STATE OF INDIANA COMPENDIUM OF LAW

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PRE-SUIT AND INITIAL CONSIDERATIONS

Pre-Suit Requirements/Prerequisites to Suit

A) **State.** The pre-suit requirement for tort actions against any state agency is governed by IND. CODE § 34-13-3-6 (2016). Prior to suit, notice of the loss must be filed with the attorney general or the state agency involved within two hundred seventy (270) days after the loss occurs. Failure to comply will bar any claim.

B) **Emancipation.** The pre-suit requirement for actions involving the termination of parent-child relationship is governed by IND. CODE § 31-35-2-6.5 (2016). This requires the person filing for termination of the parent-child relationship to provide notice of the hearing.[1]

Relationship to the Federal Rules of Civil Procedure

Indiana has its own code of civil procedure, titled the Indiana Rules of Trial Procedure (IND. TR. R.). IND. CODE §§ 34-8-2-1, 2 (2016). It has adopted certain portions of the Federal Rules. In the absence of Indiana precedent, Indiana courts look to the Federal Rules and federal court interpretation for guidance. *Rollins Burdick Hunter v. Ball State*, 665 N.E.2d 914, 920 (Ind. Ct. App. 1996).

Description of the Organization of the State Court System

A) **Structure.** There are two primary levels of Indiana state courts: trial courts and appellate courts. The Supreme Court of Indiana, the Court of Appeals of Indiana, and the Indiana Tax Court are appellate-level courts. There are three different kinds of trial courts: circuit courts, superior courts, and local city or town courts. Learn about Indiana's Court System, http://www.in.gov/judiciary/2646.htm.

Circuit courts. Indiana Courts, Indiana Trial Courts: Types of Courts, COURTS.IN.GOV, http://www.in.gov/judiciary/2674.htm states:

> Each county in Indiana has at least one circuit court. Indiana has 92 counties, and 90 of these counties comprise their own circuit, with their own circuit court. The remaining two small counties (Ohio and Dearborn Counties) have been combined to form one circuit.

Circuit courts continue to have unlimited trial jurisdiction, unless exclusive or concurrent jurisdiction is conferred upon other courts. *Id.*

Superior courts. Superior courts have general jurisdiction, and are also charged with establishing small claims and minor offense divisions (in counties without superior courts, the circuit courts handle small claims cases).

[1] Proposed Legislation.

City/Town courts. City and town courts handle minor offenses such as violations of city ordinances, misdemeanors, and infractions. These courts commonly handle traffic matters. City and town courts are not courts of record, so appeals from city and town courts go to the circuit or superior courts. *Id.*

B) **Judicial selection.** Indiana Supreme Court and Court of Appeals justices receive gubernatorial appointment after selection by a nominating commission. Circuit, superior, and city/town justices are elected by voters in partisan elections after being nominated at primary elections or by petition. The judges for most courts are voted on every six years, but judges of local city and town courts are voted on every four years. Methods of Judicial Selection: Indiana, WWW.JUDICIALSELECTION.US, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=IN.

C) **Alternative dispute resolution.** Indiana's regulation of arbitration, mediation, and all other forms of alternative dispute resolution ("ADR") is found in IND. CODE §§ 34-57-1 *et seq*. (2016) and the Indiana Rules for Alternative Dispute Resolution (IND. R. A.D.R.). All persons (except minors and mentally incompetent persons), by an instrument in writing, may submit a controversy for arbitration. IND. CODE § 34-57-1-3 (2016).

1) The INDIANA RULES OF ALTERNATIVE DISPUTE RESOLUTION apply in all civil and domestic relations litigation filed in all Circuit, Superior, Municipal, and Probate Courts in the state. *Id.* A presiding judge may order any civil or domestic relations proceeding to mediation, non-binding arbitration or mini-trial. *Id.* Mediation programs are governed by IND. R. A.D.R. 2 (2016), arbitration by IND. R. A.D.R. 3 (2016), and mini-trials by IND. R. A.D.R. 4 (2016). Specific rules governing family law arbitration are found in IND. CODE §§ 34-57-5-*et seq*. (2016).

Service of Summons

A) **Person.** Service of summons upon a person is governed by IND. CODE § 31-32-9-1 (2016). Service on a person may be made under IND. TR. R. 4.1 (2016). Service on a person includes: (1) personal service and (2) service by mail. Personal service must be made at least three (3) days prior to the hearing, and service by mail must be made at least ten (10) days before the hearing. IND. CODE § 31-32-9-1 (2016). If service is made by mail, the papers shall be deposited in the United States mail addressed to the person on whom they are being served, with postage prepaid. Service shall be deemed complete upon mailing. IND. TR. R. 5.

B) **Organization.** Service of summons upon an organization is governed by IND. TR. R. 4.6 (2016). For a domestic or foreign organization, service may be made upon an executive officer or an appointed agent and for a partnership, upon a general partner. IND. TR. R. 4.6(A)(1), (2). "Service upon a state governmental organization must be made upon the executive officer thereof and also upon the Attorney General." IND. TR. R. 4.6(A)(3). Service must not be made upon a person listed in section (A) at their place of abode unless an affidavit attached to the summons states that alternative service would be impractical. IND. TR. R. 4.6(B). If service upon an organization cannot be made as provided in

subdivision (A) or (B) of that rule, service may be made by leaving a copy of the summons and complaint at any office of such organization located within this state with the person in charge of such office. IND. TR. R. 4.6(C) (2016). IND. CODE § 34-33-2-1 (2016) states that if service of process is made upon the resident agent of the corporation, the resident agent shall forward a copy of the process by registered mail to the director's last known address.

C) **On attorney.** "Whenever a party is represented by an attorney of record, service shall be made upon such attorney unless service upon the party himself is ordered by the court." IND. TR. R. 5(B) (2016). "Service upon the attorney or party shall be made by delivering or mailing a copy of the papers to him at his last known address." *Id*.

D) **Jurisdiction.** IND. TR. R. 4.4 (2016) provides eight requirements for jurisdiction over persons who are not currently residents of Indiana, including conducting any business in the state or owning property within the state.

