

DIGEST OF INSURANCE LAW

INDIANA

Courtesy of
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CIVIL JUDICIAL SYSTEM

Courts of Original Jurisdiction

Circuit and County Courts. Circuit courts have original jurisdiction in all civil cases and all criminal cases, except when exclusive jurisdiction is conferred by law upon other courts. I.C. 33-28-1-2. County courts have original and concurrent jurisdiction in contract, tort, and possessory actions between landlord and tenant. County courts have original exclusive jurisdiction in actions for possession of property when the amount claimed does not exceed \$10,000. I.C. 33-30-4-1. County courts have original and concurrent jurisdictions in: criminal cases involving Class D felonies, misdemeanors, and infractions; cases involving violation of city, town or municipal ordinances; and cases involving traffic violations. *Id.* County courts have no jurisdiction in actions seeking injunctive relief, partition of real estate, enforcement of liens on real estate, appointment of receivers, dissolution or annulment of marriage, or on paternity, juvenile, or probate matters. I.C. 33-30-4-2.

Small Claims Courts. Each township has a small claims court in each county containing a consolidated city. I.C. 33-34-1-2. A county's small claims court has jurisdiction in civil actions involving not more than \$6,000 and emergency possessory actions involving a landlord and tenant. I.C. 33-28-3-4; 33-29-2-4. The small claims court's jurisdiction is specifically restricted against actions seeking injunctive relief, partition of real estate, enforcement of most liens on real estate, appointment of receivers, and dissolution or annulment of marriage. I.C. 33-34-3-5. Filing in small claims court is deemed a waiver of trial by jury. I.C. 33-34-3-11. However, defendant has right to demand trial by jury by affidavit at least 3 calendar days before trial date that appears on complaint. *Id.* Defendant must pay costs of filing claim in superior court. *Id.* Small claims actions are governed by Small Claims Rules. T.R. 52, which requires court to enter findings of fact and conclusions of law, does not apply to small claims proceedings. *Bowman v. Kitchel*, 644 N.E.2d 878 (Ind. 1995).

Probate Courts. Superior and circuit courts have jurisdiction of probate matters, except a separate probate court has been created by statute for St. Joseph County I.C. 33-28-1-2; I.C. 33-31-1-1. The probate court has original concurrent jurisdiction with superior courts in all matters pertaining to: the probate of wills; proceedings to resist the probate of wills; proceedings to contest wills; appointment of guardians, assignees, executors, administrators and trustees; administration and settlement of estates of minors, persons for whom a guardian has been appointed, persons with respect to whom a protective order has been issued, and deceased persons; administration of trusts, assignments, adoption proceedings, and surviving partnerships; and in all other probate matters. The probate court is specifically precluded from exercising its jurisdiction in civil actions. I.C. 33-31-1-9. In St. Joseph County, the probate court has exclusive juvenile jurisdiction. *Id.*

Superior Courts. The superior court's jurisdiction varies in different counties. Generally, superior courts have concurrent jurisdiction with circuit courts; however, superior courts are deprived of jurisdiction in some matters. The Marion County Superior Court has concurrent jurisdiction with the Circuit Court in all matters, original or appellate, as well as original and exclusive jurisdiction over trusts, wills, guardianships, assignments, adoptions, surviving partnerships, all probate related matters, and juvenile jurisdiction, as well as appellate jurisdiction over small claims courts. I.C. 33-33-49-9.

City Courts. City courts in the 4 cities with largest populations in a county having a total population of 400,000 to 700,000 have concurrent civil jurisdiction with circuit court of county when amount in controversy does not exceed \$3,000. City court has jurisdiction if parties or subject matter are in county where city is located. City court does not have jurisdiction over slander, libel, decedent's estates, appointments of guardians, marital dissolutions, or injunction or mandate actions. I.C. 33-35-2-5. City court of a third-class city that is not a county seat has concurrent jurisdiction with circuit court in civil cases where amount in controversy does not ex-



ceed \$3,000. Court lacks jurisdiction in actions for slander, libel, foreclosure of mortgages, disputes over real estate title, decedents' estates, appointment of guardians, and equitable actions. Court lacks original jurisdiction where principal defendant resides in another city having a civil city court. Certified city court judgments filed with circuit court clerk have same force as circuit court judgments. I.C. 33-35-2-6.

Town Courts. Town courts have exclusive jurisdiction over violation of town ordinances as well as jurisdiction over misdemeanors and infractions. I.C. 33-35-2-8.

Appellate Courts

Court of Appeals. The Court of Appeals has jurisdiction in all appeals from final judgments of Circuit, Superior, Probate, and County Courts notwithstanding any law, statute, or rule providing for direct appeal to the Supreme Court of Indiana, except as provided in Appellate Rule 4. (See *infra* "Supreme Court") A.P. 5(A). Appeals are taken as a matter of right from the following interlocutory orders: for payment of money; to compel execution of any documents; to compel delivery or assignment of any securities, evidence of debt, documents, or things in action; for sale or delivery of possession of real property; granting or refusing to grant, dissolving or refusing to dissolve a preliminary injunction; appointing or refusing to appoint a receiver; revoking or refusing revocation of receiver appointment; writs of habeas corpus not otherwise authorized to be taken directly to Supreme Court; transferring or refusing to transfer case under T.R. 75; and administrative agency orders required to be appealed by statute A.P. 5(B), 14(A). Discretionary appeals from interlocutory orders may also be taken to the Court of Appeals upon certification of the trial court and a finding by the Court of Appeals that appellant will suffer substantial expense, damage, or injury if order is erroneous and determination is withheld until after judgment; if order involves substantial questions of law, early determination of which will promote its more orderly disposition of case; or remedy by appeal after judgment is otherwise inadequate. A.P. 5(B), 14(B). Court of Appeals has jurisdiction to entertain actions in aid of its appellate jurisdiction and to review final orders, rulings, decisions, and certified questions of an administrative agency. A.P. 5(C).

Tax Court. The Tax Court is a court of limited appellate jurisdiction. It has exclusive jurisdiction over any case which arises under the tax laws of Indiana and is an original appeal of a final determination made by the Indiana Department of Revenue or the Indiana Board of Tax Review. I.C. 33-26-3-1. Tax Court also has exclusive jurisdiction in any initial appeal of a final determi-

nation made by the State Board of Tax Commissioners before January 1, 2002. I.C. 33-26-3-2.

Supreme Court. The Supreme Court has mandatory and exclusive jurisdiction over the following cases: criminal appeals in which sentence was death or life without parole; final judgments declaring a state or federal statute unconstitutional in whole or in part; appeals involving waiver of parental consent to abortion; and appeals involving mandate of funds under T.R. 60.5(B) and T.R. 61. A.P. 4(A)(1). The Supreme Court maintains discretionary jurisdiction over cases in which it grants transfer from decisions of the Court of Appeals and the Tax Court. A.P.4(A)(2). The Supreme Court has exclusive jurisdiction over the following: the practice of law (including admission to practice law, discipline and disbarment of attorneys, and the unauthorized practice of law); supervision of judges; supervision of courts; and issuance of writs. A.P. 4(B).

LAW

Abbreviations

A.D.R. – Rules for Alternative Dispute Resolution.
 A.P. – Indiana Rules of Appellate Procedure.
 F.2d – Federal Reporter, Second Series.
 F.3d – Federal Reporter, Third Series.
 F. Supp. – Federal Supplement.
 Ind. – Indiana Reports.
 Ind. App. – Indiana Appellate Reports.
 I.C. – Indiana Code of 1993, as supplemented.
 N.E. – North Eastern Reporter.
 N.E.2d – North Eastern Reporter, Second Series.
 T.R. – Indiana Rules of Trial Procedure.

ACCIDENT AND HEALTH INSURANCE

See "ACCIDENTAL MEANS," "DISABILITY."

Contract Law. All accident and health insurance policies delivered or issued for delivery to any person in the State of Indiana must contain provisions with regard to cancellation, scope of coverage, and renewal which are specified by statute. I.C. 27-8-5-3. Provisions are also required containing approved language with respect to: notice; claim forms; proofs of loss; time payment of claims; payment of claims; physical examinations and autopsy; legal actions; change of beneficiary; guaranteed renewability; time limitations on certain defenses; and grace periods with respect to payment of premiums. *Id.*

Cancellation. An existing contract of insurance may be cancelled by concurrent agreement of parties, a reservation in policy, or statute. *Hibler v. Conseco, Inc.*, 744 N.E.2d 1012, 1018 (Ind. Ct. App. 2001).



Renewal. Insured may renew policy as matter of right, unless insurer expressly reserves right to refuse renewal. Written notice of insurer's intention not to renew policy must be provided to insured not less than 30 days prior to premium due date. I.C. 27-8-5-3(a)(3). If insurer or its agent subsequently accepts a premium from insured, policy shall be reinstated. I.C. 27-8-5-3(a)(4).

Proximate Cause - Disease Induced by Accident. Disease is not proximate cause of death for purposes of policy excluding coverage for death resulting from disease, unless disease has set chain of events leading to death in motion or when disease merely contributes to loss which is precipitated by an accident. *Am. States Ins. Co. v. Morrow*, 409 N.E.2d 1140, 1142 (Ind. Ct. App. 1980); *Nationwide Mut. Ins. Co. v. Neville*, 434 N.E.2d 585, 592 (Ind. Ct. App. 1982).

Coverage for Preexisting Illnesses. After 2 years, no disease which is not specifically excluded from coverage may be the basis for denial of coverage of a claim, even if disease pre-dates effective date of policy. *Equitable Life Assurance Soc'y v. Bell*, 27 F.3d 1274, 1280 (7th Cir. 1994); I.C. 27-8-5-3(a)(2)(B).

Excepted Risks. It is not against public policy for accidental death policy to exclude death resulting from intentional act of another. *Evans v. Nat'l Life Ins. Co.*, 467 N.E.2d 1216, 1219 (Ind. Ct. App. 1984). Insurers may limit coverage to meet their needs, but all limitations and exclusions must be plainly expressed. *Allstate Ins. Co. v. United Farm Bureau Mut. Ins. Co.*, 618 N.E.2d 31, 33 (Ind. Ct. App. 1993). For purposes of exclusion for death occurring while engaged in aviation, being a passenger in an airplane does not constitute being engaged in aviation. *Masonic Accident Ins. Co. v. Jackson*, 164 N.E. 628, 631 (Ind. 1929). "Military service" exception did apply where insured was killed while on furlough. *Atkinson v. Indiana Nat'l Life Ins. Co.*, 143 N.E. 629, 631 (Ind. 1924). Insured injured when gasoline being poured into truck tank exploded was properly denied coverage where policy excluded injuries incurred by "exploding of" truck even when neither tank nor truck was damaged by explosion. *Industrial Cas. Ins. Co. v. Alspaugh*, 44 N.E.2d 321, 322 (Ind. Ct. App. 1942).

Notice and Proof of Loss. Insurance policies generally require notice of loss within period of time set forth in policy. While coverage may be denied based on untimely notification if insurer is prejudiced by delay, certain unique circumstances may warrant a reasonable delay in notification. See *PSI Energy, Inc. v. Home Ins. Co.*, 801 N.E.2d 705, 716 (Ind. Ct. App. 2004); *Mechs. Laundry & Supply, Inc. v. Am. Cas. Co.*, 2007 U.S. Dist. LEXIS 24369, at *20 (S.D. Ind. Mar. 30, 2007). Regardless of whether the insurer can demonstrate prejudice, no

duty to defend arises until the insurer receives notice of the claim. *Dreaded, Inc. v. St. Paul Guardian Ins. Co.*, 904 N.E.2d 1267, 1273 (Ind. 2009).

Damages. Double Indemnity. Claimant under double indemnity rider on life policy has burden to prove death of insured resulted from accidental cause. *Aetna Life Ins. Co. v. Nicol*, 86 N.E.2d 311, 314 (Ind. Ct. App. 1949).

ACCIDENTAL MEANS

Definition. "An effect which is not the natural or probable consequence of the means which produced it, an effect which does not ordinarily follow and cannot be reasonably anticipated from the use of those means, an effect which the actor did not intend to produce, and which he cannot be charged with the design of producing,...is produced by accidental means." *Am. Maize Prods. Co. v. Nichiporchik*, 29 N.E.2d 801, 803 (Ind. Ct. App. 1940). Injury may be result of accidental means although act involving accident was intentional. *Lovely v. Cooper Indus. Prods., Inc.*, 429 N.E.2d 274, 277 (Ind. Ct. App. 1981). Within insurance policies, term "accidental means" is given construction most favorable to insured. *Evans v. Nat'l Life Accident Ins. Co.*, 467 N.E.2d 1216, 1219 (Ind. Ct. App. 1984). "An 'accident'...is defined as an unusual, unexpected, and unforeseen event." *City of Jasper v. Employers Ins. of Wausau*, 987 F.2d 453, 457 (7th Cir. 1993) (internal citation omitted). Injuries intentionally inflicted by uninsured motorist fall within meaning of damages "caused by accident" in insured victim's uninsured motorist coverage. *Milwaukee Mut. Ins. Co. v. Butler*, 615 F. Supp. 491, 495 (S.D. Ind. 1985). Volitional act does not preclude injury being accidental if injury was not intended result of act. *Auto-Owners Ins. Co. v. Harvey*, 842 N.E.2d 1279, 1291 (Ind. 2006). An injury is potentially accidental, even if it occurs incrementally over time. *Four Star Fabricators, Inc. v. Barrett*, 638 N.E.2d 792, 795 (Ind. Ct. App. 1994).

Cases Held To Be Accidental. The court held insured's death or injury to be due to accidental means in the following cases: insured's cause of death was pneumonia contracted because of lowered resistance due to fractured leg caused by accident seven weeks before death, *Robinson v. Nat'l Life & Accident Ins. Co.*, 129 N.E. 707, 710 (Ind. Ct. App. 1921); sun stroke during regular employment, *Benefit Ass'n of Ry. Employees v. Hulet*, 26 N.E.2d 548, 550 (Ind. Ct. App. 1940); sun stroke during course of everyday activities, *Elsev v. Fid. & Cas. Co. of New York*, 120 N.E. 42, 43 (Ind. 1918); disease caused by physical trauma (injury to hand while asleep), *Aetna Life Ins. Co. v. Fitzgerald*, 75 N.E. 262, 263-64 (Ind. 1905); involuntary death by drowning,



Peele v. Provident Fund Soc'y, 44 N.E. 661, 663 (Ind. 1896); ptomaine poisoning from eating mushrooms, *United States Cas. Co. v. Griffis*, 114 N.E. 83, 84 (Ind. 1916); insured stabbed by insane person, *Phoenix Accident & Sick Benefit Ass'n v. Stiver*, 84 N.E. 772, 774 (Ind. Ct. App. 1908); death from carbon monoxide poisoning in his garage if reasonable inference death not suicide. *Monumental Life Ins. Co. v. Franko*, 486 N.E.2d 608, 612 (Ind. Ct. App. 1985). When insured was intoxicated, fell asleep in car, and ignited car with his cigarette, death was accidental. *USA Life One Ins. Co. of Indiana v. Nuckolls*, 682 N.E.2d 534, 541 (Ind. 1997). Intoxication exclusion did not preclude coverage when insured was intoxicated, passed out on railroad tracks, and died after being struck by train. *Am. Family Life Assurance Co. v. Russell*, 700 N.E.2d 1174, 1178 (Ind. Ct. App. 1998). Gasoline contamination was "sudden and accidental" pursuant to insurance industry's understanding of such language, requiring coverage to insured gas station for cleanup costs. *Am. States Ins. Co. v. Kiger*, 662 N.E.2d 945, 948 (Ind. 1996).

Cases Held Not To Be Accidental. Whether death or injury is accidental is generally a question of fact. *Prudential Ins. Co. v. Robbins*, 38 N.E.2d 274, 278 (Ind. Ct. App. 1941). Worker cannot recover under worker's compensation for injury unless injury is result of some untoward or unexpected event. Worker must offer proof of more than fact disability arose during term of employment. *Lovely v. Cooper Indus. Prod., Inc.*, 429 N.E.2d 274, 279 (Ind. Ct. App. 1981). In situations when injury to insured results, at least in part, from insured's own actions, proper test to determine whether injury was result of an accident is to examine insured's intent or volition: whether insured actually expected or anticipated result. Insured's subjective state of mind may be proven by circumstantial evidence. *Freeman v. Commonwealth Life Ins. Co.*, 271 N.E.2d 177, 184-85 (Ind. Ct. App. 1971) (in denying transfer at 286 N.E.2d 396 (Ind. 1972), Supreme Court specifically noted its approval of appellate court's decision and rejection of "reasonable foreseeability" test). Insured's hiring and retention of employee were not accidents. *Auto-Owners Ins. Co. v. Harvey*, 842 N.E.2d 1279, 1287 (Ind. 2006). Subjective intent of principal to molest student is not imputed to school; therefore, molestation was "accident" as to the school, and insurer was required to defend. *Wayne Twp. Bd. of Sch. Comm'rs v. Indiana Ins., Co.*, 650 N.E.2d 1205, 1209 (Ind. Ct. App. 1995), *reh'g denied, trans. denied*, (1996); *see also Allstate Ins. Co. v. Tozer*, 392 F.3d 950, 953-54 (7th Cir. 2004) (indicating *Wayne Township's* analysis focused on language of policy; court was willing to conclude certain types of mental anguish would constitute bodily injury strictly because policy was broadly worded).

ADJUSTERS

Definition. Public adjuster renders advice or assistance for compensation or reward to insured in adjustment of claims for loss under any insurance policy of real or personal property. Public adjuster is also person or corporation that advertises, solicits business, or purports to be an adjuster. Public adjusters may not adjust automobile or personal injury claims and cannot bind insureds in settlement of claims. Term "public adjuster" does not include: attorney at law admitted to practice in Indiana who adjusts insurance losses in course of practice of attorney's profession; officer, regular salaried employee, or other representative of insurer or of attorney-in-fact of any reciprocal insurer or of Lloyd's underwriter licensed to do business in Indiana who adjusts losses arising under an employer's or principal's own policies; adjustment bureau or association owned and maintained by insurers to adjust or investigate losses of such insurers or any regular salaried employee who devotes substantially all the employee's time to the business of such bureau or association; any licensed insurance producer or authorized insurer or officer or employee of same who adjusts losses for such insurer and any insurance producer or representative of a farm mutual insurance company operating under farm mutual insurance laws of Indiana on behalf of insurer; and any independent adjuster representing an insurer. I.C. 27-1-27-1. Public adjusters must be certified by Commissioner of Insurance. I.C. 27-1-27-2.

AGE

See "AUTOMOBILES"; "LIABILITY INSURANCE"; "NEGLIGENCE."

Age of Majority. Although the age of majority depends on context, no contract, sale, release, or conveyance executed by person after reaching his eighteenth birthday may be avoided by him on grounds that at time the agreement was executed he was acting under legal disability by reason of age. I.C. 34-11-6-2.

AGENTS AND BROKERS

Definition. Under Indiana statute, an insurance agent is referred to as "insurance producer," a person required to be licensed under the laws of Indiana to sell, solicit, or negotiate insurance. I.C. 27-1-15.6-2. Officers, directors, or employees of an insurer who do not receive commissions on policies written or sold, and whose duties are only indirectly related to the sale, solicitation, or negotiation of insurance, are not required to be licensed as insurance producers. I.C. 27-1-15.6-4. Generally, broker is one who represents several companies and is considered an agent of the proposed insured when applying for insurance, but a number of factors must be consid-

ered to determine whether one is a broker or an agent. *Benante v. United Pacific Life Ins. Co.*, 659 N.E.2d 545, 547 (Ind. 1995); *Estate of Mintz v. Connecticut Gen. Life Ins. Co.*, 905 N.E.2d 994, 1000-01 (Ind. Ct. App. 2009); *T.R. Bulger, Inc. v. Indiana Ins. Co.*, 901 N.E.2d 1110, 1116 (Ind. Ct. App. 2009).

For Whom. In general, insurer is not liable for acts of insurance agent who is merely a broker. *Benante v. United Pacific Life Ins. Co.*, 659 N.E.2d 545, 547 (Ind. 1995). When broker makes application for insurance and policy is issued, broker becomes an agent for insurance company and can bind it within the scope of his authority. *Id.*; *T.R. Bulger, Inc. v. Indiana Ins. Co.*, 901 N.E.2d 1110, 1117 (Ind. Ct. App. 2009). The ultimate question of agency is fact sensitive. *Benante*, 659 N.E.2d at 547; *T.R. Bulger*, 901 N.E.2d at 1116.

Fraud by Agent. Insurer is liable for reckless or intentional misrepresentation of agent. *See Vernon Fire & Cas. Ins. Co. v. Thatcher*, 285 N.E.2d 660, 671 (Ind. Ct. App. 1972), *reh'g denied, trans. denied*. However, negligence of broker is generally not imputed to insurer. *Automobile Underwriters, Inc., v. Hitch*, 349 N.E.2d 271, 276 (Ind. Ct. App. 1976). Although the insured has a duty to read and become familiar with the contents of an insurance policy, "reasonable reliance upon an agent's representations as to what will be covered under a policy can override the insured's duty to read the policy." *Everett Cash Mut. Ins. Co. v. Taylor*, 904 N.E.2d 276, 280 (Ind. Ct. App. 2009), *reh'g denied*.

Knowledge of Agent. Agent's knowledge of facts material to risk is attributable to company. *United Farm Bureau Mut. Ins. Co. v. Brantley*, 375 N.E.2d 235, 237 (Ind. App. 1978); *Union Ins. Exch., Inc. v. Gaul*, 393 F.2d 151, 155 (7th Cir. 1968).

Liability of Agent. Failure to Procure Policy. Agent failing to procure insurance, through his own neglect and fault, is liable to his principal for any resulting damages. *Dreibelbiss Title Co., Inc. v. MorEquity, Inc.*, 561 N.E.2d 1218, 1222 (Ind. Ct. App. 2007); *Steward v. City of Mt. Vernon*, 497 N.E.2d 939, 942 (Ind. Ct. App. 1986); *Brennan v. Hall*, 904 N.E.2d 383, 386 (Ind. Ct. App. 2009) (agency breached duty to obtain policy that provided coverage for insured's dog). Agent is under duty to notify principal if agent is unable to procure insurance. *Steward*, 497 N.E.2d at 942; *Brennan*, 904 N.E.2d at 386.

For Insolvent Company. Carrier's insolvency constitutes material breach of outstanding policies, thereby entitling policyholders to a refund of unearned premiums. *Bushnell v. Krafft*, 183 N.E.2d 340, 344 (1962).

Licensing and Regulation. Applicants for license as insurance producer, consultant, or surplus lines producer

must take written examination. I.C. 27-1-15.6-5. Individual who applies for insurance producer license in Indiana and who was previously licensed for same lines of authority in another state is not required to complete any pre-licensing education or examination if: individual is currently licensed in the other state; or, application is received within 90 days after cancellation of applicant's previous license and applicant produces proof that license was in good standing at time of cancellation. I.C. 27-1-15.6-9. If person is licensed as insurance producer in another state and moves to Indiana, person must submit application to be authorized to act as insurance producer in Indiana within 90 days after establishing legal residence in Indiana. Applicant who has attained designation of chartered life underwriter, certified financial planner, chartered financial consultant, chartered property and casualty underwriter, certified insurance counselor, or accredited advisor in insurance only needs to take portion of examination pertaining to Indiana laws and rules. I.C. 27-1-15.6-9. Nonresidents can qualify for non-resident license depending on reciprocity from their home state. Service of process may be made upon non-resident insurance producer by serving the Commissioner of Insurance, together with a fee of \$2.00, and then serving the non-resident insurance producer at its last known address by registered or certified mail within 10 days from service on Commissioner. I.C.27-1-15.6-21.

Uniform Unauthorized Insurance Act. Enacted to regulate and control conduct of insurers not authorized to conduct insurance business in Indiana. *See I.C. 27-4-5-1 et seq.* Crimes of theft involve deceit and are offenses of moral turpitude which allow revocation of license after conviction. *Clarkson v. Dept. of Ins.*, 425 N.E.2d 203, 206 (Ind. Ct. App. 1981).

ARBITRATION

When disputed issues had already been determined by a court of competent jurisdiction, arbitration could serve no further purpose and order to arbitrate those issues should not have been followed. *Aetna Cas. & Sur. Co. v. Dalson*, 421 N.E.2d 691, 692-93 (Ind. Ct. App. 1981).

Arbitration clauses requiring arbitration of uninsured motorist claims are enforceable but courts cannot compel arbitration of matters which parties have not agreed to arbitrate. *McNall v. Farmers Ins. Co.*, 392 N.E.2d 520, 522 (Ind. App. 1979), *trans. denied*. Actions inconsistent with intent to enforce an arbitration provision waive compliance with that provision. *Tamko Roofing Prod., Inc. v. Dilloway*, 865 N.E.2d 1074, 1078-79 (Ind. Ct. App. 2007); *see also Safety Nat'l Cas. Co. v.*



Cinergy Corp., 829 N.E.2d 986, 1000 (Ind. Ct. App. 2005), *trans. denied*.

If insurer refuses to arbitrate claim under uninsured motorist provision of insurance policy, insurer breaches contract and gives policyholder cause of action. *Bocek v. Interinsurance Exch.*, 369 N.E.2d 1093, 1095 (Ind. Ct. App. 1977).

The Indiana Supreme Court has adopted Rules for Alternative Dispute Resolution which govern mediation, arbitration, mini-hearings, summary jury trials, and private judges. A.D.R. 1.2. These rules apply in all civil and domestic relations litigation filed in all circuit, superior, county, municipal, and probate courts, but there are a number of listed exceptions. A.D.R. 1.4. The Uniform Arbitration Act is adopted under I.C. 34-57-2-1 *et seq.*

ATTORNEYS

Appointment and Authority. For cases pending prior to March 2002, court must appoint counsel when indigent applicant is without sufficient means to prosecute or defend a civil action. *Sholes v. Sholes*, 760 N.E.2d 156, 159 (Ind. 2001). I.C. 34-10-1-2 was revised in 2002 and expands the court's discretion in appointing counsel to indigent litigants. I.C. 34-10-1-2; *Sims v. Ivens*, 774 N.E.2d 1015, 1018-19 (Ind. Ct. App. 2002). When deciding whether to appoint counsel, court may consider likelihood of petitioner succeeding on merits of case and petitioner's ability to investigate and present relevant claims or defenses without assistance of counsel. I.C. 34-10-1-2. Court will use public funds to pay attorney reasonable fee. I.C. 34-10-1-2(f). An attorney representing a client is not party to the litigation; he acts on behalf of and in the name of his client, is an agent of the client, and in court stands in the client's stead. *United Farm Bureau Mut. Ins. Co. v. Groen*, 486 N.E.2d 571, 573 (Ind. Ct. App. 1985).

Conflict of Interest. Representation of an adverse interest simultaneously is potentially legal malpractice. *Apple v. Hall*, 412 N.E.2d 114, 116 (Ind. Ct. App. 1980). Attorney cannot, upon termination of representation of client, represent one whose interests are adverse to those of his former client; such representation would also expose attorney to action for malpractice. However, attorney is not prevented from representing a subsequent client against a former client, where the duties required of him do not conflict with those required in the first employment. *Id.* Insurance company does not engage in unauthorized practice of law when it employs attorneys to represent insureds. *Cincinnati Ins. Co. v. Wills*, 717 N.E.2d 151, 163 (Ind. 1999). Attorneys employed by insurance companies may represent insureds under circumstances and to the extent permitted by ethical obligations. *Id.* Attorney's failure to reveal to client, who had

entered one-third contingent fee agreement in personal injury case, that attorney intended to retain as part of his fee a pro rata share of costs of recovery, which insurers who were subrogated to client's recovery were obligated to pay, or disclose conflicting interpretations of statute, deprived client of opportunity to challenge attorney's view of statute, and created conflict of interest. *In the Matter of Robert E. Lehman*, 690 N.E.2d 696, 697 (Ind. 1997); I.C. 34-53-1-2; Rules of Prof'l Conduct, R. 1.7 cmt. 13 (1999); *see In re Ryan*, 824 N.E.2d 687, 689 (Ind. 2005) (holding the appropriate discipline once professional misconduct occurs is determined based on "the nature of the misconduct, the lawyer's state of mind which underlies the misconduct, actual or potential injury flowing from the misconduct, the duty of [the] Court to preserve the integrity of the profession, the risk to the public in allowing the respondent to continue in practice, and any mitigating or aggravating factors"). A trial court may disqualify an attorney for a violation of the Indiana Rules of Professional Conduct. *Reed v. Hoosier Health Sys. Inc.*, 825 N.E.2d 408, 411 (Ind. Ct. App. 2005).

