2.1-17-6. Uninsured and underinsured coverage also need not be made available in

connection with coverage related to or included in a commercial property and casualty insurance described as Class 2 or Class 3 coverage under IC 27-1-5-1, where it coverage a loss related to a motor not owned by the insured that is used by the insured or its agent. IC 27-5-2(f). For purposes of this exception, "owner" means the legal title holder, the lessee with exclusive use of the vehicle for excess of 30 days, a conditional vendee or lessee under an agreement of conditional sale or lease, or the mortgagor under the agreement for conditional sale or lease of a motor vehicle, under which the mortgagor has the right to purchase and immediate right of possession. *Id.*

6. Subrogation – The uninsured or underinsured insurance policy may include subrogation provisions. IC 27-7-5-6(a). The right may be enforced in the name of the insurer or the name of the insured. *Id.* The insurer does not have a subrogation right for an underinsured claim where the insurer has been provided written notice of a bona fide settlement offer that includes a certification of the liability coverage limits of the underinsured driver and the insurer fails to advance payment of the settlement amount within 30 days after receipt of notice. IC 27-7-5-6(b). An uninsured or underinsured carrier making payment due to insolvency of an insurer has no subrogation rights against the insured of the insolvent insurer or the Indiana Insurance Guaranty Association, except that the carrier may recover from the insured of the insolvent insurer that part of the payment that exceeds the policy limits of the insolvent insurer. IC 27-7-5-6(c)

C. No Fault Insurance

Indiana is not a no-fault insurance state.

D. Disclosure of Limits and Layers of Coverage

Indiana Trial Rule 26(b)(2) provides:

A party may obtain discovery of the existence and contents of any insurance

agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

E. Unfair Claims Practices

1. IC 27-4-1-4 defines that conduct which Indiana considers to be unfair methods of competition and deceptive acts and practices.

2. IC 27-4-1-4.5 defines the following unfair claim settlement practices:

(1) Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue.

(2) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies.

(3) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies.

(4) Refusing to pay claims without conducting a reasonable investigation based upon all available information.

(5) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed.

(6) Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear.

(7) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds.

(8) Attempting to settle a claim for less than the amount to which a reasonable individual would have believed the individual was entitled by reference to written or printed advertising material accompanying or made part of an application.

(9) Attempting to settle claims on the basis of an application that was altered

without notice to or knowledge or consent of the insured.

(10) Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which the payments are being made.

(11) Making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration.

(12) Delaying the investigation or payment of claims by requiring an insured, a claimant, or the physician of either to submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information.

(13) Failing to promptly settle claims, where liability has become reasonably clear, under one (1) portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.

(14) Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

(15) In negotiations concerning liability insurance claims, ascribing a percentage of fault to a person seeking to recover from an insured party, in spite of an obvious absence of fault on the part of that person.

(16) The unfair claims settlement practices defined in IC 27-4-1.5.

3. Enforcement – A person, who believes they have been adversely affected by unfair claim settlement practice, may file a complaint with the commissioner of the Indiana Department of Insurance. IC 27-4-1-5.6(a). If the commissioner believes such an act has occurred he shall deliver the complaint to the insurer within 10 days of receipt. The insurer is required to promptly investigate the complaint and provide a written report to the commissioner and the complaining party within 20 days outlining the actions taken by the insurer, or reasons for any inaction, and a good faith estimate for the time it may take to settle the claim. IC 27-4-1-5.6(b). An insurer that has committed an unfair claim settlement practice

and fails to respond is subject to action by the commissioner. IC 27-4-1-5.6(c).

Where the commissioner believes that a proceeding by him for an unfair claim settlement practice would be in the best interest of the public, he shall issue and present a statement of charges and provide a copy to any complaining party. IC 27-4-1-5. If after a hearing the commissioner determines that an unfair claims settlement practice has occurred, he shall issue writing findings and issue a cease and desist order and, at his discretion: (1) order payment of a civil penalty of not more than $25,000 per act or violation, or $50,000 if the personal knew or reasonably should have known that he was in violation of this chapter; or (2) suspend or revoke the person's license or certificate of authority, if he knew or should have known he was in violation. IC 27-4-1-6. All civil penalties are deposited with the state. *Id.* Any order from the commissioner is subject to judicial review or enforcement. IC 27-4-1-7. Any person who violates a cease and desist order may, after notice and hearing, at the commissioner's discretion, be subject to a civil penalty of not more than $25,000 for each act, or a suspension or revocation of the person's license or certificate of authority. IC 27-4-1-12.

The unfair claim settlement practices act does not create a separate private cause of action, other than an individual complainant's right to appeal a commissioner's decision. IC 27-4-1-18.

F. Bad Faith Claims

1. Statutory Claims – The only statutory basis for a bad faith claim in Indiana in the worker's compensation context. IC 22-3-4-12.1, provides that the worker's compensation board, upon hearing a claim for benefits, has the exclusive jurisdiction to determine whether an employer or insurer has acted with "a lack of diligence, in bad faith, or has committed an independent tort in adjusting or settling the claim…." *Id.* If bad faith is found by the board it has the authority to award the claimant between $500 and $20,000, in addition to attorney's fees which may not exceed 33% of the award. *Id.* This maximum award to a claimant

during the life of a claim is $20,000.