E) **Notice by publication.** Notice by publication is governed by IND. TR. R. 4.13 (2016). A request for this service requires supporting affidavits proving that a diligent search has been made and the defendant cannot be found, has concealed his whereabouts, or has left the state. The summons shall be signed by the clerk of the court or the sheriff.

Statute of Limitations

A) **Professional services.** The statute of limitations for a professional services malpractice action is governed by IND. CODE. § 34-11-2-3 (2016). Professional negligence actions must be commenced within two (2) years of the act or omission. In the context of medical malpractice, the Indiana Supreme Court has held that this period is triggered when the patient "either (1) knows of the malpractice and resulting injury or (2) learns of facts that, in the exercise of reasonable diligence, should lead to the discovery of malpractice and the resulting injury." *See David v. Kleckner*, 9 N.E.3d 147, 152 (Ind. 2014) (quoting *Booth v. Wiley*, 839 N.E.2d 1168, 1172 (Ind. 2005).

B) **Personal injury or personal property.** The statute of limitations for a personal injury action or a personal property action is governed by IND. CODE. § 34-11-2-4 (2016). Such actions must generally commence within two (2) years. A personal injury action resulting from the sexual abuse of a child must commences within the later of: 1) seven (7) years after the cause of action occurs, or 2) four (4) years after the child is no longer a dependent of the person alleged to have performed the abuse.

C) **Fraud.** The statute of limitations for fraud is governed IND. CODE § 34-11-2-7(4) (2016). An action for fraud must be commenced within six (6) years after the cause of action accrues.

D) **Libel.** The statute of limitations for libel is governed by IND. CODE § 34-11-2-4(a)(1) (2016). An action for libel, slander, or defamation must be commenced within two (2) years after the action accrues.

E) **Contracts.** Contracts have various statutes of limitations. Written contracts are governed by IND. CODE § 34-11-2-11 (2016) and actions should be commenced within ten (10) years, except where preempted by federal law – as with actions by and against carriers. *See Kennedy v. Emmert*, 53 N.E.3d 505, 508-10 (Ind. Ct. App. 2016). Contracts for the payment of money are governed by IND. CODE § 34-11-2-9 (2016) and should be commenced within six (6) years. Oral contracts are governed by IND. CODE § 34-11-2-7 (2016) and should be commenced within six (6) years.

F) **Employment.** Employment agreements are governed by IND. CODE § 34-11-2-1 (2016) and should be commenced within two (2) years.

G) **Rent.** The statute of limitations for the collection of rents is governed by IND. CODE § 34-11-2-7 (2016) and all actions should commence within six (6) years after the cause of action accrues.

H) **Debt.** The statute of limitations for collection on a debt is governed by IND. CODE § 34-11-2-7 (2016). Actions should be brought within six (6) years.

I) **Judgments.** Actions for judgments should be commenced within twenty (20) years and are governed by IND. CODE § 34-11-2-12 (2016).

J) **Crimes.** The statute of limitations for criminal actions is governed by IND. CODE § 35-41-4-2 (2016).

1) **Class A felonies.** There is no statute of limitations for a Class A felony or murder charge.

2) **Class B, C, and D felonies.** Class B, C, and D felonies (before July 1, 2014) and Level 3, 4, 5, and 6 felonies (after July 1, 2014) have a five (5) year statute of limitations.

3) **Misdemeanors.** Misdemeanors have a two (2) year statute of limitations.

4) *See* § 2(k)-(i) of this chapter for statute of limitations specific to certain offenses (misuse of funeral trust or escrow account funds).

5) **Tolling.** The statute of limitations does not run when: (1) the accused is not a resident of Indiana or conceals himself so that process cannot be served, (2) the accused conceals evidence that would otherwise be sufficient to bring charges, or (3) the person is an elected or appointed member of public office and the offense concerns theft of public funds or bribery while in office. IND. CODE § 35-41-4-2(h)(2) (2016).

K) **Tolling.** "A person who is under legal disabilities when the cause of action accrues may bring the action within two (2) years after the disability is removed." IND. CODE § 34-11-6-1 (2016). Typical reasons for tolling a statute of limitations include minority, mental

incompetence, and the defendant's bankruptcy. *See Walker v. Memering*, 471 N.E.2d 1202, 1204 (Ind. Ct. App. 1984).

1) **Minority.** With the exception of product liability actions and medical malpractice cases, the statute of limitations begins to run on the minor's 18th birthday. IND. CODE § 34-11-6-2 (2016). For malpractice cases involving minors below the age of six (6), a claim may be filed up to the child's eighth birthday. IND. CODE § 34-18-7-1 (2016). The constitutionality of the medical malpractice statute of limitations for minors has been challenged and upheld. *See Douglas v. Stallings*, 870 F.2d 1242 (Ind. 1989).

Statute of Repose

A) **Product liability.** The statute of repose applicable to negligence and strict liability in tort actions for product liability actions is governed by IND. CODE § 34-20-3-1 (2016). A product liability action must commence:

> (1) within two (2) years after the cause of action accrues; or (2) within ten (10) years after the delivery of the product to the initial user or consumer. However, if the cause of action accrues at least eight (8) years but less than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.

B) **Construction.** The statute of repose applicable to construction matters is governed by IND. CODE § 32-30-1-5 (2016):

> The action must be commenced within the earlier of ten (10) years after the date of substantial completion of the improvement or twelve (12) years after the completion and submission of plans and specifications to the owner if the action is for a defined deficiency in the design of the improvement.

C) **Worker's compensation.** The statute of repose applicable to worker's compensation occupational disease compensation is found in IND. CODE § 22-3-7-9(f) (2016). Generally, no compensation shall be payable for any occupational diseases unless disablement occurs within two (2) years after the last day of the last exposure to the hazards of the disease. Additional exceptions are found within the statute. Asbestos dust inhalation claims must be brought within in thirty five (35) years of date of last exposure if said exposure occurred on or after July 1, 1988. IND. CODE § 22-3-7-9(f)(5) (2016).