Legal Malpractice. Beneficiary under a will can maintain action against attorney who drafted will when beneficiary is known third party; however, attorney commits no breach of trust for failing to deprive a surviving spouse of his or her statutory share in estate of deceased spouse. *Walker v. Lawson*, 526 N.E.2d 968, 969 (Ind. 1988), *but see Holtz v. J.J.B. Hilliard W.L. Lyons, Inc.*, 185 F.3d 732, 750 (7th Cir. 1999). Court declined to create a separate cause of action for negligent prosecution or negligent filing of groundless lawsuit. *Mirka v. Fairfield of Am., Inc.*, 627 N.E.2d 449, 451 (Ind. Ct. App. 1994). Attorney-client relationship may be created by client's detrimental reliance on attorney's statements or conduct. Liability under doctrine of detrimental reliance found only when attorney undertook, gratuitously or otherwise, to complete an affirmative act for party who later brought suit. *Douglas v. Monroe*, 743 N.E.2d 1181, 1186 (Ind. Ct. App. 2001). Legal malpractice actions are subject to the "discovery rule," which provides that statute of limitations does not begin to run until such time as plaintiff knows, or by exercise of ordinary diligence could have discovered, that he sustained injury due to the tortious act of another. *Morgan v. Benner*, 712 N.E.2d 500, 503 (Ind. Ct. App. 1999), *reh'g denied, trans. denied*; I.C. 34-11-2-4.

Fees. Attorney fees are governed generally by Rule 1.5 of the Rules of Professional Conduct. Rules of Prof'l Conduct R. 1.5 (1989). Rule 1.5(a) requires lawyers' fees be reasonable and includes, among other factors, the following tests of reasonableness: time and labor required; novelty and difficulty of questions involved; requisite skill to perform legal services properly; likeli-



hood, if apparent to client, that acceptance of particular employment will preclude other employment by the lawyer; fee customarily charged in the locality for similar legal services; amount involved and results obtained; time limitations imposed by client or by circumstances; nature and length of professional relationship with client; experience, reputation, and ability of lawyer or lawyers performing services; and whether fee is fixed or contingent. *Id.* The Rule prohibits contingent fee arrangements in all criminal cases and some domestic relations matters. *Id.* The comment to Rule 1.5 states that when the lawyer has regularly represented a client, an understanding concerning the basis or rate of the fee ordinarily exists. In new relationships, an understanding as to the fee should be promptly established. Rules of Prof'l Conduct R. 1.5 cmt. 2 (1999).

AUTOMOBILES

See "NEGLIGENCE" and "NO-FAULT."

Age. Licensing. Learner's Permit. Minors over age of 15 eligible for learner's permits. I.C. 9-24-7-1. Operator's license issued in each of the following situations: 1) applicant is at least 16 years and 30 days old, has held a valid learner's permit at least 60 days, has obtained an instructor's certification that applicant satisfactorily completed approved driver's education course; 2) is at least 16 years and 180 days old, held valid learner's permit at least 60 days, passed required examination; 3) is at least 18 years old, operated motor vehicle for at least 1 year, passed required examination; 4) is at least 16 years and 180 days old, within past 3 years held an Indiana operator's, chauffeur's, or public passenger chauffeur's license that has not been suspended or revoked, passed required examination; 5) is at least 16 years and 180 days old, previously been non-resident of Indiana, but who, at the time of application, qualified as Indiana resident, held for at least 1 year unrevoked operator's, chauffeur's, or public passenger chauffeur's license in the state district or county in which applicant was a resident, passed required examination. I.C. 9-24-3-2. Persons age 18 and over are eligible for chauffeur's licenses. I.C. 9-24-4-2. Persons age 18 and over are eligible for public passenger chauffeur's licenses. I.C. 9-24-5-2. Must have motorcycle endorsement on driver's license or motorcycle learner's permit to operate motorcycle. I.C. 9-24-1-5. Written and operational skills test required. I.C. 9-24-10-1 and 9-24-10-4. Adult who signs application for permit or license for a minor held jointly and severally liable for damages for which minor applicant is liable. I.C. 9-24-9-4. If a minor causes injury or damage by reason of operation of a motor vehicle, the insurer of the adult who signed the application is not liable for any judgment rendered unless the motor vehicle driven by the minor is listed on the adult's policy.

Motorists Mut. Ins. Co. v. Wroblewski, 898 N.E.2d 1272 (Ind. Ct. App. 2009), *trans. denied*. Bureau of Motor Vehicles barred from issuing learner's permit or driver's license to persons under age 18 who are under expulsion, a habitual truant, have withdrawn from school for reasons other than financial hardship, or are under at least second suspension from school. I.C. 9-24-2-1(a).

Agency - Negligent Entrustment. To hold automobile owner vicariously liable for operation by another, must show operation was for owner's business or pleasure and under his control or direction; it must be "in the line of his duties as an employee" or agent of owner. *Sears v. Moran*, 59 N.E.2d 566, 568 (Ind. 1945). Absent a master/servant or principal/agent relationship, the owner may be liable on a theory of negligent entrustment upon a showing that owner entrusted vehicle to driver with knowledge driver was incompetent to drive. *Kahn v. Cundiff*, 533 N.E.2d 164, 168 (Ind. Ct. App. 1989), *aff'd*, 543 N.E.2d 627 (Ind. 1989).

Comparative/Contributory Negligence. Indiana has adopted the doctrine of comparative fault. I.C. 34-51-2-5 *et seq.* See NEGLIGENCE, Comparative/Contributory Negligence.

Compulsory Insurance Coverage. Motor vehicle may be registered only if proof of financial responsibility in amounts specified by I.C. 9-25-4-5 (\$25,000/\$50,000 bodily injury or death, and \$10,000 property damage) is produced. I.C. 9-18-2-11. Financial responsibility must be continuously maintained; operation of motor vehicle without proper maintenance may result in suspension of license, registration, or both; and may result in Class A infraction. I.C. 9-25-4-1 to -3 and 9-25-8-2. Proof of financial responsibility may be made by furnishing proof of insurance policy issued with required liability limits, placing a bond in lieu thereof, by proof of deposit of money or securities, I.C. 9-25-4-7, or by self-insurance. I.C. 9-25-4-11. Insurer may limit uninsured and underinsured motorist coverage to vehicles insured under the policy when the vehicle is owned by the insured. I.C. 27-7-5-5(b); *IDS Property Cas. Ins. Co. v. Kalberer*, 661 N.E.2d 881, 884-85 (Ind. Ct. App. 1996), *trans. denied*. Moped which met statutory definition of motorized vehicle deemed motor vehicle for purposes of exclusion from medical expense coverage under automobile policy. *Kalberer*, 661 N.E.2d at 885; I.C. 9-13-2-109. Insured's own vehicle driven by uninsured person cannot qualify as uninsured vehicle for bodily injury coverage. *Barnes v. State Farm Mut. Auto Ins. Co.*, 893 N.E.2d 325, 329 (Ind. Ct. App. 2008), *trans. denied*. An uninsured motorist policy restricting coverage to bodily injury or death sustained by the named insureds and their relatives who reside primarily with them does not violate I.C. 27-7-5-2. *Bush v. State Farm Mut.*

Automobile Ins. Co., 905 N.E.2d 1003, 1004 (Ind. 2009). Insurers must provide uninsured and underinsured motorist coverage “in limits at least equal to the limits of liability specified in the bodily injury liability provisions of an insured’s policy, unless such coverages have been rejected in writing by the insured.” I.C. 27-7-5-2; *Liberty Mut. Fire Ins. Co. v. Beatty*, 870 N.E.2d 546, 549 (Ind. Ct. App. 2007); *United Nat’l Ins. Co. v. DePrizio*, 705 N.E.2d 455, 458 (Ind. 1999); see *Monroe Guar. Ins. Co. v. Langreck*, 816 N.E.2d 485, 486-87 (Ind. Ct. App. 2004). Commercial policies are exempted from providing UM/UIM coverage. I.C. 27-7-5-1.5. Uninsured and underinsured motorist coverage will not be read into commercial policy when it has been expressly rejected in writing. *Arnett v. Cincinnati Ins. Co.*, 864 N.E.2d 366, 369-70 (Ind. Ct. App. 2007).

Policy Limits. Motor Carriers. While U.S.C. § 31139 (b)(1-2) provides a motor carrier must obtain a minimum of \$750,000 in coverage, U.S.C. § 31139 (b)(1-2) does not establish a liability limit of \$750,000 per person in a multiple-victim accident. *Carolina Cas. Ins. Co. v. Estate of Karpov*, 559 F.3d 621,624 (7th Cir. 2009). A motor carrier may elect to obtain additional coverage. *Id.*

Alcohol/DWI. Person who operates a vehicle with a blood alcohol level of at least 0.08% and less than 0.15% commits a Class C misdemeanor. I.C. 9-30-5-1(a). Person who operates a vehicle with a blood alcohol level of 0.15% or more commits a Class A misdemeanor. I.C. 9-30-5-1(b). Person who operates a vehicle under the influence of controlled substance listed in I.C. 35-48-2. Schedule I or II commits a Class C misdemeanor. I.C. 9-30-5-1(c). “Intoxicated” means under the influence of alcohol, a controlled substance, a drug other than alcohol or a controlled substance, nitrous oxide, intentionally inhaled toxic vapors, or a combination of alcohol, controlled substances, nitrous oxide, intentionally inhaled toxic vapors, or drugs in a manner that impairs condition of thought and action and causes the loss of one’s normal control of one’s faculties. I.C. 9-13-2-86. One who operates a vehicle while intoxicated commits a Class C misdemeanor. I.C. 9-30-5-2(a). One who operates a vehicle while intoxicated in a manner that endangers a person commits a Class A misdemeanor. I.C. 9-30-5-2 (b). If, while committing an offense under I.C. 9-30-5-1 or I.C. 9-30-5-2, the person has a previous operating while intoxicated conviction, and the previous conviction occurred within the 5 years immediately preceding the occurrence of the violation of I.C. 9-30-5-1 or I.C. 9-30-5-2, the person commits a Class D felony. I.C. 9-30-5-3. A Class D felony is also committed if, while committing an offense under I.C. 9-30-5-1 or 9-30-5-2, the offense results in serious bodily injury to another person; however, the person commits a Class C felony if the person has a

prior unrelated conviction under I.C. 9-30-5 within the previous 5 years. I.C. 9-30-5-4. If, while committing an offense under I.C. 9-30-5-1 or 9-30-5-2, the offense results in the death of another, the person commits a Class C felony. I.C. 9-30-5-5. However, the offense is a Class B felony if the person had a prior unrelated conviction under I.C. 9-30-5 within the 5 years preceding the commission of the offense. I.C. 9-30-5-5 (a). In addition to any criminal penalty imposed for an offense under I.C. 9-30-5 or I.C. 14-15-8, court shall recommend, after reviewing driving record and other relevant evidence, suspension of driving privileges for a fixed period of time. Court may require suspension be imposed before or after a period of incarceration, or both before and after a period of incarceration. I.C. 9-30-5-10(a). If no previous convictions of operating while intoxicated exist or previous convictions occurred at least 10 years prior, court shall recommend suspension of privileges for at least 90 days, but not more than 2 years. I.C. 9-30-5-10(b). If a previous conviction occurred more than 5 years prior, but less than 10 years, court shall recommend the suspension of person’s driving privileges for at least 180 days, but not more than 2 years. I.C. 9-30-5-10(c). If conviction is for an offense under I.C. 9-30-5-4, 9-30-5-5, 14-15-8-8(b), or 14-15-8-8(c), the court shall recommend suspension of the person’s driving privileges for at least 2 years and not more than 5 years. I.C. 9-30-5-10(e). In addition to any criminal penalty imposed for a felony under I.C. 9-30-5 *et seq.*, if a previous conviction occurred less than 5 years prior, court shall recommend suspension of the person’s driving privileges for at least 1 year and not more than 2 years. I.C. 9-30-5-10(d). Court may grant probationary driving privileges, but may require vehicle to be equipped with functioning ignition interlock device. *Id.* If conviction is for offense involving use of controlled substance listed in I.C. 35-48-2, court shall recommend suspension or revocation of person’s driving privileges for at least 6 months. I.C. 9-30-5-10(f).

Damages. Compensatory. Compensatory damages are available for personal injury, but plaintiff in wrongful death action is limited to compensatory damages authorized under wrongful death statute, I.C. 34-23-1-1, which is exclusive remedy for wrongful death. *Scully v. Armstrong*, 646 F. Supp. 213, 216 (N.D. Ind. 1986). Punitive damages are not available to plaintiff in wrongful death action. *Durham v. U-Haul Int’l*, 745 N.E.2d 755, 757 (Ind. 2001), *reh’g denied*.

Excess Over Verdict. Treble damages are not available in action for wrongful death based on vehicle collision. *Scully v. Armstrong*, 646 F. Supp. 213, 216 (N.D. Ind. 1986).

Family Purpose Doctrine. Indiana rejected family purpose doctrine; mere fact of spousal or family relationship is insufficient to impose liability on owner for wrongful or negligent acts performed by family member operating vehicle. *Wimp v. Anthis*, 396 N.E.2d 918, 920 (Ind. Ct. App. 1979); *Grinter v. Haag*, 344 N.E.2d 320, 325 (Ind. App. 1976) (discussing spousal relationship). In addition, husbands are not liable for torts of their wives. *Chapman v. Barnett*, 169 N.E.2d 212, 215 (Ind. Ct. App. 1960).

Guests. Owner, operator, or person responsible for operation of motor vehicle is not liable for loss or damage arising from injuries to or death of a parent, spouse, child or stepchild, brother, sister, or hitchhiker resulting from operation of motor vehicle while such person was being transported without payment therefore, in or upon motor vehicle, unless injuries or death are caused by wanton or willful misconduct of operator, owner or person responsible for operation of such motor vehicle. I.C. 34-30-11-1; *Bowman v. McNary*, 853 N.E.2d 984, 995 (Ind. Ct. App. 2006); *Duncan v. Duncan*, 764 N.E.2d 763, 767 (Ind. Ct. App. 2002), *reh'g denied, trans. denied*; see *Money Store Inv. Corp. v. Summers*, 822 N.E.2d 223, 231-32 (Ind. Ct. App. 2005) (discussing "willful and wanton misconduct"); see *KLLM, Inc. v. Legg*, 826 N.E.2d 136 (Ind. Ct. App. 2005) (hitchhiker was "upon" vehicle for purposes of Guest Statute immunity when struck and killed after temporarily leaving vehicle and while assisting the driver in backing up).

Imputed Negligence/Joint Enterprise. Negligence of child can be imputed to parents when parents entrusted child with an instrumentality which, because of child's lack of experience, may become source of danger to others. *Ross v. Lowe*, 619 N.E.2d 911, 915 (Ind. 1993).

Last Clear Chance. By adopting the current comparative fault system, legislature abandoned the negligence/contributory negligence system of analyzing fault. Under comparative fault, the need for ameliorative doctrine such as last clear chance is eliminated. *Miller v. Ryan*, 706 N.E.2d 244, 249 (Ind. Ct. App. 1999), *trans. denied*; see also *Sims v. Huntington*, 393 N.E.2d 135, 138 (Ind. Ct. App. 1979) (defining Last Clear Chance).

Ownership/Title. In a civil proceeding, a certified copy of a certificate of title is prima facie evidence of ownership. I.C. 34-40-4-1. While certificate of title raises inference of legal title in holder, the "certificate of title is not of itself proof of ownership or legal title to the vehicle." *Royal Indem. Ins. Co. v. Shue*, 182 N.E.2d 796, 799 (Ind. Ct. App. 1962); *Cincinnati Ins. Co. v. Moen*, 940 F.2d 1069, 1074 (7th Cir. 1991). In insurance coverage cases, when automobile dealer sells vehicle, but has not yet transferred certificate of title to buyer, ownership of newly purchased vehicle is established when evidence

shows parties have completed sale transaction. *O'Donnell v. Am. Employers Ins. Co.*, 622 N.E.2d 570, 573 (Ind. Ct. App. 1993), *reh'g denied, trans. denied*.

Pedestrians. Pedestrian has duty not to step into path of oncoming vehicle from place of safety if car is so close as to constitute immediate hazard. I.C. 9-21-17-5. Failure to do so is a Class C infraction. I.C. 9-21-17-24.

No-Fault. Indiana does not have "no-fault" insurance.

Motorized Bicycles. Operator of motorized bicycle must be at least 15 years of age and must have an identification card, permit, operator's license, chauffeur's license, or public passenger chauffeur's license. I.C. 9-21-11-12. Persons under 18 operating motorized bicycle must wear protective head gear and eye protection at all times; no one may operate motorized bicycle on interstate highways or sidewalks or at a speed greater than 25 miles per hour. I.C. 9-21-11-12 to -13.

Seat Belts. Indiana requires each occupant to have safety belts fastened while vehicle is in forward motion if vehicle is equipped with safety belt that is standard equipment installed by manufacturer and meets federal standards. I.C. 9-19-10-2. While a safety belt checkpoint may not be used to detect and issue a citation for failure to wear a safety belt, a vehicle may be stopped to determine compliance with I.C. 9-19-10. However, a vehicle, the contents, driver, or passenger in a vehicle may not be inspected, searched, or detained solely because of a violation of I.C. 9-19-10. I.C. 9-19-10-3.1. If I.C. 9-19-10 applies to a particular motorist, failure to comply does not constitute fault or limit liability of insurer, and failure to comply may not be admitted in a civil action to mitigate damages, except in a product liability action involving motor vehicle restraint or supplemental restraint system. I.C. 9-19-10-7.

Service of Process. Non-Resident Motorists. Operation of motor vehicle upon highways by non-resident or by resident who becomes non-resident is deemed equivalent to appointment by such non-resident, or his personal representative, of Secretary of State as his personal attorney upon whom process may be served growing out of any automobile accident. I.C. 34-33-3-1. Secretary of State is required to send such process by registered or certified mail to defendant, complete and deliver to court clerk affidavit showing date of mailing, send to clerk copy of return receipt along with copy of summons, and file and retain copy of the return receipt. T.R. 4.10.

In Rem Jurisdiction. Court may render judgment to the extent of its jurisdiction over the res, and service may be made upon the person or agent outside of Indi-

ana as provided under Rule 4.1, by publication under Rule 4.13, or as otherwise provided. T.R. 4.9.

Speed Limit. 30 M.P.H. in any urban district; 55 M.P.H. outside urban district and on urban interstate system; 65 M.P.H. on rural interstate system; 60 M.P.H. on rural interstate system for vehicle other than bus having declared gross weight greater than 26,000 pounds; 15 M.P.H. in alleys. Speed may be reduced when a special hazard exists. I.C. 9-21-5-2. Speed limits subject to alteration by local authorities (I.C. 9-21-5-6) and reasonableness and prudence under existing conditions. I.C. 9-21-5-1. Any vehicles normally moving 25 M.P.H. or less on public highways are required to display uniform triangular "slow moving vehicle emblem" at an approximate height of not less than three feet and not more than five feet from level ground or pavement surface; at night, slow moving vehicles must display a red or amber flashing light visible from not less than 500 feet to the rear. *See* I.C. 9-21-9-1, 2, 4.

Trailers/Weight Limits. Local authorities may prohibit operation of trucks or other commercial vehicles or may impose limitations as to weight, size, or use thereof on highways under their jurisdiction, except they may not prohibit operation of buses not more than 45 feet in length on any segment of the primary system in existence on June 1, 1991. I.C. 9-20-1-3. Power of local authorities to impose limitations does not apply to highways in state highway system and state maintained routes through cities and towns. *Id.* The Department of Transportation has same power as local authorities with respect to state transportation system. *Id.*

Uninsured and Underinsured Endorsements. I.C. 27-7-5-2 *et seq.* Motor vehicle liability insurance companies must write uninsured and underinsured motorist coverage in each policy of insurance unless named insured rejects coverage in writing. I.C. 27-7-5-2. I.C. 27-7-5-4(b) intends to place "the insured in the position he would have occupied if the tortfeasor had liability coverage equal to his [uninsured motorist] limits." *Auto-Owners Ins. Co. v. Eakle*, 869 N.E.2d 1244, 1249 (Ind. Ct. App. 2007). When multiple parties are injured, insurer is not entitled to set off all payments made by tortfeasor against uninsured motorist coverage regardless of whether all injured parties make claims. *Progressive Ins. Co. v. Bullock*, 841 N.E.2d 238, 244 (Ind. Ct. App. 2006). Word "insured" in statute refers to person to whom liability coverage is extended. I.C. 27-7-5-2 to -5. However, Indiana Uninsured Motorist Statute does not specifically define "insured" and, therefore, definition of "insured" may be controlled by insurance policy at issue. *Anderson v. State Farm Mut. Auto. Ins. Co.*, 471 N.E.2d 1170, 1174 (Ind. Ct. App. 1984). An uninsured motorist policy restricting coverage to bodily injury or death sus-

tained by the named insureds and their relatives who reside primarily with them does not violate I.C. 27-7-5-2. *Bush v. State Farm Mut. Automobile Ins. Co.*, 905 N.E.2d 1003, 1004 (Ind. 2009). Statute sets minimum standard of protection, and any attempt to narrow or subvert legislative intent through clause or exclusion will be treated as ineffective. *Allstate Ins. Co. v. Sanders*, 644 N.E.2d 884, 885-86 (Ind. Ct. App. 1994). If amount immediately available to insured is far less than underinsured motorist coverage, tortfeasor's vehicle was underinsured, and if policy says otherwise, it is illegal in Indiana. *Corr v. Am. Family Ins.*, 767 N.E.2d 535, 540-41 (Ind. 2002). Insured's own vehicle driven by uninsured person cannot qualify as uninsured vehicle for bodily injury coverage. *Barnes v. State Farm Mut. Auto Ins. Co.*, 893 N.E.2d 325, 329 (Ind. Ct. App. 2008), *trans. denied*. Insurer, by failing to act on proceedings brought by its insured against uninsured motorist, waives its right to assert any defenses which uninsured motorist would have, but retains any defenses it might have to insurance contract. *Vernon Fire & Cas. Ins. Co. v. Matney*, 351 N.E.2d 60, 67 (Ind. Ct. App. 1976). Anti-stacking clauses are enforceable. *Ansert v. Indiana Farmers Mut. Ins. Co.*, 659 N.E.2d 614, 621 (Ind. Ct. App. 1995), *reh'g denied, trans. dismissed*.

AVIATION

Uniform Act. Aviation and aeronautics are governed by the Uniform State Law for Aeronautics. I.C. 8-21-4-1 *et seq.* and I.C. 8-21-1-1 *et seq.*

Action for Wrongful Death. Limits to Liability. Owner, operator, or other person responsible for operating aircraft is not liable for death of or injury to parents, spouse, children or stepchildren of any age, or sibling when such persons are provided free transportation. I.C. 8-21-5-1. Exception does not apply if death or injury results from willful and wanton misconduct of owner, operator, or person responsible for operation of aircraft. I.C. 8-21-5-1.

Service of Process. Operation of aircraft by non-resident or by his duly authorized agent shall be deemed to be an appointment of the Secretary of State as his true and lawful attorney to receive process for all actions against non-resident arising from any aircraft accident occurring while aircraft is operating within State. I.C. 8-21-3-7(b). Such service on Secretary of State shall have same effect as if it was served on the non-resident personally. *Id.* Any action may be commenced in county where plaintiff resides or in county where accident occurred, as plaintiff may choose. *Id.*

BROKERS

See "AGENTS AND BROKERS."

BURGLARY INSURANCE

Policy held to cover theft of valuables from inner compartment of safe when such compartment was opened by force and violence, leaving visible marks, but outer door thereof was opened by manipulation of lock, leaving no visible marks of force. *London & Lancashire Indem. Co. v. Indiana Jobbing & Mercantile Co.*, 171 N.E. 219, 220 (Ind. Ct. App. 1930). Policy coverage held ambiguous; doubt resolved in favor of insured. *Id.* When immediate notice of occurrence of a burglary is required in burglary insurance policy, notice given eight or nine months after burglary was not within a reasonable time. *Fid. & Cas. Co. v. Sanders*, 70 N.E. 167, 169 (Ind. Ct. App. 1904). When off-duty substitute watchman participated in burglary of store, insurer was not relieved of liability when burglary insurance policy provided insurer should not be liable for loss if insured's watchman was principal or accessory to a burglary because policy was ambiguous as to whether watchman was excluded if off-duty rather than on-duty. *Fid. & Deposit Co. v. Pettis Dry Goods Co.*, 190 N.E. 63, 65 (Ind. 1934).

CANCELLATION

See "ACCIDENT AND HEALTH INSURANCE, Contracts"; "LIABILITY INSURANCE"; "FIRE INSURANCE, Contracts."

Automobile insurance. See 27-7-1.5 *et seq.* and I.C. 27-7-6-1 *et seq.*

Cancellation. "Cancellation" refers to the termination of a policy prior to the end of the policy period. *Hibler v. Conseco, Inc.*, 744 N.E.2d 1012, 1018 (Ind. Ct. App. 2001); *Am. Family Mut. Ins. Co. v. Ramsey*, 425 N.E.2d 243, 244 (Ind. Ct. App. 1981). Provision for cancellation of fire policies on certain conditions upon refund of unearned premiums paid held valid. *Clark v. Mfrs. Mut. Fire Ins. Co.*, 30 N.E. 212, 213 (Ind. 1892). However, tender of premiums by insurance company is not required in order to cancel if company has already paid claims under policy in excess of premiums paid. *Am. Standard Ins. Co. v. Durham*, 403 N.E.2d 879, 881 (Ind. Ct. App. 1980). Cancellation of an insurance policy occurs when an entire policy is cancelled or when a policy provision is amended or deleted so as to discontinue coverage previously available. *Westfield Co. v. Rovam, Inc.*, 722 N.E.2d 851, 858 (Ind. Ct. App. 2000). There can be no cancellation until notice given to insured. *New Amsterdam Cas. Co. v. New Palestine Bank*, 107 N.E. 554, 556 (Ind. Ct. App. 1915). Proof of mailing cancellation notice by ordinary mail to address specified by insured creates rebuttable presumption notice was received. *Conrad v. Universal Fire & Cas. Ins. Co.*, 686 N.E.2d 840, 842 (Ind. 1997). When notice sent by certified mail and returned to insurer unclaimed, presumption

is rebutted. *Id.* at 843. The notice required to effectively cancel an insurance policy must be clear, definite and certain. *Westfield Co.*, 722 N.E.2d at 858. Notice must contain such a clear expression of intent to cancel the policy that the intent to cancel would be apparent to the ordinary person. *Id.* Generally, valid contract of insurance, once effectuated, may be cancelled only by concurrent agreement, by reservation in policy, or by statute. *Hibler*, 744 N.E.2d at 1018; *Bushnell v. Krafft*, 183 N.E.2d 340, 343 (Ind. Ct. App. 1962). Without a statutory or contractual provision governing cancellation, the insurance policy will still be in effect absent a meeting of the minds or concurrent agreement as to cancellation. *Hibler*, 744 N.E.2d at 1020. When agent who represents several companies is authorized by owner of property to keep property insured, such agent has authority to accept notice of cancellation of policy on behalf of insured from company. *Sterling Fire Ins. Co. v. Comisión Reguladora Del Mercado De Henequen*, 143 N.E. 2, 6 (Ind. 1924). Return or tender of full pro rata unearned premium is condition precedent to cancellation of policy which provides it may be cancelled on notice to insured and on refunding of unearned premium. *Bushnell*, 183 N.E.2d at 343. Proof insured has accepted less than amount of unearned premium in full satisfaction upon cancellation of policy is good defense to action on policy. *Aetna Ins. Co. v. Weissinger*, 91 Ind. 297, 301 (1883). Mutual company was not excused from tendering unearned premium reasonably promptly instead of waiting until end of term, because insured could not have been assessed for losses accruing after surrender or cancellation. *Farmers Conservative Mut. Ins. Co. v. Neddo*, 40 N.E.2d 401, 405 (Ind. Ct. App. 1942).