2. Common Law – There is a legal duty implied in all insurance contracts, for the insurer to deal in good faith with its insured. *Knowledge A-Z, Inc. v. Sentry Ins.*, 857 N.E.2d 411 (Ind. Ct. App. 2006); citing *Erie Ins. Co. v. Hickman*, 622 N.E.2d 515, 518 (Ind. 1993). "As a general proposition, "[a] finding of bad faith requires evidence of a state of mind reflecting dishonest purpose, moral obliquity, furtive design, or ill will. This obligation of good faith and fair dealing includes the obligation to refrain from: (1) making an unfounded refusal to pay policy proceeds; (2) causing an unfounded delay in payment; (3) deceiving the insured; and (4) exercising an unfair advantage to pressure an insured into settlement of his claim." *Knowledge A-Z*,857 N.E.2d at 422. There is no claim where there is a good faith dispute about the amount or validity of a claim. *Id.*

Indiana does not generally allow direct actions for bad faith against insurers, but injured parties. *State Farm Mut. Auto. Ins. Co. v. Estep*, 873 N.E.2d 1021 (Ind. 2007). However, Indiana Courts have found that an insured may assign certain of its bad faith rights, including in an excess judgment setting, the injured party. *Pistalo v. Progressive Cas. Ins. Co.*, 2012 Ind. App. LEXIS 640 (Ind. Ct. App. 2012).

3. Damages - Generally, an insured can recover those damages reasonably assumed to have been within the contemplation of the parties at the time the contract was formed. *Hickman*, 622 N.E.2d at 519. The insurer may also be liable for punitive damages if it is established by clear and convincing evidence that the insurer committed bad faith. *Id.*; see also *Orkin Exterminating Co. v. Traina*, 486 N.E.2d 1019, 1023 (Ind. 1986). Under Indiana law, punitive damages are limited to the greater of three times the amount of compensatory damages or $50,000. IC 34-51-3-4. Any award of punitive damages is paid to the court clerk, when then distributes 25% of the proceeds to the party to whom the judgment was awarded, and 75% to the State of Indiana. IC 34-51-3-6. While

Indiana does not generally allow the award of attorney fees, cases analyzing bad faith conduct have found that where the insured establishing the existence of bad faith by clear and convincing evidence, an award of attorneys' fees may be recoverable under IC 34-52-1-1, which provides fees can be awarded where a party has brought an action or defense that is frivolous, unreasonable, groundless or in bad faith. See *Liberty Mut. Ins. Co. v. OSI Indus., Inc.*, 831 N.E.2d 192 (Ind. Ct. App. 2005). Damages for emotional distress may also be recoverable. *Firstmark Standard Life Ins. Co. v. Goss*, 699 N.E.2d 689 (Ind. Ct. App. 1988).

4. Excess Judgment – An insurer may be subject to a potential bad faith lawsuit against it by an insured if the insurer refuses to settle the claim within policy limits and the trial resulted in an excess verdict. *Economy Fre & Cas. Co. v. Collins*, 641 N.E.2d 382, 385-386. (Ind. Ct. App. 1994). The insurer must be liable for the entire verdict if it is found to have acted in bad faith. *Id.* Again, the plaintiff must establish, with clear and convincing evidence, that the insurer had knowledge that there was no legitimate basis for denying liability. *Freidline v. Shelby Ins. Co.*, 774 N.E.2d 37, 40 (Ind. 2002). The award of damages for failure to settle is not predicated upon the ability of the insured to satisfy the award. *Pistalo v. Progressive Cas. Ins. Co.*, 2012 Ind. App. LEXIS 640

G. Coverage – Duty of Insured

It is a prerequisite to trigger coverage under an insurance policy that the insured provide the insured with timely notice of a claim or suit and cooperate with the insurance company's investigation of a claim. *Dreaded, Inc. v. St. Paul Guardian Ins. Co.*, 904 N.E.2d 1267; *Ind. Ins. Co. v. Williams*, 448 N.E.2d 1233 (Ind. Ct. App. 1983). Failure to provide timely notice creates a rebuttable presumption that the insurer suffered prejudice. *Tri-Etch, Inc. v. Cincinnati Ins. Co.*, 909 N.E.2d 997 (Ind. 2009). In *Williams*, 463 N.E.2d 257, the Indiana Supreme Court found that notice was late when given six months after the underlying accident. Unlike the notice obligations, an insurer must show actual prejudice when it attempts to avoid coverage for an insured's failure to cooperate. *Miller v. Dilts*, 463 N.E.2d

257 (Ind. 1984).

The insured may not enter into a settlement without the insurer's consent. *Travelers Ins. Cos. v. Maplehurst Farms, Inc.*, 953 N.E.2d 1153 (Ind. Ct. App. 2011). In that case, the insurer is relieved of liability and prejudice is irrelevant.

H. Fellow Employee Exclusions

There is limited Indiana law addressing this exclusion. In *Amerisure Ins. Co. v. Nat'l Sur. Corp.*, 695 F.3d 632 (7th Cir. 2012), the Seventh Circuit Court of Appeals applied this exclusion as written in an umbrella policy to exclude coverage.