D) **Probate.** The statute of repose applicable to probate matters is IND. CODE § 29-1-7.5-6 (2016). All claims against the personal representative are barred unless a proceeding is commenced within three (3) months after the filing of the closing statement. This statute does not bar rights arising out of rights to recover from a personal representative for fraud, misrepresentation, or inadequate disclosure.

E) **Warranties.** The statute of repose applicable to breaches of express and implied warranties is IND. CODE § 26-1-2-725 (2016). This provides that an action for a breach of

any contract of sale must be brought within four (4) years after the cause of action has accrued. The parties can reduce this period by contract to as little as one (1) year, but may not extend it.

Venue Rules

A) Initial selection of venue is governed by IND. TR. R. 75 (2016) and IND. CODE § 34-35-1-1 (2016). Plaintiffs may bring a civil case in any county of the state, but IND. TR. R. 75 sets of a list of "preferred venues". There are ten (10) preferred venues listed, including the county where the greater percentage of defendants live or, if no such greater percentage, the county where any defendant lives, the county where the land in issue is located, the county where the accident occurred, and the county where the principal office of a defendant organization is located.

B) **Transfer.** If a defendant objects to the plaintiff's initial choice, under IND. TR. R. 12 (2016), and the court determines that the county chosen by the plaintiff is not a preferred venue, it is required to transfer the case to a county that meets the preferred venue requirements. If there are multiple defendants, the court should transfer to the preferred venue suggested by the first party to file an objection under IND. TR. R. 75(A).

C) ***Forum non conveniens.*** The doctrine of *forum non conveniens* is governed by IND. TR. R. 4.4 (C) through (E) (2016). *Forum non conveniens* allows a court to decline jurisdiction even though it has jurisdiction over the parties and the subject matter involved. This occurs when another forum for trial would be more convenient and better serve the interests of justice. The courts will look to the amenability to personal jurisdiction, convenience to the parties of the trial, differences in conflict of law rules, and any other factors that would have a substantial bearing upon the selection of a reasonable forum. Generally, the plaintiff's choice of forum is given deference.

1) INDIANA courts can only decline litigation in a forum when it is likely to create a "substantial injustice" to the defendant. *See Employers Ins. of Wausau v. Rectil Foam Corp.*, 716 N.E. 2d 1015 (Ind. Ct. App. 1999).

2) IND. TR. R. 4.4(D) (2016) states that no stay or dismissal shall be granted due to a finding of *forum non conveniens* until all properly joined defendants file with the clerk of the court a written stipulation that each defendant will:

a) submit to the personal jurisdiction of the courts of the other forum; and

b) waive any defense based on the statute of limitations applicable in the other forum with respect to all causes of action brought by a party to which this subsection applies.

D) **Change of venue.** IND. TR. R. 76 (2016) governs change of venue. This requires the filing of a verified motion specifically stating the grounds for the change in venue. The motion shall be granted only upon a showing that the county where suit is pending is a party or that the party seeking the change will be unlikely to receive a fair trial on account of local prejudice or bias regarding a party or the claim or defense presented by a party.

NEGLIGENCE

Comparative Fault/Contributory Negligence

A) When more than one party is responsible for an accident, comparative negligence allocates responsibility among the parties. This dictates who will receive compensation for any loss suffered and the amount of compensation.

B) **Comparative negligence.** Contributory negligence occurs when a plaintiff fails to exercise a degree of care and caution that an ordinary, reasonable, and prudent person would exercise in a similar situation. *Kroger Co. v. Haun*, 379 N.E.2d 1004, 1007 (Ind. Ct. App. 1978). This is generally a question of fact that is not appropriate for summary judgment if there are conflicting factual inferences. The plaintiff's comparative fault must be pleaded as an affirmative defense, and the defendant has the burden of proving contributory negligence. *Funston v. School Town of Munster*, 822 N.E. 2d 985, 987 (Ind. Ct. App. 2005).

C) **Indiana Comparative Fault Act.** Indiana's Comparative Fault Act modifies the common law rule of contributory negligence. IND. CODE § 34-51-2-1 *et seq.* (2016). This Act allows a jury to allocate fault among parties. IND. CODE § 34-51-2-7 (2016). *See also Owens Corning Fiberglass Corp. v. Cobb*, 754 N.E. 2d 905, 911 (Ind. 2001).

1) **Modified comparative negligence.** Indiana follows the modified comparative negligence system, which only allows an injured party to recover if it is determined that his or her fault in the injury does not reach more than 50%. If a plaintiff's fault reaches more than 50%, he or she recovers nothing. IND. CODE § 34-51-2-6 (2016). If the injured party was 50% or less at fault, he or she may still recover damages. IND. CODE § 34-51-2-7 (2016).

2) **Apportionment.** Fault apportionment under this act is a question of fact to be decided by a jury, unless there is no evidentiary dispute and the fact finder is able to come to only one logical conclusion. *See Dennerline v. Atterholt*, 886 N.E.2d 582, 598 (Ind. Ct. App. 2008). IND. CODE § 34-51-2-1 (2016) expressly excludes medical malpractice actions.

3) **Government agencies.** IND. CODE §§ 34-51-2-1, 2 (2016) does not exclude the common law defense of contributory negligence for defendants in cases alleging medical malpractice or tort claims against governmental agencies.

4) **Pro rata share.** IND. CODE § 34-51-2-5 (2016) states that if there is any contributory fault chargeable to the claimant, any amount awarded as compensatory damages for an injury attributable to claimant's contributory fault will be diminished proportionately. This will not bar recovery completely, however, unless the claimant's contributory fault is greater than the fault of all persons whose fault proximately contributed to the claimant's damages. IND. CODE § 34-51-2-6 (2016)**.**

Exclusive Remedy-Worker's Compensation Protections

A) Workers' compensation protections are governed by IND. CODE § 22-3-2-2 *et seq.* (2016). This is an exclusive remedy, as stated under IND. CODE § 22-3-2-6 (2016), excluding all other rights and remedies of such employee, the employee's personal representatives, dependents, or next of kin, at common law or otherwise.