Rescission. To effect rescission, insurer must tender return of premium within reasonable time which, if not accepted, must be paid into court. *Prudential Ins. Co. v. Smith*, 108 N.E.2d 61, 64 (Ind. 1952). Concurrence of parties in rescission of insurance contract may be shown by their express agreement or their respective acts; mutual agreement to rescind requires meeting of minds. *Cook v. Michigan Mut. Liab. Co.*, 289 N.E.2d 754, 758 (Ind. Ct. 1972). Mutual mistake of fact can also lead to rescission. *Am. United Life Ins. Co. v. The Restaurant Hospitality Ass'n of Indiana*, 898 N.E.2d 419, 425 (Ind. Ct. App. 2008), *trans. denied*. Insurer entitled to rescission if insured makes material misrepresentation in application. *Gary Nat'l Bank v. Crown Life Ins. Co.*, 392 N.E.2d 1180, 1181 (Ind. Ct. App. 1979); *see also Hibler*, 744 N.E.2d at 1018. Insurer need not tender premiums in order to rescind policy if insurer has already paid claims in excess of premiums already paid. *Am. Standard Ins.*, 403 N.E.2d at 881.

CHATTEL MORTGAGE

See "FIRE INSURANCE."

CONSTRUCTION OF POLICY

Ambiguity of Terms. Insurance policies are to be interpreted under principles of contract law. *Pender v. United States*, 866 F. Supp. 1129, 1135 (N.D. Ind. 1994). Insurance contract is ambiguous if reasonably intelligent person, on reading contract, would honestly differ to its meaning, *Benefit Trust Life Ins. Co. v. Waggoner*, 473 N.E.2d 646, 650 (Ind. Ct. App. 1985), but is not always ambiguous where two parties assert differing interpretations. *United Farm Bureau Mut. Ins. Co. v. Pierce*, 283 N.E.2d 788 (Ind. Ct. App. 1972); *O'Meara v. Am. St. Ins. Co.*, 268 N.E.2d 109, 111 (1971). Generally, when insurance policy is ambiguous, it is construed favorably toward insured and strictly construed against insurer, *Kinslow v. Geico Ins. Co.*, 858 N.E.2d 109, 114 (Ind. Ct. App. 2006); *Auto-Owners Ins. Co. v. Eakle*, 869 N.E.2d 1244, 1249 (Ind. Ct. App. 2007); *Leonard v. Union Carbide Corp.*, 180 F. Supp. 549, 552 (S.D. Ind. 1960), thereby furthering the policy's basic purpose of indemnity. *Am. Family Mut. Ins. Co. v. Hall*, 764 N.E.2d 780, 784 (Ind. Ct. App. 2002); *Am. Fam. Ins. Co. v. Globe Am. Cas. Co.*, 774 N.E.2d 932, 935 (Ind. Ct. App. 2002); see also *Farm Bureau Gen. Ins. Co. of Michigan v. Sloman*, 871 N.E.2d 324, 330 (Ind. Ct. App. 2007); *Barclay v. State Auto Ins. Cos.*, 816 N.E.2d 973, 975 (Ind. Ct. App. 2004) *reh'g denied, trans. denied* (citing *Bosecker v. Westfield Ins. Co.*, 724 N.E.2d 241, 244 (Ind. 2000) (reversing summary judgment in favor of insurer and ordering trial court to remand for proceedings due to ambiguity in policy language)). However, clear and unambiguous policy language will be given its ordinary meaning. *W. Am. Ins. Co. v. Cates*, 865 N.E.2d 1016, 1020 (Ind. Ct. App. 2007); *Everett Cash Mut. Ins. Co. v. Taylor*, 904 N.E.2d 276, 279 (Ind. Ct. App. 2009), *reh'g denied*. Courts will not construe ambiguous insurance clause most favorable to insured when clause is statutory requirement. *Lincoln Nat'l Life Ins. Co. v. Sobel*, 35 N.E.2d 121, 127 (Ind. Ct. App. 1941). Construction of ambiguous insurance policy is question of law if ambiguity arises because of language used in the instrument rather than extrinsic evidence. *Ohio Cas. Ins. Co. v. Ramsey*, 439 N.E.2d 1162, 1165 (Ind. Ct. App. 1982). Interpretation of ambiguous terms by court must harmonize conflicting positions, rather than merely support conflicting version of provisions. *Briles v. Wausau Ins. Cos.*, 858 N.E.2d 208, 213 (Ind. Ct. App. 2006). Policy language reducing limits by "any amount payable for damages under this coverage" is not ambiguous. *Beam v. Wausau Ins. Co.*, 765 N.E.2d 524, 529-31 (Ind. 2002). When definition of "person" in insurance policy is ambiguous and may be construed to include unborn chil-

dren, injuries sustained by child in utero may be covered under policy. *Progressive Ins. Co. v. Bullock*, 841 N.E.2d 238, 246 (Ind. Ct. App. 2006).

Conditional Receipt of Application. Indiana cases interpreting receipt generally bind insurance company after receipt of first premium and issuance of receipt until it notifies insureds they have failed to meet the conditions of insurability. See *Kaiser v. Nat'l Farmers Union Life Ins. Co.*, 339 N.E.2d 599, 601 (Ind. Ct. App. 1976). Conditions contained in receipts are treated as conditions subsequent requiring affirmative action by insurer, such as return of premium and notification that application is not accepted. *Id.*; *Meding v. Prudential Ins. Co.*, 444 F. Supp. 634, 636 (N.D. Ind. 1978).

A contract for insurance was created when insurer did not notify insured of necessity for medical examination, accepted consideration, and issued a receipt. *Monumental Life Ins. Co. v. Hakey*, 354 N.E.2d 333, 334-35 (Ind. Ct. App. 1976). Court indicated coverage afforded by insurer's issuance of conditional receipt for temporary life insurance for period of 60 days upon payment by insured of premium for only that period would not terminate in absence of notification of termination and return of unearned portion of premium. *Hornaday v. Sun Life Ins. Co.*, 597 F.2d 90, 93 (7th Cir. 1979). Without additional premium or delivery of actual policy of insurance, policy did not extend beyond period specified in conditional receipt. *Id.* at 94.

Inconsistent Policy Terms and Endorsements. When two inconsistent stipulations cover same subject matter – one general stipulation, providing policy becomes void upon certain condition, and other separate and distinct stipulation, providing company might void policy upon same condition – the more specific stipulation will govern. *Nw. Mut. Life Ins. Co. v. Hazelett*, 4 N.E. 582, 584 (Ind. 1886); *Fowler v. Campbell*, 612 N.E.2d 596, 600 (Ind. Ct. App. 1993). Provision in application for insurance that applicant "warrants" application to contain full and true description of property insured was found not to be a warranty but a representation. *Indiana Farmers' Live Stock Ins. Co. v. Byrnett*, 36 N.E. 779, 781 (Ind. Ct. App. 1894).

Oral Binders. Oral preliminary contract can bind insurance company to issue or renew policy of insurance in the future. *Nat'l Live Stock Ins. Co. v. Cramer*, 114 N.E. 427, 429 (Ind. Ct. App. 1916). Oral contracts for insurance may be valid. *Id.*; *Washington Fid. Nat'l Ins. Co. v. Burton*, 287 U.S. 97, 99 (1932).

Minds of parties to oral contract of insurance must meet upon all essential terms of contract, including subject of insurance, limit and duration of risks, perils insured against, amount of coverage and premium rate,



leaving nothing open for future determination. *Billboards 'N' Motion, Inc. v. Saunders-Saunders & Assoc., Inc.*, 879 N.E.2d 1135, 1139 (Ind. Ct. App. 2008); *Stockberger v. Meridian Mut. Ins. Co.*, 395 N.E.2d 1272, 1277 (Ind. Ct. App. 1979). However, when insurance agent is only a soliciting agent, this fact does not give agent authority to bind his principal by oral contract of insurance. *Farmers Mut. Ins. Co. v. Wolfe*, 233 N.E.2d 690, 695 (Ind. Ct. App. 1968); *State Life Ins. Co. v. Thiel*, 20 N.E.2d 693, 695 (Ind. Ct. App. 1939); see also *Vernon Fire & Cas. Ins. Co. v. Thatcher*, 285 N.E.2d 660, 662 (Ind. Ct. App. 1972).

DAMAGES

Appellate Review of Excessive or Insufficient Verdicts. Motion to correct error is prerequisite for appeal when a party seeks to address a claim that jury verdict is insufficient or excessive or inadequate. T.R. 59. On appeal, damages are considered excessive only if damages are so small or great as to indicate passion, prejudice, partiality, corruption, or some other improper element by trier of fact. *Faulk v. Chandler*, 408 N.E.2d 584, 586 (Ind. Ct. App. 1980); see also *Dunkelbarger Constr. Co. v. Watts*, 488 N.E.2d 355, 359 (Ind. Ct. App. 1986) (indicating a judgment will be found excessive if amount of damages appears "to be so outrageous as to impress the court at 'first blush' of its enormity"); *Foddrill v. Crane*, 894 N.E.2d 1070, 1080 (Ind. Ct. App. 2008), *trans. denied* (finding personal injury award not to be excessive when: (1) the jury did not base award upon prejudice, partiality, or corruption; (2) jury did not misunderstand or misapply evidence; (3) jury did not base award upon consideration of improper element, such as liability insurance, and (4) jury awarded damages within parameters of evidence). Award of \$700,000 for death of 62-year-old barber was not excessive. *Dunkelbarger Constr.*, 488 N.E.2d at 359. A damage award of zero dollars is not necessarily contrary to law. *Faulk*, 408 N.E.2d at 586.

Arbitration Awards and Collateral Estoppel. Decision by arbitrator is valid, final, and binding judgment as to parties. *United States Fid. & Guar. v. DeFluiter*, 456 N.E.2d 429, 432 (Ind. Ct. App. 1983). Insured who voluntarily agreed to enter into arbitration proceeding cannot subsequently bring action at law for punitive damages. *Id.* Under "permeation doctrine," the ordering of arbitration should not be precluded by collateral estoppel considerations. *Lloyds of London v. United Home Life Ins. Co.*, 549 N.E.2d 67, 70 (Ind. Ct. App. 1990), *aff'd mem.*, 563 N.E.2d 609, 610 (Ind. 1990); *Am. Gen. Fin. Mgmt. Corp. v. Watson*, 822 N.E.2d 253, 259 (Ind. Ct. App. 2005).

Comparative Negligence. Indiana has adopted the doctrine of comparative fault. I.C. 34-51-2-1 *et seq.* See NEGLIGENCE, Comparative/Contributory Negligence.

Under the Comparative Fault Act, liability for an injury is apportioned among the plaintiff(s), defendant(s), and any other person who is properly named a "nonparty." *Bornstein v. Watson's of Indianapolis, Inc.*, 771 N.E.2d 663, 664 (Ind. Ct. App. 2002). The liability of each defendant stands independently and is unaffected by the liability of other defendants, *R.L. McCoy, Inc. v. Jack*, 772 N.E.2d 987 (Ind. 2002); thus, each defendant is liable only for damages in proportion to his fault. I.C. 34-51-2-7.

Indemnification. "Although courts look upon indemnification clauses with disfavor, a party may contract to indemnify itself against its own negligence if the other party 'knowingly and willingly' agrees to indemnification. *Bethlehem Steel Corp. v. Sercon Corp.*, 654 N.E.2d 1163, 1167 (Ind. Ct. App. 1995). In order to reflect a knowing and willing acceptance, the indemnification clause must exactly state in clear and unequivocal terms that the indemnitee agrees to indemnify the indemnitor against the indemnitor's own negligence. *State Group Indus. Ltd. v. Murphy & Assoc. Indus. Servs., Inc.*, 878 N.E.2d 475, 479 (Ind. Ct. App. 2007); *Exide Corp. v. Millwright Riggers, Inc.*, 727 N.E.2d 473, 479 (Ind. Ct. App. 2000). While some indemnification agreements are permitted, a party may not indemnify itself against the sole negligence or willful misconduct of indemnitee in construction or design contracts or contracts affecting construction or design contracts. I.C. 26-2-5-1. Courts are reluctant to entitle a contractor to indemnification for faulty work performed by subcontractors because it would negate public policy to encourage contractors to save money by hiring substandard subcontractors while intending to rely on insurance to cure resulting defects. *Westfield Ins. Co. v. Sheehan Constr. Co., Inc.*, 564 F.3d 817, 819 (7th Cir. 2009). Although there are several well recognized exceptions, absent a contractual provision requiring indemnification, Indiana courts generally do not recognize a common law right to implied indemnity. *McClish v. Niagara Mach. & Tool Works*, 266 F. Supp. 987, 989 (S.D. Ind. 1967). An exception occurs when "one who is constructively liable to a third person by operation of some special statute or rule of law which imposes upon him a non-delegable duty, but who is otherwise without fault, is entitled to indemnity from one who directly causes the harm." *Id.* at 990. Additionally, derivative liability, such as respondeat superior, also constitutes an exception to the general rule. *Id.* Comparative Fault Act's fault apportionment process does not give rise to vicarious liability and indemnification rights. *Indianapolis Power & Light v. Brad Snodgrass, Inc.*, 578 N.E.2d 669, 672 (Ind. 1991).



Psychic Injuries - Mental Pain and Suffering. Under the Modified Impact Rule, when plaintiff sustains a direct impact by negligence of another and by virtue of that involvement sustains serious emotional trauma, of the kind normally expected to occur in a reasonable person, plaintiff may recover without regard to whether emotional trauma arises out of or accompanies physical injury. *Shuamber v. Henderson*, 579 N.E.2d 452, 454 (Ind. 1991); *Helsel v. Hoosier Ins. Co.*, 827 N.E.2d 155, 157 (Ind. Ct. App. 2005); *State Farm Mut. Auto. Ins. Co. v. Jakupko*, 881 N.E.2d 654, 660 (Ind. 2008) (finding term bodily injury does not include emotional damage unless it arises from touching); see also *Elliott v. Allstate Ins. Co.*, 881 N.E.2d 662, 664 (Ind. 2008); *State Farm Mut. Auto. Ins. Co. v. D.L.B.*, 881 N.E.2d 665, 666 (Ind. 2008). Even when a direct impact is not sustained, a bystander may nevertheless establish "direct involvement" by proving the bystander actually witnessed or came on the scene immediately after the death or severe injury of a loved one (relationship to bystander must be analogous to a spouse, parent, child, grandparent, grandchild or sibling) caused by the defendant's negligent or otherwise tortious conduct. *Groves v. Taylor*, 729 N.E.2d 569, 573 (Ind. 2000); *Ryan v. Brown*, 827 N.E.2d 112, 119 (Ind. Ct. App. 2005). See also *Smith v. Toney*, 862 N.E.2d 656, 663 (Ind. 2007) (declining to extend *Groves* when an engaged woman proved she actually came on the scene immediately after the death of her fiancée); *Blackwell v. Dykes Funeral Homes, Inc.*, 771 N.E.2d 692, 696-97 (Ind. Ct. App. 2002) (extending *Groves* when decedent's parents were sufficiently and directly involved in incident in which funeral home allegedly lost decedent's cremated remains, such that decedent's parents could maintain claim against funeral home for negligent infliction of emotional distress). Emotional distress damages sustained in course of tortious trespass are recoverable even absent physical injury. *Cullison v. Medley*, 570 N.E.2d 27, 29 (Ind. 1991). When courts have been satisfied the alleged mental anguish is not likely speculative, exaggerated, fictitious, or unforeseeable, the claimant has been allowed to proceed with an emotional distress claim for damages, even though the evidence of the physical injury was slight. *Bader v. Johnson*, 732 N.E.2d 1212, 1221 (Ind. 2000). Increased breathing, sweating, pulse, heart rate, adrenaline, and acuteness of the senses are not sufficient physical transformations to trigger recovery for emotional damages. *Atl. Coast Airlines v. Cook*, 857 N.E.2d 989, 999 (Ind. 2006). Emotional distress damages are generally recoverable for invasion of legal right which, by its very nature, is likely to invoke emotional disturbance. *Charlie Stuart Oldsmobile, Inc. v. Smith*, 357 N.E.2d 247, 253 (Ind. Ct. App. 1976). However, emotional distress caused by the mere possibility an individual inhaled a toxin will not warrant a cause of action for emotional

distress damages; some certainty the toxin was actually inhaled is required. *Adams v. Clean Air Sys., Inc.*, 586 N.E.2d 940, 941-42 (Ind. Ct. App. 1992). Therefore, when a lack of certainty the claimant was exposed to an amount of the chemical sufficient to cause any effects on him now or in the future exists, plaintiff's claims for emotional distress will be dismissed. *Hannan v. Pest Control Servs., Inc.*, 734 N.E.2d 674, 685 (Ind. Ct. App. 2000); see also *Outlaw v. Erbrich Prods. Co., Inc.*, 777 N.E.2d 14, 29 (Ind. Ct. App. 2002).

Punitive Damages. Ultimate determination regarding punitive damages is controlled by malfeasor's state of mind. *Dow Chem. Co. v. St. Vincent Hosp. & Health Care Ctr.*, 553 N.E.2d 144, 151 (Ind. Ct. App. 1990). An award of punitive damages requires some evidence inconsistent with hypothesis that tortious conduct was result of mistake of law or fact, honest error of judgment, over-zealousness, mere negligence, or other such non-iniquitous human failing. *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349, 358 (Ind. 1982). A showing of malice, fraud, oppression, gross negligence, willful and wanton misconduct, or heedless disregard of consequences, together with service to the public interest with such an award, is also required. *Belford v. McHale Cook & Welch*, 648 N.E.2d 1241, 1246 (Ind. Ct. App. 1995). Plaintiff must prove this conduct by clear and convincing evidence. *Travelers Indem. Co.*, 442 N.E.2d at 352; I.C. 34-51-3-2. Punitive damages must be specifically pled. T.R. 9; *1st Source Bank v. Rea*, 559 N.E.2d 381, 388 (Ind. Ct. App. 1990). Compensatory damages are prerequisite for any award of punitive damages. *Sullivan v. Am. Cas. Co.*, 605 N.E.2d 134, 140 (Ind. 1992); *Cheatham v. Pohle*, 789 N.E.2d 467, 474 (Ind. 2003). Nominal damages may be sufficient to support award of punitive damages. *Keehr v. Consolidated Freightways of Delaware, Inc.*, 825 F.2d 133, 139 (7th Cir. 1987). In order to recover punitive damages for breach of contract, plaintiff must plead and prove existence of independent tort of the kind for which Indiana law recognizes punitive damages may be awarded. *Miller Brewing Co. v. Best Beers of Bloomington, Inc.*, 608 N.E.2d 975, 980 (Ind. 1993); see also *Allstate Ins. Co. v. Hennings*, 827 N.E.2d 1244, 1250 (Ind. Ct. App. 2005). Under Indiana law, a punitive damages award may not be more than the greater of three times compensatory damages or \$50,000. I.C. 34-51-3-4. Indiana's punitive damages allocation statute provides an award of punitive damages is to be paid to the clerk of the court, and the clerk is to pay seventy-five percent of it to the State's Violent Crime Victims' Compensation Fund and twenty-five percent to the plaintiff. I.C. 34-51-3-6(a)-(c). The State's interest in a punitive damage award is effective when a finder of fact announces a verdict including punitive damages. I.C. 34-51-3-6(e). The Supreme Court of Indi-



ana held I.C. 34-51-3-6 does not create an unconstitutional taking of property and does not place a demand on an attorney's particular services in violation of the Indiana Constitution. *Cheatham v. Pohle*, 789 N.E.2d at 476. It is no defense to an action for punitive damages that defendant is possibly subject to criminal prosecution for act or omission that gave rise to civil action. I.C. 34-24-3-3. Punitive damages are not recoverable against governmental entities or governmental employees acting within the scope of their employment. I.C. 34-13-3-4; see also *Miner v. Southwest Sch. Corp.*, 755 N.E.2d 1110, 1116 (Ind. Ct. App. 2001) (holding school corporation is a governmental entity under I.C. 34-13-3-4). Punitive damages are particularly appropriate in cases involving consumer fraud. *Jones v. Abriani*, 350 N.E.2d 635, 639 (Ind. Ct. App. 1976). Insurer may be liable in suit on insurance contract. *State Farm Mut. Auto. Ins. Co. v. Estep*, 873 N.E.2d 1021, 1026 (Ind. 2007) (finding bad faith claim against insurer may not be involuntarily assigned to judgment creditor of insured when insured does not believe basis for bad faith claim exists). *Erie Ins. Co. v. Hickman*, 622 N.E.2d 515, 518 (Ind. 1993). Breach of duty of good faith in an insurance contract is an independent tort cause of action compensable with punitive damages, although that cause of action does not arise every time an insurance claim is erroneously denied. *Erie*, 662 N.E.2d at 518. The court also acknowledged the relationship existing between an insurer and its insured may be adversarial, fiduciary, or at arms-length. *Id.*; see also *Midwest Sec. Life Ins. Co. v. Stroup*, 730 N.E.2d 163, 168 (Ind. 2000).

Collateral Source Rule. In personal injury or wrongful death actions, evidence regarding collateral source payments is admissible, but evidence regarding payments of death benefits (including life insurance), insurance benefits, and pretrial payments by government entities is not admissible. I.C. 34-44-1-1 *et seq.* Proof of payments shall be considered by trier of fact in arriving at award and by court in reviewing awards alleged to be excessive. I.C. 34-44-1-3. Historically, Indiana recognized common law "collateral source rule," which prohibited defendants from introducing evidence concerning compensation received by the plaintiff from sources other than the defendant. See *Shirley v. Russell*, 663 N.E.2d 532, 535 (Ind. 1996). In 1986, however, Indiana legislature abrogated the collateral source rule and provided evidence of collateral source payments may not be prohibited except for certain specified exceptions. That statute has since been recodified at I.C. 34-44-1-2. *Knowles v. Murray*, 712 N.E.2d 1, 4 (Ind. Ct. App. 1999). To the extent an injured plaintiff's medical treatment is paid from a collateral source at a discounted rate, the collateral source rule does not bar the discounted amounts from being introduced as evidence of the rea-

sonable value of medical services, so long as evidence of the discounted rate is introduced without referencing insurance. *Stanley v. Walker*, 906 N.E.2d 852, 858 (Ind. 2009). Underinsured motorist payments are considered to be collateral sources, which may not be admitted into evidence at trial under the Collateral Source Evidence Act. *Peele v. Gillespie*, 658 N.E.2d 954, 958 (Ind. Ct. App. 1995); but see *Pendleton v. Aguilar*, 827 N.E.2d 614, 626 (Ind. Ct. App. 2005) (finding uninsured motorist benefits paid for by the plaintiff's employer are admissible at trial and can be considered by the jury in arriving at a damage award).

Statutory Caps on Awards. Indiana's Tort Claims Act, I.C. 34-13-3-1 *et seq.*, fixes aggregate liability of all governmental entities at \$300,000 for injury or death of one person in any one occurrence that accrues before January 1, 2006; \$500,000 for injury or death that accrues on or after January 1, 2006, and before January 1, 2008; \$700,000 for injury or death that accrues on or after January 1, 2008; and \$5 million for injury to or death of all persons in that occurrence. I.C. 34-13-3-4. Amount recoverable in medical malpractice actions is limited to \$750,000 for acts of malpractice occurring before June 30, 1999 and \$1,250,000 for acts occurring thereafter. I.C. 34-18-14-3.

DEATH

Abatement and Survival. All causes of action survive the death of one of the parties and may be brought by or against the representative of the deceased party, except actions for libel, slander, malicious prosecution, false imprisonment, invasion of privacy, and personal injuries to the deceased party. I.C. 34-9-3-1(a). If a party dies from a cause not related to personal injuries caused by the other party, the personal representative of the decedent may recover all damages resulting before the date of death that the decedent would have been entitled to recover. I.C. 34-9-3-4.

Action for Wrongful Death. Indiana law provides for three mutually-exclusive actions for wrongful death. The first, under what is known as the wrongful death statute ("WDS"), is primarily an action designed to compensate decedent's survivors for loss they have sustained as a result of death. *Luider v. Skaggs*, 693 N.E.2d 593, 596 (Ind. Ct. App. 1998), *trans. denied*. Only a personal representative appointed within two years of the decedent's death may file a WDS action. *Goleski v. Fritz*, 768 N.E.2d 889, 890 (Ind. 2002); I.C. 34-23-1-1; see also *Estate of Sears v. Griffin*, 771 N.E.2d 1136, 1139 (Ind. 2002). Second, under the child wrongful death statute ("CWDS"), surviving parents may bring an action for death of a child (defined as an unmarried individual without dependents who is 1) less than 20 years

old; 2) enrolled in post-secondary educational institution or career and technical education that is not a post-secondary educational program and less than 23 years old; or 3) a fetus that has attained viability). I.C. 34-23-2-1. Prior to July 1, 2009, Indiana courts routinely found the term “child” did not include unborn children. *See Bolin v. Wingert*, 764 N.E.2d 201, 204 (Ind. 2002) (holding only children born alive are covered by the CWDS); *see also McVey v. Sargent*, 855 N.E.2d 324, 327 (Ind. Ct. App. 2006) (finding failure to include unborn children in wrongful death statute does not violate privileges and immunities clause of Indiana Constitution and does not violate equal protection); *Ryan v. Brown*, 827 N.E.2d 112, 117 (Ind. Ct. App. 2005) (stating term “child” precludes unborn children); *Ramirez v. Wilson*, 901 N.E.2d 1, 3 (Ind. Ct. App. 2009), *trans. denied* (concluding viable fetus not a “child” for purposes of wrongful death statute). *But see Horn v. Hendrickson*, 824 N.E.2d 690, 697 (Ind. Ct. App. 2005) (stating an unborn child capable of life outside the womb is a “child” for purposes of the statute). Effective July 1, 2009, the Legislature amended I.C. 34-23-2-1 to recognize a fetus that has attained viability (as defined in I.C. 16-18-2-365) as a child. Third, the adult person wrongful death statute (“APWDS”) applies to claims by the personal representative for the death of an unmarried adult with no surviving dependents. I.C. 34-23-1-2.

Damages. Punitive damages are not recoverable in any of the three types of wrongful death actions recognized in Indiana. *Durham v. U-Haul Int'l*, 745 N.E.2d 755, 757 (Ind. 2001); I.C. 34-23-1-2; I.C. 34-23-2-1. Each statute otherwise permits recovery of the decedent’s hospital, medical, funeral, and burial expenses, but each differs in its provisions for recovery of economic damages and intangible damages associated with loss of the decedent’s love, care, and affection. Under the WDS, if the decedent died with someone dependent upon her for pecuniary support, lost earning capacity of the decedent and loss of love, care, and affection are recoverable. *Deaconess Hospital, Inc. v. Gruber*, 791 N.E.2d 841, 847 (Ind. Ct. App. 2003); *Chamberlain v. Parks*, 692 N.E.2d 1380, 1383 (Ind. Ct. App. 1998); *Luder v. Skaggs*, 693 N.E.2d 593, 597 (Ind. Ct. App. 1998), *trans. denied*. The CWDS permits recovery for loss of the child’s love and companionship for the period of time from the death of the child until the death of the child’s last surviving parent. I.C. 34-23-2-1. The APWDS also permits recovery for loss of love and affection suffered by the decedent’s non-dependent parent or child, subject to a \$300,000 cap. I.C. 34-23-1-2.

Parties in Interest under the WDS. Damages recovered for reasonable medical and funeral expenses inure to the exclusive benefit of decedent’s estate, for payment thereof. The remainder inures to the widow[er] and de-

pendent next-of-kin and is distributed in the same way as the personal property of the decedent. When no spouse or dependent survives the decedent, damages inure to the benefit of the person who furnished necessary medical services to decedent in connection with the last illness, to funeral director for necessary funeral expenses, and to personal representative for necessary and reasonable costs of administering the estate. When decedent is not survived by a widow[er] or dependent, the measure of damages is limited to the total of the necessary and reasonable medical and funeral expenses and expenses of administration. I.C. 34-23-1-1.

Limitations of Actions. Wrongful death actions must be commenced within two years of death. I.C. 34-23-1-1; *see also Goleski v. Fritz*, 768 N.E.2d 889, 890 (Ind. 2002) (finding action must be brought within two (2) years of appointing personal representative).