B) **Requirements.** IND. CODE § 22-3-2-2(a) (2016) provides that every employer shall pay and that every employee shall accept "compensation for personal injury or death by accident arising out of and in the course of employment, and shall be bound thereby." "To receive worker's compensation benefits, a claimant must prove both [the 'arising out of' and the 'course of employment'] elements." *ProCare Rehab Services v. Vitatoe*, 888 N.E.2d 349, 351(Ind. Ct. App. 2008).

C) **Exclusivity.** IND. CODE § 22-3-2-6 (2016) bars a court from hearing any common law action brought by the employee for the same injuries. However, IND. CODE § 22-3-2-13 (2016) permits an action against third party tortfeasors, so long as the third party is neither the plaintiff's employer nor his fellow employee.

D) **Bars to recovery.** IND. CODE § 22-3-2-8 (2016) provides that no compensation will be given if the injury or death is the result of an employee's "knowingly self-inflicted injury, his intoxication, his commission of an offense, his knowing failure to use a safety appliance, his knowing failure to obey a reasonable written or printed rule of the employer which has been posted in a conspicuous position in the place of work, or his knowing failure to perform any statutory duty."

Indemnification

A) In Indiana, an obligation to indemnify arises by contract or statute. *Marion County Public Library v. Charlier Clark and Linard*, 929 N.E. 2d 838, 851 (Ind. Ct. App. 2010). However, a right to indemnity may be implied at common law. *Indianapolis Power & Light Co. v. Snodgrass*, 578 N.E.2d 669, 671 (Ind. 1991).

B) **Damage.** In indemnification cases, the damage that occurs is the incurrence of a monetary obligation that is attributable to the actions of another party. *Pflanz v. Foster*, 888 N.E.2d 756, 759(Ind.2008).

C) **Circumstances.** An action for indemnity may be commenced under three circumstances:

1) A defendant may bring a third-party action in the original action against a potential indemnitor.

2) A defendant may file a cross-claim for indemnity against a codefendant in the original action.

3) A defendant may await a finding of its liability in the original action and then file an independent action for indemnity against the alleged indemnitor.

TLB Plastics Corp., Inc. v. Proctor & Gamble Paper Product Co., 542 N.E.2d 1373, 1376 (Ind. Ct. App. 1989).

D) **Standard.** An action for indemnity "will lie only where a party seeking indemnity is without actual fault but has been compelled to pay damages due to the wrongful conduct of another for which he is constructively liable." *Rotec, Div. of Orbitron, Inc. v. Murray Equip., Inc*., 626 N.E. 2d 533, 535 (Ind. Ct. App. 1993). This is allowed in the absence of any express contractual or statutory obligation to indemnify. Indemnity does not permit a claim by one joint tortfeasor against another, unless allowed by substantive law, namely express contract or statute, negligence without fault, or breach of warranty. *See R.N. Thompson & Assoc., Inc. v. Wickes Lumber*, 687 N.E.2d 617, 619 (Ind. Ct. App. 1997). *See also* 2 William F. Harvey, INDIANA PRACTICE, RULES OF PROCEDURE ANNOTATED § 14.6 (2d ed. 1987).

E) **Expenses.** An indemnitee who incurs legal expenses through an action for which he is entitled to indemnification is allowed to recover the expense of creating his defense and reasonable attorney fees. *See Bethlehem Steel Corp. v. Sercon Corp*., 654 N.E.2d 1163, 1169 (Ind. Ct. App. 1995) (quoting *Zebrowski & Assoc. v. City of Indianapolis*, 457 N.E.2d 259 (Ind. App. 1983)).

F) **Tort actions.** Common-law claims for indemnity generally arise in tort actions, such as respondeat superior or breach of warranty situations. *Coca-Cola Bottling Co.-Goshen v. Vendo Co.*, 455 N.E.2d 370 (Ind. App. 1983). These claims are equitable in nature, and the party claiming indemnity must be free from negligence in the tort situation.

Joint and Several Liability

A) **Pure several liability.** In Indiana, the courts follow a pure several liability approach in entering judgment against multiple defendants. IND. CODE § 34-51-2-8 (2016). The amount for which each defendant is financially liable is proportionate to his or her share of the fault.

B) **Contribution.** Contribution distributes a loss among joint tortfeasors, requiring each to pay his or her proportionate share of the common liability. IND. CODE § 34-51-2-12 (2016) states that there is no right of contribution among tortfeasors**.** This does not affect any rights of indemnity, however.

C) **Effect of settlement.** When a release or covenant not to sue is reached with one defendant, it does not discharge any of the others for liability for the injury or wrongful death unless it terms so provide. However, recovery against the remaining tortfeasors shall be reduced to the extent of any amount stated in the release or in the amount of the consideration actually paid for it (whichever is greater). IND. CODE §§ 34-44-1-1 *et seq.* (2016).

1) **Covenants of good faith and fair dealing.** Indiana does not recognize the existence of a covenant of good faith and fair dealing in all contracts, but an implied covenant of good faith and fair dealing is found in employment contracts and

insurance contracts. *Old Nat. Bank v. Kelly*, 31 N.E.3d 522, 531 (Ind. Ct. App. 2015).

Strict Liability

A) IND. CODE § 34-20-2-3 (2016) provides:

> [A] product liability action based on the doctrine of strict liability in tort may not be commenced or maintained against a seller of a product that is alleged to contain or possess a defective condition unreasonably dangerous to the user or consumer unless the seller is a manufacturer of the product or of the part of the product alleged to be defective.

Willful and Wanton Conduct

A) Indiana law defines willful and wanton conduct as "an intentional act done with reckless disregard of the natural and probable consequences of injury to a known person under the circumstances known to the actor at the time or an omission or failure to act when the actor has actual knowledge of the natural and probable consequence of injury and his opportunity to avoid the risk." *Sportsdrome Speedway, Inc. v. Clark*, 49 N.E.3d 653, 661 (Ind. Ct. App. 2016). Therefore, a willful and wanton omission is described as: "a failure to act when the actor has actual knowledge of the natural and probable consequence of injury and his opportunity to avoid the risk." *Id* at 663.

1) Willful and wanton misconduct has two elements: "1) The defendant must have knowledge of an impending danger or consciousness of a course of misconduct calculated to result in probable injury; and 2) the actor's conduct must have exhibited an indifference to the consequences of his own conduct." *Id* at 661.

DISCOVERY

Electronic Discovery Rules

Electronic discovery relates to the discovery of electronically stored information. IND. TR. R. 34(A) (2008) allows discovery of electronically stored information including "writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations from which information can be obtained, translated, if necessary, by the respondent into reasonably usable form." *See also* IND. TR. R. 26(A). When requesting electronically stored information the form or forms of production can be specified. IND. TR. R. 34(B). If served with a request for electronically stored information under IND. TR. R. 34(B) a party can object to the request, but must provide the reasons for the objection. *Id.* If an objection is made to the form or forms of producing the electronically stored information or no form was specified in the request, then the responding party must state the form or forms it intends to use. *Id.* Additionally, the court can issue a protective order to protect a party or person from producing electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. IND. TR. R. 26(C) (2008). On motion to compel discovery or for a protective order,

if a party shows that the information is not reasonably accessible because of undue burden or cost the court may still order discovery if the requesting part can show good cause. *Id.*

Expert Witnesses

Expert witnesses are governed by IND. TR. R. 26(B)(4) (2016) and IND. R. EVID. 701-705 (2016).

A) **Trial witnesses.** Trial witnesses are divided into two categories: lay witnesses and expert witnesses. IND. R. EVID. 701-2 (2016).

1) **Lay witnesses.** Lay witnesses are governed by IND. R. EVID. 701 (2016) and can only give fact or lay opinion testimony.

2) **Expert witnesses.** Expert witnesses are governed by IND. R. EVID. 702 (2016). These witnesses are to provide scientific, technical, or other specialized knowledge to assist the trier of fact to understand the evidence presented or to determine a fact in issue.

a) IND. R. EVID. 702(b) (2016) states that expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.

B) **Discovery of expert work product.** IND. TR. R. 26(B)(4)(a)(i) (2016) allows a party to obtain discovery of the identity of a testifying expert witness, the subject matter on which the expert is to testify, the substance facts and opinions to which the expert is to testify, and a summary of the grounds for each opinion through interrogatories. IND. TR. R. 26(B)(4)(a)(ii) does not explicitly grant the right to depose an opposing testifying expert without first obtaining a court order, which is contradictory to the Federal Rules of Civil Procedure. However, a non-testifying expert's facts or opinions are only discoverable upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain the information by other means. IND. TR. R. 26(B)(4)(b) (2016). Indiana requires that expert testimony be based upon reliable scientific principles, differing from the Federal Rules of Civil Procedure, which does not articulate such a determination of reliability. IND. R. EVID. 702(b) (2016).

Non-Party Discovery

A) IND. TR. R. 45 (2016) governs the issuance of subpoenas in civil matters. Subpoenas are issued either by the clerk or an attorney licensed to practice in Indiana who has appeared on behalf of a party in the court where the action is pending. Subpoenas can be issued to nonparties for attendance of witnesses or for the production of documentary evidence. IND. TR. R. 45 (2016). IND. TR. R. 45(B) also allows a court to quash or modify the subpoena if it is unreasonable or oppressive.

B) **Depositions.** IND. TR. R. 45(D) states that a non-party witness may only be deposed in the county in which he resides, is employed, transacts his business in person, or at another convenient placed fixed by court order. A nonresident may only be required to attend in

the state and county in which he is served, within forty (40) miles of service, or at another convenient placed fixed by court order. IND. TR. R. 45(D) (2016).

Privileges

A lawyer's duty to protect client communications and information can be found in the attorney-client privilege, the work product doctrine, The Indiana Rules of Trial Procedure, and the Indiana Rules of Professional Conduct (IND. R. PROF. C.). To protect privileged information during discovery, a party must create a privilege log expressly claiming the privilege and describing the nature of the documents, communications, or things not produced or disclosed in a manner that enables other parties to assess the applicability of the privilege or protection. IND. TR. R. 26(B)(1) (2016). A court then considers first whether the production of the privileged information is relevant and then whether it is privileged. *Canfield v. Sandock*, 563 N.E.2d 526, 531 (Ind. 1990). The court can make this determination through an in camera inspection, but this is rare. *Id.*

A) **Attorney-client privilege.** IND. CODE § 34-46-3-1 (2016) states that attorneys are not required to testify as to attorney-client confidential communications obtained in the course of providing legal services. However, this privilege is waivable by the client. *Matter of Wood*, 358 N.E.2d 128, 132 (1976).

B) **Work product.** IND. TR. R. 26(B)(3) (2016) protects documents and tangible things that are "prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative." *See American Buildings Co. v. Kokomo Grain Co. Inc*., 506 N.E. 2d 56, 65 (Ind. Ct. App. 1987), *see also TP Orthodontics v. Kesling*, 15 N.E.3d 985, 997 (Ind. 2014). Further, under 26(B)(3), these documents enjoy a near absolute immunity from discovery if they contain "the mental impressions, conclusions or legal theories of an attorney or other representative of a party concerning the litigation."

C) **Confidentiality.** Under IND. R. PROF. C. 1.6(a) (2016), a lawyer is prohibited from revealing information relating to the representation of a client unless the client gives informed consent. IND. R. PROF. C. 1.6(b) provides that a lawyer must reveal client information if the lawyer reasonably believes that it will prevent serious bodily harm or death. IND. R. PROF. C. 1.6(c) allows disclosure of a client's name and files in the event that the lawyer has a mental or physical disability, which does not allow for the continuation of his duties.

D) IND. CODE § 34-46-3-1 (2016) *et seq.* provides additional forms of privileged communications.

1) IND. CODE § 34-46-3-1(2) (2016): Physicians, as to matters communicated to them by patients, in the course of their professional business, or advice given in such cases.