Unexplained Absence. Presumption of I.C. 29-2-5-1 provides for settlement of absentee’s estate if absentee is gone for five years without having made provisions for individual’s property and 1) probate court determines that individual’s property is suffering waste for want of care or 2) the family of the individual needs use or proceeds from property for support or education. In order for the court to presume one dead, notice must be published once each week for three consecutive weeks, with the first notice published more than thirty days before the hearing in a newspaper of general circulation. I.C. 29-2-5-1(b). For beneficiaries of life insurance policy to raise presumption of death, it is necessary to show insured left his residence for temporary purpose, was not heard from for seven years, and diligent inquiry has been made concerning his whereabouts. *Metro. Life Ins. Co. v. Lyons*, 98 N.E. 824, 825-26 (Ind. Ct. App. 1912); *Roberts v. Wabash Life Ins. Co.*, 410 N.E.2d 1377, 1382 (Ind. Ct. App. 1980); *Malone v. ReliaStar Life Ins. Co.*, 558 F.3d 683, 691 (7th Cir. 2009). Courts presume insured survived beneficiary in instances when no sufficient evidence exists indicating insured and beneficiary died other than simultaneously. *Roberts*, 410 N.E.2d at 1382. Evidence that would go to explain the individual’s absence rebuts the presumption of death, but it does not prevent the presumption from arising in the first place. *Malone*, 558 F.3d at 691. The same factors that are used to raise the presumption of death can also serve as circumstantial evidence of death-in-fact. *Id.*

DISABILITY

Partial Disability. Indiana worker’s compensation law governs temporary partial disability benefits to injured workers. I.C. 22-3-3-9. Any worker’s compensation payments made to employee by employer may be deducted from the amount to be paid as compensation to

employee subject to approval by the Worker's Compensation Board. I.C. 22-3-3-23(a). Compensation shall be paid to injured employee during such disability at a weekly compensation rate equal to sixty-six and two-thirds percent of the difference between his average weekly wage and the weekly wages at which he is actually employed after the injury, for a period not to exceed 300 weeks. I.C. 22-3-3-9. If an employee, only partially disabled, refuses "employment suitable to his capacity procured for him, he shall not be entitled to any compensation at any time during the continuance of such refusal unless in the opinion of the worker's compensation board such refusal was justifiable." I.C. 22-3-3-11.

Total Disability. Injuries causing temporary total disability or total permanent disability shall be compensated at a rate of sixty-six and two-thirds percent of the average weekly wage not to exceed 500 weeks. I.C. 22-3-3-8; see *Justiniano v. Williams*, 760 N.E.2d 225, 226 at n.2 (Ind. Ct. App. 2001). However, in addition to temporary total disability benefits not exceeding 78 weeks, claimant can recover weekly compensation of 60% of the average weekly wage, not to exceed \$200 for 500 weeks for total permanent disability benefits. I.C. 22-3-3-10(b); *Lowell Health Care Ctr. v. Jordan*, 641 N.E.2d 675, 677 (Ind. Ct. App. 1994). Phrase "total disability," should be given rational and practical construction, and is relative term, depending upon nature of employment, capabilities of injured person, and circumstances of each case, and is usually question of fact. *Metro. Life Ins. Co. v. Heavener*, 24 N.E.2d 813, 815 (Ind. Ct. App. 1940).

"Total disability" under insurance policies does not mean absolute physical inability or complete helplessness to transact any kind of business. Test is whether condition of insured is such as to prevent him from transaction of all kinds of work pertaining to his occupation or profession. *Continental Cas. Co. v. Novy*, 437 N.E.2d 1338, 1348 (Ind. Ct. App. 1982).

"Total and permanent" disability is defined as disability which prevents employee from performing any work for compensation or profit. *Id.* at 816. Insured may receive temporary disability payments from insurance companies. *Beam v. Wausau Ins. Co.*, 765 N.E.2d 524, 533 (Ind. 2002) (allowing insurance company to make disability payments for temporary total disability, temporary partial disability, and permanent partial disability).

Disability Insurance - Proof of Condition. Filing of "due proof" of disability excused when insured is of unsound mind. *Guardian Life Ins. Co. of Am. v. Brackett*, 27 N.E.2d 103, 108 (Ind. Ct. App. 1940). Reasonable proof of disability, only, is required, and not such proof as insurer may demand. Expert medical testimony is not

essential. *Metro. Life Ins. Co. v. Frisch*, 65 N.E.2d 852, 855 (Ind. Ct. App. 1946).

FINANCIAL RESPONSIBILITY LAW

See Law Digest Tables; "AUTOMOBILES, Compulsory Coverage."

Person may not operate a vehicle on public highway in Indiana if financial responsibility is not in effect with respect to vehicle. I.C. 9-25-4-1; see *N. Indiana Pub. Serv. Co. v. Bloom*, 847 N.E.2d 175, 181 (Ind. 2006); see also *Mikel v. Am. Ambassador Cas. Co.*, 652 N.E.2d 503, 506 (Ind. 1995) (Indiana residents who operate motor vehicles must fulfill Indiana's statutory financial responsibility requirement to purchase automobile insurance and cannot refuse to buy it). Minimum amounts of financial responsibility for one accident are \$25,000 for bodily injury or death of one individual, \$50,000 for injury or death of two or more individuals; and \$10,000 for property damage. I.C. 9-25-4-5; see *State Auto Ins. Co. v. Shannon*, 769 N.E.2d 228, 232 (Ind. Ct. App. 2002). Burden of proof of financial responsibility is on vehicle owner, not insurer. *Combs v. Standard Mut. Ins. Co.*, 639 N.E.2d 675, 677 (Ind. Ct. App. 1994). Indiana Aircraft Financial Responsibility Act, I.C. 8-21-3-1 *et seq.*, requires any aircraft operator involved in an aircraft accident in Indiana resulting in bodily injury, death, or property damage to another exceeding \$100, to report within ten days and also requires proof of financial responsibility of \$10,000 and \$20,000 for bodily injury or death of one person or two or more people respectively, and \$20,000 for property damage, to be furnished to the Indiana Department of Transportation.

FIRE INSURANCE

Arson. State Fire Marshal must release relevant information from arson investigation files to insurer providing information. I.C. 27-2-13-4; 1984 Op. Atty. Gen. #84-6. Authorized agency investigating a fire believed to be caused by arson may order insurer to withhold payment on insurance policy proceeds for up to 30 days from date of order. I.C. 27-2-13-5. Insurer shall release information to authorized agency with respect to arson investigation. I.C. 27-2-13-2. Indiana Code requires insurance companies, when asked in writing, to disclose information and evidence obtained during their investigation of the fire to the police. *Wise v. State*, 719 N.E.2d 1192, 1199 (Ind. 1999). Fire loss insurer may be liable for punitive damages for failing to pay insureds' claim when insurers could not prove insureds were arsonists and did not inform insured of suspicion of arson or that insurer was denying claim on basis of arson, but led insured to believe only problem with claim was alleged



defects in proof of loss claim. *Riverside Ins. Co. v. Pedigo*, 430 N.E.2d 796, 807-08 (Ind. Ct. App. 1982). Evidence of incendiary origin of fire demonstrated insurer did not act in bad faith in contesting liability. *Hoosier Ins. Co., Inc. v. Mangino*, 419 N.E.2d 978, 987 (Ind. Ct. App. 1981). See also *Indiana Ins. Co. v. Plummer Power Mower & Tool Rental, Inc.*, 590 N.E.2d 1085, 1093 (Ind. Ct. App. 1992). Circumstantial evidence is sufficient to establish arson defense to payment under homeowner's policy. *Stout v. Farmers Ins. Exch.*, 881 F. Supp. 401, 405 (S.D. Ind. 1994).

Appraisal. Provision of fire policy for appraisal of loss "to each item" did not preclude appraisal with respect to actual cash value of building when entire building destroyed by fire. *Atlas Constr. v. Indiana Ins.*, 309 N.E.2d 810, 812 (Ind. Ct. App. 1974). Appraisal may be set aside if tainted with fraud, collusion or partiality of appraisers. *Huber v. United Farm Fam. Mut. Ins. Co.*, 856 N.E.2d 713, 717 (Ind. Ct. 2006). Appraisers must act free from bias, partiality, or prejudice in favor of either party. *Id.* Broad evidence rule permitted fact finder to consider any relevant evidence which tended to establish "actual cash value" of the insured property, when the policy limited insurer's liability to that value. *Ohio Cas. Ins. Co. v. Ramsey*, 439 N.E.2d 1162, 1165 (Ind. Ct. App. 1982).

Assignment. Contract stipulations as to assignment must be followed unless company, for whose benefit they are usually made, waives same. *German-American Ins. Co. v. Sanders*, 46 N.E. 535, 536 (Ind. Ct. App. 1897). When no provision exists to the contrary, policy may be assigned by parol. *Id.* In dispute between two insurers as to whether liability for fire loss should be apportioned because vendors' insurer failed to deny validity of assignment, purchasers' insurer was not required to present proof of valid assignment of vendors' interest in policy or to prove nature and extent of assigned interests. *Indiana Ins. Co. v. Sentry Ins. Co.*, 437 N.E.2d 1381, 1388 (Ind. Ct. App. 1982).

Chattel Mortgages. Provision in policy covering personal property, to effect that if property is or becomes encumbered by chattel mortgage it is voided, was held valid. *Union Assur. Soc'y Ltd. v. Reneer*, 156 N.E. 833, 834-835 (Ind. Ct. App. 1927). When such provision is in policy, insured is charged with knowledge thereof, and failure of insurance company to inquire as to encumbrances does not constitute waiver. *Id.* But, such provisions have been held waived when there is no written application, no questions asked, no statements made, and no knowledge by insured that existence of mortgage was fatal to her insurance; *German Mut. Ins. Co. v. Niewedde*, 39 N.E. 534, 535 (Ind. Ct. App. 1895); or when insurer or agent had knowledge of encumbrance but is-

sued policy and accepted premium. *Fire Ass'n v. Yeagley*, 72 N.E. 1035, 1036 (Ind. Ct. App. 1905). The right to forfeit policy is not waived with regard to future encumbrances by insurer's failure to require answer on application regarding pre-existing encumbrances. *Milwaukee Mechs. Ins. Co. v. Niewedde*, 39 N.E. 757, 758 (Ind. Ct. App. 1895). However, when owner of insured property mortgages it without notice to insurer and in violation of condition in policy, then sells property and assigns policy to purchaser, who obtains assent of insurer to assignment without insurer's knowledge of mortgage, insurer cannot set up previous forfeiture by assignor to defeat action by assignee. *Continental Ins. Co. v. Munns*, 22 N.E. 78, 79 (Ind. 1889). When assignees of lease gave lessee chattel mortgage, lessee was entitled to lien on fire insurance proceeds to extent proceeds replaced collateral, which was destroyed by fire. *Moore v. Boxman*, 245 N.E.2d 866, 870 (Ind. Ct. App. 1969).

Contract - Policy. Binder. Insured may recover fire loss based on oral binder. *Hoosier Ins. Co. v. Ogle*, 276 N.E.2d 878, 879 (Ind. Ct. App. 1971).

Cancellation. If fire insurance contract does not have explicit cancellation provision, termination is determined within the reasonable conduct of the parties. *Hoosier Ins. Co.*, 276 N.E.2d at 879. Pursuant to policy language, cancellation effective even though insureds never received notice of cancellation. *Am. Family Ins. Group v. Ford*, 293 N.E.2d 524, 526 (Ind. Ct. App. 1973).

Mortgage Clause. Under provisions of mortgage agreement, fire policy proceeds were to go to mortgagee, even though it rendered funds unavailable for lessee's restoration. *Loving v. Ponderosa Sys. Inc.*, 479 N.E.2d 531, 536 (Ind. 1985).

Reformation. Seller of property is only entitled to unpaid balance on sales contract, rather than all fire insurance proceeds, unless seller establishes contract reformation. *Smith v. Metz*, 153 N.E.2d 919, 922-23 (Ind. Ct. App. 1958). When plaintiff intended fire policy to cover certain merchandise, equity could reform policy when agent erroneously described location. *Newark Fire Ins. Co. v. Martinsville Harnes Co.*, 128 N.E. 616, 617 (Ind. Ct. App. 1920).

Severable Contracts. Material misrepresentation or omission of fact in insurance application, relied on by insurer in issuing policy, renders coverage voidable at insurer's option. *Colonial Penn Ins. Co. v. Guzorek*, 690 N.E.2d 664, 672 (Ind. 1997); *Safe Auto Ins. Co. v. Farm Bur. Ins. Co.*, 867 N.E.2d 221, 225 (Ind. Ct. App. 2007) (finding insured's failure to inform insurer of her move-

from Indiana to Michigan prior to renewal of her policy constituted a material misrepresentation).

Standard Provision. Provision in fire insurance policies calling for proceeds to be paid to mortgagee as its “interest may appear” is standard language entitling mortgagee to proceeds to extent of mortgage debt. *Fifth Third Bank v. Ind. Ins. Co.*, 771 N.E.2d 1218, 1224 (Ind. Ct. App. 2002).

Damages. Excepted Risks. Explosions. In action to recover under explosion endorsement for fire policy, adoption of proper theory is a jury question. *Lever Bros. Co. v. Atlas Assurance Co., LLC*, 131 F.2d 770, 775 (7th Cir. 1942). Fire damage award cannot be based on conjecture, speculation, or guesswork. *Southern Ind. Gas. & Elec. Co. v. Indiana Ins. Co.*, 383 N.E.2d 387, 396 (Ind. Ct. App. 1978).

Fixtures. No cases to date. *Cf. Farmers’ Mut. Ins. Ass’n v. Kryder*, 31 N.E. 851, 852 (Ind. Ct. App. 1892) (policy covering barn and “contents therein” did not include loss of horses struck by lightning outside of barn, even though horses were usually kept in barn).

Friendly Fires. Inadvertent loss of personal property in “friendly” fire not covered. *Owens v. Milwaukee Ins. Co.*, 123 N.E.2d 645, 646-47 (Ind. Ct. App. 1955).

Smoke and Soot. No cases to date.

Proof of Loss. No statute. Compliance with policy provision requiring notice of proof of loss is condition precedent to recovery. *Ebert v. Grain Dealers Mut. Ins. Co.*, 303 N.E.2d 693, 696, 700 (Ind. Ct. App. 1973). Provisions requiring making of particular proof of loss under oath as soon as possible, etc., impose duty of making proof within reasonable time, without unreasonable delay. *Baker v. German Fire Ins. Co.*, 24 N.E. 1041, 1041 (Ind. 1890). Indiana courts have construed numerous phrases to require the insured to give reasonable notice. *Askren Hub States Pest Control Services, Inc. v. Zurich Ins. Co.*, 721 N.E.2d 270, 278 n. 7 (Ind. Ct. App. 1999) (including phrases such as “reasonable notice,” “promptly notify,” “notice as soon as possible,” “notice as soon as practicable,” and “immediate notice”). Whether delay in giving notice to insurer is reasonable depends on circumstances in each case. *Erie Ins. Exch. v. Stephenson*, 674 N.E.2d 607, 611 (Ind. Ct. App. 1996). If evidence is only susceptible to one reasonable interpretation, then what constitutes a reasonable amount of time is a question of law for the court to decide. *Rogier v. Am. Testing & Eng’g Corp.*, 734 N.E.2d 606, 617 n. 4 (Ind. Ct. App. 2000). Requirements there be written notice of claim under policy and verified proof of loss are valid, but easily waived. *Farm Bureau Ins. Co. v. Crabtree*, 467 N.E.2d 1220, 1224 (Ind. Ct. App. 1984). Generally, insurer must act in good faith toward

its insured, and conduct which leads insured to reasonably believe claim or proof of loss is not required will result in waiver of those requirements or act as estoppel to insurer’s attempt to raise them as ground for denial of coverage. *Id.*

When insurer or its agents have formed relationship with insured or acted toward her in such way as to cause insured to reasonably believe written notice and formal proofs of loss will not be required, insurer will not be permitted to raise such matter as defense. *Huff v. Travelers Indem. Co.*, 363 N.E.2d 985, 992 (Ind. 1977).

Repair. When evidence conflicted as to whether home was totally destroyed by explosion and plaintiffs introduced evidence of restoration, defendants had burden of proving injury was permanent by showing cost of restoration exceeded before and after market value. *S. Ind. Gas & Elec. Co. v. Ind. Ins. Co.*, 383 N.E.2d 387, 395 (Ind. App. 1978).

Replacement Value. Actual cash value is synonymous with fair market value and is not consistent with replacement cost. *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349, 354 (Ind. 1982).

Multiple Policies. Co-Insurance. Co-insurance denotes a relative division of risk between insurer and insured, depending on the relative amount of policy and actual value of property insured. *Monroe Guar. Ins. Co. v. Backstage, Inc.*, 537 N.E.2d 528, 529 (Ind. Ct. App. 1989).

Concurrent Insurance. Before pro rata contribution may be required between insurers providing concurrent coverage, policies must cover same parties, same interest in same property, against same casualty. *Ind. Ins. Co. v. Sentry Ins. Co.*, 437 N.E.2d 1381, 1388 (Ind. Ct. App. 1982).

Contribution between Companies. Pro rata contribution could be required between purchasers’ insurers and vendors’ insurers although vendors were named insureds under both policies. *Ind. Ins. Co.*, 437 N.E.2d at 1388.

Excessive Policies. Excess carrier is subrogated to rights and obligations of its insureds as against primary carrier. *Certain Underwriters of Lloyd’s & Co. v. General Acc. Ins. Co.*, 909 F.2d 228, 231 (7th Cir. 1990).

HOSPITAL

Evidence—Records. Hospital records and photocopies of hospital records are included in the business records exception to the hearsay rule. I.C. 34-43-1-4. Absent court approval, records of mental health patients are not admissible without permission of the patient or court order for good cause. I.C. 16-39-2-7; I.C. 16-39-2-8.



Liens. Any hospital in state is entitled to hold a lien for the reasonable value of its services or expenses on any judgment for personal injuries except for persons covered under state or federal compensation or federal liability acts. A hospital may claim such a lien when the judgment is rendered or thereafter. A hospital must enter a written statement of its intentions to hold such a lien into the judgment docket. I.C. 32-33-4-1. A hospital must also perfect its lien by filing for record with the Office of the Recorder in the County in which the hospital is located. This must be completed within one hundred and eighty (180) days after the patient is discharged, and a copy must be sent to each person claimed to be liable, the attorney representing the patient and the Department of Insurance. I.C. 32-33-4-4. A lien perfected as to a patient's original lawyer is effective against a subsequent lawyer who does not receive actual notice of it and distributes settlement funds without paying the hospital. *Tankersley v. Parkview Hosp., Inc.*, 791 N.E.2d 201, 201 (Ind. 2003). A hospital bears the risk of losing its claim if proper notice is not given. *Stephens v. Parkview Hosp., Inc.*, 745 N.E.2d 262, 266 (Ind. Ct. App. 2001).

A hospital's liens will be subordinate to claims for attorney's fees, court costs, and all other expenses related to the recovery of claims or damages for the relevant personal injuries. I.C. 32-33-4-2.

A hospital also has a lien on any cause of action or claim accruing to a patient or her legal representative because of an illness or injuries that both gave rise to the cause of action and necessitated the hospital care. This lien applies to amounts recovered by settlement or compromise, but not to accidents or injuries governed by state or federal compensation or federal liability acts. A hospital must deduct the amount of any medical insurance proceeds it received on behalf of the patient and must make reasonable efforts to pursue such insurance claims. Moreover, this lien is not assignable and is subordinate to any attorney's lien. If a patient would receive less than 20% of the settlement or compromise if the liens were paid in full, the liens must be reduced on a pro rata basis to permit the patient to receive 20%. I.C. 32-33-4-3. Nonetheless, the patient will remain liable for the remainder of any underlying debt. *Cullimore v. St. Anthony Med. Ctr.*, 718 N.E.2d 1221, 1225 (Ind. Ct. App. 1999).

Warranties. Although health care professional is an independent contractor, hospital may be liable for negligence of health care professional if apparent agency is shown. *Sword v. NKC Hosps.*, 714 N.E.2d 142, 148-52 (Ind. 1999). A hospital owes duty of reasonable care to its patients and may be liable under doctrine of *res ipsa loquitur* for employees' negligent acts if 1) the injuring

instrumentality is shown to be under the management or exclusive control of the defendant or his servants; and 2) the accident is such as in the ordinary course of things does not happen if those who have management of the injuring instrumentality use proper care. *Vogler v. Dominguez*, 624 N.E.2d 56, 63 (Ind. Ct. App. 1993); *Cleary v. Manning*, 884 N.E.2d 335, 338 (Ind. Ct. App. 2008). Yet, Indiana courts have declined to apply *res ipsa loquitur* to any case which involves an unexpected outcome in a medical procedure. *Narducci v. Tedrow*, 736 N.E.2d 1288, 1293 (Ind. Ct. App. 2000).

Immunity. City or county hospitals are not liable for losses resulting from performance of discretionary function; the act or omission of someone other than the government entity or its employee; initiation of a judicial or administrative proceeding; misrepresentation if unintentional; adoption and enforcement of or the failure to adopt or enforce a law (including rules and regulations), unless the act of enforcement constitutes false arrest or false imprisonment; act or omission performed in good faith and without malice under the apparent authority of a statute which is invalid, if the employee would not have been liable had the statute been valid; or the issuance, denial, suspension or relocation of or the failure to do the above to any authorization, where discretionary. I.C. 34-13-3-3.

City or county hospitals, like other governmental subdivisions, do not waive their right to sovereign immunity upon purchase of insurance. *Seymour Nat'l Bank v. State*, 428 N.E.2d 203, 205 (Ind. Ct. App. 1981).

Hospitals are required to provide counsel and pay for all costs and fees incurred by or on behalf of employee in defense of a claim for a loss occurring because of acts or omissions within the scope of her employment, regardless of whether employee can or cannot be held personally liable for the loss. I.C. 34-13-3-5.

HUSBAND AND WIFE

Community Property. Indiana is not a community property state.

Interspousal Immunity. In 1972, the Indiana Supreme Court abrogated common law doctrine of interspousal immunity in tort actions. *Brooks v. Robinson*, 284 N.E.2d 794, 798 (Ind. 1972). Spouses may sue one another in actions of ejectment, partition, and contract. *Id.* A person may petition any court for protective order, and in certain cases an emergency protective order, on behalf of that person or member of the petitioner's household. I.C. 34-26-5-2.

Loss of Consortium. Loss of consortium claims compensate for the loss of conjugal relations, services, and companionship previously provided by the injured



spouse. *Durham v. U-Haul International*, 745 N.E.2d 755, 765 (Ind. 2001). In actions for personal injury, rather than actions for a resulting death, a wife's damages for loss of husband's earnings merge with those of her husband. *McDaniel v. McDaniel*, 201 N.E.2d 215, 218 (Ind. 1964). A wife is entitled to recover for loss of consortium against a wrongdoer who has injured her husband. *Troue v. Marker*, 252 N.E.2d 800, 806 (Ind. 1969); see also *Rosander v. Copco Steel & Eng'g Co.*, 429 N.E.2d 990, 991 (Ind. Ct. App. 1982). However, a wife is not entitled to recover for loss of support due from husband in such action. *Troue*, 252 N.E.2d at 805. A husband's medical malpractice claim against a doctor is purely a derivative claim. *Mayhue v. Sparkman*, 653 N.E.2d 1384, 1386 (Ind. 1995). If personal injury claim is statutorily barred, any subsequent claim for consortium damages will also be barred. See *Wine-Settergren v. Lamey*, 716 N.E.2d 381, 390 (Ind. 1999) (spouse may not bring loss of consortium claim when spouse's personal injury claim is barred by Workers' Compensation Statute). Moreover, consortium damages are not recoverable if death of spouse is instantaneous. However, a spouse may still recover damages for wrongful death, including damages for loss of love, care and affection. *DeHoyos v. John Mohr & Sons*, 629 F. Supp. 69, 74 (N.D. Ind. 1984); *Johnson v. Inland Steel Co.*, 1992 U.S. Dist. LEXIS 19733, at *2 (N.D. Ill. Dec. 28, 1992).

INFANTS

See "AUTOMOBILES, Age"; "NEGLIGENCE, Age."

An infant may sue or be sued in her own name, in her own name by a guardian ad litem or next friend, or in the name of her court-appointed representative. If an infant is not adequately represented, court must appoint guardian ad litem. T.R.17 (C). The trial court must consider whether appointing guardian ad litem is necessary. *Crayne v. M.K.R.L.*, 413 N.E.2d 311, 313 (Ind. Ct. App. 1980). A child wrongfully injured may bring her action any time until two years after her majority, I.C. 34-11-6-1, except in product liability actions excluding asbestos, where the limitations period applies regardless of minority. I.C. 34-20-3-1; *Harris v. A.C.&S., Inc.*, 785 N.E.2d 1087, 1089 (Ind. 2003). Parents may sue for injury or death of a child jointly or individually. If individually, the parent suing must name the other parent as co-defendant to protect his or her interest. In the case of divorce, the parent to whom custody was awarded may sue. A guardian may also sue for injury to or death of a ward. I.C. 34-23-2-1. In case of the death of the child's custodian, a personal representative shall be appointed to maintain an action for the injury or death of the child. I.C. 34-23-2-1(c). When an action is brought by the guardian for an injury to a ward, damages shall inure to the benefit of that ward. I.C. 34-23-2-1(d).

The wrongful death of an unemancipated child, unmarried and without dependents, entitles a parent to recover the value of the child's services, child's love and companionship, and various expenses from death until age twenty, or age twenty-three if in college or a vocational program. I.C. 34-23-2-1. Note, however, medical malpractice statute limits the amount recoverable for any injury or death of a patient to \$750,000 if the action occurred before July 1, 1999, and \$1,250,000 thereafter. I.C. 34-18-14-3(a). Wrongful injury to a parent does not create an independent cause of action for loss of parental consortium for the minor child. *Dearborn Fabricating & Eng'g Corp., Inc. v. Wickham*, 551 N.E.2d 1135, 1139 (Ind. 1990). Parental tort immunity exists, but is not absolute. It does not bar action based on a claim of intentional felonious conduct if there is no issue of parental privilege. *Barnes v. Barnes*, 603 N.E.2d 1337, 1342 (Ind. 1992).

INLAND MARINE

Insurance companies that insure against risks caused by river, canal, inland navigation, and transportation may not insure against losses arising from explosion of steam boilers; losses arising from breakage of plate or other glass, except when caused by fire, wind, hailstorm, and except when loss occurs to glass which is part of any dwelling house; risks of the classes commonly known as fidelity insurance and surety bonds; risks of the classes commonly known as burglary or theft insurance, except for risks to any dwelling house; and risk of legal liability by reason of bodily injury to person, except as such liability may result from ownership, maintenance, use or operation of an automobile. I.C. 27-1-5-1; I.C. 27-1-22-2. See *Logestan v. Hartford Steam Boiler Inspection & Ins. Co.*, 626 N.E.2d 829, 838 (Ind. Ct. App. 1993).

LIABILITY INSURANCE

Cancellation. Insurer may rescind automobile policy on grounds of fraud or misrepresentation; right to deny coverage is not affected by the Financial Responsibility Act or the Uninsured Motorists Coverage Act. *Colonial Penn Ins. Co. v. Guzorek*, 690 N.E.2d 664, 672 (Ind. 1997). Insured has ten days from date insurer mails a notice and cancellation to obtain other insurance. *Moore v. Vernon Fire Ins. Co.*, 234 N.E.2d 661, 663 (Ind. Ct. App. 1968).