2) IND. CODE § 34-46-3-1(3)(A-B) (2016): Clergymen, as to the confessions, admissions, or confidential communications made in the course of disciple enjoined by the clergyman's church, or made to a clergyman in the clergyman's professional character as a spiritual adviser or counselor.

3) IND. CODE § 34-46-3-1(4) (2016): Husband and wife, as to communications made to each other.

EVIDENCE, PROOFS, AND TRIAL ISSUES

Accident Reconstruction

A) *See Lytle v. Ford Motor Co.*, 814 N.E.2d 301 (Ind. Ct. App. 2004) states:

> Where an expert's testimony is based upon the expert's skill or experience rather than on the application of scientific principles, the proponent of the testimony must only demonstrate that the subject matter is related to some field beyond the knowledge of lay persons and the witness possesses sufficient skill, knowledge or experience in the field to assist the trier of fact to understand the evidence or to determine a fact in issue.

B) **Scientific principles.** "When the expert's testimony is based upon scientific principles, the proponent of the testimony must also establish that the scientific principles upon which the testimony rests are reliable." *Id.*

Appeal

A) **Jurisdiction.** Cases directly appealable to the Supreme Court include (1) appeals of final judgments in which state or federal statutes are declared unconstitutional in whole or in part (2) appeals involving the mandate of funds under IND. TR. R. 60.5(B) and 61 (2016), (3) appeals involving parental consent to abortion under IND. TR. R. 62, and (4) certain interlocutory appeals authorized under IND. R. APP. P. 14 (2016), in which the State seeks the death penalty or life without parole. IND. R. APP. P. 4 (2016). The appellate court has jurisdiction over all other appeals of final judgment and over interlocutory appeals, except those appeals described in IND. R. APP. P. 4(A)(3). IND. R. APP. P. 5 (2016).

B) **Interlocutory appeals.** There are two types of interlocutory appeals:

> A. Interlocutory Appeals of Right. Appeals from the following interlocutory orders are taken as a matter of right by filing a Notice of Appeal with the Clerk within thirty (30) days after the notation of the interlocutory order in the Chronological Case Summary:
>
> (1) For the payment of money;
>
> (2) To compel the execution of any document
>
> (3) To compel the delivery or assignment of any securities, evidence of debt, documents or things in action;
>
> (4) For the sale or delivery of the possession of real property;

(5) Granting or refusing to grant, dissolving, or refusing to dissolve a preliminary injunction;

(6) Appointing or refusing to appoint a receiver, or revoking or refusing to revoke the appointment of a receiver;

(7) For a writ of habeas corpus not otherwise authorized to be taken directly to the Supreme Court;

(8) Transferring or refusing to transfer a case under Trial Rule 75; and

(9) Issued by an Administrative Agency that by statute is expressly required to be appealed as a mandatory interlocutory appeal.

B. Discretionary Interlocutory Appeals. An appeal may be taken from other interlocutory orders if the trial court certifies its order and the Court of Appeals accepts jurisdiction over the appeal. This includes interlocutory appeals relating to class certification in class actions.

(1) Certification by the Trial Court. The trial court, in its discretion, upon motion by a party, may certify an interlocutory order to allow an immediate appeal.

IND. R. APP. P. 14 (2016).

C) **Notice of appeal.** The notice of appeal must be filed with the Clerk within thirty days after a final judgment is noted in the Chronological Case Summary, or within fifteen days after the notation of an order for interlocutory appeal. IND. R. APP. P. 9, 14 (2016).

Collateral Payments

A) Under IND. CODE § 34-44-1-2 (2016), in a personal injury or wrongful death action, proof of collateral payments may be admitted into evidence, except for the following: (1) "payments of life insurance or other death benefits," (2) "insurance benefits for which the plaintiff or members of the plaintiff's family have paid for directly," or (3) payments made by the state, the United States, or a U.S. government agency.

Convictions

A) **Criminal.** Evidence of prior convictions for specific crimes (murder, treason, rape, robbery, kidnapping, burglary, arson, or criminal confinement) and crimes of dishonestly (lying, cheating, deceiving or stealing) are admissible, as long as no more than ten (10) years have passed since the date of the conviction or since the witness was released from jail. IND. R. EVID. 609(a), (b) (2016).

Dead Man's Statute

A) **Incompetency.** In any trial where a person is suing or defending the deceased as a representative, an adverse or interested party is not a competent witness as to matters against the estate. IND. CODE § 34-45-2-4 (2016).

B) **Depositions.** In cases where either the deceased gave a deposition or testified, and this testimony or deposition can be used as evidence on the matter, then the adverse party is considered competent regarding any matters embraced in the deposition or testimony. IND. CODE § 34-45-2-4(e) (2016).

Medical Bills

Generally, statements of charges for medical bills are admissible as damages evidence, and such statements constitute prima facie evidence that the bills are reasonable. IND. R. EVID. 413 (2016). Evidence of the collateral payments of the medical bills is inadmissible. IND. R. EVID. 409. However, in cases where the reasonable value of medical services is disputed, the opposing party may introduce evidence to challenge the reasonableness of the proffered medical bills, including evidence of the amount actually paid by the plaintiff for medical services after discount under an insurance contract. Nevertheless, the amount paid is not conclusive of reasonableness. Rather, the jury will determine the reasonable and fair value of medical expenses necessarily incurred based on the evidence. *Patchett v. Lee*, 46 N.E.3d 476, 482 (Ind. Ct. App. 2015).

Offers of Judgment

A party may make an offer of judgment at any time more than ten (10) days prior to the start of litigation. If the offer is rejected and the final court decision is *less* favorable than the final offer that was made, then the party who rejected the offer must pay costs incurred by the party making the offer after the offer was made. IND. TR. R. 68 (2016). Costs do not generally include attorney's fees. *See generally Srivastava v. Indianapolis Cong.*, 779 N.E.2d 52 (Ind. Ct. App. 2002).

Offers of Proof

A) An offer of proof is the method by which counsel places before the trial court (and ultimately the reviewing court) the evidence he or she wishes to present, to allow the court to determine the relevancy and admissibility of the proposed testimony. *See generally Herrera v. State*, 679 N.E.2d 1322, 1325 (Ind. 1997).