Compromise of Claims. Duty to Act in Good Faith. Insurer's liability for breach of contract could be based on refusal to deal in good faith in settling an insured's claim. *Transport Ins. Co. v. Terrell Trucking, Inc.*, 509 N.E.2d 220, 225 (Ind. Ct. App. 1987). There is a legal duty implied in an insurance contract that insurer must deal in good faith with insured. *Erie Ins. Co. v. Hick-*

man, 622 N.E.2d 515, 517 (Ind. 1993). “The obligation of good faith and fair dealing with respect to the discharge of the insurer’s contractual obligation includes the obligation to refrain from (1) making an unfounded refusal to pay policy proceeds; (2) causing an unfounded delay in making payment; (3) deceiving the insured; and (4) exercising any unfair advantage to pressure an insured into a settlement of his claim.” *Allstate Ins. Co. v. Fields*, 885 N.E.2d 728, 732 (Ind. Ct. App. 2008), *trans. denied*. Insurer may violate its duty of good faith by refusing to make payments in compliance with an agreed judgment. *United Farm Bureau Mut. Ins. Co. v. Ira*, 577 N.E.2d 588, 591 (Ind. Ct. App. 1991). Duty of good faith may be breached by an unreasonable delay in denying or accepting coverage. *Hamed v. General Acc. Ins. Co.*, 842 F.2d 170, 172-175 (7th Cir. 1988); *but see Gray v. Am. Family Mut. Ins. Co.*, 825 F. Supp. 203, 210 (S.D. Ind. 1993). If insurer engages in bad faith while failing to settle claim, insurer may be liable for excess judgment regardless of financial status. *Econ. Fire & Cas. Co. v. Collins*, 643 N.E.2d 382, 386 (Ind. Ct. App. 1994). However, insurance company does not necessarily act in bad faith by erroneously denying insurance claim. *Hickman*, 622 N.E.2d at 512. Insurer does not breach its duty of good faith by tendering a release, absent an allegation the insurer forced the insured to sign the release. *Wedzeb Ent., Inc. v. Aetna Life & Cas. Co.*, 570 N.E.2d 60, 64 (Ind. Ct. App. 1991). Further, bare unsupported assertions indicating insurer initially offered to pay certain percentage of loss, then reduced offer, and thereafter denied coverage entirely, will not support claim for bad faith. *Sadler v. Auto-Owners Ins. Co.*, 904 N.E.2d 665, 673 (Ind. Ct. App. 2009). Finally, an insurer’s refusal to break its own rules, which the insurer communicated to the insured, does not amount to bad faith. *Estate of Mintz v. Connecticut Gen. Life Ins. Co.*, 905 N.E.2d 994, 1000-01 (Ind. Ct. App. 2009).

Right of Insurer to Settle. Insurer found negligent for failure to settle may be liable for judgment in excess of policy limits. *Bennett v. Slater*, 289 N.E.2d 144, 146 (Ind. Ct. App. 1972). Insurer may not hide behind the “legally obligated to pay” policy language after it abandoned its insured and the insured settled the claim against her by agreement. *Am. Family Mut. Ins. Co. v. Kivela*, 408 N.E.2d 805, 813 (Ind. Ct. App. 1980). *See also* Indiana Unfair Claims Settlement Practices Act, I.C. 27-4-1-4.5.

Contribution among Joint Tortfeasors. When potential liability for which agent seeks indemnity arises from failure to notify proper parties of termination of insurance, court fails to recognize right of contribution among joint tortfeasors and agent has no right to indemnity. *Augustine v. First Fed. Sav. & Loan Ass’n*, 384 N.E.2d 1018, 1022 (Ind. 1979). Joint tortfeasors are no longer

viewed as a single entity under Indiana’s Comparative Fault Act. *Huffman v. Monroe County Cmty. Sch. Corp.*, 588 N.E.2d 1264, 1266 (Ind. 1992).

Cooperation of Insured. Insured’s failure to appear at and attend trial entitled insurer to judgment. *Potomac Ins. Co. v. Stanley*, 281 F.2d 775, 781 (7th Cir. 1960). However, insurer must show actual prejudice from insured’s breach of cooperation clause in order for insurer to avoid liability. *Miller v. Dilts*, 463 N.E.2d 257, 265 (Ind. 1984). Insurer must do everything reasonably possible to contact a recalcitrant insured and make reasonable effort to force cooperation through the legal process. *Smithers v. Mettert*, 513 N.E.2d 660, 662-63 (Ind. Ct. App. 1987). However, regardless of whether the insurer can demonstrate actual prejudice, no duty to defend arises until the insurer receives notice of the claim. *Dreaded, Inc. v. St. Paul Guardian Ins. Co.*, 904 N.E.2d 1267, 1273 (Ind. 2009).

Coverage. Construction of Terms. Policies may exclude coverage for injuries to occupants. However, policy ambiguity will be interpreted most strictly against insurer. *Meridian Mut. Ins. Co. v. Cox*, 541 N.E.2d 959, 962 (Ind. Ct. App. 1989). When definition of “person” in insurance policy is ambiguous and may be construed to include unborn children, injuries sustained by child in utero may be covered under policy. *Progressive Ins. Co. v. Bullock*, 841 N.E.2d 238, 246 (Ind. Ct. App. 2006). Nonetheless, a father’s loss of service claim for injury to minor occupant was not excluded because the injury was to “property” and not to “person.” *Automobile Underwriters, Inc. v. Camp*, 32 N.E.2d 112, 114 (Ind. Ct. App. 1941). Merely being an occupant of a vehicle will not be sufficient to demonstrate “use” of a vehicle to trigger liability coverage. *Estate of Sullivan v. Allstate Ins. Co.*, 841 N.E.2d 1220, 1225 (Ind. Ct. App. 2006).

Indiana recognizes the “known loss” doctrine, meaning coverage is precluded for “losses which exist at the time of the insuring agreement, or which are so probable or imminent that there is insufficient risk being transferred between the insured and insurer.” *Crawfordsville Square, LLC v. Monroe Guar. Ins. Co.*, 906 N.E.2d 934, 937 (Ind. Ct. App. 2009). The term “loss in progress” refers to the “notion that an insurer should not be liable for a loss which was in progress before the insurance took effect.” *Id.*

Policy Limits. Motor Carriers. While U.S.C. § 31139 (b)(1-2) provides a motor carrier must obtain a minimum of \$750,000 in coverage, U.S.C. § 31139 (b)(1-2) does not establish a liability limit of \$750,000 per person in a multiple-victim accident. *Carolina Cas. Ins. Co. v. Estate of Karpov*, 559 F.3d 621,624 (7th Cir.

2009). A motor carrier may elect to obtain additional coverage. *Id.*

Standard Provisions. No policy shall be issued to the owner of a motor vehicle without provision insuring owner against liability for damages or death or injury to a person or property resulting from the negligent operation of the motor vehicle, in the business of owner or otherwise, by any person legally using or operating the same with the permission, express or implied, of owner. I.C. 27-1-13-7. Rule construing ambiguous insurance language most favorably to insured does not apply when clause to be interpreted is statutory requirement. *Lincoln Nat'l Life Ins. Co. v. Sobel*, 35 N.E.2d 121, 127 (Ind. Ct. App. 1941), *reh'g denied*, 37 N.E.2d 698 (Ind. Ct. App. 1941).

Omnibus provisions. Indiana law does not require omnibus coverage to permissive users of the owner's vehicle and instead requires only that the owner be afforded coverage for the permittee's use. *Transamerica Ins. Co. v. Henry*, 563 N.E.2d 1265 (Ind. 1990); *Safeco Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 555 N.E.2d 523 (Ind. Ct. App. 1990). Clause in automobile policy defining "insured" as one "authorized" should not afford coverage to a third party to whom named insured's child, as permittee with only apparent authority to authorize permittees, loans the vehicle. *State Farm Mut. Auto Ins. Co. v. Gonterman*, 637 N.E.2d 811, 815 (Ind. Ct. App. 1994); *see also Learman v. Auto-Owners Ins. Co.*, 769 N.E.2d 1171, 1176 (Ind. Ct. App. 2002). Insurer is liable for judgment against insured's driver while driving with insured's implied consent. *Nat'l Mut. Ins. Co. v. Eward*, 517 N.E.2d 95, 98 (Ind. Ct. App. 1987). Omnibus coverage attaches even when permission obtained by misrepresentation if misrepresentation was immaterial to possession of the vehicle and insured failed to reasonably inquire into any misrepresentation which was material. *Auto Owners Ins. Co. v. Stanley*, 262 F. Supp. 1, 5 (N.D. Ind. 1967). One with permission of insured to use his vehicle continues as a permittee while vehicle is in his possession, even though that use may deviate from the contemplated use. *Warner Trucking, Inc. v. Carolina Cas. Ins. Co.*, 686 N.E.2d 102, 107 (Ind. 1997); *Briles v. Wausau Ins. Co.*, 858 N.E.2d 208, 213 (Ind. Ct. App. 2006). Driver of an automobile involved in collision shall not be covered by insured's policy when insured did not give driver permission. *State Farm Mut. Auto Ins. Co. v. Latham*, 793 F. Supp. 183, 187 (S.D. Ind. 1992). Courts generally look to actual company practices rather than formal company policies to determine liability regarding loaning of vehicles. *Universal Underwriters Ins. Co. v. Tutwiler Cadillac, Inc.*, 2008 U.S. Dist. LEXIS 35979, at *6-12 (S.D. Ind. May 1, 2008).

Direct Action Against Insurer. Rights of Injured Party. Claimant has no standing to sue defendant's insurer for allegedly handling claim either in bad faith or negligently. *Menefee v. Schurr*, 751 N.E.2d 757, 760 (Ind. Ct. App. 2001); *Bennett v. Slater*, 289 N.E.2d 144, 148 (Ind. Ct. App. 1972); *Selective Ins. Co. v. Cagnoni Development, LLC*, 2008 WL 126950, at *6 (S.D. Ind. Jan. 10, 2008); *but see Hosler v. Caterpillar, Inc.*, 710 N.E.2d 193, 197 n.7 (Ind. Ct. App. 1999). Bad faith claim against insurer may not be involuntarily assigned to judgment creditor of insured when insured does not believe basis for bad faith claim exists. *State Farm Mut. Auto. Ins. Co. v. Estep*, 873 N.E.2d 1021, 1027-28 (Ind. 2007). There is no duty to settle a claim running from insured to claimant, nor is the claimant a third-party beneficiary of the duty owed to insured by insurer. *Eichler v. Scott Pools, Inc.*, 513 N.E.2d 665, 667 (Ind. Ct. App. 1987). However, insurer may have duty to preserve evidence if litigation is foreseeable. *Thompson v. Owensby*, 704 N.E.2d 134, 140 (Ind. Ct. App. 1998), *trans. denied*, 726 N.E.2d 304 (Ind. 1999). Plaintiff must also show duty was breached and plaintiff was harmed as a result. *J.S. Sweet Co., Inc. v. Sika Chem. Corp.*, 400 F.3d 1028, 1032 (7th Cir. 2005). Duty to preserve evidence does not apply to testimonial evidence. *Loomis v. Ameritech Corp.*, 764 N.E.2d 658, 663 (Ind. Ct. App. 2002). As an additional exception to the no direct action rule, if the defendant's insurance coverage is in question, claimant may bring claim for declaratory relief against insurer to determine coverage obligations for claimant's injury. *City of South Bend v. Century Indemnity Co.*, 821 N.E.2d 5, 11 (Ind. Ct. App. 2005).

Duty to Defend. Insurer's duty to defend is determined by language of policy. *Hastings Mut. Ins. Co. v. Webb*, 659 N.E.2d 1049, 1052 (Ind. Ct. App. 1995). Liability and duty to defend under a policy require insurer to look to allegations in complaint and also to make independent investigation of the facts and determine duty to defend under the policy. *Monroe Guar. Ins. Co. v. Monroe*, 677 N.E.2d 620, 624 (Ind. Ct. App. 1997), *trans. denied*, 690 N.E.2d 1190 (Ind. 1997); *but see Transamerica Ins. Serv. v. Kopko*, 570 N.E.2d 1283, 1285 (Ind. 1991) (holding there is no duty to defend when the nature of a claim is not obviously covered by insurance policy). An insurer does not have a duty to defend losses which took place prior to the insuring agreement because Indiana recognizes the "known loss" doctrine, meaning coverage is precluded for "losses which exist at the time of the insuring agreement, or which are so probable or imminent that there is insufficient risk being transferred between the insured and insurer." *Crawfordsville Square, LLC v. Monroe Guar. Ins. Co.*, 906 N.E.2d 934, 937 (Ind. Ct. App. 2009). An insurer's duty to defend is not suspended by the mere



filing of a declaratory judgment action. *Allianz Ins. Co. v. Guidant Corp.*, 884 N.E.2d 405, 414 (Ind. Ct. App. 2008), *trans. denied*.

Liability between Insurers. Primary. If “other insurance” clauses conflict, clauses should be ignored and each insurer is liable for a prorated amount of the resultant damage not to exceed policy limits. *United Farm Bureau Mut. Ins. Co. v. Nationwide Mut. Fire Ins. Co.*, 678 N.E.2d 1165, 1168 (Ind. Ct. App. 1997); I.C. 27-8-9-7 (providing which policy is to be considered primary when conflict between motor vehicle liability insurance and any other liability insurance exists). The purpose of I.C. 27-8-9-7 is to “resolve coverage disputes caused by the “other insurance” clauses of competing primary insurers. *Old Republic Ins. Co. v. RLI Ins. Co.*, 887 N.E.2d 1003, 1010 (Ind. Ct. App. 2008), *trans. denied*. Similarly, I.C. 27-8-9-9 also applies to determine priority between insurance policies providing the same level of coverage. *Id.*; see also *Safe Auto Ins. Co. v. Enterprise Leasing Co., Inc.*, 889 N.E.2d 392, 397 (Ind. Ct. App. 2008), *reh'g denied* (noting I.C. 27-8-9-9 sets statutory priorities where concurrent policies exist). When one policy offers primary coverage, and the remaining policies in a dispute provide true excess coverage, I.C. 27-8-9-9 does not apply to prioritize an excess insurer’s policy ahead of the insurer’s policy. *Old Republic*, 887 N.E.2d at 1011. Insured’s failure to designate a party as named insured under a primary policy does not render primary policy’s schedule limits inapplicable for the purpose of determining an excess insurer’s obligation to provide coverage. *United States Fire Ins. Co., Inc. v. Charter Financial Group, Inc.*, 851 F.2d 957, 959 (7th Cir. 1988).

Excess. Liability of insurer under an excess insurance clause arises only after limits of primary policy are exhausted. *Ryder Truck Lines, Inc. v. Carolina Cas. Ins. Co.*, 385 N.E.2d 449, 452 (Ind. 1979). Excess insurer is not estopped from recovering from primary insurer for wrongful failure to settle. *Certain Underwriters of Lloyd’s & Co. v. Gen. Accident Ins. Co. of Am.*, 909 F.2d 228, 232 (7th Cir. 1990). However, primary insurer owes no direct duty to excess insurer. *PHICO Ins. Co. v. Aetna Cas. & Sur. Co. of Am.*, 93 F. Supp. 2d 982, 989 (S.D. Ind. 2000). When one policy offers primary coverage, and the remaining policies in a dispute provide true excess coverage, I.C. 27-8-9-9 and I.C. 27-8-9-7 do not apply to prioritize an excess insurer’s policy ahead of the insurer’s policy. *Old Republic Ins. Co. v. RLI Ins. Co.*, 887 N.E.2d 1003, 1010 (Ind. Ct. App. 2008), *trans. denied*. The general language of a standard escape clause of owner’s liability policy is insufficient to shift primary liability to operator’s insurer, which provided the policy with the excess clause. *Indiana Ins. Co. v. Am. Underwriters, Inc.*, 304 N.E.2d 783, 788 (Ind. 1973);

McMurray v. Nationwide Mut. Ins. Co., 878 N.E.2d 488, 490-91 (Ind. Ct. App. 2007); see also *United Farm Bureau Mut. Ins. Co. v. Nationwide Mut. Fire Ins. Co.*, 678 N.E.2d 1165, 1167 (Ind. Ct. App. 1997).

Exclusions. Intentional Acts. In determining whether, pursuant to exclusionary clause in policy, coverage is precluded by insured’s intentional acts, there must be a showing insured intended harm or harm can be inferred from nature of the act. However, if it is clear insured was not consciously aware injury was practically certain to result, coverage is not precluded. *PSI Energy, Inc. v. Home Ins. Co.*, 801 N.E.2d 705, 727-28 (Ind. Ct. App. 2004); *Allstate Ins. Co. v. Herman*, 551 N.E.2d 844, 845 (Ind. 1990); *Home Ins. Co. v. Neilsen*, 332 N.E.2d 240, 244 (Ind. Ct. App. 1975). An intentional act is “caused by accident” under the innocent victim’s uninsured motorist coverage. *Milwaukee Mut. Ins. Co. v. Butler*, 615 F. Supp. 491, 495 (S.D. Ind. 1985).

Assault. Acts done in self-defense which intentionally cause harm to others do not entitle insured to benefits of coverage. *Home Ins. Co. v. Neilsen*, 332 N.E.2d 240, 244 (Ind. Ct. App. 1975).

Violations of Law. Insurer has no duty to defend or pay amounts which insured paid to settle suits when insured is charged with violations of law. *Home Ins. Co. v. Neilsen*, 332 N.E.2d 240, 244 (Ind. Ct. App. 1975).

Miscellaneous Exclusions. Automobile liability policy that excludes coverage for any injury to a person related by blood, marriage, or adoption to insured, does not contravene public policy and is valid and enforceable to preclude liability coverage for injury sustained by spouse of insured. *Allstate Ins. Co. v. Boles*, 481 N.E.2d 1096, 1098 (Ind. 1985). Child molestation falls within policy exclusion for injury which is expected or intended by insured. *Wiseman v. Leming*, 574 N.E.2d 327, 329 (Ind. Ct. App. 1991). An exclusion in automobile policy stating “any person using a vehicle without a reasonable belief the person is entitled to do so” does not apply to family members. *Am. States Ins. Co. v. Adair Indus., Inc.*, 576 N.E.2d 1272, 1273 (Ind. Ct. App. 1991). In addition, if terms used to distinguish different classes of people within policy are ambiguous, terms will be interpreted in favor of insured. *Bedwell v. Sagamore Ins. Co.*, 753 N.E.2d 775, 779 (Ind. Ct. App. 2001).

Waiver. Mere silence or inaction on part of insurer following demand to defend is not sufficient to constitute express waiver; mere failure to disclaim liability does not result in waiver of insurer’s right to disavow liability; insurer only estopped from asserting lack of coverage when insured is prejudiced as result of unreasonable delay. *Protective Ins. Co. v. Coca-Cola Bottling Co.*, 423 N.E.2d 656, 661 (Ind. Ct. App. 1981). When

insured is not prejudiced as result of insurer's delay in disclaiming liability, no implied waiver exists as a matter of law and insurer is not estopped from denying liability. *Id.* Doctrines of waiver and estoppel extend to any ground upon which liability can be denied by insurer. *Nat'l Mut. Ins. Co. v. Fincher*, 428 N.E.2d 1386, 1389 (Ind. Ct. App. 1981). To establish waiver, insured must show conduct or acts of its insurer sufficient to justify reasonable belief on part of insured that insurer would not insist on compliance with policy terms. *Wallace v. Indiana Ins. Co.*, 428 N.E.2d 1361, 1366 (Ind. Ct. App. 1981).

Reservation of Rights. Insurer, after making independent determination it has no duty to defend, must protect its interest by filing a declaratory judgment action or defend under a reservation of rights. *Liberty Mut. Ins. Co. v. Metzler*, 586 N.E.2d 897, 902 (Ind. Ct. App. 1992). Homeowner's liability insurer is not required to give notice of disclaimer or reservation of rights to a party allegedly injured by insured, but is only required to give such notice to insured to avoid being bound by equitable estoppel. *Snodgrass v. Baize*, 405 N.E.2d 48, 53 (Ind. Ct. App. 1980).

Infants. Provision exempting insurer when a vehicle "is being operated by any person in violation of the law as to age" is valid if policy does not contain omnibus clause. *Culley v. Farm Bureau Mut. Ins. Co.*, 69 N.E.2d 19, 19 (Ind. 1946); see also *McNall v. Farmers Ins. Group*, 392 N.E.2d 520, 526-27 (Ind. Ct. App. 1979).

Insolvency of Insured. No liability policy shall be issued unless it contains provision that insolvency or bankruptcy of the insured shall not release the insurance carrier from payment of damages for injury sustained or loss occasioned during life of such a policy. I.C. 27-1-13-7. If such insolvency or bankruptcy prevents insured from successfully executing its claim, the action may be maintained by the injured person or personal representative against the insurance carrier under the terms of the policy for the amount of judgment in said action not to exceed the amount of policy. *Id.* Claims against an insolvent liability insurer are recoverable against insurance guaranty association and include both judgments and unpaid claims. *Indiana Ins. Guaranty Ass'n v. Kiner*, 503 N.E.2d 923, 926 (Ind. Ct. App. 1987); I.C. 27-6-8-1 *et seq.*

Jury. Question of whether insurer should be estopped is for a jury. *Sur v. Glidden-Durkee*, 681 F.2d 490, 496 (7th Cir. 1982). Generally, a jury should not decide whether failure of insurer to tender back premiums because of a breach constitutes waiver. *Gary Nat'l Bank v. Crown Life Ins. Co.*, 392 N.E.2d 1180, 1182 (Ind. App. 1979).

Notice. No policy shall be issued without a provision that notice given by or on behalf of insured to any authorized agent of the insurer shall be deemed to be notice to the insurer. I.C. 27-8-5-3(a)(5). Insurer has notice of suit against its insured when it receives a subpoena and request to produce a copy of the policy issued to insured. *Frankenmuth Mut. Ins. Co. v. Williams*, 645 N.E.2d 605, 608 (Ind. 1995). Insured's failure to give reasonable notice will not bar recovery under policy unless insurer suffers prejudice as a result of delay. *Shelter Mut. Ins. Co. v. Barron*, 615 N.E.2d 503, 507 (Ind. Ct. App. 1993). Although prejudice is presumed upon showing of unreasonable delay in notifying insurer of the accident or filing of the lawsuit, the presumption may be rebutted by evidence prejudice did not actually occur. *Id.* However, regardless of whether the insurer can demonstrate prejudice, no duty to defend arises until the insurer receives notice of the claim. *Dreaded, Inc. v. St. Paul Guardian Ins. Co.*, 904 N.E.2d 1267, 1273 (Ind. 2009).

Punitive Damages. In *Grant v. North River Ins. Co.*, 453 F. Supp. 1361, 1370 (N.D. Ind. 1978), the court held, to the extent the insured is held directly liable for acts or conduct giving rise to a punitive damage award, punitive damage liability cannot, as a matter of public policy, be shifted to insurer. See also *Executive Builders, Inc. v. Motorists Ins. Co.*, 2001 U.S. Dist. LEXIS 6775 at *15-16 (S.D. Ind. Mar. 30, 2001). However, to extent insured is held vicariously liable for such acts or conduct, liability for punitive damages will shift to insurer when insurer has agreed to pay "all sums which the insured shall become legally obligated to pay." *Id.* at 17. Insurer is not entitled to recover punitive damages against uninsured motorist carrier for wrongful denial of claim, when claim was denied because of noniniquitous human failing. *Miller v. Farmer's Ins. Group*, 560 N.E.2d 1261, 1262 (Ind. Ct. App. 1990). Reliance upon incorrect but reasonable theories in denial of a claim is not sufficient to justify award of punitive damages. *Indiana Ins. Co. v. Plummer Power Mower & Tool Rental, Inc.*, 590 N.E.2d 1085, 1093 (Ind. Ct. App. 1992).

LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

See Law Digest Tables.

Limitations in Contract. Oral contracts must be acted upon within six years after cause of action has accrued. I.C. 34-11-2-7. For oral employment contracts, there is a two-year statute of limitations from the date of the act or omission. I.C. 34-11-2-1. This section applies to specific disputes arising out of employment relationships and a two-year limitation applies to all actions relating to employment relationships, except when there is a written employment contract. *Id.* As to written con-

tracts for payment of money, a six-year statute of limitations applies. I.C. 34-11-2-9. For contracts in writing other than those for payment of money, including all mortgages, a ten-year statute of limitation applies. I.C. 34-11-2-11. For contracts in writing other than those for payment of money entered into before September 1, 1982, not including chattel mortgages, deeds of trust, judgments, or recovery of real estate, a twenty-year statute of limitations applies. *Id.* A statute of limitation may commence to run at the time the note was due, rather than on the earlier date of the exercise of the option to accelerate. *Uland v. Nat'l City Bank*, 447 N.E.2d 1124, 1128 (Ind. Ct. App. 1983). For sale of goods under I.C. 26-1-2-725, action for breach of any contract or sale must be brought within four years; parties may reduce the period of limitations to not less than one year, but may not extend it. *Id.* When action commenced within time limit is so terminated as to leave available a remedy by another action for the same breach, such other action may be commenced after the expiration of time limited and within six months after termination of the first action, unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute. I.C. 26-1-2-725. If there is a conflict in the statute of limitations set forth by I.C. 34-11-2 and I.C. 26-1-2-725, the Indiana legislature has stated I.C. 26-1-2-725 prevails. I.C. 34-11-2-7; *Troyer v. Cowles Prods. Co., Inc.*, 732 N.E.2d 246, 247 (Ind. Ct. App. 2000).

Accrual. Unless the applicable statute provides otherwise, in computing any period of time prescribed by a statute of limitations, the day of the act, event or default from which the designated period of time begins to run shall not be included. T.R. 6(A). When a period of time allowed is less than seven days, intermediate Saturdays, Sundays, legal holidays, and days on which the office is closed shall be excluded from computations. T.R. 6(A)(4). The last day of the period so computed is to be included unless it is a Saturday, a Sunday, a legal holiday as defined by state statute, or a day the office in which the act is to be done is closed during regular business hours. *Id.* In any event, the period runs until the end of the next day that is not a Saturday, a Sunday, a legal holiday, or a day on which the office is closed. *Id.* If any person entitled to bring an action, or one liable to any action, dies before the expiration of time limited, the cause of action shall survive to or against his representatives and may be brought at any time after the expiration of the time limited, but within eighteen months after the death of such person. I.C. 34-11-7-1. If after commencement of action, the plaintiff fails from any cause except negligence in the prosecution, or the action abates or is defeated by death of a party, or judgment be arrested or reversed on appeal, a new action may be brought not later than three years after date of such de-

termination or last date action could have been commenced under statute of limitations. I.C. 34-11-8-1. *See Hosler v. Caterpillar, Inc.*, 710 N.E.2d 193, 196 (Ind. Ct. App. 1999).

Discovery Rule. A cause of action for a tort claim accrues when a plaintiff knew, or in exercise of ordinary diligence could have discovered, an injury had been sustained as a result of tortious act of another. *Wehling v. Citizens Nat'l Bank*, 586 N.E.2d 840, 843 (Ind. 1992). It is not necessary that the full extent of damage be known or ascertainable, only that some ascertainable damage has occurred. *Doe v. United Methodist Church*, 673 N.E.2d 839, 842 (Ind. Ct. App. 1996).

Fraud. A six-year statute of limitations exists for relief against fraud. I.C. 34-11-2-7. The statute of limitations for fraud applies to constructive trusts. *Terry v. Davenport*, 112 N.E. 998, 1002 (Ind. 1916). The statute of limitation begins to run when the fraud is perpetrated unless there is active and intentional concealment. *Prime Mortgage, Inc. v. Nichols*, 885 N.E.2d 628, 640-41 (Ind. Ct. App. 2008).

Tolling. Disregard of a regulation will not toll the running of statute of limitations once the complete cause of action has accrued. *Monsanto Co. v. Miller*, 455 N.E.2d 392, 397 (Ind. Ct. App. 1983). Plaintiff will not be time-barred if he first learns of the wrong after limiting period if fraud is continuous and fraudulent party continues to actively conceal the fraud. *Hughes v. Glaese*, 659 N.E.2d 516, 520 (Ind. 1995). However, plaintiff's failure to exercise reasonable diligence to discover information which has been concealed will preclude tolling. *Id.* at 519. The fraudulent concealment statute, I.C. 34-11-5-1, creates an exception to the two-year statute of limitations for injuries to a person and for damage to personal property. *Fager v. Hundt*, 610 N.E.2d 246, 251 (Ind. 1993). If any person liable to an action shall conceal the fact from the knowledge of the person entitled thereto, the action may be commenced at any time within the period of limitations after the discovery of the cause of action. I.C. 34-11-5-1.

When litigant is prevented from enforcing her remedy during pendency of legal proceedings, the time during which she is prevented will not be counted against her in determining whether statute of limitations has barred her action. *Commercial Credit Corp. v. Ensley*, 264 N.E.2d 80, 86 (Ind. Ct. App. 1970).

Waiver. The statute of limitations within which an action must be brought may be waived. *Burnett v. Villeneuve*, 685 N.E.2d 1103, 1107 (Ind. Ct. App. 1997). Statute of limitations is waived by any action or inaction manifestly inconsistent with intention to insist on the statute. *Hamilton v. Plaut*, 81 Ind. 417, 427 (1882);



Schafer v. Buckeye Union Ins. Co., 381 N.E.2d 519, 523 (Ind. Ct. App. 1978). Parties may not extend or waive time limitations under a “non-claim” statute, which imposes a time limitation as a condition precedent and is self-executing, *i.e.* workers’ compensation. *Cox v. Am. Aggregates Corp.*, 684 N.E.2d 193, 196 (Ind. 1997). While not favored, contractual limitations shortening the time of commencement of suit are valid, at least so long as a reasonable time is afforded, unless it contravenes a statute. *Schafer*, 381 N.E.2d at 522. *See also Troxell v. Am. States Ins. Co.*, 596 N.E.2d 921, 923 (Ind. Ct. App. 1992).

Statutory References to Specific Limits on Causes of Action. Product liability action based upon negligence or strict liability in tort must be commenced within two years after cause of action accrues or within ten years after product is delivered to initial user, except that actions accruing between eight and ten years after that initial delivery may be commenced within two years after the cause of action accrues. I.C. 34-20-3-1. Statute of limitations applies regardless of minority or legal disability. *Id.* Asbestos-related actions must be commenced within two years after discovery of injury. I.C. 34-20-3-2.

There is a two-year statute of limitations for malpractice actions. I.C. 34-11-2-3. Likewise, there is a two-year statute of limitations for personal injuries and damage to personal property. I.C. 34-11-2-4. However, a six-year limitation exists for injuries to property other than personal property. I.C. 34-11-2-7.

MALPRACTICE

Medical. Statutory Requirements. The Indiana Medical Malpractice Act, I.C. 34-18-1-1 *et seq.*, applies to any legal wrong, breach of duty, or negligence, or unlawful act or omission proximately causing injury based on an act or treatment performed or furnished, or which should have been performed or furnished, by a hospital for, to, or on behalf of a patient. *Methodist Hosp. of Ind., Inc. v. Rioux*, 438 N.E.2d 315, 316 (Ind. Ct. App. 1982). Claim brought against a health care provider must ordinarily be filed within two years from date of alleged act, omission, or neglect, except that a minor under age six has until his eighth birthday to file. I.C. 34-18-7-1; *Ledbetter v. Hunter*, 842 N.E.2d 810, 815 (Ind. 2006) (finding statute requiring minors to file suit within two years of their injury or by eighth birthday if injured in first six years of life constitutional). Medical malpractice statute has traditionally been termed an occurrence statute, which begins to run from date of alleged malpractice, not when alleged malpractice is discovered. *Yarnell v. Hurley*, 572 N.E.2d 1312, 1314 (Ind. Ct. App. 1991). If medical malpractice leads to death, limitations period

remains two years from act of malpractice, but must be termed wrongful death action, not malpractice. *Newkirk v. Bethlehem Woods Nursing and Rehab. Ctr, LLC*, 898 N.E.2d 299, 300-01 (Ind. 2008). However, the period of limitations is tolled up to and including ninety days following receipt by claimant of medical review panel opinion. I.C. 34-18-7-3. Also, in situations when plaintiff cannot be reasonably expected to discover alleged medical practice until after limitation period has expired, the occurrence based statute of limitations violates open courts clause and equal privileges and immunities clause of State Constitution and is replaced with a judicially created discovery based statute of limitations. *Jacobs v. Manhart*, 770 N.E.2d 344, 351 (Ind. Ct. App. 2002). Accordingly, two-year statute is tolled if patient suffered from a latent medical condition, which rendered him unable to discover the malpractice within the statutory period. *Brinkman v. Bueter*, 879 N.E.2d 549, 554 (Ind. 2008); *Martin v. Richey*, 711 N.E.2d 1273, 1278 (Ind. 1999); *Herron v. Anigbo*, 897 N.E.2d 444, 448-49 (Ind. 2008), *reh’g denied*; *Moyer v. Three Unnamed Physicians from Marion County and Delaware County, Indiana*, 845 N.E.2d 252, 260 (Ind. Ct. App. 2006). In addition, if fraudulent concealment has occurred, the claim may be filed beyond the basic allowance in the statute of limitations of two years from the date of the occurrence of the alleged malpractice. *Hughes v. Glaese*, 659 N.E.2d 516, 519 (Ind. 1995); *Hopster v. Burgeson*, 750 N.E.2d 841, 857 (Ind. Ct. App. 2001). Medical malpractice defendant who asserts statute of limitations as affirmative defense holds burden of proving action commenced outside of statutory period. *Overton v. Grillo*, 896 N.E.2d 499, 502 (Ind. 2008), *reh’g denied*. If established, burden switches to plaintiff to prove “issue of fact material to a theory that avoids the defense.” *Id.* Plaintiff attorney fees may not exceed 15% of any recovery from the fund. I.C. 34-18-18-1. No action against a health care provider may be commenced in any court before it has been presented to a medical review panel and an opinion is rendered by the panel, unless the plaintiff is seeking less than \$15,000 in damages. I.C. 34-18-8-4; 34-18-8-6. However, parties may agree, in writing, to waive the panel review process. I.C. 34-18-8-5. Panel must also make a separate determination at the time it renders its opinion, as to whether defendant health care provider’s name should be forwarded to the appropriate licensing board for review. I.C. 34-18-9-4.

Expert Testimony. To establish a prima facie case of medical malpractice, plaintiff must provide expert testimony showing the physician’s performance fell below the applicable standard of care and that physician’s negligence proximately caused plaintiff’s injuries. *Etienne v. Caputi*, 679 N.E.2d 922, 924 (Ind. Ct. App. 1997). Absent such expert evidence, there is no genuine



issue of material fact for a jury and summary judgment is appropriate. *Id.* In limited circumstances, courts have held no expert testimony is necessary when negligence is inferable through *res ipsa loquitur* or is apparent even to a layman. *See, e.g., Cleary v. Manning*, 884 N.E.2d 335, 340 (Ind. Ct. App. 2008). If a medical review panel has issued an opinion in favor of a health care provider, plaintiff must establish an issue of fact as to the breach of the duty of care, via expert testimony, in order to avoid summary judgment. *Kennedy v. Murphy*, 659 N.E.2d 506, 507 (Ind. 1995).

Standard of Care. A physician must exercise degree of care, skill, and proficiency exercised by reasonably careful, skillful, and prudent practitioners in the same class to which he belongs, acting under same or similar circumstances. *Vergara v. Doan*, 593 N.E.2d 185, 186 (Ind. 1992). Physician's mistaken diagnosis does not constitute negligence if he has used reasonable skill and care in formulating the diagnosis. *Schultheis v. Franke*, 658 N.E.2d 932, 939 (Ind. Ct. App. 1995). Mere proof diagnosis was wrong or cure was not affected is insufficient. *Id.*

Wrongful Birth/Wrongful Life. Damages for "wrongful life" are not recognized under Indiana law. *Cowe v. Forum Group, Inc.*, 575 N.E.2d 630, 635 (Ind. 1991). However, if wrongful birth action can establish a physical impact or transformation, a negligence claim or claim for emotional distress may succeed. *Id.*; *Bader v. Johnson*, 732 N.E.2d 1212, 1222 (Ind. 2000).

Damages. Total amount recoverable for an injury or death of a patient may not exceed \$750,000 for acts occurring before July 1, 1999. Thereafter, this limit will be raised to \$1,250,000. Qualified health care provider is not liable for more than \$250,000. All amounts due to the patient which are in excess of the individual providers' liability are paid from the Indiana Patient's Compensation Fund. I.C. 34-18-14-3. The Fund cannot challenge causation after a settlement has been reached with a provider, but damages can still be disputed based on chance of survival and likelihood of returning to work. *Atterholt v. Herbst*, 902 N.E.2d 220, 222-24 (Ind. 2009). If a single injury exists, injured plaintiff is entitled to only one recovery. *St. Anthony Med. Ctr. v. Smith*, 592 N.E.2d 732, 739 (Ind. 1992); *see also Bova v. Roig*, 604 N.E.2d 1, 3 (Ind. 1992). If plaintiff has sustained two separate and distinct injuries caused by two separate occurrences of malpractice, regardless of whether one or two doctors were responsible, plaintiff may obtain two separate recoveries under the fund. *Miller v. Mem. Hosp.*, 679 N.E.2d 1329, 1331 (Ind. 1997). Doctor who commits more than one negligent act in treating a patient is only liable under Medical Malpractice Act for one maximum statutory payment if only one compensable

injury results. *Patel v. Barker*, 742 N.E.2d 28, 33 (Ind. 2001). Doctor who commits only one act of malpractice, yet causes more than one compensable injury to more than one patient, is still only liable for one maximum statutory payment. *McCarty v. Sanders*, 805 N.E.2d 894, 899 (Ind. Ct. App. 2004). Doctor who commits two or more negligent acts in treating a patient, and thereby causes two or more distinct injuries, is liable for the maximum statutory payment for each compensable injury. *Medical Assurance of Indiana v. McCarty*, 808 N.E.2d 737, 745 (Ind. 2004). Federal government is entitled to protection of a statutory cap on recovery for a medical malpractice award provided by Indiana law to qualified health care providers. *Carter v. United States*, 982 F.2d 1141, 1144 (7th Cir. 1992).

Informed Consent. A physician has a duty to make reasonable disclosure of material facts relevant to decision required by patient. *Spar v. Cha*, 881 N.E.2d 70, 74 (Ind. Ct. App. 2008). Material facts include general nature of patient's condition; proposed treatment, procedure, examination, or test; expected outcome; material risks; and reasonable alternatives to such treatment, procedure, examination, or test. *Revord v. Russell*, 401 N.E.2d 763, 766 (Ind. Ct. App. 1980); I.C. 34-18-12-3. If patient signs written consent, and consent is explained to patient and witnessed by an individual at least eighteen years of age, a rebuttable presumption is created that consent is informed consent. I.C. 34-18-12-2. In informed consent cases, reasonably prudent physician standard of care applies. *Culbertson v. Mernitz*, 602 N.E.2d 98, 100 (Ind. 1992). Expert testimony is required to establish this standard of care unless clearly within layman's comprehension. *Id.* at 102. To be actionable, a causal relationship must exist between a physician's failure to inform and injury to plaintiff. *Revord*, 401 N.E.2d at 767. Absent special circumstances, a hospital has no independent duty to obtain patient's informed consent. *Auler v. Van Natta*, 686 N.E.2d 172, 175 (Ind. Ct. App. 1997).

Liability for Others. An individual who renders professional services as an employee of a professional corporation is liable for the conduct of other employees of the professional corporation under his direction or control to the same extent as a sole practitioner would be so liable. I.C. 23-1.5-2-6. The Indiana Supreme Court adopted the doctrine of apparent agency set forth in the Restatement (Second) of Torts § 429, by which a hospital may be held liable for negligent actions of independent contractors in some circumstances. *Sword v. NKC Hospitals, Inc.*, 714 N.E.2d 142, 152 (Ind. 1999).

Legal. See "ATTORNEYS."

Other Professionals - Damages. An architect has a duty to supervise to assure construction conforms to the

authorized plans; however, architect does not assume responsibility for persons lawfully on the construction site unless he contracted to do so or assumed the duty through his affirmative conduct. *See Teitge v. Remy Constr. Co., Inc.*, 526 N.E.2d 1008, 1012 (Ind. Ct. App. 1988).

Standard of Care. Seventh Circuit Court of Appeals has concluded Indiana would adopt the Ultramares standard, requiring a contractual relationship or at least affirmative evidence of conduct which indicates the professional's knowledge of the third party's reliance in imposing liability on accountants. *Toro Co. v. Krouse, Kern & Co.*, 827 F.2d 155, 159 (7th Cir. 1987); *but see First Cmty. Bank & Trust v. Kelley, Hardesty, Smith & Co., Inc.*, 663 N.E.2d 218, 223-24 (Ind. Ct. App. 1996). Indiana has adopted the Ultramares standard when the liability of a surveyor was at issue, but limited its holding in that case. *Essex v. Ryan*, 446 N.E.2d 368, 373 (Ind. Ct. App. 1983). An architect is bound to perform obligations for which he contracted with reasonable care and is liable for failing to exercise professional skill and reasonable care in preparing plans and specifications according to contract. *Strauss Veal Feeds, Inc. v. Mead & Hunt, Inc.*, 538 N.E.2d 299, 303 (Ind. Ct. App. 1989).

NEGLIGENCE

See Law Digest Tables.

Age. In Indiana, children under age of 7 are conclusively presumed to be incapable of contributory negligence; children between ages of 7 and 14 are rebuttably presumed to be incapable of contributory negligence; and, absent special circumstances, children over age of 14 are chargeable with exercising the standard care of an adult. *Mangold v. Indiana Dep't of Natural Resources*, 756 N.E.2d 970, 976 (Ind. 2001). Persons entrusted with children have a special responsibility recognized by common law to supervise their charges. *Miller v. Giesel*, 308 N.E.2d 701, 706 (Ind. 1974). Persons are required to use greater care in dealing with children of tender years than with older persons who have reached age of discretion; greater duty of care extends even when children are trespassers. *Penso v. McCormick*, 25 N.E. 156, 158 (Ind. 1890).

Attractive Nuisance. For doctrine of attractive nuisance to apply, the following facts must exist: the subject structure or condition must be maintained or permitted on the property by the occupant; be peculiarly dangerous to children; be of such a nature that children would not comprehend the danger; be particularly attractive to children and provide special enticement for them to play or sport thereon; owner must know, or facts alleged must be such as to charge owner with constructive knowledge of the existence of the structure and that children are

likely to trespass; and injury sustained must be a natural, probable, and foreseeable result of the alleged wrong. *Kelly v. Ladywood Apartments*, 622 N.E.2d 1044, 1048-49 (Ind. Ct. App. 1993); *see also City of Indianapolis v. Johnson*, 736 N.E.2d 295, 298 (Ind. Ct. App. 2000) (stating common law liability as to invited guests and attractive nuisances remains intact); *Cunningham v. Bakker Produce*, 712 N.E.2d 1002, 1007 (Ind. Ct. App. 1999) (holding attractive nuisance doctrine did not apply because case involved artificial condition commonly found in nature). Doctrine applies only to latent dangers. *Kelly*, 622 N.E.2d at 1049. Attractive nuisance doctrine is inapplicable to dangers which are obvious and known to children. *Id.*

Assumption of Risk. Incurred risk is based upon the proposition one incurs all ordinary and usual risks of an act upon which the actor voluntarily enters, so long as those risks are known and understood by the actor. *Clem v. United States*, 601 F. Supp. 835, 844 (N.D. Ind. 1985). Incurred risk is an affirmative defense and, therefore, must be established by defendant by a preponderance of the evidence. *Town of Highland v. Zerkel*, 659 N.E.2d 1113, 1121 (Ind. Ct. App. 1995), *trans. denied*, (1996); *Faulk v. Nw. Radiologists, P.C.*, 751 N.E.2d 233, 243 (Ind. Ct. App. 2000); *see also Kostidis v. Gen. Cinema Corp.*, 754 N.E.2d 563, 571 (Ind. Ct. App. 2001) (affirmative defense of incurred risk requires evidence of actual knowledge and appreciation of the specific risk involved and plaintiff must voluntarily accept that specific risk).

Comparative/Contributory Negligence. The Comparative Fault Act in Indiana, I.C. 34-51-2-1 *et seq.*, governs any action based on fault brought to recover damages for injury or death to a person, or harm to property. I.C. 34-51-2-1 through I.C. 34-51-2-19 (1998); *see Bulldog Battery Corp. v. Pica Invs., Inc.*, 736 N.E.2d 333, 337 (Ind. Ct. App. 2000). However, the Act does not apply to 1) a qualified health care provider under I.C. 16-9.5 (before its repeal); I.C. 27-12 (before its repeal); or I.C. 34-18 for medical malpractice, or 2) any action that accrued before January 1, 1985. I.C. 34-51-2-1. Any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for injury attributable to the plaintiff's contributory fault. I.C. 34-51-2-5; *Control Techniques, Inc. v. Johnson*, 762 N.E.2d 104, 109 (Ind. 2002); *Mendenhall v. Skinner & Broadbent Co.*, 728 N.E.2d 140, 142 (Ind. 2000) (discussing Comparative Fault Act). Claimant will be unable to recover from one or more defendants if his contributory fault is greater than fault of all persons who proximately contributed to the claimant's damages. I.C. 34-51-2-6; *Sparks v. White*, 899 N.E.2d 21, 30 (Ind. Ct. App. 2008). Incurred risk is not a complete defense under Comparative Fault Act. *Heck v.*



Robey, 659 N.E.2d 498, 504-05 (Ind. 1995). Defendant must timely and specifically identify nonparty even if nonparty is known to plaintiff. *Templin v. Fobes*, 617 N.E.2d 541, 544 (Ind. 1993). Adoption of Indiana Comparative Fault Act did not change common law rule that tortfeasor may not rely on physician's negligent treatment of victim's injuries to avoid or reduce tortfeasor's liability, and thus, driver and owner of truck, who were sued for injuries sustained by passenger of automobile which collided with truck, could not assert nonparty defense against physician who had allegedly committed malpractice in treating passenger. *Edwards v. Sisler*, 691 N.E.2d 1252, 1253-54 (Ind. Ct. App. 1998). "If the negligent actor is liable for another's bodily injury, he is also subject to liability for any additional bodily harm resulting from normal efforts of third persons in rendering aid which the other's injury reasonably requires, irrespective of whether such acts are done in a proper or a negligent manner." *Infectious Disease of Indianapolis, P.S.C. v. Toney*, 813 N.E.2d 1223, 1230 (Ind. Ct. App. 2004) (quoting Restatement (Second) of Torts § 457).

Damages - Compensatory. Generally, determination of damages in Indiana requires evaluation of reasonable and necessary medical, hospital, nursing and related expense, the nature, extent and permanency of the injury as the same affects quality and enjoyment of life, loss of earnings, impairment of earning capacity, physical pain and suffering, past and future, mental pain, suffering and anguish past and future and disfigurement or deformity. *Grubbs v. United States*, 581 F. Supp. 536, 540-41 (N.D. Ind. 1984). If named by defendant, a "non-party" shall be considered in allocation of fault; under the Comparative Fault Act, a non-party is a person who contributed to the injury or damage but who has not been joined as a defendant. I.C. 34-51-2-8; I.C. 34-6-2-88; *R.L. McCoy, Inc. v. Jack*, 772 N.E.2d 987, 989-90 (Ind. 2002); *Blocher v. Debartolo Props. Mgmt. Inc.*, 760 N.E.2d 229, 240 (Ind. Ct. App. 2001); *Mendenhall v. Skinner & Broadbent Co.*, 728 N.E.2d 140, 142 (Ind. 2000). Absent express contrary indication, court presumes Act's non-party provisions apply prospectively. *Chestnut v. Roof*, 665 N.E.2d 7, 9 (Ind. 1996); *New Albany-Floyd County Educ. Ass'n v. Ammerman*, 724 N.E.2d 251, 259 (Ind. Ct. App. 2000).

Punitive. Punitive damages may be awarded only if there is clear and convincing evidence that the defendant acted with malice, fraud, gross negligence, or oppressiveness which was not the result of a mistake of fact or law, honest error [of] judgment, overzealousness, mere negligence, or other human failing. *Bergerson v. Berger-son*, 895 N.E.2d 705, 715 (Ind. Ct. App. 2008). "Gross negligence" refers to same kind of oppressive conduct symbolized by fraud or malice. *Prudential Ins. Co. v. Executive Estates, Inc.*, 369 N.E.2d 1117, 1132 (Ind. Ct.

App. 1977). Punitive damage award may not exceed greater of three times compensatory damage or \$50,000. I.C. 34-51-3-4. Punitive damages shall be distributed twenty-five percent to plaintiff and seventy-five percent to clerk of court. I.C. 34-51-3-6. Distributing seventy-five percent of punitive damages to clerk of court does not create an unconstitutional taking of property and does not place a demand on an attorney's particular services in violation of the Indiana Constitution. *Cheatham v. Pohle*, 789 N.E.2d 467, 477 (Ind. 2003).

Limitation on Awards. General rule is that the damages awarded must be within scope of the evidence. *Prudential Ins. Co. v. Executive Estates, Inc.*, 369 N.E.2d 1117, 1133 (Ind. Ct. App. 1977). To be considered excessive, damages assessed must be so grossly and outrageously excessive as to induce belief damages were result of prejudice, partiality, or corruption. *Kampo Transit, Inc. v. Powers*, 211 N.E.2d 781, 792 (Ind. Ct. App. 1965).

Definition/Negligence. Negligence is a failure to exercise that degree of care which a person of ordinary prudence would exercise under the same or similar circumstances. *Vance v. City of Franklin*, 30 N.E. 149, 150 (Ind. Ct. App. 1892). Negligence consists of three elements: a duty imposed by law, a violation of that duty, and an injury proximately caused thereby. *Webb v. Jarvis*, 575 N.E.2d 992, 995 (Ind. 1991); see *Benton v. City of Oakland City*, 721 N.E.2d 224, 232 (Ind. 1999). To impose duty, three factors usually must be balanced: 1) relationship between parties; 2) reasonable foreseeability of harm to person injured; and 3) public policy concerns. *Id.* However, it has recently been held court need not necessarily resort to the *Webb* test "if there is well-settled authority imposing a duty under the circumstances." *Simon Property Group, L.P. v. Brandt Constr., Inc.*, 830 N.E.2d 981, 988 (Ind. Ct. App. 2005) (holding an intent to assume duty of care evinced in contract may be enough to predicate actionable negligence claim). A voluntary participant in a sporting event "does not owe a duty to fellow participants to refrain from conduct which is inherent and foreseeable in the play of the game even though such conduct may be negligent and may result in injury absent evidence that the other participant either intentionally caused injury or engaged in conduct so reckless as to be totally outside the range of ordinary activity involved in the sport." *Geiersbach v. Frieje*, 807 N.E.2d 114, 118-19 (Ind. Ct. App. 2004); see also *Parsons v. Arrow Head Golf, Inc.*, 874 N.E.2d 993, 997 (Ind. Ct. App. 2007) (holding golf course did not owe duty to golfer to prevent back injury resulting from stepping off of golf cart path onto green). A negligent act or omission is the proximate cause of an injury if the injury is a natural and probable consequence, which, in light of the circumstances, should reasonably have been fore-

seen. *Bradtmiller v. Hughes Props., Inc.*, 693 N.E.2d 85, 89 (Ind. Ct. App. 1998). Negligence arising from non-feasance must be premised on special relationship between the parties. *Estate of Cummings v. PPG Indus., Inc.*, 651 N.E.2d 305, 309 (Ind. Ct. App. 1995).

Governmental Immunity. Indiana's comparative fault law does not apply to claims against governmental entities. I.C. 34-51-2-2; *Yates v. Johnson County Board of Comm'rs*, 888 N.E.2d 842, 852 (Ind. Ct. App. 2008). The common law principle of contributory negligence acts as a complete bar to recovery in actions brought under the Tort Claims Act. *Town of Highland v. Zerkel*, 659 N.E.2d 1113, 1120 (Ind. Ct. App. 1995).

Imputed Negligence. To impute negligence of one to another, the relation between them must be one invoking principles of agency, parties must have been cooperating in joint or common enterprise, or the relation of parties must have been such that the person to whom the negligence is imputed must have had legal right to control the action of the person actually negligent. *Sheridan v. Siuda*, 276 N.E.2d 883, 890 (Ind. App. 1971), quoting *Union Traction Co. of Indiana v. Gaunt*, 135 N.E. 486, 487 (Ind. 1922). A responsible agent intervening between the original negligence and the injury cuts off the line of causation, relieving the person guilty of the original negligence from liability. *Kelly v. Davidson*, 154 N.E.2d 888, 892 (Ind. Ct. App. 1958).

Liquor Liability/Dram Shop Act. I.C. 7.1-5-10-15.5 provides any person who barter, delivers, sells, exchanges, provides, or gives away intoxicating liquor is not liable in a civil action for damages caused by impairment or intoxication of the person who was furnished the intoxicating liquor unless the person furnishing the alcoholic beverage had actual knowledge the person whom he was serving was visibly intoxicated at the time the alcoholic beverage was furnished, or the intoxication of the person to whom the alcoholic beverage was served was a proximate cause of the death, injury, or damage alleged in the complaint. This statute has extended civil liability to family, friends, or acquaintances who merely furnish "one more drink" to an intoxicated person. See *Vanderhoek v. Willy*, 728 N.E.2d 213, 218 (Ind. Ct. App. 2000); *Ashlock v. Norris*, 475 N.E.2d 1167, 1169 (Ind. Ct. App. 1985). Cf. *Campbell v. Bd. of Trs. of Wabash*, 495 N.E.2d 227, 230-31 (Ind. Ct. App. 1986).

Joint and Several Liability. The Comparative Fault Act abolished application of joint and several liability in matters in which the Act is applicable. See I.C. 34-51-2-6. If harm is brought about by simultaneous and active operation of the effects of both an actor's negligence and also a third party's negligence, the conduct of each is a

cause of the harm and both parties are liable. *N. Indiana Transit, Inc. v. Burk*, 89 N.E.2d 905, 911 (Ind. 1950).

Last Clear Chance. With adoption of Comparative Fault Act, I.C. 34-51-2-1, *et seq.* (1985), the doctrines of last clear chance and superseding and intervening causes are no longer available to excuse plaintiff negligence. *Hull v. Taylor*, 644 N.E.2d 622, 624-25 (Ind. Ct. App. 1994); *Miller v. Ryan*, 706 N.E.2d 244, 249 (Ind. Ct. App. 1999).

Negligence Per Se. Unexcused or unjustified violation of a duty prescribed by statute or ordinance constitutes negligence per se if statute is intended to protect the class of persons in which plaintiff is included and against the risk of harm which has occurred as a result of the violation. *Hodge v. Nor-Cen, Inc.*, 527 N.E.2d 1157, 1160 (Ind. Ct. App. 1988). Exceptions exist when compliance with statute or ordinance is impossible or non-compliance is excusable. *Jenkins v. City of Fort Wayne*, 210 N.E.2d 390, 393 (Ind. Ct. App. 1965). When there is no causal connection between violation of statute or ordinance and plaintiff's injuries, jury should not be permitted to consider evidence of violation as tending to show negligence. *Conrad v. Tomlinson*, 279 N.E.2d 546, 553 (Ind. 1972).

Premises Liability. Duty owed by landowner to entrant onto his land is determined by entrant's status as trespasser, licensee, or invitee. *Burrell v. Meads*, 569 N.E.2d 637, 638-39 (Ind. 1991); *State Farm Fire & Cas. Co. v. T.B.*, 762 N.E.2d 1227, 1232-33 (Ind. 2002). A trespasser is one who enters premises for his own convenience, curiosity, or entertainment without the landowner's permission. *Burrell*, 569 N.E.2d at 640. A landowner owes trespasser a duty to refrain from willfully or wantonly injuring the trespasser after discovering his presence. *Id.* at 639. A licensee is one who enters the premises for his own convenience, curiosity, or entertainment with the landowner's permission. *Id.* at 640. A landowner owes licensee the duty to refrain from willfully or wantonly injuring him or acting in a manner to increase his peril and to warn licensee of any latent danger on the premises of which landowner has knowledge. *Id.* at 639. An invitee is one who is invited by landowner to enter upon the land and includes a public invitee, a business visitor, and social guest. *Id.* at 642. A landowner owes an invitee the duty to exercise reasonable care for his protection while invitee is on landowner's premises. *Id.* at 639.

Res Ipsa Loquitur. Res ipsa loquitur is a rule of evidence that allows an inference of negligence to be drawn from the facts surrounding the injury. Under res ipsa loquitur, a plaintiff must show the injury is one which does not ordinarily occur in the absence of negligence, was caused by an instrumentality over which the

defendant had exclusive control, and was not due to any voluntary act of plaintiff. *Slease v. Hughbanks*, 684 N.E.2d 496, 499 (Ind. Ct. App. 1997). See also *Aldana v. Sch. City of E. Chicago*, 769 N.E.2d 1201, 1206 (Ind. Ct. App. 2002) (stating that to prove the exclusive control requirement of *res ipsa loquitur*, plaintiff is simply required to show either 1) a specific instrument caused the injury and defendant had control over that instrument or 2) any reasonably probable causes for the injury were under the control of defendant); *Narducci v. Tedrow*, 736 N.E.2d 1288, 1292 (Ind. Ct. App. 2000). Application of *res ipsa loquitur* does not shift burden of proof to the defendant. Establishment of the inference necessitates proof which could explain away such inference. *Snow v. Cannelton Sewer Pipe Co.*, 210 N.E.2d 118, 121 (Ind. Ct. App. 1965).