B) In order to save an objection to the court's refusal to admit testimony, a defendant must make an offer to prove what the evidence would be. An offer of proof consists of three parts: (1) the substance of the evidence; (2) an explanation of its relevance; and (3) the proposed grounds for its admissibility. 8A IND. LAW ENCYCL. CRIMINAL LAW § 336 (2012).

Relationship to the Federal Rules of Evidence

One of the Indiana Supreme Court's objectives in adopting the Indiana Rules of Evidence was to bring state evidence law closer to federal evidence law, so unless a consideration unique to Indiana

supports a different approach, the Supreme Court has directed Indiana courts to construe Indiana evidence rules consistently with the prevailing body of decisions from other jurisdictions interpreting the Federal Rules of Civil Procedure. *See Doe v. Shults-Lewis Child and Family Servs., Inc.*, 718 N.E.2d 738, 751 (Ind. 1999); *see also* 12 IND. PRAC., INDIANA EVIDENCE § 102.101 (3d ed.) (2011); *see also Lewis v. Indiana*, 34 N.E.3d 240, n.6 (noting that the Court "does not hesitate to look to federal cases interpreting the rules for guidance when … confronted with a similar issue").

Seat Belt and Helmet Use Admissibility

A) **Seat belts.** Evidence of the failure to wear a seatbelt is not admissible in a civil action, either for the purpose of demonstrating "fault" or negligence on the part of the plaintiff under the Comparative Fault Act, or for the purpose of attempting to show a failure to mitigate damages. *Fort Wayne v. Parrish*, 32 N.E.3d 275 (Ind. Ct. App. 2015). Failure to wear a seatbelt is admissible for the purpose of showing the adequacy of the vehicle restraint systems in a products liability action based upon a "crashworthiness" theory. *Morgen v. Ford Motor Company*, 797 N.E.2d 1146 (Ind. 2003).

B) **Helmets.** Indiana residents are not required by law to wear motorcycle helmets if they are over the age of eighteen. Evidence of the failure to wear a helmet is inadmissible for the purpose of demonstrating contributory negligence. *State v. Eaton*, 659 N.E.2d 232 (Ind. Ct. App. 1995).

Spoliation

"Mere ownership of potential evidence, even with knowledge of its relevance to litigation, does not suffice to establish a duty to maintain such evidence." *Glotzbach v. Froman*, 854 N.E.2d 337 (Ind. 2006). "There is no common law duty on the part of an employer to preserve, for an employee, potential evidence in the employee's possible legal action against a third party." *Id*. "In the absence of an independent tort, contract, agreement, or special relationship imposing a duty to the particular claimant, a claim of negligent or intentional interference with a person's prospective or actual civil litigation by the spoliation of evidence is not recognized in Indiana." *Id.* (quoting *Murphy v. Target Products*, 580 N.E.2d 687 (Ind. App. 1991).

Subsequent Remedial Measures

Subsequent remedial measures are not admissible to prove negligence or culpable conduct in connection with the event. Evidence of subsequent remedial measures is admissible, however, when it is offered for another purpose, such as proving ownership, control, feasibility of precautionary measures, or impeachment. IND. R. EVID. 407 (2016).

Use of Photographs

Before being entered into evidence, photographs must pass a two-prong test. First, someone who has personal knowledge of the photograph must testify that it accurately portrays what it is meant to show. IND. R. EVID. 901 (2012). Second, like all evidence, it is subject to a judicial balancing test to ensure that it is not more prejudicial, confusing, misleading, or delaying than helpful to any party involved in the trial. IND. R. EVID. 403 (2016).

DAMAGES

Caps on Damages

There are statutory caps for punitive damages and medical malpractice cases.

A) **Medical malpractice.** IND. CODE § 34-18-14-3 (2016) limits recovery for the injury or death of a patient to:

1) $500,000.00 for injuries occurring before January 1, 1990;

2) $750,000.00 for injuries occurring between December 31, 1989 and before July 1, 1999; and

3) $1,250,000.00 for injuries occurring after June 30, 1999.[2]

B) **Punitive damages.** IND. CODE § 34-51-3-4 (2016) limits punitive damages to the greater of:

1) Three times the amount of compensatory damages awarded in the action, or

2) $50,000.00.

Calculation of Damages

A) In Indiana, a plaintiff bringing a cause of action for personal injuries may recover damages including:

1) Post and future pain and suffering

2) Post and future mental suffering caused by the injury

3) Future medical bills

4) Increased risk of harm

5) Lost income, wages, and earnings

[2] New caps go into effect July 1, 2017.

B) Indiana courts have found that awards for pain, suffering, fright, humiliation, and mental anguish are particularly within the province of the jury because they involve the weighing of evidence and credibility of witnesses. *See, e.g., Gary Community School Corp. v. Larydell*, 8 N.E.3d 241, 250 (Ind. Ct. App. 2014).

1) "Where the damages cannot be calculated with mathematical certainty, the jury has liberal discretion in assessing damages." *Stanton v. Ritter and the Kroger Co.*, 745 N.E.2d 828, 845 (Ind. App. 2001)

C) **Discretion.** The computation of damages is a matter within the sound discretion of the trial court. *Fischer v. Heymann*, 12 N.E.3d 867, 870 (Ind. 2014). For a civil action, under IND. CODE 34-24-3-1 (2016), a person may be allowed an amount not exceeding three (3) times the actual damages of the person suffering the loss, a reasonable attorney's fee, as well as various enumerated expenses arising out of the action. In the case of an intentional tort, under IND. CODE § 34-51-2-10 (2016), the plaintiff may recover one hundred percent (100%) of the compensatory damages in a civil action for intentional tort from a defendant who was convicted after a prosecution based on the same evidence.

Available Items of Personal Injury Damages

A) **Past medical bills.** In order to recover an award of damages for medical expenses, the party seeking to recover these damages must prove that the expenses were both reasonable and necessary**.** *Smith v. Syd's Inc.*, 598 N.E.2d 1065, 1066 (Ind. 1992).