Sudden Emergency. When one is confronted with a sudden emergency without sufficient time to determine with certainty the best course to pursue, he is not held to same accuracy of judgment required of him if he had time for deliberation. *Gamble v. Lewis*, 85 N.E.2d 629, 634 (Ind. 1949). If one exercises such care as an ordinarily prudent man when confronted with a sudden emergency, he is not liable for injury which resulted from his conduct, even though another course of conduct would have been more judicious, safer, or might have avoided the injury. *Id.* Before one is entitled to the benefits of the sudden emergency doctrine, his conduct must be free from negligence which contributed to creation of the emergency itself. *Cartwright v. Harris*, 400 N.E.2d 1192, 1195 (Ind. Ct. App. 1980). Sudden emergency doctrine remains viable under the Comparative Fault Act. *Compton v. Pletch*, 580 N.E.2d 664, 664 (Ind. 1991). See also *Brooks v. Friedman*, 769 N.E.2d 696, 699-700 (Ind. Ct. App. 2000).

NO-FAULT

Indiana does not have no-fault insurance. *Progressive N. Ins. Co. v. Rasner*, 673 N.E.2d 522, 526 (Ind. Ct. App. 1996).

PENALTIES AND ATTORNEY'S FEES

Statutory provisions for failure to pay policy benefits. Insurance against legal expenses, including attorney's fees, may be provided as a Class 2 type of insurance, except those expenses resulting from the following: retainer contracts with an estimated fee; plans limited to consultation and advice on simple matters; plans providing limited benefits on simple matters on a voluntary or informal basis, not involving legally binding promise, in the context of employment, education, or similar relationship; legal services provided by unions or employee associations to their members in matters re-

lated to that employment; and payment of fines, penalties, judgments or assessments. I.C. 27-1-5-1(m)(1)-(5).

Payment to Attorney for Services. If an insurer pays money or transfers property to an attorney for services, within four months prior to filing a successful petition for liquidation under I.C. 27-9, or at any time in contemplation of proceeding to liquidate, then the transaction may be examined by a court. I.C. 27-9-3-25.

Priority of Distribution of Claims. Attorney's fees have Class 1 priority in liquidation proceedings of an insurer's estate. I.C. 27-9-3-40.

PRIVILEGED COMMUNICATIONS

Attorney/Client. Attorney has legal and ethical duty to maintain inviolate the confidence and to preserve secrets of a client both during and subsequent to attorney/client relationship. *In re Robak*, 654 N.E.2d 731, 735 (Ind. 1995). An attorney is not required to testify as to confidential communication made in course of professional business and as to advice given in such cases. I.C. 34-46-3-1(1); see *Lahr v. State*, 731 N.E.2d 479, 482 (Ind. Ct. App. 2000). Privilege does not depend on pendency or expectation of litigation or whether a fee has been paid. *Roberts v. Carrier Corp.*, 107 F.R.D. 678, 686 (N.D. Ind. 1985). The fact the attorney/client relationship once existed does not preclude the attorney from giving evidence of non-professional communications subsequently made to him by client. *Harless v. Harless*, 41 N.E. 592, 594 (Ind. 1895). However, an attorney may testify as to conversation occurring before the attorney/client relationship arose. *Jennings v. Sturdevant*, 40 N.E. 61, 62 (Ind. 1898). The burden is on the person asserting privilege to establish its existence, *Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., Inc.*, 132 F.R.D. 204, 207 (N.D. Ind. 1990), as well as to show the consultation was a professional consultation. *Colman v. Heidenreich*, 381 N.E.2d 866, 869 (Ind. 1978).

Insurer/Insured. When the insurance policy compels insurer to defend claims against insured concerning event which may be basis of a claim by third party, statements from insured to insurer are privileged and protected from disclosure. *Richey v. Chappell*, 594 N.E.2d 443, 445 (Ind. 1992).

Clergyman/Penitent. Clergymen are not required to testify regarding confessions or admissions made to them in course of discipline enjoined by their respective churches. I.C. 34-46-3-1(3); see also *Old Indiana L.L.C. v. Montano*, 732 N.E.2d 179, 184 (Ind. Ct. App. 2000). However, admissions to a clergyman are admissible in criminal case, if not made to him in his professional character, in the course of discipline enjoined by church.

Gillooley v. State, 58 Ind. 182, 184 (1877). This privilege did not apply to a farmer who belonged to bible organization, which distributed bibles and visited jails to talk with inmates, because farmer was not “clergyman.” *Rutledge v. State*, 525 N.E.2d 326, 328 (Ind. 1988). Moreover, if pastoral confessions do not constitute a tenet or discipline of the church, and the church does not recognize confidential pastor/parishioner relationship with respect to evidence of a crime, then the admission is not privileged. *Ball v. State*, 419 N.E.2d 137, 139-40 (Ind. 1981).

Doctor/Patient. Under I.C. 34-46-3-1(2), a physician is not required to testify as to matters communicated to her by patients in the course of her professional business or advice given in such cases, except as otherwise provided by statute. *See In re Commitment of J.B.*, 766 N.E.2d 795, 797 (Ind. Ct. App. 2002). Exemptions include duty to report child abuse or neglect, I.C. 31-33-5-1, and disclosure of chemical test results to law enforcement officers, I.C. 9-30-6-6. None of the following are grounds for excluding evidence resulting from report of child who may be a victim of child abuse or neglect: health care provider/patient, husband/wife, certified social worker, clinical social worker or therapist/patient privilege. I.C. 31-32-11-1. Physician/patient privilege applies only to communications necessary to treatment or to diagnosis looking toward treatment. *Thomas v. State*, 656 N.E.2d 819, 822 (Ind. Ct. App. 1995). Records and information maintained in the course of providing mental health services to patient are confidential, and patient’s record is not admissible in any proceeding without consent of patient. I.C. 16-39-2-7; *In re J.O.*, 556 N.E.2d 948, 949 (Ind. Ct. App. 1988) (applying I.C. 16-14-16-8(f)). Physician may not assert privilege for own protection to frustrate lawful process against him, *State v. Jagers*, 506 N.E.2d 832, 834 (Ind. Ct. App. 1987); rather, the privilege is personal to the patient and can only be exercised by the patient or his legal representative. *In re Estate of Beck v. Campbell*, 240 N.E.2d 88, 92 (Ind. Ct. App. 1968).

Spousal. A husband or wife is not required to testify as to communications made to each spouse. I.C. 34-46-3-1(4); *Rubalcada v. State*, 731 N.E.2d 1015, 1022 (Ind. 2000). However, one spouse is not precluded from testifying against the other in a criminal prosecution. *State v. Wilson*, 836 N.E.2d 407, 409 (Ind. 2006). Privilege between husband and wife is not ground for excluding evidence resulting from report of child who may be victim of child abuse or neglect. I.C. 31-32-11-1. Marital privilege is accorded only to those who maintain legal relationship of husband and wife. *Gajdos v. State*, 462 N.E.2d 1017, 1021 (Ind. 1984). A claim of privilege is restricted to confidential communications and information gained by reason of marital relationship. *Mahoney v.*

State, 388 N.E.2d 591, 594 (Ind. Ct. App. 1979). As long as communication is made within the course of marriage, divorce does not subsequently remove privilege. *See e.g. Russell v. State*, 743 N.E.2d 269, 272 (Ind. 2001); *Bergner v. State*, 397 N.E.2d 1012, 1019 (Ind. Ct. App. 1979). Moreover, death of husband or wife does not remove disability of survivor to testify to conversations held with each other during marriage. *Noble v. Withers*, 36 Ind. 193, 195 (1871). Privileged communication between husband and wife is not limited to audible communication, but includes any knowledge gained by virtue of an act by one spouse, which would not have been done in the presence of the other spouse but for the marital relationship. *Bergner*, 397 N.E.2d at 1019. When communication between husband and wife is intended to be transmitted to third person or is made in presence of third person, there is no privilege. *Fielden v. State*, 437 N.E.2d 986, 989 (Ind. 1982). Marital privilege does not apply in criminal prosecutions if the spouse was the party injured by the offense committed. *Van Donk v. State*, 676 N.E.2d 349, 351 (Ind. Ct. App. 1997); *Rubalcada*, 731 N.E.2d at 1022.

Waiver. Client alone may claim or waive attorney/client privilege. *Gubitz v. State*, 360 N.E.2d 259, 265 (Ind. Ct. App. 1977). Accused who testified as to confidential communications between himself and his attorney destroyed the privilege and consented that attorney might be a witness concerning such matters. *Fluty v. State*, 71 N.E.2d 565, 567 (Ind. 1947). Generally, attorney/client privilege excludes testimony regarding preparation of a will; however, when attorney preparing the will is a witness to it, privilege is waived. *Brown v. Edwards*, 640 N.E.2d 401, 404-06 (Ind. Ct. App. 1994). Declarations made to attorney in presence of adverse party are not privileged. *Owens v. Best Beers of Bloomington, Inc.*, 648 N.E.2d 699, 703 (Ind. Ct. App. 1995).

Physician/patient privilege is not an absolute bar; rather, it can be waived by patient, either expressly or by implication. *Thomas v. State*, 656 N.E.2d 819, 822 (Ind. Ct. App. 1995). When defendant failed to object that admission of a statement violated physician/patient privilege, the issue was waived. *Corder v. State*, 467 N.E.2d 409, 415 (Ind. 1984). Privilege as to all matters causally or historically related to physical or mental condition put in issue by a claim is waived. *Vargas v. Shepherd*, 903 N.E.2d 1026, 1030 (Ind. Ct. App. 2009); *see also Canfield v. Sandcock*, 563 N.E.2d 526, 529 (Ind. 1990). Privilege does not extend to third parties who overhear conversation unless such persons are necessary for purpose of transmitting information and aiding a doctor. *Doss v. State*, 267 N.E.2d 385, 390 (Ind. 1971). Parties waived privilege when signed and delivered document which authorized and directed any and all medical information concerning the patient could be

freely discussed and given “without limitation.” *Boger v. Krinn*, 228 N.E.2d 426, 428 (Ind. Ct. App. 1967). Voluntary testimony of a defendant as to his physical condition, when such condition is an issue, waives privilege. *Shultz v. State*, 417 N.E.2d 1127, 1134-35 (Ind. Ct. App. 1981). Doctor/patient privilege is also waived when plea of not guilty by reason of insanity is entered. *Bailey v. State*, 346 N.E.2d 741, 745 (Ind. 1976).

PRODUCT LIABILITY

Strict Liability. I.C. 34-20-1-1 *et seq.* applies to an action brought by a user or consumer against a manufacturer or seller for physical harm caused by a product, regardless of the substantive legal theory or theories upon which the action is brought. *Camplin v. ACandS, Inc.*, 768 N.E.2d 428, 429 (Ind. 2002). Strict liability doctrine is available only in manufacturing defect cases. I.C. 34-20-2-2.

Further, seller of a product cannot be strictly liable in tort unless seller also manufactures product. I.C. 34-20-2-3; *Duncan v. M&M Auto Service, Inc.*, 898 N.E.2d 338, 342 (Ind. Ct. App. 2008). However, if an Indiana court does not have jurisdiction over manufacturer, then principal distributor or seller may be considered to be manufacturer in order to protect consumers from overseas entity. I.C. 34-20-2-4; *Kennedy v. Guess, Inc.*, 806 N.E.2d 776, 782 (Ind. 2004). Simply licensing name does not open defendant to liability. *Id.* at 783. To establish product liability claim based on a product itself, plaintiffs must show they were injured by product because it was defective and unreasonably dangerous, and that: 1) plaintiff is in the class of persons that seller should reasonably foresee as being subject to harm caused by defective condition; 2) seller is engaged in business of selling the product; and 3) product was expected to and did reach consumer without substantial change. I.C. 34-20-2-1; *see also Progressive Ins. Co. v. Gen. Motors Corp.*, 749 N.E.2d 484, 487 (Ind. 2001); *Butler v. City of Peru*, 733 N.E.2d 912, 918 (Ind. 2000).

Product is defective if seller fails to 1) properly package or label product to give reasonable warnings of danger about product or 2) give reasonably complete instructions on proper use of product, when seller, by exercising reasonable diligence, could have made such warnings or instructions available to the end user or consumer. I.C. 34-20-4-2; *Miller v. Honeywell, Int'l, Inc.*, 2002 U.S. Dist. LEXIS 20478, at *38-39 (S.D. Ind. Oct. 15, 2002). Plaintiff may use circumstantial evidence to establish a manufacturing defect existed only in certain circumstances. *Whitted v. General Motors Corp.*, 58 F.3d 1200, 1209 (7th Cir. 1995); *Ford Motor Co. v. Reed*, 689 N.E.2d 751, 754 (Ind. Ct. App. 1997). In Indiana, mere failure of product in a particular accident does

not alone evidence defect; rather, product may be shown to be defective because of manufacturing flaws, design defects, or failure to warn of potential dangers. *Moss v. Crossman Corp.*, 136 F.3d 1169, 1171 (7th Cir. 1998). A product is defective if, at the time conveyed from seller, it is in a condition: 1) not contemplated by reasonable persons among those considered expected users or consumers, and 2) it is unreasonably dangerous to expected user or consumer when used in reasonable expectable ways of handling or consumption. I.C. 34-20-4-1; *Moss v. Crossman Corp.*, 945 F. Supp. 1167, 1175-76 (N.D. Ind. 1996). In a negligence case, “open and obvious danger” rule provides manufacturer is liable only for hidden defects; however, this rule is not applicable in the strict liability context. *Johnson v. Kempler Indus., Inc.*, 677 N.E.2d 531, 538 (Ind. Ct. App. 1997).

Proximate cause is established if injury caused by product is a natural and probable consequence which has, or should have been, reasonably foreseen or anticipated in light of attendant circumstances. *Wolfe v. Stork RMS-Protecon, Inc.*, 683 N.E.2d 264, 268 (Ind. Ct. App. 1997). If defendant cannot show the alteration of product is a direct and undisputed cause of injury, summary judgment on the issue of proximate cause is precluded. *Henderson v. Freightliner, LLC*, 2005 WL 775929, at *10 (S.D. Ind. Mar. 24, 2005). Product misuse operates as defense only if it is not foreseeable. *Montgomery Ward & Co. v. Gregg*, 554 N.E.2d 1145, 1156 (Ind. Ct. App. 1990).

Breach of Warranty. Action for breach of warranty may sound in contract or tort, the latter arising out of a duty fixed by law, and not by agreement between the parties. *Wilson v. Studebaker-Worthington, Inc.*, 582 F. Supp. 383, 387 (S.D. Ind. 1983).

Implied. Because a count based on tortious breach of implied warranty is duplicative of a count based on strict liability in tort, both counts may not be pursued in the same lawsuit. *Zepik v. Ceeco Pool & Supply, Inc.*, 637 F. Supp. 444, 450 (N.D. Ind. 1986), *vacated in part on other grounds*, 856 F.2d 936 (7th Cir. 1998); *but see Gorman v. Saf-T-Mate, Inc.*, 513 F. Supp. 1028, 1038 (N.D. Ind. 1981) (holding claims not duplicative). Recovery from manufacturer for personal injury caused by defective goods on theory of breach of implied warranty of merchantability under Indiana UCC—does not require buyer seeking recovery to be in vertical privity with manufacturer. *Hyundai Motor Am., Inc. v. Goodin*, 822 N.E.2d 947, 951 (Ind. 2005); *see also Cincinnati Ins. Co. v. Hamilton Beach/Proctor-Silex, Inc.*, 2006 WL 299064 at *3 (N.D. Ind. Feb. 7, 2006). Under Indiana UCC, warranty that goods shall be merchantable is implied in contract for sale if seller is a merchant with respect to goods of that kind, I.C. 26-1-2-314. There is

implied warranty that goods will be fit for a particular purpose, so long as 1) seller has reason to know of buyer's purpose at time of contracting; and 2) buyer's reliance on seller's skill and judgment to select and furnish suitable goods. I.C. 26-1-2-315. Seller may exclude or modify both implied warranties by following I.C. 26-1-2-316. Measure of damages for breach of warranty is the difference, at time and place of acceptance, between value of goods as accepted and value goods would have had if they had been as warranted, unless special circumstances show proximate damages of different amount. I.C. 26-1-2-714(2). Incidental and consequential damages may be recovered in a proper case. I.C. 26-2-2-714(3). Personal injuries proximately caused by breach of warranty can support consequential damages. I.C. 26-1-2-715(2)(b).

Contractual warranties, whether express or implied, extend to any natural person who is in the family or household of the buyer or who was a guest in the home and is injured because of the breach of warranty if it is reasonable to expect such person to use, consume, or be affected by the goods. I.C. 26-1-2-318.

Duty to Warn. A manufacturer has a duty to warn about potential dangers of its product. *See York v. Union Carbide Corp.*, 586 N.E.2d 861, 867 (Ind. Ct. App. 1992). Threshold question regarding manufacturer's liability for damages resulting from its failure to warn is whether manufacturer had duty to warn. *Am. Optical Co. v. Weidenhamer*, 457 N.E.2d 181, 187 (Ind. 1983). Absent proof of dangerous instrumentality, or proof of defect or improper design, manufacturer has no duty to warn of product-related dangers. *Id.* Action based on design defect or failure to warn is governed by reasonable care standard. *Miller v. Honeywell Int'l. Inc.*, No. IP 98-1742 C-M/S, 2002 U.S. Dist. LEXIS 20478, at *39 (S.D. Ind. Oct. 15, 2002). Supplier of imminently dangerous chattel must warn all who may come in contact with it of any concealed danger, regardless of privity. *Dudley Sports Co. v. Schmitt*, 279 N.E.2d 266, 275 (Ind. Ct. App. 1972). A supplier of a chattel has no duty to warn of an obvious hazardous condition which a "mere casual looking over will disclose." *Dutchmen Mfg., Inc. v. Reynolds*, 891 N.E.2d 1074, 1085 (Ind. Ct. App. 2008), *trans. denied*. Purchaser's knowledge is not sole criteria for establishing existence of duty to warn. *Hinkle v. Niehaus Lumber Co.*, 525 N.E.2d 1243, 1245 (Ind. 1988). Supplier must know or have reason to know product would likely be dangerous if used in a foreseeable manner. *Id.*

Indemnification. Indiana's Products Liability Act does not affect the rights of any person found liable to seek and obtain indemnity from any other person whose actual fault caused a product to be defective. I.C. 34-20-

9-1. The right of indemnity does not arise if the party seeking indemnity could be a joint tortfeasor. *Huber v. Henley*, 669 F. Supp. 1474, 1481 (S.D. Ind. 1987).

Punitive. Punitive damages are allowed only when the evidence shows malice, fraud, gross negligence or oppressiveness, and the tortious conduct did not result from mistake, honest error, over-zealousness, negligence, or other non-iniquitous human failing. *Wright-Moore Corp. v. Ricoh Corp.*, 794 F. Supp. 844, 867-68 (N.D. Ind. 1991). Punitive damages are proper when there is an award of either compensatory damages or affirmative relief of an equitable nature. *Dotlich v. Dotlich*, 475 N.E.2d 331, 346 (Ind. Ct. App. 1985). Punitive damages are limited to the greater of three times compensatory damages awarded or \$50,000. I.C. 34-51-3-4. However, punitive damages shall be distributed twenty-five percent to plaintiff and seventy-five percent to clerk of court. I.C. 34-51-3-6; *Cheatham v. Pohle*, 789 N.E.2d 467, 477 (Ind. 2003) (upholding statute as constitutional). Punitive damages are not recoverable on a wrongful death action under Indiana law. I.C. 34-24-3-1; *See Durham v. U-Haul Int'l*, 745 N.E.2d 755, 757 (Ind. 2001) *reh'g denied*. Public policy prohibits insurance covering direct liability for punitive damages; insurance may still be obtained to cover vicarious liability for punitive damages. *Grant v. North River Ins. Co.*, 453 F. Supp. 1361, 1370-71 (N.D. Ind. 1978). Conscious indifference, reckless disregard for the safety of others, reprehensible conduct, and needless disregard for the consequences have warranted punitive damages. *Reed v. Ford Motor Co.*, 679 F. Supp. 873, 878 (S.D. Ind. 1988). The clear and convincing evidence standard applies to punitive damages claims. I.C. 34-51-3-2.

Presumption that Product is Not Defective. There is a rebuttable presumption a product which caused physical harm was not defective if, before sale, the product was in conformity with recognized state of the art or complied with applicable regulation. I.C. 34-20-5-1; *Schultz v. Ford Motor Co.*, 857 N.E.2d 977, 985 (Ind. 2006) (holding jury instructions on I.C. 34-20-5-1 are authorized by Ind. R. Evid. 301); *Ford Motor Co. v. Moore*, N.E.2d 418, 425 (Ind. Ct. App. 2009), *trans. pending as of date of this publication* (giving presumption continuing effect even when contrary evidence received).

Defenses. Defenses are codified. I.C. 34-20-6-1 *et seq.* Burden of proof rests with the party raising the defense. I.C. 34-20-6-2.

User Aware of Danger. It is a defense that the user or consumer bringing the action: 1) knew of the defect, 2) was aware of the danger in the product, and 3) nevertheless proceeded to make use of the product and was injured. I.C. 34-20-6-3. Knowledge of risk is subjective,

turning on plaintiff's actual knowledge and acceptance of a specific risk. *McDonald v. Sandvik*, 870 F.2d 389, 395 (7th Cir. 1989).

Misuse. It is a defense that the cause of injury was misuse of the product by the consumer. I.C. 34-20-6-4. The misuse defense may not be a complete defense but rather an element of comparative fault. *Morgen v. Ford Motor Co.*, 797 N.E.2d 1146, 1148 n.3 (Ind. 2003). When not reasonably expected by a manufacturer, a plaintiff's failure to use available safety devices can constitute misuse in a crashworthiness case. *Id.* at 1149.

Alteration. It is a defense that a cause of physical harm is a modification or alteration of the product after delivery if the modification or alteration proximately caused the physical harm when modification or alteration is not reasonably expectable to the seller. I.C. 34-20-6-5; *Smock Materials Handling Co. v. Kerr*, 719 N.E.2d 396, 404 (Ind. Ct. App. 1999).

Comparative Fault. Effective July 1, 1995, comparative fault applies to product actions. I.C. 34-20-8-1. "In assessing percentage of fault, the jury shall consider the fault of all persons who contributed to the physical harm, regardless of whether the person was or could have been named as a party, as long as the nonparty was alleged to have caused or contributed to cause the physical harm." *Id.*

Privity of Contract. Privity of contract is no longer required in defective product personal injury action that sounds in tort. *Wilson v. Studebaker-Worthington, Inc.*, 582 F. Supp. 383, 388 (S.D. Ind. 1983). However, recovery from the manufacturer for personal injury caused by defective goods on theory of breach of implied warranty of merchantability does require buyer seeking recovery to be in privity of contract with the manufacturer. *Martin Rispens & Son v. Hall Farms, Inc.*, 621 N.E.2d 1078, 1084 n.2 (Ind. 1993).

Statute of Limitations. General product liability actions have 2 year statute of limitations and 10 year statute of repose. I.C. 34-20-3-1; *Allied Signal, Inc. v. Ott*, 785 N.E.2d 1068, 1071 (Ind. 2003); *TH Agriculture & Nutrition v. Akaiwa*, 872 N.E.2d 1104, 1108 (Ind. Ct. App. 2007). However, under I.C. 34-20-3-2, a product liability action from asbestos exposure must be commenced within two years after the cause of action accrues, there being no firm statute of repose. *Allied Signal*, 785 N.E.2d at 1071. This section only applies to persons who sold or mined commercial asbestos. *Id.*

RELEASE

See Law Digest Tables.

Contract Law—General. Consideration. Consideration is an essential element to every contract. *McCartin McAuliffe Mech. Contractor, Inc. v. Midwest Gas Storage, Inc.*, 685 N.E.2d 165, 174 (Ind. Ct. App. 1997), *trans. denied*, 706 N.E.2d 166 (Ind. 1998). Consideration for a contract involves the concept of a bargained-for exchange. *Gibson v. Neighborhood Health Clinics*, 121 F.3d 1126, 1130 (7th Cir. 1997). Indiana law does not require that consideration be adequate; slight consideration will suffice to make a contract enforceable. *United States v. Stump Home Specialties Mfg. Co.*, 905 F.2d 1117, 1122 (7th Cir. 1990).

Accord and Satisfaction. An "accord" is an agreement to compromise or settle; "satisfaction" is the execution of the agreement; either party may rescind accord at any time before satisfaction. *Karvalsky v. Becker*, 29 N.E.2d 560, 563 (1940). Accord and satisfaction is a method of discharging a contract, or settling a cause of action arising from either contract or tort, by substituting for such contract or cause of action an agreement for satisfaction thereof and executing such substituted agreement. *Sunderman v. Sunderman*, 63 N.E.2d 154, 157 (1945). An accord and satisfaction must be supported by consideration to be given effect. *Daube & Cord v. LaPorte County Farm Bureau Co-Op. Ass'n*, 454 N.E.2d 891, 894 (Ind. Ct. App. 1983). *But see, Chesak v. Northern Indiana Bank & Trust Co.*, 551 N.E.2d 873, 876 (Ind. Ct. App. 1990).

Release of Joint Tortfeasors. In general, a release of one joint tortfeasor will not release other tortfeasors. *Pelo v. Franklin Coll. of Indiana*, 715 N.E.2d 365, 365 (Ind. 1999); *Huffman v. Monroe County Cmty. Sch. Corp.*, 588 N.E.2d 1264, 1267 (Ind. 1992); *but see Cleary v. Manning*, 884 N.E.2d 335, 340 (Ind. Ct. App. 2008) (declining to enforce rule in medical malpractice cases). Release of a servant does not release the master under respondeat superior. *Farm Bureau v. Blossom*, 668 N.E.2d 1289, 1293 (Ind. Ct. App. 1996), *overruled*, 715 N.E.2d 365 (Ind. 1999).

Fraud and Misrepresentation. If the release is obtained by fraud, the injured party may rescind it. *Pub. Utils Co. v. Iverson*, 121 N.E. 33, 35 (Ind. 1918). If release obtained via fraud in factum, release cannot be enforced by either party or ratified. *Cf. Cline v. Guthrie*, 42 Ind. 227, 236 (1873); *Trook v. Lafayette Bank & Trust Co.*, 581 N.E.2d 941, 948 (Ind. Ct. App. 1991). A release of claim for personal injuries may be avoided if it was executed in reliance on misrepresentation, amounting to fraud by release or his agent as to nature or extent of injuries. *Indiana Ins. Co. v. Handlon*, 24 N.E.2d 1003, 1005 (Ind. 1940). However, the fact plaintiff did not read release before signing it is attributable to his own negligence, absent fraud. *Shumate v. Lycan*, 675 N.E.2d 749,



753 (Ind. Ct. App. 1997). Although the insured has a duty to read and become familiar with the contents of an insurance policy, “reasonable reliance upon an agent’s representations as to what will be covered under a policy can override the insured’s duty to read the policy.” *Everett Cash Mut. Ins. Co. v. Taylor*, 904 N.E.2d 276, 280 (Ind. Ct. App. 2009), *reh’g denied*.

Infants/Capacity. Contracts of minors are voidable and may be disaffirmed; however, a minor is bound on his contracts for necessities furnished to him. *Mitchell v. Campbell & Fetter Bank*, 195 N.E.2d 489, 492-93 (Ind. Ct. App. 1964). See *Scott County Sch. Dist. One v. Asher*, 324 N.E.2d 496, 499 (Ind. 1975).

Mistake. Before a release may be set aside on grounds of mutual mistake, mistake must be the mistake of both parties. *Auto. Underwriters v. Smith*, 133 N.E.2d 72, 75 (Ind. Ct. App. 1956). In determining whether mistake was mutual, all of the circumstances relating to signing of release and sum paid for release are to be taken into consideration. *Crane Co. v. Newman*, 37 N.E.2d 732, 739 (Ind. Ct. App. 1941).

REPRESENTATIONS AND WARRANTIES

Statutory Provisions. Express warranties by affirmation, promise, description. I.C. 26-1-2-313. Implied warranty of merchantability. I.C. 26-1-2-314. Implied warranty of fitness for a particular purpose. I.C. 26-1-2-315. Exclusion or modification of warranties. I.C. 26-1-2-316.

Misrepresentation. An insured’s answers on an insurance application are “representations,” and must be substantially true only so far as they relate to material risk. *Holtzclaw v. Bankers Mut. Ins. Co.*, 448 N.E.2d 55, 58 (Ind. Ct. App. 1983). A material misrepresentation or omission of fact in an insurance application, relied on by the insurer in issuing the policy, renders the coverage voidable at the insurer’s option. *Colonial Penn Ins. Co. v. Guzorek*, 690 N.E.2d 664, 672 (Ind. 1997). If policy incorrectly states insured does not own dogs when insured requested coverage for dogs, insured may seek damages from the broker due to liability imposed against insured as result of dog bite. *Brennan v. Hall*, 904 N.E.2d 383, 386 (Ind. Ct. App. 2009). Health and accident policies are voidable if a false statement materially affected acceptance of risk or hazard by an insurer. See I.C. 27-8-5-5. An insured’s misstatement of material fact, whether intentional or innocent, makes contract voidable at election of insurer, if insurer has not waived such benefit. *Ruhlig v. Am. Comty. Mut. Ins. Co.*, 696 N.E.2d 877, 880 (Ind. Ct. App. 1998). A misrepresentation is material if the fact omitted or misstated might reasonably have influenced the insurer in deciding whether to accept or reject the risk or charge a higher

premium. *Id.* at 881. Whether the misrepresentation is material is generally a question of fact. *Id.*

Rescission. If there are material misrepresentations in an insurance application, the policy may be rescinded, unless the insurer has waived the benefit of avoidance by its conduct and knowledge of the facts. *Ruhlig v. Am. Comty. Mut. Ins. Co.*, 696 N.E.2d 877, 881 (Ind. Ct. App. 1998). When an insurer is bound to use ordinary care and diligence to guard against a misrepresentation, an insurer may rely thereon without further inquiry, so long as the insurer has no reason to doubt the validity of the statement. *Id.* An insurer does not have a duty to obtain and review an applicant’s medical records for inconsistencies or misstatements on the application. *Id.* An automobile liability insurer cannot rescind coverage absent evidence that the injured third party received uninsured motorists benefits. *Coy v. National Ins. Ass’n*, 730 N.E.2d 355 (Ind. Ct. App. 1999).

Reformation. In Indiana, equity has jurisdiction to reform written documents in only two well-defined situations: 1) when there is a mutual mistake, meaning there has been a meeting of the minds, but the written document does not express what the parties intended, or 2) when there has been a mistake by one party and fraud or inequitable conduct by the other party. *Plumlee v. Monroe Guar. Ins. Co.*, 655 N.E.2d 350, 356 (Ind. Ct. App. 1995). However, reformations for mistakes are only available if mistakes are mistakes of fact, not mistakes of law. *Evan v. Poe & Assoc., Inc.*, 873 N.E.2d 92, 100 (Ind. Ct. App. 2007); *Estate of Spry v. Greg & Ken, Inc.*, 749 N.E.2d 1269, 1275 (Ind. Ct. App. 2001). Further, a parole contract cannot be reformed since equity will not reform agreements not reduced to writing. *Ballew v. Town of Clarksville*, 683 N.E.2d 636, 640 (Ind. Ct. App. 1997). Also, equity should not intervene and courts should not grant reformation when the complaining party failed to read the instrument or, if he read it, failed to give heed to its plain terms. *Estate of Spry*, 749 N.E.2d at 1275.

SERVICE OF PROCESS

See Law Digest Tables.

Upon Corporations. Process may be served on a corporation’s registered agent; if the corporation has no registered agent, or the registered agent cannot with reasonable diligence be served, the corporation may be served by registered or certified mail, addressed to the secretary of the corporation or other executive officer, at the corporation’s principal office, with return receipt requested. I.C. 23-1-24-4. A subsidiary doing business in the forum state is not necessarily an agent for process of the parent corporation. *Gen. Fin. Corp. v. Skinner*, 426 N.E.2d 77, 84 (Ind. Ct. App. 1981).

Upon Registered Agent. Every person lawfully engaged in writing worker's compensation insurance in Indiana must notify the Insurance Commissioner of his appointment of a resident agent in Indiana upon whom service of process may be had for the enforcement of this chapter. I.C. 27-7-2-24.

Upon Non-Resident Motorists. Upon conviction or an unsatisfied judgment against a non-resident which results in suspension of the non-resident's driving privilege in the state, the Bureau of Motor Vehicles shall transmit a certified copy of the conviction or unsatisfied judgment to the motor vehicle bureau or state officer performing the functions of a commissioner in the state in which the non-resident resides. I.C. 9-25-3-2. Non-resident motorists are required to hold the same level of insurance coverage as prescribed by Indiana law when the vehicle operates in Indiana. I.C. 9-25-6-13.

Upon Insurance Commissioner. An unauthorized foreign or alien insurer who issues or delivers contracts of insurance to residents of Indiana, solicits applications for such contracts, collects premiums, membership fees, assessments or other considerations for such contracts, or transacts any insurance business, thereby appoints the Insurance Commissioner as his agent for service; the legal force and validity is the same as personal service of process in Indiana upon the insured. I.C. 27-4-4-3. Also, any act of transacting insurance business by any unauthorized insurer is equivalent to and shall constitute an irrevocable appointment by such insurer of the Secretary of State or his successor in office, to be the true and lawful attorney of such insurer upon whom may be served all lawful process in any action by the Commissioner of Insurance or by the State. I.C. 27-4-5-4.

Personal Service. Service upon the defendant's insurer, but not the defendant, is improper. *Shafer v. Lieurance*, 659 N.E.2d 229, 231 (Ind. Ct. App. 1995).

SUBROGATION

In General. Subrogation has been defined as "the substitution of one person in the place of another with reference to a lawful claim, demand or right, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities." *Farm Bureau Insurance Co. v. Allstate Ins. Co.*, 765 N.E.2d 651, 656 (Ind. Ct. App. 2002) (quoting *Black's Law Dictionary* 1427 (6th Ed. 1990)). The right of subrogation is not founded upon contract, express or implied, but upon principles of equity and justice. *Home Owner's Loan Corp. v. Henson*, 29 N.E.2d 873, 875 (Ind. 1940). The right includes every instance in which a non-volunteering party pays a debt for another who is primarily liable and which, in good conscience, should be paid by the latter. *Id.* Subrogation is not an absolute

right, but depends on equities and attending facts and circumstances of each case. *Vonderahe v. Ortman*, 147 N.E.2d 924, 925 (Ind. Ct. App. 1958). "When an insurer claims a right through subrogation, it stands in the shoes of the insured and takes no rights other than those which the insured had." *Farm Bureau Ins. Co.*, 765 N.E.2d at 656.

Parties to Action. Subrogation cannot be applied unless those whose rights will be affected are parties to the proceeding. *Michigan City v. Marwick*, 116 N.E. 434, 438 (Ind. Ct. App. 1917). A plaintiff cannot be subrogated to rights of a defendant under a contract with a third person in an action where the third person is not made a party. *Citizens St. R.R. Co. v. Robbins*, 42 N.E. 916, 918 (Ind. 1896). The doctrine of equitable subrogation does not permit an excess insurance policy carrier to sue the attorneys of its insured for legal malpractice. *Querrey & Harrow, Ltd. v. Transcontinental Ins. Co.*, 885 N.E.2d 1235, 1236 (Ind. 2008).

Liability Insurance. Upon payment of a loss resulting from the tortious conduct of a third party, insurer becomes subrogated, by operation of law, to whatever rights insured may have against wrongdoer. *Auto Owners' Protective Exch. v. Edwards*, 136 N.E. 577, 579 (Ind. Ct. App. 1922). Intervention of right by insurer is permitted in actions against uninsured motorists. *Vernon Fire & Cas. Ins. Co. v. Matney*, 351 N.E.2d 60, 64 (Ind. Ct. App. 1976). "[T]he cumulative effect of the spirit of the Indiana Trial Rules, the interests of justice, the avoidance of multiple litigation and the conservation of judicial time compels our conclusion to allow intervention by the insurer." *Id.* Therefore, insurer has right to intervene and have a full and complete adjudication of the issues at a single trial. *Id.* However, if insurance carrier receives sufficient notice of action between insured and uninsured motorist and chooses not to intervene, resulting judgment is binding upon carrier in a subsequent action with its insured. *Id.* at 67; *see also Westfield Ins. Co. v. Axsom*, 684 N.E.2d 241 (Ind. Ct. App. 1997), *aff'g Matney*, 351 N.E.2d 60 (Ind. Ct. App. 1976); *Woodring v. Culbertson*, 227 F.R.D. 290, 293 (N. D. Ind. 2005) (applying the same rule in federal court); *Owner-Operators Ind. Drivers Ass'n, Inc. v. Mayflower Transit, Inc.*, 2006 WL 1794751, at *9 (S.D. Ind. Jun. 27, 2006). If insurer seeks subrogation to proceeds of settlement or judgment obtained by insured against third party, insurer must pay pro-rata share of insured's reasonable expenses incurred in pursuing claim in order to obtain payment. I.C. 34-53-1-2.

Collision Insurance. A collision insurance policy containing a clause providing insured shall do nothing after the loss to prejudice insurer's subrogation rights will be unavailable to insurer if insurer's conduct

amounts to a breach of contract and will result in a waiver of the subrogation right. *Nat'l Mut. Ins. Co. v. Fincher*, 428 N.E.2d 1386, 1389 (Ind. Ct. App. 1981); *see also Tate v. Secura Ins.*, 587 N.E.2d 665, 671 (Ind. 1992).

Surety. A party, without compulsion, making a voluntary payment of the debt of another is not entitled to subrogation, but a right of subrogation does exist in favor of one who, bound as a surety, pays the debt or obligation of the principal under compulsion of his suretyship obligation. *Loving v. Ponderosa Sys., Inc.*, 479 N.E.2d 531, 536 (Ind. 1985) (*quoting Nat'l Mut. Ins. Co. v. Maryland Cas. Co.*, 187 N.E.2d 575, 578 (Ind. Ct. App. 1963)).

Worker's Compensation. An employer's compensation carrier, having paid compensation, may collect the compensation paid or payable to the employee or his dependents plus medical and burial expenses from the person in whom legal liability for damages exists. I.C. 22-3-2-13. An employer's compensation insurance carrier may commence an action at law for collection against the other person in whom legal liability exists, at any time within one (1) year from the date of the expiration of the two (2) years when the action accrued to the injured employee, or, in the event of his death, to his dependents, notwithstanding the provisions of any statute of limitations to the contrary. *Id.* Provided the worker or his dependents receive an amount exceeding the worker's compensation benefits in a third party action, the compensation carrier is entitled to a statutory lien and/or reimbursement from the judgment subject to its *pro rata* share of the expenses and costs of the bringing the third party claim. *Travelers Indem. Co. of Am. v. Jarrells*, 906 N.E.2d 912, 915 (Ind. Ct. App. 2009), *trans. pending as of date of this publication.*

WAIVER AND ESTOPPEL

In General. Waiver is the intentional relinquishment of a known right, and estoppel is the misleading of a party entitled to rely on acts or statements coupled with a consequent change of position to his detriment. *Henry B. Gilpin Co. v. Moxley*, 434 N.E.2d 914, 920 n.3 (Ind. Ct. App. 1982). Provisions of a written insurance contract may be waived orally. *Egnatz v. Medical Protective Co.*, 581 N.E.2d 438, 441 (Ind. Ct. App. 1991). The doctrines of waiver and estoppel are not available to bring within coverage of an insurance policy risks that are not covered by its terms or risks that are expressly excluded therefrom. *Huff v. Travelers Indem. Co.*, 363 N.E.2d 985, 992 (Ind. 1977). This rule does not apply when an insurer or its agent misrepresents the extent of coverage to an insured, thereby inducing the insured to purchase coverage that does not in fact cover the disputed risk. *Everett Cash Mut. Ins. Co. v. Taylor*, 904 N.E.2d 276,

280 (Ind. Ct. App. 2009), *reh'g denied*. Further, when an insurer defends an action on behalf of an insured without a reservation of rights, but with knowledge of a defense to coverage, the rule does not apply. *Id.*

Waiver by Agent. A waiver of a provision in an insurance policy can only be made by an agent possessing competent authority. *Old Line Auto. Ins. v. Kuehl*, 141 N.E.2d 858, 862 (Ind. Ct. App. 1957). Competent authority includes an agent's apparent authority. *Gallant Ins. Co. v. Isaac*, 751 N.E.2d 672, 677 (Ind. 2001); *Adsit Co., Inc. v. Gustin*, 874 N.E.2d 1018, 1027 (Ind. Ct. App. 2007). A corporation's waiver of the provisions of its policy restricting the authority of agents may be made by the agents. *Federated Mut. Implement & Hardware Ins. Co. v. Bunch*, 455 F.2d 247, 251-52 (7th Cir. 1972). Agents can waive policy provisions which are for the insurer's benefit. *Id.* Factual knowledge held by insurance company's agent, who is acting in the scope of his employment, is imputed, by law, to principal insurer. *Federal Kemper Ins. Co. v. Brown*, 674 N.E.2d 1030, 1033 (Ind. Ct. App. 1997), *trans. denied*, 690 N.E.2d 1190 (Ind. 1997).

Non-waiver Agreements. An insurer can protect itself from waiver and estoppel by defending under a non-waiver agreement. *Ohio Cas. Ins. Co. v. Rynearson*, 507 F.2d 573, 580 (7th Cir. 1974). However, a stipulation in a policy that provisions cannot be waived by an agent may itself be waived by insurer. *Federated Mut. Implement & Hardware Ins. Co. v. Bunch*, 455 F.2d 247, 252 (7th Cir. 1972). A general agent or agent having authority to issue and collect for policies may affect waiver despite existence of a non-waiver clause. *Id.*

Premiums. An insurer is estopped from denying liability if it retains a premium after learning policy is void. *N. Assurance Co. v. Summers*, 17 F.3d 956, 960 (7th Cir. 1994); *Allianz Ins. Co. v. Guidant Corp.*, 884 N.E.2d 405, 414-15 (Ind. Ct. App. 2008), *trans. denied*. To rescind a policy based on material misrepresentation, insurer must tender back any consideration paid under the policy. *Conrad v. Universal Fire & Cas. Ins. Co.*, 686 N.E.2d 840, 842 (Ind. 1997). A material misrepresentation is grounds for rescission of the policy. *Colonial Penn Ins. Co. v. Guzorek*, 690 N.E.2d 664, 673 (Ind. 1997).

Proof of Loss. Requirements of written notice of a claim and verified proof of the loss are valid, but easily waived. *Midwest Mut. Ins. Co. v. Indiana Ins. Co.*, 412 N.E.2d 84, 86 (Ind. Ct. App. 1980). The standard is one of good faith. *Id.* If insurer is dissatisfied, it should make dissatisfaction known to insured. Conduct which leads insured to a reasonable belief the claim or proof of loss is not required results in waiver of those requirements or as estoppel to insurer's attempt to raise them as grounds

for denial of coverage. *Farm Bureau Ins. Co. v. Crabtree*, 467 N.E.2d 1220, 1224 (Ind. Ct. App. 1984). A fire insurer must establish an affirmative defense only by a preponderance of the evidence that the fire was deliberately set and the amount of loss was misrepresented. *Stout v. Farmers*, 881 F. Supp. 401, 405 (S.D. Ind. 1994). Mere silence of an insurer will not constitute waiver of proof. *Wallace v. Indiana Ins.*, 428 N.E.2d 1361 (Ind. Ct. App. 1981). When an insurance company denies liability, it waives proof of loss or defects in proofs already furnished. *McNall v. Farmers*, 392 N.E.2d 520, 523 (Ind. Ct. App. 1979); *but see Safety Nat'l Cas. Co. v. Cinergy Corp.*, 829 N.E.2d 986, 1005 (Ind. Ct. App. 2005) (distinguishing *McNall* when there was an express waiver and finding "mere silence or inaction on the part of an insurer is not sufficient to constitute an express waiver"). Making payments without requiring proof of loss waives the same. *U.S. Casualty Co. v. Vinson*, 149 N.E. 90, 92 (Ind. Ct. App. 1925). The burden of proof is on the insured to establish either proof of loss within time required or waiver of such requirement. *Weaver v. Nat'l Cas. Co. of Detroit*, 143 N.E. 608, 609 (Ind. Ct. App. 1924).

WORKERS' COMPENSATION

Original Jurisdiction. The Indiana's Workers' Compensation Act applies, subject to certain exceptions, to every employer and employee in Indiana. I.C. 22-3-2-2(a). Burden of proof is on employee; proof by employee of element of a claim does not create presumption in favor of employee with regard to another element of claim. *Id.* The Act requires employers to insure their liability, or procure a certificate from worker's compensation board authorizing employers to carry the risk without insurance. A general contractor does not have duty to secure coverage, but has duty to require a subcontractor to establish coverage. *Wolf v. Kajima, Int'l, Inc.*, 621 N.E.2d 1128, 1132 (Ind. Ct. App. 1993), *trans. granted, adopted*, 629 N.E.2d 1237 (Ind. 1994). An injured employee must file a claim for compensation within two years after the occurrence of the accident. I.C. 22-3-3-3. Generally, every employer shall pay, and every employee shall accept, compensation for personal injury or death by an accident arising out of and in the course of employment. I.C. 22-3-2-2. The board has exclusive right to order payment for all services provided under the statute. I.C. 22-3-3-5. The initial hearing of a claim before the board will be by any or all of its members who will hear the parties, and the dispute shall be determined in a summary manner. I.C. 22-3-7-27(d).

Appellate Jurisdiction. If an application for review is made to the board within thirty days after receiving a copy of an award made by less than all the board's members, the full board shall review the evidence and

make an award. I.C. 22-3-7-27(e). An award of the full board shall be conclusive and binding, unless either party to the dispute, within thirty days of receiving a copy of award, appeals to the Court of Appeals under the same terms that govern appeals in ordinary civil actions. I.C. 22-3-7-27(f). The Court of Appeals shall have jurisdiction to review all questions of law and fact. *Id.* The board of its own motion may certify questions of law to Court of Appeals for its decision. *Id.*

Benefits. Wages. Compensation varies with respect to date of injury and amount of average weekly wage. I.C. 22-3-3-22. When employee is working at same time in same grade or kind of work for different employers under separate concurrent contracts for hire, employee's total earnings from all such employers is to be considered in determining his average weekly wage, but only if the concurrent employments are similar. *LeFort v. Miller's Merry Manor, Inc.*, 572 N.E.2d 1330, 1331 (Ind. Ct. App. 1991).

Medical. An employer shall furnish an attending physician at no cost to the employee. I.C. 22-3-3-4. Refusal by employee to accept services shall bar employee from all compensation during period of refusal. I.C. 22-3-3-4(c). Employees may not choose a doctor at employer's expense absent emergency, employer's failure to provide a physician, or some other good reason. I.C. 22-3-3-4(d). An employer's right to choose a physician includes the right to change physicians, even absent business or medical reason. *Furno v. Citizens Ins. Co.*, 590 N.E.2d 1137 (Ind. Ct. App. 1992). Payment of statutory medical attention and supplies by employer does not constitute an admission of liability under Workers' Compensation Act. *Burton-Shields Co. v. Steele*, 83 N.E.2d 623, 627 (Ind. Ct. App. 1949).

Disability. "Disability" refers to an injured employee's inability to work, while "impairment" refers to an injured employee's total or partial loss of physical function. *Walker v. State*, 694 N.E.2d 258, 264 (Ind. 1998). Employee is entitled to permanent partial impairment benefits resulting from injury regardless of employee's ability to work. *Indiana Ins. Guaranty Ass'n v. William Tell Woodcrafters, Inc.*, 525 N.E.2d 1281, 1284 (Ind. Ct. App. 1988). This is true even if employee is able to earn greater wages after injury than before injury. *Id.* Subject to certain exceptions, temporary total disability is payable so long as the injured employee is not at maximum medical improvement. However, a claimant cannot recover in excess of 500 weeks of temporary total disability benefits. *See Kohlman v. Indiana Univ.*, 670 N.E.2d 42 (Ind. Ct. App. 1996); I.C. 22-3-3-8. Temporary partial disability is paid to an injured employee who is able to return to limited work, but earns less as a result of restricted duties. I.C. 22-3-3-9. Perma-

nent total disability consists of three elements: permanence, total, as opposed to partial, scope of disability, and inability to work. *Walker*, 694 N.E.2d 258, 264 (Ind. 1998).

Death. When an employee dies within 500 weeks as a result of injuries sustained in the course of employment, benefits will be paid to the deceased's dependents, if any. I.C. 22-3-3-17. The dependent's rate is the same as the temporary total disability rate and is payable for a maximum of 500 weeks. *Id.*

Employment Defined. Casual. The word "casual" used in the Worker's Compensation Act has been defined as follows: "[t]he usual and ordinary sense of happening without design, without being foreseen or expected, without regularity, occasional, incidental, liable to happen, subject to chance or accident, or uncertain." *Lasch v. Corns*, 89 N.E.2d 553, 555 (Ind. Ct. App. 1950). Compensation is not awarded when employment is both casual and not in the usual course of the employer's business. I.C. 22-3-2-9; I.C. 22-3-6-1.

Dual Capacity. An employee working in a dual capacity for an employer may be covered by the Worker's Compensation Act while engaged in one capacity, but excluded from the Act while engaged in the other capacity. *Union Twp. v. Hays*, 207 N.E.2d 223, 225 (Ind. Ct. App. 1965). Compensation depends on the kind of service being rendered at the time of injury. *Id.*

Exclusive Remedy. Worker's compensation provides the exclusive remedy against the employer for an employee's injury suffered by an accident arising out of and in the course of employment. I.C. 22-3-2-6.

Arising Out of and in the Course of. The Worker's Compensation Act authorizes the payment of compensation to employees for "personal injury or death by accident arising out of and in the course of the employment." I.C. 22-3-2-2(a). Thus, for an injury to be compensable under the Act, it must both arise out of the employment and arise in the course of the employment; both requirements must be met before compensation is awarded, and neither alone is sufficient. *Milledge v. The Oaks*, 784 N.E.2d 926, 929 (Ind. 2003); *Mueller v. DaimlerChrysler Motors Corp.*, 842 N.E.2d 845, 847-48 (Ind. Ct. App. 2006). "Arising out of" refers to the origin and cause of the injury, while "in the course of" refers to the time, place, and circumstances under which the injury occurred. *Milledge*, 784 N.E.2d at 929. The person who seeks worker's compensation benefits bears the burden of proving both elements. *Id.* "An injury arises out of employment when a causal nexus exists between the injury and the employment.... This risk does not need to be expected or foreseen to be incidental to employment.... As a general rule, a risk is incidental to the

employment if the risk involved is not one to which the public at large is subjected.... This general rule is referred to as the increased risk test." *Conway v. Sch. City of E. Chicago*, 734 N.E.2d 594, 599 (Ind. Ct. App. 2000) (internal citations omitted). The "nexus is established when a reasonably prudent person considers the injury to be born out of a risk incidental to the employment, or when the facts indicate a connection between the injury and the circumstances under which the employment occurs." *Global Constr., Inc. v. March*, 813 N.E.2d 1163, 1169 (Ind. 2004). Courts sometimes apply another test, referred to as "positional risk," if the risk appears neutral. *Milledge*, 784 N.E.2d at 931. If positional risk test applies, then an injury arises out of employment if it would not have occurred but for the fact the conditions and obligations of the employment placed the claimant in the position in which he was injured. *Id.* "Examples of 'neutral risks' include cases of stray bullets, roving lunatics, and other situations in which the only connection of the employment with the injury is that its obligations place the employee in a particular place at a particular time when he was injured by some neutral force, meaning by neutral that neither personal to the claimant nor distinctly associated with the employment." *Conway*, 734 N.E.2d at 599. Therefore, if the injury was caused by a co-worker who held animosity towards the injured claimant, it would not be considered neutral. *Id.* Under such circumstances, the court would be forced to use the increased risk analysis. *Id.*

Occupational Disease. In order to qualify for compensation under the Worker's Occupational Diseases Act, a claimant must establish he has suffered an occupational disease along with a disablement. I.C. 22-3-7-2(a); *Woodworth v. Lilly Indus. Coatings, Inc.*, 446 N.E.2d 646, 648 (Ind. Ct. App. 1983). A claimant must establish the disease of which he complains arose out of and in the course of his employment and that he is permanently and totally disabled if unable to earn equal wages in suitable employment. I.C. 22-3-7-10; *Hurd v. Monsanto Co.*, 908 F. Supp. 604, 609 (S.D. Ind. 1995). Carpal tunnel is not an occupational disease under the Act. *Duvall v. ICI Americas, Inc.*, 621 N.E.2d 1122, 1125 (Ind. Ct. App. 1993).

Mental Injury. Mental conditions are compensable if the mental stress is a result of a primary compensable injury or if the disorder itself is the primary injury arising out of and in the course of employment. *Eastham v. Whirlpool Corp.*, 524 N.E.2d 23, 28 (Ind. Ct. App. 1988).

Pre-Existing Injury. When physical impairment or disability pre-exists a compensable injury and is aggravated or exacerbated, worker's compensation benefits are awarded to the increased permanent impairment or

disability which is attributable to a work-related injury. I.C. 22-3-3-12; *Rork v. Szabo Foods*, 439 N.E.2d 1338, 1342 (Ind. 1982); *Bowles v. Griffin Indus.*, 798 N.E.2d 908, 911 (Ind. Ct. App. 2003). I.C. 22-3-3-12 does not apply to exacerbation or aggravation of pre-existing but non-impairing and non-disabling conditions of the body. *U.S. Steel Corp. v. Spencer*, 645 N.E.2d 1106, 1108 (Ind. Ct. App. 1995); *Goodman v. Olin Matheison Chem. Corp.*, 367 N.E.2d 1140, 1144 (Ind. Ct. App. 1977).

Fellow Employee Rule. A fellow employee is afforded immunity under I.C. 22-3-2-6 if the act causing injury arose out of and was incidental to employment. To maintain a common law action against a co-employee tortfeasor for an injury arising out of and occurring in the course of employment, plaintiff must either show the injury was not by accident, or the tortfeasor was not in the same employ when the injury occurred. *Wine-Settergren v. Lamey*, 716 N.E.2d 381, 384 (Ind. 1999). In determining whether a co-worker is in the same employ, “[e]mployment means more than merely performing services directly related to the job for which the employee was hired, and includes activities reasonably incidental to one’s employment.” *DePuy, Inc. v. Farmer*, 847 N.E.2d 160, 164 (Ind. 2006) (internal citations omitted). If employee is injured while actively participating in horseplay, employee cannot pursue a remedy against co-employee outside the Workers’ Compensation Act. *Tippman v. Hensler*, 654 N.E.2d 821, 826 (Ind. Ct. App. 1995), *superseded by*, 716 N.E.2d 372 (Ind. 1999).

Liens. A lien of a worker’s compensation carrier applies to any settlement fund regardless of whether the carrier has a pending subrogation suit. *Dearing v. Perry*, 499 N.E.2d 268, 271 (Ind. Ct. App. 1986). An employer cannot assert a lien under I.C. 22-3-2-13 against a negligent third party after the negligent third party pays settlement proceeds over to the worker. *State v. Mileff*, 520 N.E.2d 123, 128 (Ind. Ct. App. 1988); *Schneider Nat’l Carriers, Inc. v. Nat’l Employee Care Sys., Inc.*, 469 F.3d 654, 658 (7th Cir. 2006). The Workers’ Compensation Board has no authority to impose a lien on proceeds an injured worker collects from a third party; rather, protection is afforded through a civil court order. *Sowers v. Covered Bridge Tree Serv.*, 621 N.E.2d 1111, 1112 (Ind. 1993). An employer may join a civil claim against a third party within 90 days of receipt of notice of suit. I.C. 22-3-2-13. Provided the worker or his dependents receive an amount greater than the worker’s compensation benefits in a third party action, the compensation carrier is entitled to a statutory lien and/or reimbursement from the judgment subject to its *pro rata* share of the expenses and costs of the bringing the third party claim. *Travelers Indem. Co. of Am. v. Jarrells*, 906 N.E.2d 912, 915 (Ind. Ct. App. 2009), *trans. pending as of date of this publication*.

Attorney’s Fees. Fees may be fixed and shall be subject to approval of the board. I.C. 22-3-4-12. Generally, all disputes pertaining to fees will be heard by the office of the board. 631 I.A.C. 1-1-25.