B) **Future medical bills.** The costs must be established by admissible testimony from competent witnesses. The introduction into evidence of written estimates for future medical costs is not included under IND. R. EVID. 413. *Cook v. Sherman*, 796 N.E.2d 271, 278 (Ind. 2003).

C) **Hedonic damages.** Under Indiana's wrongful death statute, hedonic damages are not included in a damage assessment. IND. CODE § 34-23-1-2 (2016). *Southlake Limousine v. Brock*, 578 N.E.2d 677, 680 (Ind. App. 1991).

D) **Increased risk of harm.** A plaintiff must show that (1) the doctor was negligent; (2) the negligent act increased the risk of harm; and (3) the negligence "was a substantial factor in causing the harm." *Laycock v. Sliwkowski*, 12 N.E.3d 986, 991 (Ind. Ct. App. 2014).

E) **Loss of normal life.** This refers to an individual's lack of personal enjoyment or the inability to enjoy life in the manner accustomed to. This factor is only to be included with or as a factor of other damages, such as pain and suffering. It is an error to instruct a jury on the loss of quality and enjoyment of life as a separate element of damage. *Seifert v. Bland*, 546 N.E. 2d 1242 (Ind. App. 1989), *reversed on other grounds by, Seifert v. Bland*, 587 N.E.2d 1317 (Ind. 1992).

Mitigation

Generally, a non-liable party must mitigate its damages. *Deible v. Poole*, 691 N.E.2d 1313 (Ind. Ct. App. 1998), *aff'd*, 702 N.E.2d 1076 (Ind. 1998). "[T]he burden lies with the liable party to prove that the non-liable party has not used reasonable diligence to mitigate its damages." *Id*. Mitigation of damages is a defense available to negligent defendants, and this defense addresses conduct by the injured party that aggravates or increases the party's injuries. *Id*.

Punitive Damages

A) **Standard.** The standard for punitive damages is clear and convincing evidence in order to support the recovery of punitive damages. IND. CODE § 34-51-3-2 (2016).

B) **Jury instructions.** A jury is not allowed to be advised of any limitation on the amount of a punitive damage award or the allocation of money received in a payment of a punitive damage award under IND. CODE § 34-51-3-3 (2016).

C) **Payment.** When a verdict includes a punitive damages award in a civil action, under IND. CODE § 34-51-3-6 (2016), "the party against whom the judgment was entered shall notify the office of the attorney general of the punitive damage award." The clerk will then pay the person to whom punitive damages were awarded twenty-five percent (25%) of the punitive damage award. The remaining seventy-five percent (75%) will be paid to the treasurer of the state who shall deposit the funds into the violent crime victims compensation fund established by IND. CODE § 5-2-6.1-40 (2016); IND. CODE § 34-51-3-6.

D) **Caps.** An award for punitive damages is governed by IND. CODE § 34-51-3-4 (2016). A punitive damage award may not be more than the greater of three times the amount of compensatory damages awarded or fifty thousand dollars ($50,000.00).

Recovery of Pre-Judgment Interest

A) The recovery of prejudgment interest is generally allowed under IND. CODE § 34-51-4-7 (2016). IND. CODE § 34-51-4-9 governs the rate of prejudgment interest, which will not be less than six percent (6%) nor more than ten percent (10%) per year, and will be computed as simple interest. The mechanical determination of the period during which interest accumulates is made under IND. CODE § 34-51-4-8 (2016).

B) **Requirements.** IND. CODE § 34-51-4-1 *et seq.* (2016) allows a successful litigant to collect prejudgment interest, subject to several restrictions. In addition, among other exceptions to the allowance for prejudgment interest recovery, a plaintiff may not collect prejudgment interest on amounts awarded as punitive damages. IND. CODE § 34-51-4-3 (2016). The statute specifically provides that a successful plaintiff may not collect prejudgment interest if:

1) within one (1) year after a claim is filed in the court, or any longer period determined by the court to be necessary upon a showing of good cause, the party

who filed the claim fails to make a written offer of settlement to the party or parties against whom the claim is filed;

2) the terms of the offer fail to provide for payment of the settlement offer within sixty (60) days after the offer is accepted; or

3) the amount of the offer exceeds one and one-third (1 1/3) of the amount of the judgment awarded.

IND. CODE § 34-51-4-6 (2016).

Recovery of Attorney's Fees

A) Indiana follows the general rule that each party must pay his or her own attorney fees. *Masonic Temple Ass'n of Crawfordsville v. Indiana Farmers Mut. Ins. Co.*, 837 N.E.2d 1032, 1037 (Ind. Ct. App. 2005). "Therefore, attorney fees are not allowable in the absence of a statute, agreement, or rule to the contrary." *Id.* at 1037-38. Further, "[i]t has long been established in this State, however, that the bare term 'costs' does not encompass attorney fees." *State v. Holder*, 295 N.E.2d 799, 800 (1973).

B) **Circumstances.** IND. CODE § 34-52-1-1 (2016) provides for recovery of costs by the prevailing party and recovery of attorney fees for a prevailing party when enumerated conditions exist. In a civil action, the court may award attorney's fees as part of the cost to the prevailing party, but doing so requires the court to first determine whether a nonprevailing party:

1) "brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless;"

2) "continued to litigate the action or defense after the party's claim or defense clearly became frivolous, unreasonable, or groundless;" or

3) "litigated the action in bad faith."

If the court determines that a nonprevailing party engaged in any of the described conduct, the court must require the nonprevailing party to reimburse the prevailing party for the reasonable attorney's fees incurred. Any award of attorney's fees under this provision does not prevent a prevailing party from bringing an action against another party arising out of the same facts, but the prevailing party may not duplicate its recovery of attorney's fees.

C) **Mandatory attorney fees.** When a party prevails in suit under IND. CODE § 34-24-3-1 (2016) (providing for the recovery of damages for property crime victims) and proves that attorney fees have been incurred, an award of attorney fees is mandatory. *Patricia Ann Brown, C.P.A. v. Brown*, 776 N.E. 2d 394, 398 (Ind. App. 2002).

This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for

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